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Book Reviews

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BOOK REVIEWS

Municipalities and the Law in Action. 1949 Edition. Edited by Charles S. Rhyne. Washington: National Institute of Municipal Law Officers, 1949. Pp. 441. $10.00.

The prosaic, professional, and sometimes confidential nature of the duties of a city attorney has shielded both him and the public from the growing necessity for special knowledge and training in acting as legal counsel for a municipality. Only scattered attention has been paid to methods for improving his efficiency or for increasing the value of his services to the city. As long as municipal responsibilities followed the traditional pattern, no loss to the city was involved. But added responsibilities in social and economic spheres during the past 25 years have demanded that the city attorney be equipped to advise and act for his employer in new, diverse and complex situations—not often encountered in a law school curriculum nor in the average private practice. He himself needed help and information, and like the city manager he has had to provide it for himself.

The National Institute of Municipal Law Officers provides a nationwide exchange of information, liaison service with federal agencies and research and consultant services on legal problems of concern to municipalities. It is also active for and against measures in Congress which vitally affect either municipal administration or the welfare of its citizens as a group—an important function as long as it is conducted in a dignified manner and plainly in the public interest. For example, during 1948 it sponsored testimony before Congressional committees in opposition to the Rizley bill limiting federal control over natural gas companies in the belief that the legislation would result in higher gas rates to consumers.

Annually the member attorneys, drawn principally from cities of 25,000 population or over, gather in convention to listen to planned programs and informally discuss mutual problems. A transcript of the 1948 convention forms the subject matter of the publication reviewed.

The volume is similar in form to preceding editions. Each of the 19 committee reports briefly surveys developments during the year 1948 in its assigned field. Featured are abstracts of significant court decisions and notes on the status of federal and state legislation affecting municipalities. Comment on these cases is generally limited, and though issue might be taken with some of the general conclusions set forth, it must be remembered that these reports serve the general purpose of putting

the individual city attorney on notice. The lawyer who acts on the recommendation or conclusion of a report without going back to the source material does so at his own risk.

In addition to the committee reports there are prepared speeches which concentrate and expand on particular subjects, and verbatim reports of panel discussions which make the book very readable. The urgency of solving current difficulties, uniformly present in urban areas throughout the country despite variation in size and geographic location, is reflected in the give and take of these informal debates, and even the areas of disagreement are explored sincerely and without apparent rancor. The city attorney who either participates in the discussions or examines carefully the printed transcript should come across ideas and suggestions of assistance in his own locality.

Reference to all of the principal reports, speeches, and discussions contained in the book is beyond the scope of a review. Suffice it to say that they cover most of the current legal questions in municipal administration. Some parts of the book inspire comment.

One particular field in which the city attorney has long been concerned and in which a spirited exchange of ideas, information and opinion took place at the convention, is methods of raising new revenues through taxation. Municipalities have always struggled to meet budget requirements, and new obligations piled on the inflated cost of old since the war have intensified their dispute with the states over division of sources of revenue. Some cities are despairing of state aid and trying out new taxing devices to fit old legal restrictions. For example there are city income taxes, sales taxes, new privilege license taxes, admissions taxes, occupation taxes, gross receipts taxes, and others.

Considerable interest was manifested in the experience of Pennsylvania municipalities under a 1947 act which permitted about two-thirds of the local governmental units in the state to levy any tax not imposed by the state. This power has been exercised by over 750 governmental units in imposing over 1,000 separate taxes, and proponents of the measure feel that it has satisfied the undeniable need of the local units for additional revenues as well as returning more responsibility to local units. On the other hand, a Pennsylvania state official claims that:

"It permits the multiplication of taxes upon the same person or subject, it provides no safeguards against capricious or punitive taxes, and it authorizes a multitude of political agencies with no skill or perspective in the exacting science of taxation to exercise to the fullest the taxing power, one of the highest prerogatives of sovereignty, as their essentially uncontrolled whim, prejudice or extravagance may dictate."

So great was the reaction in Pennsylvania that the 1949 Legislature had to curb to some degree the 1947 authority. Since this solution has

been suggested by many sources throughout the country, it is fair to ask: Is complete freedom to levy any tax not imposed by the state the most workable solution for the cities' financial plight?

Broad taxing authority indiscriminately exercised will serve only to make our crazy-quilt tax pattern more confused. If the cities take the lead in demanding broad forms of authority—even though their motives may be justifiable—the new taxes which result may be so unpopular or misunderstood or even unwise that a return to strict state control will be induced. Specific delegation of additional taxing powers by the state would provide relief without unduly complicating over-all tax administration. It would seem advisable for our cities to continue to campaign for a fundamental overhaul of state taxation policies to insure justice to the state, cities, counties and taxpayers alike.

Taxation is but one facet of the general movement by our urban communities to obtain more local self-government, as well as more efficient government. Almost necessary to the success of any such movement is the grant of "home rule" powers. Helpful to the exercise of home rule is the consolidation of overlapping local governmental units and particularly cities and counties in metropolitan areas. It is encouraging to find the NIMLO discussing both theories in its convention.

The advantages of home rule have been widely accepted in principle, but in few states has an adequate and workable definition been approved by the legislature and interpreted liberally by the courts. Much research and careful draftsmanship must be incorporated into home rule legislation in the future, before the attempt to secure legislative approval is made, for much of the difficulty in home rule legislation now on the statute books has been doubt as to the extent of legislative intent. It is for this reason that the address on home rule is somewhat disappointing, although the committee report on city-state relations is excellent. The speaker on home rule, by assuming that a general grant of home rule would solve all the city's difficulties, failed to take into account the lessons of the home rule struggle—that state courts have rendered much home rule legislation in the past meaningless because of lack of evidence that legislatures intended a grant of broad powers. It is also disappointing to find that the otherwise excellent bibliography on home rule appended to the speech contains no citations for the years since 1940.

On the subject of city-county consolidation the attorneys discussed with interest the outstanding example of successful consolidation—the city and county of Denver. The experience of Denver is not typical of the full range of consolidation possibilities, however, and it is to be hoped that there will be further study of the theory, including the basic

local government policy changes which are inherent in complete consolidation of cities and counties.

These and other portions of the book deal with the problems which must be solved on the local or state level. A larger portion of the book is concerned with federal-city relations.

But the best contribution to municipal legal methods in the volume is the section devoted to public utilities and in particular to the discussion of rate regulation. For many years cities have been concerned with rate fixing in so far as it affects the public interest, and most large cities are represented at hearings before state utilities commissions and federal agencies on rate increases for public utilities in their vicinity. Since each industry presents a different problem in determining reasonable rates, the city attorney has had to become an expert on the operation of utilities in order to make an effective appearance. Only recently have telephone rate increases become important to the cities, and thus many city legal representatives have found themselves unprepared to contest the carefully documented cases of the telephone companies, even when convinced that the rate requests are not altogether justified.

It is therefore interesting to find the technique of intervening in a telephone rate proceeding explained in detail by the utilities counsel of Kansas City, Missouri. Procedurally, he makes suggestions for intervention on topics such as cooperation with utilities commission counsel, the hire of technical experts, and crucial questions in cross examination. Substantively he describes the financial organization of the companies, determination of the rate base in conformity with the theory laid down by the U. S. Supreme Court in *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591 (1944), separation of the rate base for a single state from the total company investment, examination of the test year to determine the feasibility of new rates, and the items of expense which may alter the test year picture and which are most susceptible to challenge. All phases of telephone rate controversies are covered, and the article should be of great value to the attorney making preparations to contest telephone rate increases on behalf of his city.

If the modern city is to be in the forefront of administrative methods and types of service rendered, it must be well informed. To be well informed, it must have the advice of alert and intelligent counsel. For that attorney this volume, as well as other publications of the NIMLO, is indispensable.

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The Rational Basis of Contracts and Related Problems in Legal Analysis. By Merton Ferson. Brooklyn: Foundation Press, 1949. Pp. 330. $4.00.

Twelve readable chapters present Dean Ferson's analysis of contract law fundamentals. His discussion applying his theories to several classical contract problems is not burdened overmuch by citation of authority, but carries the reader by the strength and simplicity of his analysis. Most of these essays appeared first in law review articles; publishing them within one set of covers brings out certain unifying concepts which could be overlooked in the separated articles.

The author starts with the definition of a "legal transaction" as a series of events by which a member of a free society in the exercise of his "private autonomy" gives up a right or takes up an obligation. Dean Ferson then illustrates the definition with some common examples of legal transactions—gifts, exchanges, bilateral and unilateral contracts, and appointment of agents. Pointing out similarities and dissimilarities, he concludes that every legal transaction is characterized by a final indication of assent, a "juristic act," which makes it operative.

This concept of the final momentary consummating "juristic act" is then applied to the exposition of certain much discussed contract problems—crossed offers, third party beneficiary contracts, acceptance by mail, death of an offeror before acceptance, discharge of a debt on part payment, and the liability of a principal or master for misrepresentations by his agent or servant. The solutions reached are not new, but the course of reasoning is often persuasive in its appeal to common sense and understanding.

The best example is the chapter reprinting the excellent article from the Yale Law Journal on the rule from the case of *Foakes v. Beer* that part payment of a liquidated debt will not discharge the whole debt though the creditor gives a receipt acknowledging payment in full. The courts have commonly declared that this conclusion is regrettably unavoidable because there is no consideration for the discharge. Dean Ferson does not like this rule; he adds his voice to the chorus of condemnation on the ground of its injustice and inexpediency and then carries on with a strong argument that the rule lacks sound legal basis. He agrees that there is no consideration, but he regards the legal transaction between the debtor who pays a part of the amount due in exchange for the creditor's receipt for the whole (or statement that the whole is discharged) as a present exchange rather than a contract; no consideration is required because the creditor makes no executory promise. The debtor does not ask for or receive the creditor's promise of future discharge, nor even the creditor's promise to abstain from future action to

collect the balance. What passes to the debtor is an instrument (or oral statement) to the effect that the debt is cancelled simultaneously with the part payment; the deal is an exchange of a sum of money for an instantaneous surrender of the claim. The relative values of the properties involved are of no importance where no promise of future performance is made. This analysis is persuasively consistent with the probable intention of the parties; both normally regard the deal as a completed transaction with nothing left for future performance by either.

One of the author's fundamental theses is that the courts have unnecessarily hampered themselves by regarding promise as a necessary element of a contract, whereas all that is essential is a "manifested consent of the obligor"; this is the "basis of contracts" which gives the book its title. A manifestation of consent is complete upon expression, while a promise requires communication, according to the author, by standard dictionary definition. The emphasis upon a communicated promise is understandable, as Dean Ferson says, in the light of legal history. The contract remedy in common law developed as an action based upon deceit, the defendant being charged with having deceptively induced the plaintiff to rely upon a promise; and without communication there could be no reliance. But Dean Ferson's idea is that the "promise" theory does not fit modern contract law. He suggests, for instance, that the "manifestation" theory serves better than the "promise" theory of contract to furnish a simple answer to the problem of the mailed acceptance; the act of mailing is the necessary manifestation of consent and therefore is the acceptance even without communication.

It may be that we generally think of a promise as an undertaking communicated to the promisee, and certainly communication commonly occurs; but it is not clear that communication is essential to the idea of a promise. The author acknowledges that Section 2 of the Restatement of Contracts defines a promise without reference to the element of communication. Webster's International Dictionary (1946) defines "promise" in these words:

> "One's pledge to another to do or not do something specified; narrowly, a declaration which gives to the person to whom it is made a right to expect or to claim the performance or forbearance of a specified act."

A "pledge to another" in the dictionary definition may mean a pledge *communicated* to another; but it may also mean a pledge simply *addressed* to another. That is precisely what the mailed assent must be, in order to be an acceptance; it must be properly addressed to the offeror. Of course Dean Ferson does not mean that any manifestation of assent by the offeree, regardless of the form it takes, will be an effective acceptance. A message of acceptance inadvertently sent to the wrong

person would manifest assent, but would not make a contract. To create a contract, the offeree must indicate assent in some manner expressly or impliedly called for by the offer. If the offer expressly provides that mailing the proper message will complete the acceptance, or that the message must be communicated to be an acceptance, no room is left for controversy. If the offeror has not been specific the problem is to determine what interpretation should be put upon his acts and words as to the necessity of communication; the circumstances often give room for the argument that the offeror has by implication assented to acceptance by proper dispatch. As Dean Ferson recognizes, the argument that the post office is an agent of either or both parties is not only unsatisfactory, it is legally absurd.

The "manifestation" theory is also relied upon as indicating an easy way to the protection of the third party beneficiary; the author points out that there is a clear indication of intent to be bound to the third party, though no promise is communicated to him. But there is a promise conveyed, or at least addressed, to a promisee, the second party in the transaction. The problem is not whether party number three can claim a right in the absence of a promise, or of a communicated promise, but whether his right can be based upon a promise communicated (or addressed) to party number two.

There is room for doubt that the solution of these problems is simplified by substituting "manifestation of assent" for "promise" as the basis of contracts. A fundamental question is whether there is any difference between a promise and a contractual manifestation of assent. Except in unilateral contracts, where the acceptance is non-promissory, the offeree's consent must be at least addressed to the offeror unless the offeror has specified otherwise. The offeree's manifestation of assent must also be given in response to the offer, unless cross-offers can form a contract, as Dean Ferson argues should be the rule since there is sufficient manifestation of assent; but even in that case the assent is addressed to the offeror. A letter from the offeree to a third person stating definite willingness and intent to accept a certain offer would not be treated as sufficient manifestation of assent so that a contract would be created. The manifestation of assent, to result in a contract with a certain person, then, must be directed to that person or given in a manner which he has agreed to in advance in his offer; such a manifestation it seems could properly be called, in the language of the dictionary, a "pledge to another," that is, a promise.

Dean Ferson's book should be read, however, for an understanding of the strength of his position on this and other matters. The book is not intended as a text covering even in summary fashion the subject

of contracts; it is a study of selected parts of the field which in the author's opinion have not been too clearly understood. Acceptance of any rule in any social science as correct beyond the possibility of question is dangerously conducive to mental blindness. Dean Ferson's chapters serve well their purpose to encourage a re-examination of certain underlying ideas of contract law.

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