

## Cases and Materials on the Law of Municipal Corporations (Book Review)

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clubhouse. A new personnel will not obviate all of the evils of party government. It will, however, eradicate a great deal of the downright dishonesty and many of the more flagrant abuses.

Many of the activities of these clubs—social, welfare and charitable—are acknowledged by the author to be commendable. Some others are obviously anti-social. An aroused public opinion, expressed through personal activity in the local political organizations, will go a long way towards removing anti-social tendencies.

The book is admirable in its searching analysis of the facts of the existing system. It leaves an impartial reader, as well as an informed political observer, with the distinct impression that the local political club is not entirely hopeless, that it may still be used to good civic advantage, and that with effective changes in some of its activities and some of its objectives, it may be turned into a more potent vehicle than it has been in carrying on good government.

SAMUEL I. ROSENMAN.\*

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CASES AND MATERIALS ON THE LAW OF MUNICIPAL CORPORATIONS. By E. Blythe Stason.<sup>1</sup> St. Paul: West Publishing Co., pp. xxix, 761.

The City of New York celebrates this year the 250th anniversary of the granting of the first American charter in 1686,<sup>2</sup> by Thomas Dongan, then colonial governor of New York. This fact and the appearance of Prof. Stason's excellent volume suggest a review of some aspects of the municipal corporation. We note first the course of development of the municipality, ably sketched by Prof. Stason in his "Introductory Notes."

## I

The "city states" of Athens, Rome and Carthage were independent, owing allegiance to no superior authority. With the growth of the Roman Empire and the concomitant development of strong central authority, there arose provincial cities, subject to the authority of the Empire and lacking almost entirely any local autonomy. Here developed the concept of municipal corporate personality—a city possessing legal capacity to own property and to sue and be sued.<sup>3</sup> After the Dark Ages, cities emerged on the continent of Europe as commercial centers with feudal overlords exercising plenary jurisdiction. In

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<sup>2</sup> The City of Albany, in the same year, acquired its Dongan Charter. For a brief examination of same, see ANDERSON, *AMERICAN CITY GOVERNMENT* (1932) 393. For an analysis of the Dongan Charter granted to New York City, see PETERSON AND EDWARDS, *NEW YORK AS AN EIGHTEENTH CENTURY MUNICIPALITY* (1917) 13.

<sup>3</sup> P. 2.

England, the early boroughs obtained their charters by grant or purchase directly from the King. In the early American colonies, charters were granted by the colonial governors or proprietors in the name of the King. Thus originated the Dongan charter of the City of New York. After the American Revolution the legislatures of the states granted municipal charters.

Forms of municipal government in America have varied and have been adapted to meet local needs. In a great many municipalities, the early form of mayor-council still persists. The Galveston flood of 1900 led to the establishment there in 1901 of the commission form of government, under which the executive and legislative functions rest in a commission. About 500 American municipalities have experimented with this form of government. Its popularity is definitely waning. It contravened the American doctrines of separation of powers, and checks and balances, and aroused fears of despotic administration. During the past decade, practically no city has adopted it. In 1914, Dayton, Ohio, introduced the city manager type of municipal government, under which a city employs an expert manager to conduct its affairs in the same manner that a private corporation employs its chief executive or administrative officer. The city manager plan has been adopted in over 400 American cities, including 17 cities with a population in excess of 100,000.<sup>4</sup> It is free from many of the objectionable features of the commission form of government. The city manager has no legislative power and is subject to the control of the city council.

On the heels of a tremendous increase in urban population came an even greater multiplication of municipal functions. In 1800, no city in the United States had a population of 100,000 inhabitants. Only five cities had populations in excess of 20,000. To-day New York City boasts a population of 7,200,000.<sup>5</sup> The primary functions of the early municipality included some form of policing, maintenance of local courts, regulation of trade and collection of taxes. How rudimentary these were may be gleaned from the record of the origin in New York City of municipal street lighting. In 1761, in the interest of public safety, the common council of the City of New York established a system of street lighting, and procured permission to levy a tax for the purchase of necessary supplies. But prior thereto, an ordinance of 1697 had required that the occupant of "Every Seaventh house \* \* \* in the Darke time of the Moon \* \* \* Cause A Lanthorne & Candle to be hung out on a Pole Every Night."<sup>6</sup> Mischievous persons, however, delighted in breaking or removing the lanterns. "It is thought to be done by some daring Rakes, in order to convince the Owners, how easy those Lamps Might be demolished without Discovery."<sup>7</sup> From such small beginnings evolved the functions of the modern municipality. Contrast with this the wide scope of the public health functions it now commonly exercises: prevention of the spread of contagious disease, food inspection, furnishing water, milk inspection, prevention and abatement of nuisances,

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<sup>4</sup> P. 6. See also PRASHKER, *OUTLINES OF THE LAW OF MUNICIPAL CORPORATIONS* (1927) 4.

<sup>5</sup> P. v. The figure representing the estimated population of New York City is taken from the statistics set forth on the reverse side of New York City Bill for Real Estate Taxes—Levy of 1936.

<sup>6</sup> PETERSON AND EDWARDS, *op. cit. supra* note 2, at 325.

<sup>7</sup> POST-BOY, Feb. 3, 1752, quoted in PETERSON AND EDWARDS, *ibid.*

regulation of slaughter houses, prevention of air pollution by dust and smoke, street cleaning, maintenance of garbage incinerators, medical inspection of school children, ambulance and hospital service, noise abatement, and inspection and licensing of restaurants, ice cream parlours, barber shops, laundries and hotels. Under this category of public health functions, the modern municipality establishes zones restricting the use of land to prescribed purposes, limiting and regulating the height of buildings, and fixing the maximum amount of space and area that buildings in any given zone may occupy.<sup>8</sup> It limits the height and construction of billboards and sky signs on the roofs of buildings; such ordinances have been sustained where it appears that they were enacted not merely for aesthetic purposes.<sup>9</sup> The most significant of recently evolved municipal functions in this category is slum clearance, financed in part by federal aid.<sup>10</sup> The municipality has entered the field of private enterprise, and has become the owner and manager of numerous utilities. We find in the United States to-day about 7,000 municipally owned water systems, and 2,000 municipally owned electric power plants.<sup>11</sup> In consequence of the recent Supreme Court decision in the *T. V. A.* case,<sup>12</sup> we may anticipate, in the near future, a substantial increase in the latter. Airports, ice plants, gasoline filling stations and operation of buses are among the most recent municipal ventures.

Multiplication of services has naturally multiplied the number of municipal officers and employees. New York City alone has approximately 125,000 persons on its payroll.<sup>13</sup> Their recruitment, promotion, tenure and salary schedules create a host of problems. Here is implicit the struggle between the notion that "to the victor belong the spoils" and a merit system operated to establish and maintain a career service.<sup>14</sup>

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<sup>8</sup> In sustaining municipal zoning regulations, the Supreme Court, a decade ago, wrote: "Building laws are of modern origin. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex constitutions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. \* \* \* The line which thus separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. A regulatory zoning ordinance which would be clearly valid as applied to the great cities might be clearly invalid as applied to rural communities. \* \* \* A nuisance may be merely a right thing in a wrong place—like a pig in the parlor, instead of in the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114, p. 145 at 160 (1926).

<sup>9</sup> See PRASHKER, *op. cit. supra* note 4, at 35.

<sup>10</sup> See Note (1936) 10 ST. JOHN'S L. REV. 280.

<sup>11</sup> P. v.

<sup>12</sup> *Ashwander v. Tennessee Valley Authority*, — U. S. —, 56 Sup. Ct. 466 (1936).

<sup>13</sup> BETTER GOVERNMENT PERSONNEL, REPORT OF THE COMMISSION OF INQUIRY ON PUBLIC SERVICE PERSONNEL (1935) 150.

<sup>14</sup> The Commission of Inquiry on Public Service Personnel lists a number of fallacies in American thinking which have impeded the development of an efficient civil service, *viz.*: (1) "to the victor belong the spoils;" (2) the duties of governmental employees are "so plain and simple that men of intelligence

## II

Against this setting, Prof. Stason turns to a study of the case law and applicable statutory and constitutional material. He develops the major topics of legislative control over municipal corporations, municipal powers in general, municipal action to promote public welfare, licenses and franchises, appropriation of municipal funds, municipal contracts and liability thereon, municipal indebtedness and liability thereon, municipal torts and liability therefor, municipal property and, finally, special assessments. We select for consideration here the topics of legislative control and municipal indebtedness.

In the absence of constitutional provision therefor, does a municipality have an inherent right of local self-government which is beyond legislative control? Prof. Stason quite properly begins his treatment of legislative control with a consideration of this mooted question, involved recently in a Rhode Island case.<sup>15</sup> The court, guided by the great weight of authority, followed the rule of *Trenton v. New Jersey*,<sup>16</sup> viz.: "In the absence of state constitutional provisions safe-guarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will."<sup>17</sup>

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can readily qualify themselves for their performance."; (3) "charity begins on the public payroll"; (4) "patronage is the price of democracy"; (5) "the best public servant is the worst one. A thoroughly first-rate man in public service is corrosive. He eats holes in our liberties. The better he is and the longer he stays, the greater is the danger."; (6) "tenure is the cure of spoils"—fallacious, because guaranteed tenure, standing alone, is dangerous; it is used by politicians as a "dug-out for spoilsmen"; (7) the way to eradicate spoils is to begin at the bottom with clerks, stenographers, policemen, etc.—unfounded, because evidence gathered by the Commission shows that "the top posts are of supreme importance, and that the chief administrative officers who are spoils-men can demoralize the rank and file and wreck the service in spite of any law;" (8) "home town jobs for home town boys"; (9) "public service is always less capable and efficient than private enterprise"; (10) the spoils system can be eradicated through the prohibition of specific abuses—erroneous, because what is required is "not negative laws, but the positive and militant handling of the problem of personnel with the active backing of the public and the press." *Op. cit. supra* note 13, at 16.

<sup>15</sup> *City of Providence v. Moulton*, 52 R. I. 236, 160 Atl. 75 (1932), p. 13.

<sup>16</sup> 262 U. S. 182, 43 Sup. Ct. 534 (1923) p. 18.

<sup>17</sup> Note, however, the contrary view expressed by the New York Court of Appeals, viz.: "The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution. \* \* \* The rights thus secured after a long struggle and by great pressure, although at times denied and violated by the ruling monarch, were never lost, but were brought over by the colonists the same as they brought over the right to breathe, and they would have parted with the one as soon as the other"; *People ex rel. Metropolitan St. Ry. v. Tax Commissioners*, 174 N. Y. 417, 67 N. E. 69 (1903), *aff'd*, 199 U. S. 1. For excellent consideration of this question, see MCBAIN, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE* (1916) 13. Dean McBain, however, makes no reference to the Metropolitan St. Ry. case in this connection; see, particularly, his note 1, p. 14.

In the famous *Dartmouth College* case,<sup>18</sup> the Supreme Court held that the charter of a private corporation constitutes a contract, protected by the constitutional provision forbidding the passing of any law impairing the obligation of contracts. This provision is, however, inapplicable to municipal corporations. But the due process clause of the Fourteenth Amendment may be implemented to prevent the compulsory transfer of municipal property to private agencies.<sup>19</sup>

Legislative control, practically unlimited, and variously exercised over municipalities, afforded occasion for favoritism, discrimination and undue meddling. In consequence, many states resorted to constitutional limitations. Among those examined by Prof. Stason are the following: (1) provisions requiring consent of local authorities or electors as a condition precedent to the exercise of franchise rights upon local streets and highways;<sup>20</sup> (2) provisions requiring the selection of local officials by vote of local electors;<sup>21</sup> (3) provisions prohibiting special legislation;<sup>22</sup> (4) municipal home rule by constitutional amendment.<sup>23</sup>

A different type of constitutional limitation is that which imposes debt and tax restrictions upon the municipality. These Prof. Stason considers in connection with municipal indebtedness. They do not primarily secure the municipality against legislative interference.<sup>24</sup> They are intended to secure the municipality against its own extravagance and waste. Recent events point to their inadequacy.

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Prof. Stason's volume is an excellent aid to students and teachers of the law of municipal corporations.

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CASES ON FEDERAL PROCEDURE. By Armistead M. Dobie. St. Paul: West Publishing Co., 1935, pp. xxxix, 803.

Back in 1928, a handbook of Federal Jurisdiction and Procedure, of which Dean Dobie is the author, appeared upon the market. Although the work was

<sup>18</sup> *Trustees of Dartmouth College v. Woodward*, 4 U. S. 518 (1819).

<sup>19</sup> *Proprietors of Mount Hope Cemetery v. City of Boston*, 158 Mass. 509, 33 N. E. 695 (1893), p. 35, note 3.

<sup>20</sup> N. Y. CONST. art. III, § 18.

<sup>21</sup> N. Y. CONST. art. X, § 2 (amd. 1935).

<sup>22</sup> *Supra* note 20.

<sup>23</sup> N. Y. CONST. art. XII; art. III, § 26 (amd. 1935); art. X, § 2 (amd. 1935).

<sup>24</sup> Dean McBain quite properly reminds us "that many of the debts of municipal corporations were incurred at the direct command of the legislature. Viewed in the light of the usual legislative practice in this respect, these constitutional provisions were certainly in the nature of limitations in behalf of the city. The probable truth of the matter is that they were directed to the legislature and to the city with the taxpayer chiefly in mind." MCBAIN, *op. cit. supra* note 17. See N. Y. CONST. art. VIII, § 10 (forbidding the giving or loaning of any money or property to, or in aid of any individual, association or corporation); N. Y. CONST. art. III, § 28 (forbidding the giving of extra compensation); N. Y. CONST. art. VIII, § 10 (forbidding incurring of indebtedness to amount exceeding 10% of assessed valuation of real estate and restricting amount to be raised by tax).

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