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Review of “Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915” By James Willard Hurst

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BOOK REVIEWS

LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915. By James Willard Hurst. Cambridge: The Belknap Press of Harvard University Press. 1964. Pp. xx, 946. \$17.50.

The lumber industry in Wisconsin began in the mid-1830's. Spurred by the demand for lumber from the prairies, it grew to be a major industry shortly after the Civil War. In the last quarter of the nineteenth century Wisconsin lumbermen cut more than 50 billion board feet of white pine. By 1915, however, they had exhausted most of the state's timber resources, and the industry declined to minor significance. The growth, boom, and decay of this industry left a rich record in the materials produced by Wisconsin's legal agencies—session laws, legislative journals, court decisions, governors' messages, other executive documents—and a poorer but still considerable record in the materials produced by the federal legal agencies. These records supply the basic raw material for Willard Hurst's *Law and Economic Growth*.

Using this raw material, Hurst develops ideas and concepts which he initially published in *Law and the Conditions of Freedom in the Nineteenth-Century United States*¹ and in *Law and Social Process in United States History*² in an intensive examination of the interaction between Wisconsin's lumber industry and its legal order as the industry developed and declined. Close attention to the detail of historical data adds a meatiness which the earlier volumes lack.³ But while *Law and Economic Growth* is less abstract, it is no less rich in ideas, insights, and original analysis; it is perhaps the best and most important work in American legal history yet published.

History should not be confused with chronology or anecdote. A work is not history unless, as a minimum, it contributes to an understanding of the sequence of events and conditions with which it is concerned. The quality of a work of history varies directly with the range and depth of its understanding. By this test *Law and Economic Growth* is excellent history; in it Hurst contributes to an understanding not only of the specifics of the legal history of the Wisconsin lumber industry but also of some major influences which were felt throughout nineteenth-century American legal history.

1. Madison: University of Wisconsin Press. 1956. This volume is the text of the Julius Rosenthal lectures delivered at Northwestern University in 1955.

2. Ann Arbor: University of Michigan Law School. 1960. This volume is the text of the Thomas M. Cooley lectures delivered at the University of Michigan in 1959.

3. But see HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950), which is also quite meaty.

One such influence was the momentum of the past. Patterns of thinking, once established, persisted despite changes in the social, economic and physical facts to which such patterns were applied. Because the legal processes provided opportunities for verbalization and justification of decisions (reached through formal fact-finding and decision-making procedures), they were a potential source of resistance to the past's momentum. Striking failures to realize this potential characterize our nineteenth-century legal history. Much major policy resulted from default in the decision-making process rather than from awareness of facts and rational consideration of alternatives.

Hurst uses this concept of decision-by-default to help understand the history of public lands disposition in Wisconsin, and uses that specific history as an illustration of the general concept.⁴ The federal government initially owned all Wisconsin. Prior to the settlement of Wisconsin, the federal government had developed procedures for disposing of its lands. These procedures fell into two major categories: (1) large scale grants to the states to be used in aid of specified purposes, such as education and transportation improvements; and (2) sales of small tracts at minimal prices with preferential treatment for actual settlers. Solely because these procedures were familiar and could be used without additional effort, it applied them to the disposition of its Wisconsin lands, both in the southern non-forest portion of the state and in the northern pinelands. There was no consideration of whether or not these procedures were appropriate for lands whose primary value was in standing timber; no one recognized the problem. The legal processes did not create an awareness of the physical and economic factors which differentiated farmland from pineland.

One result was that the federal government sold its timberlands for very low prices and thereby allowed lumbermen to apply their scarce supply of fluid capital to finance their operations. A different approach to public lands disposition might well have slowed the pace or altered the course of the industry's development. "Cheap sale of federal timberland was itself a capital subsidy of a crude kind, ill-defined and little discussed, but the key to the [lumber] industry's growth. However, this want of definition or discussion was the critical aspect of the matter. The point is, precisely, that Congress never voted this *de facto* subsidy as an affirmative, deliberated decision; it simply allowed the subsidy to occur, by the play of market forces upon generalized procedures for disposal of public lands, having no reference to the special values or problems presented by the possession of forest wealth."⁵

4. This theme recurs in Hurst's discussion of the application by the state government of the general property tax to standing timber.

5. Pp. 133-34.

This touches upon another factor of significant influence on our legal history: the availability of capital. Throughout most of the nineteenth-century, the scarcity of fluid capital (money and labor) contrasted sharply with the abundance of real capital (land and other natural resources). "Scarcity of fluid capital was the dour fact about which developed the most recalcitrant problems of political economy in Wisconsin, as in all the other new states that emerged from the nineteenth-century push westward. Businessmen made no more steady and insistent demand upon law than that it help them overcome their lack of working capital."⁶ The railroad land grants showed the prodigious use made of real capital to alleviate fluid capital scarcity. The widespread use (and consequent rapid evolution) of the corporation as a form of business organization may have resulted as much from its functions of mobilizing and concentrating capital as from its limited liability features. "Yet the same scarcity of cash made it difficult to raise large public revenues from taxes."⁷ The government's lack of fiscal resources contributed more to whatever laissez-faire traits it had during the nineteenth-century than did doctrinaire beliefs about its proper role in the economy. Indeed, the fact that aid was given to the railroads by state⁸ and local governments, as well as by the federal government, indicates that laissez-faire ideas were never a significant part of our working philosophy.

Hurst also considers the extreme particularity—a particular solution to each of a series of similar particular problems—which so much nineteenth-century legislation displayed. The Wisconsin legislature granted over 800 special statutory franchises for stream use.

Stream franchise policy developed mainly in response to activities conceived as local ventures—to provide a power dam at a particular place for a particular mill, improvements of the channel of a given tributary or a designated part of a principal river, a boom at a point especially suited to large sorting or rafting operations. . . . Hundreds of special franchises were built around a common core of provisions as to location, height, navigation guaranties, terms of operation, compensation for flowage. That draftsmen's practice could so far standardize the general content of franchises acknowledged a common core of problems and values. Why, then, for sixty years did legislation spawn variations in secondary details . . . instead of achieving codification of standard formulas? . . . The legislative process was simply not geared to generalize perception out of particular pressures. . . . More was involved than mere operational efficiency. Narrow perception of issues carried

6. P. 10.

7. *Ibid.*

8. Wisconsin was prohibited by its constitution from aiding "internal improvements" but other state governments not so limited did aid railroads.

great danger of putting the legislative process under intolerable strains and encouraging resolution in private terms alone of problems of public concern.⁹

The private and local acts of any nineteenth-century state legislature would yield additional examples of this particularity.

This particularity is one example of the law's narrow range of response to economic and social problems characteristic of much nineteenth-century legislation. Another example of this limited response is the equally characteristic lack of sophistication in the use of sanctions. In discussing the development of Wisconsin timber trespass law, Hurst generalizes:

The naive reaction to continuing law violation is to announce stronger penalties; it requires harder thought and effort, and more money, to take the more effective course of tightening up field enforcement, or—most efficient, but probably most immediately expensive—devising means to prevent trouble. In passing through these phases, Wisconsin timber trespass law conformed to a pattern which stamped most controversial areas of nineteenth-century legal regulation.¹⁰

Hurst relates this limited response to the national character of the nineteenth-century Americans. Like Tocqueville, Hurst believes that the similarity of experiences and circumstances shared by most nineteenth-century Americans produced enough similar traits in enough of them to make some generalizations about those traits meaningful. Indeed, Hurst's view of our national character is quite similar to Tocqueville's. He views the nineteenth-century Americans as busy and active—conscious of their role as continent conquerors and eager to get on with the job—"little given to philosophy"¹¹—"so engrossed with the 'practical' problems of the urgent present that they showed themselves quite impractical about the future"¹²—in short, as doers rather than thinkers. This concept of our national character does contribute to an understanding both of the particularity and of the unsophisticated sanctions of nineteenth-century American law; at the same time those features of our legal history provide some evidence that we did have such a national character. But this concept should be used with caution and with full realization that it is based upon generalizations about some traits of some people. Hurst does not always make these limitations explicit.

Like much good history, *Law and Economic Growth* bears on the present as well as the past. Current problems concerning the economic development of the underdeveloped nations are of critical importance. While of course

9. Pp. 252-53.

10. P. 349.

11. P. 10.

12. P. 507.

these mid-twentieth-century problems differ significantly from those which confronted nineteenth-century America,¹³ our experience is relevant. Hurst illustrates vividly the complexity of the ideological and institutional infrastructure which supported our economic growth; he shows that economic development is intertwined with and dependent upon legal institutions. A precondition to sustained economic growth in the underdeveloped nations is the structuring of their existing legal systems to provide the necessary institutional support for growth. Hurst's history provides some much-needed understanding of the nature and scope of this problem.

In short, *Law and Economic Growth* is excellent and significant American legal history.

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OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT: A SYMPOSIUM ON ANTI-DISCRIMINATION LEGISLATION, FREEDOM OF CHOICE, AND PROPERTY RIGHTS IN HOUSING. By Alfred Avins, General Editor. New York City: The Bookmailer, Inc., 1963. Pp., 316. \$6.00.

This symposium, the first in the country on anti-discrimination legislation in housing, covers a lot of ground. There are general articles on anti-discrimination legislation in housing, a legislative history of the debates on the fourteenth amendment, a discussion of the constitutionality of the President's order barring discrimination in federally-assisted housing, social science assessments, discussions of foreign policy, morality, property rights, and integration, studies on crime, slums, and integration, the Negro housing market, property values, home building, prohibition and integration, and a host of other topics.

The symposium is laid out like a symphony, with each of the individual articles given a part to play. Several of the basic articles make up the theme. Subordinate articles, like subordinate instruments in an orchestra, play variations on that theme, or give emphasis to points not fully covered in the main articles. The totality of the effect, when all of the articles are taken together, is to cover just about every imaginable point connected with this subject.

13. See Kuznets, *Present Underdeveloped Countries and Past Growth Patterns*, in *ECONOMIC GROWTH* (Nelson ed. 1960).