

Committee that "on balance" this authority is "a necessary instrument to advance the national interest" is beginning to be questioned. It is hoped that this doubt will gain support.

The authors of "Freedom To Travel" obviously did not intend it as a definitive statement of American policy on passport control. What they hoped to do was stimulate an informed and rational discussion of this important public issue. Their admirable report will undoubtedly achieve that purpose.

WILL MASLOW*

* Member of the New York and Supreme Court Bars; General Counsel, American Jewish Congress.

Law and Locomotives: The Impact of the Railroad on Wisconsin Law in the Nineteenth Century. By Robert S. Hunt. Madison, Wisconsin: The State Historical Society of Wisconsin, 1958. Pp. xii, 292. \$6.50.

In 1874 Benjamin R. Curtis, of the Massachusetts Bar, stood at the apex of his profession in terms of reputation for legal acumen and individual integrity. Many lawyers and laymen throughout the nation devoutly hoped that President Grant would choose Curtis to succeed Chase as Chief Justice of the United States. That the President did not do so, even after suffering the humiliation of two false starts, was widely regarded as a reflection upon the President and not upon a man who had earlier served with distinction as a member of the Supreme Court and whose solid professional and personal distinctions acquired in that service bore the liberal patina of dissent from the reactionary dogmas of *Dred Scott v. Sandford*.¹

1874 was also the year in which a frontier legislature in Wisconsin passed, in what it conceived to be the public interest, a statute limiting transportation charges exacted from its citizens by the railroads operating in the state. The statute in question—the so-called Potter Law—was a rudimentary beginning at best on the complex job of economic regulation. In addition to prescribing maximum rates for various classifications of passenger and freight service, it created an administrative body of three commissioners with powers to inquire into operating costs and to reduce, but not to raise, the prescribed rates in certain narrowly defined instances. The sanctions provided by the law were wholly inadequate inasmuch as no authority was given the state to proceed directly against the railroads for violation of the statutory rates.

Mild as this was, at least by reference to the standards of regulation lying just over the horizon, the two major railroads in Wisconsin promptly announced that they would not obey the law when it became effective, and set in motion legal maneuvers looking towards the invalidation of the law in the courts. These included, as a first step, obtaining opinions from prominent law-

¹ 60 U.S. (19 How.) 393 (1857).

yers that the law was a nullity. One such opinion was supplied by Curtis.² He stated that "it is not within the field of legislation, under any American Constitution, to fix and prescribe for the future, what prices shall be demanded either for commodities or for personal service, or for a union of both." This principle he derived not from any specific or otherwise identifiable constitutional limitation, but rather from some general spirit immanent in the country's institutions as a whole and those of Wisconsin in particular.³

In the ensuing litigation as to the validity of the statute under Wisconsin law, it required the exertion of the fullest range of the powers and personality of an extraordinary state court judge—Chief Justice Edward G. Ryan of the Wisconsin Supreme Court—to lay this doctrine to rest; and the railroads, in the best tradition of deference to the rule of law, dutifully bowed to his will and complied with the law during the short life remaining to it before its repeal in 1876. The point for present purposes, however, is that if a lawyer who combined the professional sophistication and demonstrated breadth of Curtis could fail so signally to find within the framework of law the powers requisite to cope with a pressing public need, it is hardly surprising that the pioneer community of Wisconsin was slow and fumbling in its legal responses to the phenomenon of the railroad corporation.

This is the theme of Mr. Hunt's absorbing account of the interaction of law and locomotive upon each other in the Wisconsin of the last century. Chief Justice Ryan was the exception. In his opinion in the Potter Law litigation⁴ there is found what was less noticeable in other Wisconsin legal institutions—an explicit recognition of the non-private aspects of the railroad in relation to a society straining to build its economic foundations, and a confident acceptance of the premise that these aspects are within reach of the resources of law.

It is Mr. Hunt's conclusion that "the legislature in general failed to establish its basic position of supremacy" (p. 168) and that, in the main, this arm of the

² Two others were furnished, respectively by Rockwood Hoar, also of the Boston Bar, and William M. Evarts, of New York. Curiously enough, these two were coupled with Curtis in the hopes that Grant might see fit to make an outstanding appointment. After the President's first two nominees evoked such a lack of enthusiasm that they were never confirmed by the Senate, the mantle fell upon the relatively unknown Morrison R. Waite, of Ohio. It was Waite who wrote the opinion first sustaining the efforts of a state legislature to regulate the rates of a private business, *Munn v. Illinois*, 94 U.S. 113 (1877). On the same day the Waite court upheld, in the so-called Granger Cases, several of the state statutes regulating railroads, including the Potter Law. See *Peik v. Chicago & Northwestern Ry. Co.*, 94 U.S. 164 (1877).

³ Although Curtis did find additional support for his conclusion in the state constitution's ban on taking property for a public use without just compensation, and in the Contracts Clause of the Federal Constitution (because of the alleged diminution of revenues available to satisfy creditors), he did not refer to "due process of law" or to the Fourteenth Amendment. As a prophet of the course of judicial control over rate-making as it was to develop under the last-mentioned provision, he failed notably when, in the course of his argument, he posed this alternative: ". . . this power to prescribe prices of commodities and service for the future, does not exist at all, or it is unlimited." See Fairman, Mr. Justice Miller and the Supreme Court 199 n. 36 (1939).

⁴ *Attorney General v. Chicago & Northwestern Ry. Co.*, 35 Wis. 425 (1874).

government persisted in turning over to the railroads substantial portions of the public authority without any comprehension of the significance of what it was doing. It delegated powers of eminent domain; it passed along large tracts of public lands which the railroad promoters had prevailed upon Congress to give to the state; it granted the powers and privileges of corporate existence and combination; and it authorized local governments to participate in the financing of the new enterprises.

This is not to say that these actions were necessarily bad, or that they did not effectively advance the obvious and urgent public interest in providing transportation facilities so critically required in an undeveloped area. Indeed, an entrepreneur contemplating prospectively the problems involved in building a railroad in the Wisconsin of the 1850's, could not be assured of success even with this kind of help. But, as Mr. Hunt implies, the same kind and degree of assistance could have been extended under conditions of continuing control and supervision which would have tempered some of the excesses and prevented some of the injury to the innocents which subsequently occurred.⁵

Many of these injuries were due not so much to the selfish scheming of the early promoters as to an enveloping fuzziness in the minds of the people at large with respect to the public character of a railroad-building venture in the mid-Nineteenth Century; and sometimes the intervention of the law for a benevolent purpose only contributed to the confusion. For example, the citizens of the fledgling state believed they had taken a far-sighted step towards preventing abuse when they embedded in their constitution a flat prohibition upon state borrowing for internal improvements. But the effect of this prohibition was to cause the search for capital to center upon stock subscriptions by municipalities and individuals along the proposed routes, more often than not with disastrous consequences which might well have been avoided if the state had been free to provide direct financial aid for a facility of state-wide concern. The fascinating, albeit painful, description in this book of the devices employed to obtain stock subscriptions from farmers, secured by mortgages of their lands and with the cash coming from the sale of this paper in the Eastern money markets, is a classic case of distributing among the few the cost of an improvement which should have been shared by the many. Thus the embodiment in the law of a principle which was unexceptionable on its face but woefully out of harmony with the realities of the situation represented a legal response which proved worse than no response at all.

The legislature's general record of inadequacy is, in this survey, paralleled by the ineptitude of the executive. With rare and highly sporadic exceptions, the governors of Wisconsin throughout this period furnished no effective leadership in devising solutions for problems which touched closely upon the interests

⁵ A striking feature of Mr. Hunt's story is the rigidly stern enforcement by the courts, under circumstances which frequently cried aloud for the ameliorative intervention of equitable considerations, of the notes, bonds, and mortgages given by the local governments and individual farmers to aid railroad construction.

of all citizens. It is not too clear why this was so. Since this period was merely the lull before the impending storm of the intense and thorough regulation which took place under the spur of Governor LaFollette in the early years of the next century, it is interesting to speculate on the perennial question of whether it is the accident of personality, or the inertia of the times, that is decisive for the shaping of events.

Lawyers who read this book will be gratified by the author's conclusion that it was the courts which exhibited the greatest statesmanship and enjoyed the most success in bringing the influences of law to bear on a social problem of major magnitude. Judges like Ryan and practitioners like Matthew Carpenter functioned with considerable effectiveness in the vacuum of legislative and executive inaction or inadequacy. Judges, working from common law formulations in the main, did the most to integrate the railroad into the existing structure with a minimum of economic dislocation and unfairness to personal rights and interests. The parallel this presents with events of more recent vintage will not be lost upon those with a sense of the recurrent rhythms of history. It confirms a deepening conviction, among a growing number of thoughtful people, of the necessity for wise and steadfastly independent judges, and of the significance of the mechanism of the private lawsuit as an instrument for the accommodation of change.

Viewed against the elaborate framework of present-day regulation, the story told by this book challenges the attention principally because of the slowness of the law's reactions. Mr. Hunt's chosen period, for example, ends without even the most primitive utilization of the administrative processes which characterize railroad regulation today. This dilatoriness is the more striking when it is remembered that during this period the railroads enjoyed an almost complete monopoly status and, in consequence, could press their monopoly advantage in harmful ways beyond the reach of courts deciding cases in the common law tradition. The regulation came eventually, of course, but only after the barn door had been swinging wide on its hinges for a long time and many people had been badly trampled by the iron horse rampaging at will.

Mr. Hunt's counterpart of the future, writing of the latter part of the Twentieth Century, may find it necessary to deal somewhat more with the problems presented by the impact of the law on the railroad instead of the other way round, as in this book. For once regulation came, it stayed. Desperately and indefensibly late in arriving, it seems grimly determined not to expose itself to the charge of leaving too soon, despite the fact that any remnant of the monopoly power for which this regulation was tardily contrived is about as hard to find today as a steam locomotive.

Where regulation is slow in coming when needed in fact, great damage can, of course, be done to the social and economic fabric, as Mr. Hunt's researches reveal. May it not, however, be plausibly supposed that the persistence of close regulation beyond its appointed time produces its own ills? And does this not

suggest that, even as the legal responses of an organized society to a new problem carry costs in consequence of delay, those responses entail other—and equally detrimental—costs if they continue unabated after the problem itself has disappeared? Mr. Hunt's telescope may come to the hand of his successor with the other end offering the more accurate angle of vision.

What is certain is that this kind of historical study of the law's operation will always have a valued place. Apart from its intrinsic worth as a factual re-creation of the events of a particular time and place, it is instructive for later generations of law-makers wrestling with the eternal problem of making the law responsive to changing events. Mr. Hunt's book does both in ample measure, and serves as additional confirmation of the wisdom of those at the University of Wisconsin, notably Willard Hurst, who thought some years ago that there were rich veins to be quarried in American legal history, and that the prospecting could as profitably be done in their own back yard as in some more remote region.

CARL MCGOWAN*

* Member of the Chicago Bar.

Close Corporations. By F. Hodge O'Neal. Chicago: Callaghan and Company, 1958. 2 Vols. Vol. 1: Pp. xx, 369; Vol. 2: Pp. vii, 437. \$30.00.

The field of corporate law is the subject of many volumes, but these two erudite volumes are the first to be devoted to the subject of the "Close Corporation," and it is the close corporation, after all, which is the concern of most lawyers who have corporate clients. Professor F. Hodge O'Neal has carefully culled from the vast body of corporate law those portions pertaining to the close corporation. He has assembled them in logical order, and with a clear analysis and an excellent set of specimen forms has presented them to us for ready reference.

Control devices and flexible arrangements are often of fundamental importance in the close corporation. Heretofore, the lawyer wishing to counsel his clients in this area found it necessary to resort to a variety of sources, as well as to his imagination. Now, by reference to this work, even the lawyer with relatively little experience can counsel his corporate clients regarding a multitude of choices in flexible arrangements. The experienced corporate lawyer will also find a great deal of assistance in Professor O'Neal's having tied together lucidly and expertly varied close corporation problems, including those with tax consequences, and presenting suggested solutions, some of which might previously have been thought about only vaguely, if at all.

The term "close corporation" is used in this book to mean a corporation whose shares are not generally traded in the securities markets. Professor O'Neal points out that while this term usually designates a small enterprise, many close corporations have tremendous assets and operate all over the world. Most of the problems discussed in his book are pertinent to all close corporations, irrespective of size.