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Public Utility Regulatory Law (Book Review)

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have been brought into the communist world, it does not appear that a foreign connection will make communism less attractive to American radicals. The danger does not lie in the free choice of communism by the American people, but rather in its adoption through deceit, or its imposition by physical force. Manifestly it is necessary to give "increased drawing-power to our great traditions of democracy and freedom," [21] but this is not enough to insure the survival of these traditions.

Professor Chafee has emphasized that intemperance in the administration of laws directed against communist suspects has resulted in hardships upon innocent persons. But it is questionable whether this intemperance is more destructive of the common good than the liberality of those who would risk the transformation of some of our institutions into weapons for the destruction of constitutional freedom. It is doubtful whether prior crises of liberty in American history in the fields of religion, politics, economics, philosophy or sociology, apart from crime itself, afford true analogies with regard to communism.

BRENDAN F. BROWN.*

PUBLIC UTILITY REGULATORY LAW. By Everett C. McKeage. New York: Vantage Press, 1956. Pp. 107. $5.00.

This book is by Everett C. McKeage, who has served as Chief Counsel of the California Public Utilities Commission for seventeen years, after an outstanding career at the bar and on the bench of that state. It brings together addresses on public utility regulatory law delivered by him. The addresses, when first published, attracted wide and favorable notice. Their publication in book form will be welcomed by administrators and practitioners.

The scope of the addresses is broad. In one hundred and seven pages the author considers comprehensively the place and functions of regulatory commissions; Section 13 of the Interstate Commerce Act, its genesis and present impact upon state authority; the valuation of public utility property; the due process concept under administrative law; state regulation of air carriers; the repudiation of the rule in the *Ben Avon* [1] case; and utility regulation in California.

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[21] P. 62.

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[1] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

The underlying philosophy of the author is that public utilities are public trustees because they are grantees of special privileges, including the right of condemnation, and render services affected with a public interest which, except for such grant, government would itself provide.

The author is of the Jefferson-Madison school. On the conflicts in federal and state jurisdiction he closes the first chapter with the warning in the celebrated statement of John P. Curran:

> . . . I assert that "Eternal vigilance is the condition upon which the Federal Constitution has permitted the several States their liberty of action in the intrastate field." This assertion may not be, in a technical sense, an exact statement of the law, because the Federal Constitution did not grant anything to the States which they did not then possess but, as a practical matter, I contend that my assertion is painfully correct.[2]

Space limits comment to two of the chapters. It is hoped that it is enough, however, to whet the appetite. The chapter on Section 13 of the Interstate Commerce Act serves to point up Mr. Curran's warning. This section makes unlawful rates for intrastate transportation prescribed by a state when found by the Interstate Commerce Commission to discriminate unduly against interstate or foreign commerce, and vests the Commission with power to fix a minimum and maximum superseding rate.

The chapter traces developments under Section 13 through the decisions of the Commission and the courts. The analysis is keen; the comment sometimes sharp, but fair. The author never has out of mind the warning with which he closed the first chapter.

Current events fully justify the warning. In a case now pending, the complaining railroad company contends that Section 13 of the Interstate Commerce Act extends to the order of a state commission denying permission to discontinue the operation of an intrastate passenger train, and that on a finding by the Interstate Commerce Commission that such order burdens interstate commerce the commission is vested with the power to nullify the requirement that the operation of the train be continued.

In the chapter in which the author considers the valuation of public utility property for rate-fixing, the author traces through the decisions the shift in the position of the United States Supreme Court on this subject. He pictures the long contest which culminated in the overcoming of the "fair value at the time of the inquiry" rule by the "prudent investment" rule—the substituting for the rule that the Constitution requires that the utility be afforded opportunity to earn a fair return on the fair value of the property devoted to public use at the time of the inquiry, of the rule that constitutional requirements are met when opportunity to earn a fair return on the prudent in-

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[2] P. 50.

vestment in the property is afforded. While this struggle is no longer at crest, it continues in various forms before commissions and courts.

The author is of the Brandeis-Holmes school, a stout defender of "prudent investment." The lack of any detailed consideration of what constitutes a "fair return" is a matter of regret. So, too, is the want of consideration of the "cost of money" in determining a fair rate of return. The author's views would be of interest and of value. It is to be hoped that at some later day he will add to the debt owing him by administrators and practitioners by setting forth his views on these subjects.

FRANK H. SOMMER.*

CONTRACTS TO MAKE WILLS. By Bertel M. Sparks. New York: New York University Press, 1956. Pp. 230. $5.00.

This is a treatise on the legal relations arising out of contracts to devise or bequeath. The author has adequately stated these relations. In addition, he has underlined some of the confusion in this area originating in a failure to differentiate the legal incidents of a contract and those of a will. It is elementary that a contract, once made, creates mutual rights and obligations and cannot be revoked by the unilateral action of either party thereto. On the other hand, it is likewise elementary that a duly executed will does not create a legal interest in any of the beneficiaries named therein, and it may be revoked by the testator at any time. A testator is generally acknowledged to possess this power to revoke his will, even though such will was drawn in accordance with a contract theretofore made by him.

It has been stated in some leading judicial opinions that a contract to devise or bequeath may be revoked upon notice given by one party to the other, but that such a contract cannot be revoked after the death of either party thereto, apparently on the theory of estoppel. If the courts making these observations had the contract to devise or bequeath exclusively in mind, they are obviously inaccurate. A contract to devise or bequeath, like any other contract, cannot be revoked upon notice given by one party to the other; like other contracts, it can be terminated only upon the consent of both parties thereto. Furthermore, a contract of this kind is enforceable to some extent during the lifetime of both parties thereto, and upon the death of

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