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BOOK REVIEWS

FROM EVIDENCE TO PROOF. By Marshall Houts. Charles C. Thomas, Springfield, Illinois: 1956. Pp. 32, 396.

I reviewed this book as a busy lawyer—as a practitioner who spends most of his time in court. What practical value, if any, this book has to the average attorney, is the standard by which I determined to weigh this work. Is it a book that will just gather dust on the shelf in a lawyer's office, or does it possess the potential of being of genuine and frequent service to the lawyer who must, of necessity, confine his library to books that are in fact working tools, was the question I determined to resolve.

My approach in the examination and review of this volume may well differ from the evaluation of the book made by an erudite student of the philosophy of law, or by a professor of law, whose actual contact with the law in operation is, at least to some degree, abstract. Having read *From Evidence to Proof* in the foregoing light I find it a most useful volume that should be of great practical and recurring value to the practicing attorney. He will have frequent occasion to profitably consult it.

The work is not a treatise on the law of evidence. It does not concern itself with the technical aspects of the admissibility of evidence. Rather, it explores and attempts to familiarize one with the investigative fields and procedures available to attorneys in their search to ascertain and establish the probative facts, determinative of the issues that may be involved. It is a searching analysis of means and methods to establish fact, to convert evidence into proof. It concerns itself not only with the means and methods of ascertaining the facts but discusses the inherent weaknesses, advantages and disadvantages of the various investigative procedures. It alerts one to the danger of losing sight of the probative value of the facts or the misinterpretation of the significance thereof.

Judge Houts devotes several chapters to the investigations, inquiries, tests and examinations made by experts in the fields of photography, ballistics, fingerprints, handwriting, document examination, psychology, psychiatry and pathology. The cautions and controls that should properly be observed in evaluating the probative value of expert testimony is demonstrated in precise and factual fashion.

A most interesting chapter deals with the reliability of confessions generally and of statements obtained through the use of lie-detectors, truth serum and hypnosis.

In another chapter he discusses the probative value of identification testimony by eye-witnesses and spotlights the latent dangers in such identifications, particularly when made under emotional stress or other exciting circumstances. The possibility of mistaken identification by witnesses, unwittingly influenced by adroitly made suggestions, is effectively discussed. The book is replete with helpful illustrations.

This volume can be of great value in the preparation of cross-examination. Since it discusses not only the investigation procedures and methods, but the weaknesses of the several methods and the margin for error existent in each, it will furnish one with material with which to cross-examine. Its suggestions in each field will stimulate one's thinking and in consequence give birth to independent approaches and slants for fertile cross-examination.

Particularly in the field of expert testimony can this book be of great assistance. Detailing as it does the scientific and specialized methods employed by the various experts in their respective fields in making their investigations and in arriving at their conclusions, it acquaints the reader with sufficient technical information of the subject matter, not only to aid him in cross-examining the adversary's expert, but it aids him

further in informing him sufficiently of the technical aspect of the expert's approach to enable the reader to intelligently explore the subject with his own expert in preparation for direct as well as cross-examination. I expect to make frequent use of this book. Covering as it does a great range of fact-finding investigation methods, there will be very few instances where it will not be of value to read the chapter dealing with the subject matter of the case at hand to stimulate one's preparation of cross and direct examination.

Considerable space could be devoted to discussing each chapter of the book separately but nothing would be accomplished thereby. The foregoing adequately summarizes the subject matter of the volume and evaluates its worth to the profession.

The author, a member of the Tennessee and Minnesota Bars, formerly a Special Agent of the Federal Bureau of Investigation, and formerly attached to the Office of Strategic Services, has a background of experience and training in investigation work that amply establishes him as an authority on the subject matter of the book.

GEORGE W. HERZ†

PUBLIC UTILITY REGULATORY LAW. By Everett C. McKeage.¹ Vantage Press, New York: 1956. Pp. 107.

In this book, Mr. McKeage has collected three of his addresses to groups concerned with utility law, three articles prepared by him for legal periodicals, and an excerpt from a brief which he filed in the Supreme Court of California. To the extent that Mr. McKeage deemed it appropriate, he has amended his original compositions (dating between 1948 and 1955) to reflect the impact upon his topics of subsequent judicial pronouncements. Each of the author's writings is set forth as a self-contained chapter (resulting in some repetition of thought and phrase) which will be treated *seriatim* herein.

The author openly refrains from presenting a purely objective discourse on various phases of the law of utility regulation and unequivocally asserts his personal convictions which have evolved during his respectable tenure as practitioner, jurist and commission counsel.

I. The Place and Functions of the Regulatory Commission. (pp. 15-50).

In determining the matters brought before them, public utility regulatory bodies decide questions of law which are reviewable by the courts. However, because the decisions of the regulatory commissions involve highly technical considerations, wherein the commissioners are (theoretically) particularly versed, they should be reviewable only by the highest courts of the respective states and not by any court of first instance. (pp. 16-18).

Although a lawfully created commission is duty bound to exercise its mandatory jurisdiction, it should reject "the ancient Federalist doctrine that 'A good judge expands his jurisdiction.'" (p. 19).

Utility regulation commenced in this country in the 1870's. The regulatory process first took the form of direct legislation aimed at a particular industry which even-

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tually gave way to the administrative agency created by the legislature and functioning under varying degrees of judicial supervision.² (pp. 20-23).

Mr. McKeage views the primary objective of public utility regulation to be "to secure to the public adequate service at reasonable rates, without discrimination." (p. 21). In this connection, the regulatory body "is a trustee for the public." (p. 24). A regulated utility has no constitutional guaranty of realizing a profit from its public service operation, but must merely be provided with a "fair opportunity" to earn a reasonable return.³ (pp. 24-25).

Mr. McKeage argues that the decisions of the Supreme Court of the United States have equated the terms "nonconfiscatory return" and "fair return," and he espouses the allowance by regulatory commissions to public utilities under their jurisdiction of rates which will provide the latter with no greater than the minimum nonconfiscatory return on the investment which has been devoted to public service. (pp. 25-32). The courts have not adopted the author's stand on this question "in view of the obvious practical difficulties which would result from forcing the Commission always to set rates at the very brink of confiscation."⁴

An outline of the several aspects of the utility operation which may lawfully be subjected to regulation is presented by the author accompanied by his observation that such "cradle to the grave" regulation is justifiable in that a public utility "performs a function of the State." (pp. 32-35).

Rate regulation should be premised upon a balancing of the interests of the utility's consumers and investors.⁵ (p. 37). Rates charged by a public utility must be reasonable, and it is a function of the commission to disallow a recovery by the utility from its consumers of any component in its rate base⁶ or any item in its operating expenses which is either unreasonably incurred or unreasonable in amount. (pp. 36-42).

At the conclusion of this chapter, the author comments upon the conflict of state and federal jurisdictions over the interstate utility, pointing up as among the problems in this area the separation of property, revenues and expenses of the public enterprise engaged in both interstate and intrastate activities. Mr. McKeage, designating himself as "a passionate believer in the Jeffersonian philosophy of States' rights," admonishes the States to maintain eternal vigilance against federal encroachments upon their right to regulate intrastate commerce. (pp.42-50).

II. Section 13 of the Interstate Commerce Act, Its Genesis and Its Present Impact on State Authority. (pp. 51-62).

Mr. McKeage decries the expanding dominance of federal regulatory authority over

2. The history of this regulatory metamorphosis is treated more fully in chapter III.

3. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942).

4. *Detroit v. FPC*, 230 F.2d 810, 815 (D.C. Cir.), cert. denied, 352 U.S. 829 (1956).

5. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

6. The cost or value of the property devoted to public service by the utility (and, indirectly, by its investors). Commissions generally ascertain the annual revenue which must be recouped by the utility by adding to a reasonable forecast of annual operating expenses (including income taxes), a percentage (rate of return) of the accepted rate base. The return (product of rate of return and rate base) when reduced by the annual interest payable to debt capital lenders constitutes the expected net profit after taxes available for investment, addition to surplus or distribution to stockholders. It is to be noted that interest payable on debt capital is not treated as an operating expense, but is employed in computing the permissible rate of return.

intrastate utility activities which he attributes to a trend toward increased centralization of government reflected in the decisions of the Supreme Court of the United States. The author points to the addition of paragraphs (3) and (4) to section 13 of the Interstate Commerce Act⁷ by the Transportation Act of 1920 as the outstanding illustration of this process. Section 13, as thus amended, conferred upon the Interstate Commerce Commission the power to require a change in intrastate rates or practices, notwithstanding state approval thereof, where such change was found necessary to protect interstate commerce against undue prejudice or discrimination. It is shown by the author that this enactment followed the 1914 decision in *Houston, E.&W. Tex. Ry. v. United States*,⁸ wherein it was held that the ICC had authority to require an increase in an intrastate rate which was found to be injurious to interstate commerce, even though section 1 of the Act provided that the Act did not apply to purely intrastate traffic.

In the opinion of the reviewer, it is difficult to see how intrastate transportation is to be wholly immune from federal regulation unless we are to subscribe to a proposition that the Constitution did not purport to confer upon Congress *plenary* power to regulate interstate commerce and that such power as Congress received was intended to be subject to frustration by local authorities acting either deliberately or in the ignorance attending their limited scope of inquiry.

III. The Valuation of Public Utility Property. (pp. 63-80).

This chapter appropriately begins with the author's observation that:

"The subject of valuation in the regulatory field probably has engendered more disagreement and contrariety of opinion, and has strained more friendships, than any other subject with the possible exceptions of religion, politics and the keen dispute over the authorship of the works attributed to William Shakespeare."

The valuation controversy revolves about the proper dollar amount which the commission should allow as the utility's rate base in prescribing the revenue to be collected by the utility from its customers.⁹ Original cost of the property devoted to public service and present day reproduction cost of such property¹⁰ constitute the dipoles of the valuation gamut.

Mr. McKeage traces the historical development of valuation practices as influenced or dictated by judicial pronouncement from *Munn v. Illinois*,¹¹ holding that rate-fixing was a legislative function not subject to judicial interference, to the requirement expressed in *Chicago, M., and St. P. Ry. v. Minnesota*¹² that regulated rates must be able to withstand the judicial test of non-confiscation, through the "hodge-podge"¹³ of the rule in *Smyth v. Ames*,¹⁴ issuing a mandate to commissions that they consider several enumerated factors including original cost and present reproduction cost, each "to be given such weight as may be just and right in each case," to the emergence therefrom of the present fair value method, and finally to *FPC v. Hope Natural Gas Co.*,¹⁵ decreeing that a commission need give no consideration to

7. 49 U.S.C.A. § 13 (1929).

8. 234 U.S. 342 (1914).

9. See note 6 *supra*.

10. In each case reduced by accumulated depreciation, itself a controversial computation.

11. 94 U.S. 113 (1877).

12. 134 U.S. 418 (1890).

13. Mr. Justice Frankfurter, dissenting in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 627 (1944).

14. 169 U.S. 466 (1898).

15. 320 U.S. 591 (1944).

present reproduction cost and need employ no particular formula in arriving at allowable rates, provided the result reached is reasonable as to the investors in the light of all the circumstances. Additional confusion was injected into the valuation potpourri by the fact that the utilities and the commissions have argued on both sides of the fence in this litigious marathon, depending upon whether a period of economic depression or inflation had intervened between the acquisition of the property to be valued and the rate hearing.

Mr. McKeage's refutation of a popular misconception that the *Hope* case has obviated the need for computing a rate base to serve as a touchstone for the judicial review of the rate prescribed by a commission (pp. 77, 78) finds support in a recent decision of the Court of Appeals for the District of Columbia.¹⁶

The author expresses a preference for the use of a reasonable original-cost rate base which is generally readily ascertainable and which is not subject to fluctuation with the inexorable drifting of price levels. Other writers manifesting this predilection have advocated a greater flexibility in the rate of return to be applied against the fixed rate base for the purpose of assisting the investor of risk capital over the inflationary humps in our economic cycles.¹⁷

IV. Due Process Concept Under Administrative Law. (pp. 81-89).

In this chapter Mr. McKeage discusses the contention that the administrative agency acting in its "legislative" capacity does not accord, to those affected by its rulings, the procedural due process required of a judicial tribunal. To attain a dependable and permanent solution of this problem, the author suggests that "the investigating and prosecuting functions of these administrative tribunals *must be constituted a separate agency* of government, thus rendering the administrative tribunal, to all intents and purposes, a purely adjudicative body." (p. 88).

V. State Regulation of Air Carriers. (pp. 90-100).

Here the author again summarizes the federal-state conflict of regulatory jurisdiction in both interstate and intrastate commerce and expresses his approbation of the rejection by Congress and the courts of the contention made by "some of the large air carriers" that air transportation, unlike other forms of common carriage, should be regulated exclusively by the federal government even with respect to intrastate operations.

VI. Rule in the *Ben Avon* Case Has Been Repudiated. (pp. 101-03).

This chapter consists of a short excerpt from an answer and brief prepared by Mr. McKeage in behalf of the California Public Utilities Commission wherein the

16. See note 4 supra. In remanding to the Federal Power Commission a decision which had allowed an interstate natural gas transmission company to recover in its rates the market value of natural gas produced by such company, on the ground that the Commission had failed to set forth findings to justify an allowance exceeding the amount resulting from a conventional rate base computation, the Court said:

"For, though we hold [the conventional rate base] method not to be the only one available under the statute, it is essential in such a case as this that it be used as a basis of comparison. . . . Unless it is continued to be used at least as a point of departure, the whole experiment under the [Natural Gas] Act is discarded and no anchor, as it were, is available by which to hold the terms 'just and reasonable' to some recognizable meaning." 230 F.2d at 818-19.

17. Barnes, *The Economics of Public Utility Regulation* (1947); Clemens, *Economics and Public Utilities* (1950).

author demonstrates that the Supreme Court of the United States in its later decisions departed from the principle which it had set forth in the *Ben Avon* case.¹⁸

VII. Public Utility Regulation in California (pp. 104-07).

In discussing the unusual status of the California Public Utilities Commission the author states: "I am aware of no other regulatory body that has such broad legislative and judicial powers as those possessed by the Commission." That Commission, informs the author, is both a court of record and an administrative tribunal. Its acts are reviewable only by the highest court of the State, and the provisions of its enabling legislation take precedence over any conflicting terms of other legislation or even the State Constitution.

Mr. McKeage in his book expressly did not purport to present an exhaustive or even detailed exposition on the law of public utility regulation. Nor would such have been possible in a book of this length.¹⁹

Intended by the author as a collection of articles which would be of particular interest to the practitioner of utility law, the book was not designed as a primer for the beginning student of this specialized area of jurisprudence, although it can well serve as thought-provoking collateral reading for the ambitious student.

Through his frequent assertions of personal conviction, Mr. McKeage indirectly brings to light that the attorney practicing before administrative agencies (and not merely the courtroom lawyer) addresses his arguments to individual human beings possessed of varying philosophies and should, therefore, be well grounded in the art of advocacy.

JOSEPH C. NELSON†

NATIONAL SECURITY AND INDIVIDUAL FREEDOM. By John Lord O'Brian. Harvard University Press, Cambridge: 1955. Pp. 84.

This is a slim book by an authority on an era past. Its author has just retired from the board of the Fund for the Republic whose worries were the same as Mr. O'Brian's in these Godkin Lectures, delivered at Harvard in the spring of 1955. With that in mind, the titles of the two lectures are self-explanatory: *Security in an Age of Anxiety* and *Security, Sanity, and Fair Play*. Mr. O'Brian reviews with great legal skill nearly all the reservations voiced against our Internal Security System by persons who are certainly no friends of Communists. But it is amusing to see the truly "liberal" mind argue brilliantly against specific institutional arrangements of a kind he doesn't like, while being obviously unaware of the general truth in his reasoning. He writes, for instance, "It is an old and inexorable law known to all students of government administration that, in practice, once a bureau is established it is all but impossible to get rid of it. The same law applies to regulations and procedures. . . . Once the government undertakes to regulate any field, it seemingly always becomes

18. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). The *Ben Avon* precept guaranteed in an appeal from an administrative rate fixing order the right to an independent judicial determination of the facts, as well as of the law, pertaining to the constitutional issue of confiscation. Not all state courts and lower federal courts have acceded to the Supreme Court's repudiation of this doctrine. See Davis, *Administrative Law* 919-20 (1951).

19. See, e.g., Nichols, *Rate of Return* (1955), a volume exceeding 400 pages on one factor of the many involved in the regulation of a utility's rates.

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necessary for it to reach out and regulate other fields." (p. 44). Indeed, Mr. O'Brian, of course, worries about the regulation of subversive activities. But why do our "liberals" scoff at this principle when a man such as F. A. Hayek invokes it against segmental socialism? In these lectures attorney O'Brian uses the tactics of the courtroom where he is at home: he operates in a one-dimensional reality, he sets up the illusion of an institutional problem in a watertight compartment, worlds apart from all other institutions. Thus, he shows with chilling clarity how "the ancient right of privacy" is ignored by "administrative officials" who have but one governmental goal in mind; but we wonder why anyone in our country who invokes the ancient right of privacy in an argument against the income tax is ridiculed? Come next spring in most of our national magazines and newspapers we will again find stories about and lists of *honoraria* received by informers in the pay of the Internal Revenue Service. Miraculously, every year, shortly before the deadline for filing the income tax return, Americans are frightened by sensational news about envious neighbors and disgruntled employees who inform on real or often, I presume, merely imaginary income tax evasions of their fellow Americans. To date no "liberal" saw anything wrong with that; but in regard to our Internal Security System, aiming at Communists instead of taxpayers, Mr. O'Brian has this to say: "And whether or not the use of secret evidence and of information furnished by anonymous informants violates the due process clause in a technical legalistic sense, there can be no doubt that these practices do violate the ancient historic traditions of fair play." (p. 61).

The following gem of logic makes it even clearer that in some legal quarters taxpayers and businessmen are deemed in less need of constitutional protection than Communists:

"It is one of the tragic ironies that after a period in which the courts by new interpretations have greatly liberalized the constitutional restraints upon government officials in the field of economics, at the same time they have been acquiescing in placing restraints on the liberties of the citizens." (p. 57). This, it seems, is not a tragic irony or paradox at all. If Mr. O'Brian took seriously his own statement on page 44 (quoted above) he would not be surprised by the fact he describes on page 57.

We have no space to review in full this potpourri of contradictions. To be sure, in the beginning (pp. 6-7), the author shows awareness of the dangers to individuality posed by the welfare state and public education. He realizes that the welfare state has "encouraged growth in the idea of the supremacy of the state over the status of the individual." (p. 6). But Mr. O'Brian is quick to call the welfare state "a great concept," a worthy objective. Toward the end of his lectures, however, he bases his belief in public conscience on "the enthusiasm which recently greeted the decision of the Supreme Court condemning President Truman's seizure of the steel plants." And on page 67 Mr. O'Brian chides the American public for having acquiesced "in the unprecedented growth of government regulatory power in the field of economics during the 1930's."

The author also relies heavily on the dubious results of Professor Stouffer's *Communism, Conformity and Civil Liberties*, quoting from it that only very few Americans are really concerned about the Communist threat. ". . . [C]ontrary to widespread belief, the country is not now in the grip of hysteria or of emotional fear of Communism."* This, if true, cuts the ground from under Mr. O'Brian's venture into the sociology of public opinion. If all the confused indignations, the author's and those

* Stouffer, *Communism, Conformity and Civil Liberties* (1955). Quoted by the author at p. 54.

quoted by him, were dropped we would have left some ten pertinent pages on the constitutional aspects of the Internal Security Act.

As a whole this tract makes about as much sense to the reviewer as the logic of a young theology professor at one of our better graduate schools who told him in 1955: "Why, of course, we can have Communists on the faculties of our universities. We even have Catholic professors." The latter, presumably, are liable to send signals to the Strategic Air Command of the Vatican.

There is perhaps some hope that the peculiar anxiety reflected in Mr. O'Brian's book will find more appropriate targets in the wake of recent events in Hungary.

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