plight of the colored population in the South, whose problem is described as
primarily one of economics and not likely to be solved by illogical irritants
such as FEPC, is mild in comparison with that of the racial minorities
in Boston. The book is written in a readable style; its title is derived from
the second stanza of the national anthem.

Edward Dumbauld†

Transportation Under Two Masters. By Charles D. Drayton. Wash-

The conflict between those who think that the nation's transportation
system is being run for the benefit of the public, and those who believe that
the public is being "wring" for the benefit of the transportation system, has
again broken out into the open—and on different fronts. On the judicial
front, there are at least two major battles looming: one initiated by the
State of Georgia in protest over rate discriminations suffered by southern
industry; the other, a "big stick" attack by the Department of Justice
against the use of the "conferences" of competing railroads as a device for
dealing with problems of mutual interest. On the legislative front, the
flanking attack of the Bulwinkle bill would seek to free the railroads from
the clutches of the Sherman Act, and—not incidentally—render impotent
the forces now attacking in the courts. The battle has also been taken di-
rectly to the public. Under the prodding and with the support of Thurman
Arnold, Warne C. Wiprud has, in a recent book, Justice in Transportation,1
set off a powerful blast in the hope of jarring the public loose from the tight
grip of railroad monopoly. Now comes Charles D. Drayton to the defense,
in Transportation Under Two Masters, with a denial of the monopoly allega-
tion and a plea that the Justice Department cease poaching on Interstate
Commerce Commission domain.

On the purely quantitative level, this book is more heavily weighted with
vituperations than with insights. The chief targets, Messrs. Arnold and
Wiprud, are but the conduits for an attack upon that school of thought
which regards well-measured doses of the Sherman Act as the proper medi-
cine for preventing a hardening of the arteries of transportation. There is
no basis in legal authority, it is argued, for the application of the Sherman
Act to the rate-making "conferences" of competing railroads; despite the
"conferences" of competitors, the Interstate Commerce Commission never-
theless has the final say over rate-making, thus insuring maximum public
protection. Mr. Drayton believes that placing control of the nation's trans-
portation agencies "under two masters"—the Interstate Commerce Com-

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mission and the courts via the Department of Justice—invites havoc and chaos; "co-operation and coordination"—not "destructive competition"—are "now recognized as paramount considerations" 2 under our prevailing national transportation policy.

The Freight Association cases, 3 which held that two or more carriers may not, under the Sherman Act, lawfully get together for the purpose of agreeing upon transportation rates, provide a difficult hurdle for Mr. Drayton; indeed, he may very well have stumbled in the attempt to clear it. The holdings in these cases, the author maintains, was made necessary "to cover a situation where otherwise there was a vacuum. Until that vacuum was filled, as it has been subsequently by legislation providing adequate safeguards for the public through regulation, the court was practically forced to find a remedy in the Sherman Act." 4 "Had it [i.e. the "vacuum" situation] been otherwise, the majority decisions in [these transportation cases] must be considered a usurpation of legislative power by the court." 5 Is one to infer from this that filling the "vacuum" would not be considered a "usurpation of legislative power"? Mr. Drayton's certainty of the inapplicability of the Sherman Act should, it seems, be shaken just a little by the impressive collection of legal authorities contained in the Wiprud volume; by the fact that during the war, the holding of a War Production Board "Certificate 44" was necessary to obtain immunization of railroad rate conferences from Sherman Act prosecutions; and by the present attempts of the railroads to obtain express legislative exemption from the Act. But the zeal of the advocate is undaunted; and whether it is well-bottomed or exaggerated will be determined with finality by nothing less than the authoritative judicial decisions which are now in the making.

The thesis that reliance upon the Interstate Commerce Commission, under its presently constituted authority, will eventually assure a modern, efficient, low-cost transportation system flies in the face of well-known testimony before respectable Congressional committees to the effect that the installation of efficient and economical equipment has been seriously delayed, the development of new low-cost transportation service stifled, and discriminatory freight rates perpetuated. 6 It cannot be gainsaid that the uncoordinated efforts of separate government agencies concerned with the same subject matter is poor administration, and invites untold confusion and inefficiencies. "Transportation under two masters" is, as Mr. Drayton suggests, undesirable, for with one master there is at least greater opportunity for planning and coordination. But the problem is not so much how

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2. P. 54.
4. P. 25. (Italics supplied.)
5. P. 22. (Italics supplied.)
6. See, for example, Hearings before Senate Subcommittee of the Committee on Military Affairs on Scientific and Technological Mobilization, Part 12, 78th Cong., 1st Sess. (1943).
many masters there shall be over the transportation system, as who shall be the master. The Arnold-Wiprud master would, at best, be a policeman wielding a corrective stick in an area of activity urgently in need of the tools of a planner. Mr. Drayton, on the other hand, has a master and a plan. But unfortunately, his is not a master plan in the public interest.

JULIUS COHEN †


The most important work of Lucas de Penna (ob. 1390), a contemporary of Bartolus and Baldus, is a very full commentary on the Tres Libri, the last three books of the Codex. It is not merely a simple gloss on a well-known text, but more accurately, a number of comprehensive legal treatises hung upon it, the provisions of the Code furnishing a series of convenient points of departure. Nine sixteenth century editions of the Commentaria sufficiently attest its popularity and usefulness, but in more recent times neither the volume nor its author has attracted the attention of any but the learned. This undeserved neglect now has been remedied, for an account of Lucas de Penna and an analysis of his work form the major portion of Dr. Ullmann's book, which thus would seem less a treatise on the medieval idea of law than an exposition of the ideas of a fourteenth century Italian jurist. But this is only a partial truth. Though Lucas de Penna is without doubt its central figure, the volume provides interstitially a general view of late medieval juristic thought. Emphasis within this field is placed almost completely upon the broad jurisprudential and philosophic aspects of law, though some attention is devoted to the no less revealing details of its practical, administrative side. Thus Dr. Ullmann's volume is essentially an account of Lucas de Penna's social, legal, and political ideas, extracted from the Commentaria, supplemented by shorter discussions of these same subjects drawn from the writings of other contemporary post-Glossators.

For Lucas de Penna, as for most jurists in the middle ages, justice is preeminent and sovereign. Law can be an enforceable rule of action only when its ordinances realize the idea of right.¹ Only in so far as decisions embody justice do they acquire validity and authority.² “Humanae leges eatenus valent, quatenus non discrepant a divinis.”³ Despite the explicit command of the ruler, an appointed judge may be objected to and removed ex justa causa.

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3. P. 54.