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Cases on the Law of Public Utilities (2nd Ed.)(Book Review)

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CASES ON THE LAW OF PUBLIC UTILITIES. Second edition. By Young B. Smith, Noel T. Dowling, and Robert L. Hale. St. Paul: West Publishing Co., 1936, pp. x, 1107.

A casebook is but a tool of instruction and as such suffers in time from inadequacy and obsolescence. These factors of depreciation may arise from a restatement of applicable principles in the light of recent statutory enactment or from a new approach and emphasis in the manner of teaching the subject. These factors are especially operative during periods of growth and development. Such has been the experience through which public utility law has gone since the publication in 1926 of the first edition. Not only has it been enriched by a large number of more recent cases, but there has also developed a radical change of approach in the presentation of the subject.

The new edition reflects the influence of these factors. It brings case law up to date. The student of the first edition will find the second edition unexplored territory. Old landmarks have entirely disappeared and new landmarks have risen to overtower and dwarf some of those still remaining.

But the present edition is more than a mere refitment of the original work. The whole edifice has been so completely altered that it is really a new structure. In the former edition, the bulk of the material was devoted to a consideration of the shipper-carrier relationship, while the constitutional and statutory aspects of federal and state control of business in the public interest was brought in as a side show. In the new edition, the side show becomes the main attraction. The subject of public utility regulation in its broad constitutional and statutory aspects dominates and integrates most of the selected cases and gives unity and coherence to the whole book.

Chapter one is a good illustration of the new approach and emphasis. Thus, the first 73 pages of the first edition, which dealt with the common-law concepts of public utilities, are condensed in an introductory note of six pages so that, at the very outset, the student finds himself in the heart of present-day public utility law, namely, the problem of "public interest". Under the subtitle of "On the Ground of No Public Interest" there are presented in chronological order the leading decisions of the United States Supreme Court on this subject from the date of the *Munn* case[1] to the *Nebbia* case.[2] These decisions trace the ever receding dividing line between utilities and business enterprises in respect to which the right of governmental regulation on the ground of public interest was rejected by the courts.

That these authoritative pronouncements do not offer the student a sure and safe guide as to whether a business enterprise, not heretofore regulated as a public utility, will fall within or outside the dividing line, is no fault of the authors. Until the Supreme Court, by its time-honored process of inclusion and exclusion, has passed upon each particular case as it arises, one can only venture a reasoned guess as to whether an unadjudicated statutory enactment is valid or not, unless, of course, a changed membership of the Supreme Court adopts the unorthodox views of the late Justice Holmes to the effect that the much discussed phrase, "clothed with a public interest", is a "fiction intended to beautify what

[1] Munn v. Illinois, 94 U. S. 113 (1877).
[2] Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505 (1934).

is disagreeable to the sufferers" and that "subject to compensation, when compensation is due, the legislature may forbid or restrict any business when it has sufficient force of public opinion behind it." [3]

Another feature of the new edition which has especially impressed this reviewer is the amplified editorial annotation. This is particularly prominent and significant in Chapter 4, where the authors have compiled the leading cases dealing with the methods used by the courts for determining *judicially* whether rates already prescribed yield a fair return upon the fair value of the company's property devoted in the public service, a task which Mr. Justice Stone, though not speaking for the Court, has characterized as "the most speculative undertaking imposed upon them in the entire history of English jurisprudence." [4] Here, more so than through the remainder of the casebook, the editorial notations furnish shrewd and incisive comment. The footnotes are also replete with references to comments in recent law reviews and other periodicals which, together with the pointed questions and criticisms, should give direction to class discussion and to the research of the student not oriented in this field of law.

Skilful ordering and grouping of materials are well illustrated by Chapter 2, which, under the heading of Competition and Monopoly, deals with the two facets of this subject; first, the fostering of competition by the aid of the common-law and statutory prohibitions against restraint of trade, and second, the prevention of ruinous competition in the public utility field through the statutory requirements of certificates of convenience and necessity. The two are wisely linked together, for upon analysis, the student will find that underlying all the cases is the implied or expressed public policy to safeguard the general public interest.

Chapter 3 should, in the opinion of this reviewer, follow Chapter 5. They both involve the work-a-day problems arising out of serving the individual consumer and formulating individual rate schedules. Cases dealing with gas, electric and telephone services are a welcome addition to the text of both chapters, for problems in connection with these services are fast replacing those relating to the common-carrier services, as the focal point of the development of law in this field.

The treatment of the important subject of Discrimination in Service and Rates has also been enhanced in value by the addition to the text of cases dealing with gas, electric and telephone companies. Though the problems of discrimination in these fields are similar to the more familiar problems of common carriers, they arise under different circumstances and thereby help to clarify the applicable principles.

The subject of liability to which the first edition devoted about 350 pages is somewhat condensed in the present edition. Since this subject is often covered in other law courses, the material of this chapter may be further condensed. In any event, it might be well to cover the common-law aspect of public utility liability in an introductory note and limit the selected cases to the phase involving the extent, character and validity of statutory liability.

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[3] Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[4] West v. Chesapeake & Potomac Tel. Co., 295 U. S. 662, 689, 55 Sup. Ct. 894 (1934).

The cases grouped in the concluding chapter deal with questions of administrative procedure, of methods of review and of notice and hearing, topics often excluded from academic consideration. The subject of notice and hearing, however, deserves more prominent treatment than is accorded it. Significantly, the Johnson Act of 1934, which limits the original jurisdiction of the Federal District Courts in respect to administrative rate orders, has no application unless the challenged rate order "has been made after reasonable notice and hearing." But what constitutes an adequate administrative hearing within the meaning of the Johnson Act, or of other statutory enactments, or under the due process clause of State and Federal Constitutions, where the validity of administrative action is in question?

The Courts have yet to give an authoritative answer with respect to this provision of the Johnson Act. But they have given some indication of their views with respect to other statutory provisions and the judicial requirements under the due process clause.[5] These important cases are missing from the otherwise comprehensive list of cases and may well be grouped together under the heading of Notice and Hearing, with special emphasis on the requirements of the statute and of due process to render the hearing adequate and the resulting administrative action valid.

Considering the high scholarly attainments and previous contributions of the authors, a first-class piece of work was naturally to be expected from their joint authorship. The new edition fulfils this expectation.

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CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE. Second edition. By Louis Prashker.[1] Brooklyn: St. John's University School of Law, 1937, pp. lviii, 1431.

The law of pleading and practice is ever in flux. Therefore, one who labors on a case book on this subject, ventures upon a task made doubly difficult by the uncertainty of his materials. Not only is he uncertain as to the permanency of his contribution, but he must have considerable doubt of his decisions as to what materials should be included, which should be emphasized, and how recent developments should be illustrated.

Thus, proper orientation, in a field governed by expediency, but expressed in terms of logic, is no mean attainment; and an author of a work on pleading and practice is, therefore, peculiarly in a position to appreciate the horrors of

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[5] Morgan v. United States, 298 U. S. 468, 56 Sup. Ct. 906 (1935) (reported after publication of new edition); West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U. S. 63, 55 Sup. Ct. 316 (1934); Panama Refining Company v. Ryan, 293 U. S. 388, 55 Sup. Ct. 241 (1935); Atchison Ry. Co. v. United States, 284 U. S. 248, 52 Sup. Ct. 146 (1931); Northern Pacific Ry. Co. v. Dept. of Public Works, 268 U. S. 39, 45 Sup. Ct. 412 (1925); Pacific Gas & Electric Co. v. Railroad Commission, 13 F. Supp. 931 (N. D. Cal. 1936).

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