

*Municipal Control of Public Utilities.* By OSCAR LEWIS POND, LL.B., Ph.D. (New York: The Columbia University Press. 1906. Pp. 115.)

This monograph, which forms the first number of volume xxv of the Columbia University Studies in History, Economics, and Public Law, is devoted to a study of the general attitude of American courts toward the increasing sphere of municipal activity. The writer begins by making clear the dual capacity of the American municipal corporation, its governmental or purely public capacity on the one hand, and its semi-private functions as a purveyor of economic or commercial services on the other. The former class of functions, such as the provision of police and fire protection, are mainly mandatory powers, and may neither be abridged nor delegated. As to the manner in which a municipal corporation exercises these powers the courts have been disposed to permit entire discretion, provided always that this discretionary power is not abused to the violation of private proprietary rights.

It is, however, with the other class of municipal powers—those which the municipal corporation exercises as a business entrepreneur—that the volume is mainly concerned; and Dr. Pond has set before himself the difficult task of setting forth, in terse form, the general attitude of the courts towards the increasing commercial activity of American towns and cities so far as this attitude may be discerned from the large mass of judicial decisions. In this connection emphasis is first laid upon the very liberal spirit in which the courts have usually construed the scope of powers granted to a municipal corporation by its charter. Having regard to the public nature and purposes of a municipal corporation, powers have been drawn very freely by implication, much more readily in fact than are ordinarily obtained by implication from the charters of private corporations. These implied powers which a large number of judicial decisions have attributed to municipal corporations have usually been based upon one of three different grounds. The first invoked perhaps most commonly is that various functions may be assumed by the town or city as a part of its "police power," a general jurisdiction which many decisions have given sufficient elasticity to include not alone the protection of life, health, and property, but the right to provide for the use and convenience of citizens public services such as water and light. The supply of electricity for private use by a municipal cor-

poration has, in at least one important case (*Crawfordsville v. Braden*, 130 Indiana, 149), been decided to be "a legitimate exercise of the police power for the preservation of property and health." All the decisions, it is true, do not go quite so far.

Implied power to provide services of a commercial nature are frequently found, again, in the "general welfare" clause commonly included in civic charters, this general provision being widely adopted by the courts as a basis for permitting to municipalities the most complete freedom of commercial activity not clearly inconsistent with their public character or derogatory to specific statutory regulations. And even where the extension is based neither upon an elastic interpretation of "police power" or "general welfare," resort is not uncommonly had, in the third place, to the principle that if a service is in its nature public or municipal the right of the municipal corporation to provide such service does not depend upon an express grant of powers but may be reasonably implied. This of course leaves open the very important question as to what is not a "public" enterprise; and the decision of this point becomes of vital consequence in view of the constitutional provisions which, in several States, forbid municipal borrowing except for strictly public purposes. Here, again, the courts have, as a rule, dealt very liberally with the municipalities, permitting the creation of municipal indebtedness for the establishment of rapid transit facilities, ferries, and the like. In fact, with the single important exception of a decision which denied to a municipality the privilege of engaging in the sale of coal and wood as a public enterprise, the general tenor of judicial dicta has been towards the expansion of the implied powers of municipal corporations.

The facility with which a municipal corporation may increase its commercial activities is, as Dr. Pond takes occasion to point out, affected by the attitude which the higher authorities take toward such utilities in the matter of taxation. Municipal property used for purely governmental purposes is invariably, in the absence of express statutory stipulation to the contrary, exempt from State burdens. But as regards property acquired and used by municipal corporations in their private business capacity this exemption is not so uniform. One decision, in fact, has declared the action of a State legislature in expressly relieving such property from State taxes to be clearly unconstitutional. The author suggests, however, that if the property acquired for a purpose which has been deemed suf-

ficiently public to permit of its acquisition through municipal borrowing, it should logically be regarded as sufficiently public in its nature to be afforded exemption from taxation. In other words the incidental fact that municipal property may be used to realize a commercial profit does not necessarily, the writer thinks, infringe its purely public character or render it in any sense analogous to private property for purposes of taxation.

From the doctrine that the establishment and operation of water, gas and other like services is a function which may properly be deemed municipal, it seems to follow that all property which a municipality may acquire and hold in this connection is charged with a public trust and that the power does not inhere in the trustee municipality to dispose of such property. Only by express State authority the courts have held, may such property be alienated. Without such authority the municipal corporation seems to possess no more right to sell its gas plant than to auction off the city hall. Hence it appears that the general trend of judicial decisions has facilitated the establishment of municipal business enterprises and has, at the same time, tended to render more difficult any reversion to a policy of placing public services in private hands. Whatever may be thought of this attitude as the embodiment of an economic or political policy, the judicial decisions are wholly consistent.

Two interesting chapters are devoted by Dr. Pond to the Power to Grant Exclusive Franchises, and to the Regulation of Rates for Public Utilities. Stress is laid upon the part which the courts have played in preventing the granting of exclusive franchises by municipal corporations except in such cases as they have obtained statutory power so to do, and upon the fact that the judicial authorities will not so construe a franchise as to make it exclusive if any other reasonable construction is permitted by its express terms. Wherever the power to enfranchise accrues by implication to a municipal corporation it has been the practice of the courts to see that these implied powers are exercised within strictly reasonable limits; what these limits are, however, is a matter of fact to be determined upon its merits in each particular case. On the whole, as the writer shows, the courts have been very friendly to the principle that public authority should have the right to regulate the rates at which public services are rendered by private corporations. It does not follow however, that this right necessarily vests in the authorities of the municipality. It so vests only when such power of regulation has been accorded to

the municipality by the State either in express terms or by necessary implication; or when, on the other hand, it has been acquired by the terms of the franchise granted to the private organization. Even when the power of regulation is to hand, moreover, it must be exercised in what the courts may deem to be, upon the circumstances of each case, a reasonable manner.

In the concluding chapter of the volume, Dr. Pond summarizes his general conclusion and adds a full list of cited cases. These conclusions bear the marks of a discriminating hand and sound judgment. The monograph is throughout a careful study of a very interesting topic, and presents in very succinct and readable form all the important generalizations which one may safely venture to make within the field with which it professes to deal.

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*Commerce in War.* By L. A. ATHERLEY-JONES, assisted by HUGH H. L. BELLOT. (London: Methuen & Co. 1907. Pp. xii, 654.)

According to the preface, "The purpose of this work is to provide a full exposition of the rules of international law which govern the commercial relations of the subjects of neutral and belligerent States."

The subjects of the chapters are as follows: Contraband, blockade, continuous voyage, carriage of property at sea, right of visit and search, capture and condemnation, formalities of capture, recapture and rescue.

These chapters are preceded by a lengthy table of cases in which are noticed several inconsistent abbreviations and occasional errors.

In the text the first and second chapters on contraband and blockade, respectively, are decidedly the best. These chapters cover more than two hundred and fifty of the six hundred and fifty pages of the book thus giving an extended treatment of the topics of contraband and blockade. In the chapter on contraband there is an excellent historical sketch of the development of the theory of contraband and of the inequalities in practice from early times to the present. It would probably be possible to find attempts to define contraband by treaty several centuries earlier than the treaty of 1604 between England, Spain and Burgundy which is mentioned. There seems to be no reference to the interesting English proclamation of 1626 extend-