



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 36 | Number 3

Article 5

4-1-1958

Book Review

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

North Carolina Law Review, *Book Review*, 36 N.C. L. REV. 373 (1958).

Available at: <http://scholarship.law.unc.edu/nclr/vol36/iss3/5>

This Book Review is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

BOOK REVIEW

Municipal Law. By Charles S. Rhyne. Washington: National Institute of Municipal Law Officers. 1957. Pp. xxi, 1125. \$10.00.

There has long been a need, as Mr. Rhyne points out in his introduction, for a good one-volume reference book on municipal law. City and town attorneys frequently need a quick case citation, perhaps to support an opinion needed at a council meeting coming up within hours or for immediate advice to a busy department head. McQuillin's twenty volumes, encyclopedic and verbose and over-organized, are difficult to use, are reliable in the long run only as leads to pertinent cases, and are too expensive for the average city attorney with a general practice.¹ The material on municipal corporations in *American Jurisprudence* and *Corpus Juris Secundum* is in general more compact and usable, but the attorney must have the entire set for complete coverage of local governmental problems. For convenience this new one-volume work covering the whole span of municipal law is most welcome.

Mr. Rhyne has based this book on his long and successful experience as General Counsel of the National Institute of Municipal Law Officers. As the "city attorney's attorney" he has, over a period of twenty-two years, built up the largest single file of municipal legal materials in the country. This file has been the basis for the monthly and annual publications of the Institute and for the 144 special research reports on special legal problems which it has published.

In format *Municipal Law* is attractive and usable. The 1125 pages are not too bulky, a very readable type face has been used, and the double column arrangement on each page is easy to follow. There are both a detailed table of contents and a complete index, making it simple to locate any subject. The chapter headings are simple and easy to follow. And, most important, the scope of the book conforms to the experience of city attorneys today. It covers the field from incorporation to regulation for aesthetic purposes, from airports to urban renewal, from regulation of hog pens to the protection of civil rights.

There is one long-range disadvantage to the one-volume format. Any legal text is, of course, out-of-date on publication to the extent that new decisions and statutes are relevant. Apparently no provision has been made for periodic supplements to *Municipal Law*, which means that the municipal attorney must continue to keep current with the law

¹ McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS (3d ed. 1949).

from other sources (such as the monthly publications of NIMLO) until a new edition is found feasible.

Municipal Law is termed a "handbook on municipal law since 1910."² As to purpose Mr. Rhyne appropriately states in the preface that "a completely new approach and a completely new summary of the law as it exists today is required. This study attempts that task." Furthermore, the author states "that every action by the municipality must be justified under its legal powers. This book is designed to aid in those interpretations by restating the municipal law in use today as revealed by the nation-wide experience and the material which is available in a most unique way through NIMLO."

Mr. Rhyne has set an ambitious goal. He has moved a long way towards reaching that goal. *Municipal Law* is good; it is convenient; it will be invaluable for city attorneys. But in recommending that every city attorney purchase and use this book, as this reviewer does most heartily, it is also necessary to point out its limitations.

This is not a book for pleasant evening reading. It is a reference book for a busy attorney, but as a reference the text should have a standard of quality on which the attorney can rely. Though in general the author does a good job of summarizing the law, even a casual examination of the book leads one to suspect that the text is more a compilation of headnotes than an analytical treatment of judicial opinions. In some places the text is misleading when it attempts to summarize a complex issue or when it attempts to generalize conflicting points of view. Sometimes important qualifying words such as "in general," "usually," or "in Oregon" (or Minnesota or Florida) are omitted when they had better been retained. There are even contradictory statements from one chapter to another, contradictions that would surely have been eliminated with more careful editing.

Time and space make any comprehensive analysis impossible, but a few examples should demonstrate the limitations inherent in the text, limitations which the city attorney should understand. Here are two such examples taken from the section defining generally the always confusing "governmental-proprietary" distinction.

1. "A legislative declaration that a certain activity of a municipality is a public governmental function is usually conclusive as to the nature of that activity." (p. 68) Query? Then why has not the distinction been erased by legislative act? Certainly North Carolina lawyers

²The date limitation appears only on the jacket, although the preface refers to developments in the law during the last "thirty years." Perhaps the intention was to summarize the developments since the last edition of Dillon's treatise. See DILLON, *MUNICIPAL CORPORATIONS* (5th ed. 1911). If so, this intention, and limitation, should have been more specifically asserted.

familiar with *Rhodes v. Asheville*³ could not subscribe to this statement. While there are *airport* cases in a few states supporting the statement, the *Rhodes* case (an airport case) is not cited as contradicting the general statement. Furthermore, the text in the chapter on tort liability acknowledges that the distinction is made by the courts.

2. "On the other hand, a municipality usually exercises proprietary functions when it promotes the comfort, convenience, safety and happiness of its own inhabitants rather than the welfare of the general public. For example, proprietary functions usually include building and maintaining bridges, streets and highways, water works, sewers, collection of refuse, and similar activities." (p. 69) Later, in the chapter on municipal tort liability, the author states that "the general rule is that the collection, removal and disposal of garbage refuse and ashes are governmental functions . . ." (p. 774) Which statement are we to believe? The latter is, of course, the general rule. And is responsibility for streets and highways, for example, really considered by the courts as a proprietary function? Again the discussion in the chapter on municipal tort liability is more precise and is a better generalization of the confused state of the law concerning liability for failure to exercise due care in the maintenance of streets. (pp. 750-51)

These are examples of contradictions. In the same section there are inconsistencies from one sentence to another. Compare the statement that "a municipality may own property and have property rights which are so far private that they are not held at the pleasure of the legislature" with the statement that "the fact that the operation of a particular facility is conducted in a private or proprietary, as distinguished from a governmental, capacity does not ordinarily free it from state control." (p. 69) The former statement is frequently made, but except in a few isolated decisions a municipality has not been given "rights which are so far private that they are not held at the pleasure of the legislature."

Again, in discussing acquisition of municipal property, an Alabama case⁴ is cited as authority for the statement that "a municipal corporation may not acquire property for investment or speculation; nor become a dealer in real estate." (p. 374) There may be cases actually supporting this statement, but the holding in the cited cases does not. There is dictum in the Alabama case, to be sure, but the relevance of the dictum is questionable in view of the factual situation.

It is perhaps obvious that a one-volume reference cannot take into consideration all statutory provisions as well as judicial decisions. In

³ 230 N.C. 134, 52 S.E.2d 371 (1949), *rehearing denied*, 230 N.C. 759, 53 S.E.2d 313 (1949).

⁴ *Powell v. Birmingham*, 258 Ala. 159, 61 So. 2d 11 (1952), cited in note 2 on p. 374.

a field so dependent on statutory law, however, judicial decisions give an incomplete picture. It is one thing to make the statement that "it has been uniformly held that municipal zoning laws and building regulations do not apply to the erection, maintenance and control of state owned and operated buildings or improvements." But is the picture complete when there are state laws in existence expressly making state buildings subject to municipal zoning regulations?⁵ And yet on a few points statutory law is specifically cited to present a more concrete picture. For example, several North Carolina special acts are specifically cited as examples of extraterritorial zoning authority. (p. 321, n. 29)

Again, in discussing municipal regulation of parking, Rhyne points out that the *Scoggin* case,⁶ holding that North Carolina courts cannot accept evidence of the registration of a motor vehicle as prima facie evidence that the registered owner parked the vehicle, has been overruled by subsequent legislation. (p. 447, notes 18 and 20) This is true. But it is confusing to the user of this book to be told in one instance that legislation has reversed the decision of the court and not to be told in another. For example, in discussing special assessments, the statement is made that "state property is generally immune from special assessments levied by cities for public improvements" and that in line with this rule "it has been held that a municipality lacks authority to levy special assessments for curbs and gutters along a state highway and, accordingly, an agreement between a municipality and a state whereby the latter agrees to the levy of such special assessments against state property is null and void." (p. 303) A North Carolina case is cited in support of the latter statement.⁷ But, the case itself does *not* have anything to do with the power of a municipality to levy assessments against state property. It actually concerns the power of municipality to levy assessments for the construction of a highway which is part of the state highway system and for which the state has primary financial responsibility. Moreover, while the general rule in North Carolina has been that municipalities cannot levy special assessments against state property, the general law has been amended to permit the state to petition for such improvements and to pay the state's share of the cost of such improvements.⁸

Citations obviously posed a difficult problem for the author. In order to keep all the subject matter within the bounds of one volume, comprehensive citations from the states had to be discarded. The user must realize, therefore, that the absence of a cited case from his jurisdiction

⁵ See, e.g., N.C. GEN. STAT. § 160-181.1 (1952).

⁶ *State v. Scoggin*, 236 N.C. 19, 72 S.E.2d 54 (1953).

⁷ *Shaver Motor Co. v. Statesville*, 237 N.C. 467, 75 S.E.2d 324 (1953).

⁸ N.C. GEN. STAT. § 160-82 (1952).

on any particular point does not mean that there are not cases in his jurisdiction on that point. And the law in his jurisdiction may be contrary to the general statement of the law set forth by Mr. Rhyne. For example, as noted above, the North Carolina court has held that operation of an airport is not a governmental function, even though the legislature specifically provided that it should be considered as a governmental function. The *Rhodes* case, giving the contrary North Carolina view, is not cited by Mr. Rhyne.

With all the wealth of resources at the author's command, it is also disappointing that more law review articles, notes, and comments are not cited. Frequently the best analysis of difficult points of law can be found in these materials, and yet relatively few are included.

Following McQuillin and other texts, Rhyne begins his book with a definition of the city and town as a "municipal corporation" and moves on to creation, extension of boundaries, dissolution, and municipal charters before taking up basic consideration of municipal powers. This is the traditional approach, but the force of tradition does not make it any more logical. The doctrine of legislative supremacy is still the foundation-stone of municipal law, and it would seem to make sense to start with the state, the state's responsibility for creating local political subdivisions, and constitutional limitations which have been placed on the state's legislative power over local governmental units. The creation of municipal corporations, extension of corporate boundaries, and dissolution of municipalities are all easier to understand if one first understands (1) such constitutional limitations as public purpose, delegation of authority, and the requirement of public control, and (2) the constitutional rights held by a municipality as against the state.

In fact, *Municipal Law*, like its other brethren in the legal reference field, suffers from the lack of historical, administrative, and policy background material. Home rule becomes concrete only against the background of history. Zoning becomes understandable only against the background and purpose of comprehensive planning. The zoning ordinance is intended, theoretically at least, to be one of a number of devices for carrying out a plan. And yet planning is discussed only after 59 sections on zoning. Urban renewal and slum clearance can be understood, policy-wise and as a matter of law, only against the background of how and why the city has come to be concerned with the regulation of private land development and land use through abatement of nuisances, building and housing codes, subdivision control, and zoning. Yet urban renewal and slum clearance are discussed topically before any of these subjects. Is it beyond the scope of a book on municipal law to make reference to the administrative and legislative policy which

motivates city governments, or must all policy objectives be gleaned from a court's interpretation of policy in published cases?

This book is well adapted to give the attorney without prior experience in municipal law much of the background he needs. It does not attempt to provide the administrative and policy background which is essential if the attorney is to be a good municipal counselor. But if it results in better-informed city attorneys, it will have met a real need. As already pointed out, the book has its limitations. It is to be hoped that municipal attorneys will give this edition a reception that will encourage future revised editions. Revisions cannot help but make this handbook steadily stronger and more useful, even indispensable, for city attorneys.

GEORGE H. ESSER, JR.

Assistant Director
Institute of Government
Chapel Hill, N. C.