"STATE AND FEDERAL POLICE POWER"

By

Calvin L. Brown
Associate Justice, Minnesota Supreme Court

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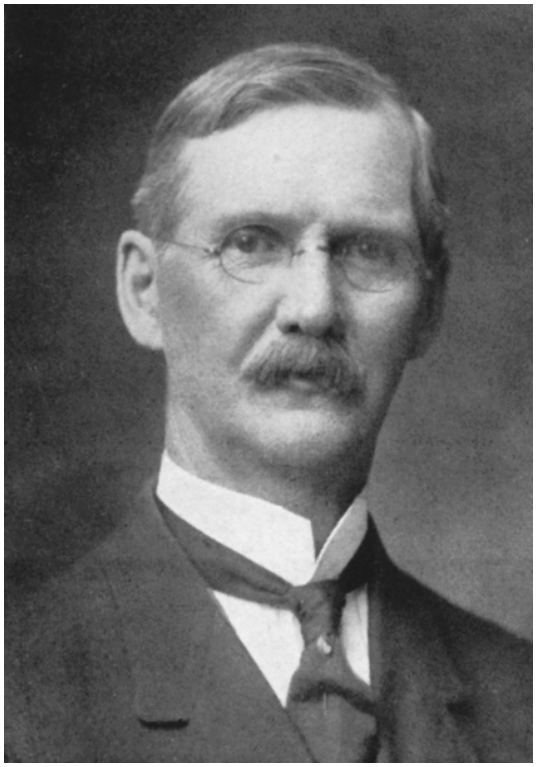
FOREWORD

By

Douglas A. Hedin
Editor, MLHP

Calvin Luther Brown was fifty-four years old and in his second term on the Minnesota Supreme Court when he delivered the following address to the Minnesota Academy of Social Sciences on December 3, 1908. He was a district court judge from 1887 to 1899, an associate justice on the supreme court from 1899 to 1913, and chief justice from 1913 to 1923.



The topic of his paper was "the police power"— what is called government regulation today—the same subject that Justice David Brewer discussed in an address to the New York State Bar Association in 1893, "The Movement of Coercion." They differ markedly in tone and content. To an extent this can be explained by matters of time and place—Brewer delivered his address during the Populist uprising to a group of urban lawyers, Brown to an audience of academics and

lawyers in the midst of the Progressive era. Unlike Brewer, Brown seems not to be moved by a religious or ideological fervor. On the surface, Brown is descriptive, mentions reasons for change, yet is very wary of government power. He seems settled in the mainstream of conservative constitutional thought of his time.

Faintly echoing Brewer, who considered the police power to be sometimes misused to "attack" the right of private property, Brown viewed it as "the most autocratic" of the powers of government:

> **Of the three great governmental powers,—taxation, eminent domain, and police power,—the last is by far the most autocratic, drastic, and far-reaching. It reaches out its strong hand and lays hold of many subjects for regulation and control.**

While he listed examples of evils addressed by prudent use of the police power, he warned that excessive regulation deprived citizens of the benefits of protecting and advancing their own interests through "liberty of contract," a cherished freedom:

> **In the early days in England, and for centuries, police legislation covered an exceedingly wide range and the acts of Parliament disclose the strong paternal character of the government as then existing. Many classes of citizens in those times were deprived of the right of contract by the scope and effect of express legislation. . . . These laws covered practically all subjects appropriate for contract in the ordinary affairs of life and the classes affected had no alternative but submission and were thus in effect denied that liberty and freedom of contract now so highly prized and carefully guarded and protected. . . . But legislation of this character, in the evolution of the times, has undergone a marked change. To-day, both in England and this country, the utmost**

> **liberty of contract is extended to the citizen, high or low, restricted only in the interest of humanity and the public good. The change was brought about in this country by the adoption of state and federal constitutions guaranteeing to the citizen life, liberty, and the pursuit of happiness.**

In his address to the New York State Bar Association, Brewer grounded the right to accumulate, use and enjoy private property in the Bible — the "movement [to diminish protection to private property] . . . in spirit, if not in letter, violates both the Eighth and Tenth Commandments." In contrast Brown's historical analysis seems based on John Locke's theory that a State of Nature preceded the making of a social contract to form civil society and government; and, while the Bible is absent, there is something similar: natural law or "natural liberty" which, together with constitutional guarantees, imposes limits on the state's police power:

> **In a state of natural liberty, every person is permitted to act in harmony with his individual notions, provided he does not transgress those limits which are assigned to him by the law of nature. . . . And though many things permitted by natural liberty are prohibited by civil law, under the wise and just government, every citizen will gain greater liberty and society will be better protected by wholesome restrictions upon both natural and constitutional rights. Yet the police power is not omnipotent. It has its limitations, and constitutional or natural rights can be invaded only in the interests of the community at large.**

He concluded his paper with a quotation from Cicero: *Solus populi suprema lex*, which translates as "The health of the people should be the supreme law" or "Let the good of the people be the supreme law" or "The welfare of the people shall be the supreme law."

In his speech, he referred to the attorney general who would follow him at the podium. That was Attorney General Edward T. Young, whose address on "The Present Problems Involved in Minnesota's Statehood" is posted separately on the MLHP.

Justice Brown delivered his address on the evening of December 3, 1908, at the Law School of the University of Minnesota in Minneapolis. It was published the next year: 2 *Publication of the Minnesota Academy of Social Sciences* 54-64 (1909). It is complete, though reformatted.

His paper may be read in conjunction with two speeches by David Brewer, Associate Justice of the U. S. Supreme Court, which also discuss the "police power" of the state: "Protection to Private Property from Public Attack" (1891) and "The Movement of Coercion" (1893). ◊

STATE AND FEDERAL POLICE POWER

By Calvin L. Brown

My remarks on the subject assigned me will be quite general and with the view only of refreshing the mind respecting the scope of one of the great powers of the state, and the basis for the solution of many of the problems with which it is from time to time confronted. Time will not permit of a close discussion of the subject, and it is believed that a few general observations will answer the purposes intended by those who requested the paper.

The police power represents the authority possessed by the state, in its sovereign capacity, to enact and enforce such laws regulating the conduct and affairs of the citizen as are deemed reasonably necessary and expedient for the promotion of the health, morals, and general welfare of the people. It is essentially paternal and dates its origin with organized governments, though not until comparatively recent times has it been known under the name "police power." It is inherent in all civil governments, in fact the foundation of our whole social system, and its exercise does not depend upon either constitutional or statutory grant of power. In this country it is vested exclusively in the several states, except upon those subjects which are within the sole control of the federal government, of which interstate commerce is the most conspicuous example. Of the three great governmental powers, — taxation, eminent domain, and police power, — the last is by far the most autocratic, drastic, and far-reaching. It reaches out its strong hand and lays hold of many subjects for regulation and control. It is the foundation of all our penal laws and the prosecution and punishment for crime; it sustains statutes regulating the manner of acquiring title to property, whereby the transfer, particularly of real property, is required to be made and recorded in the manner prescribed; it regulates the descent and distribution of the estates of deceased persons; it authorizes the discharge of debtors from their obligations

through bankruptcy or insolvency proceedings, though their property surrendered for that purpose is wholly insufficient to discharge them in full; it controls with a firm hand the subject of marriage and divorce, and exercises a comprehensive grasp upon all domestic relations, prescribing rights, duties and obligations of husband and wife, parent and child, guardian and ward, master and servant; it authorizes compulsory education, and sanctions, in the interest of public health, the invasion by officials of the private home and the removal therefrom of an unfortunate member affected with a contagious disease and his confinement in a so-called pest house, and approves compulsory submission to vaccination to prevent the spread of small pox; it is the foundation of all judicial proceedings and the authority of the courts to compel obedience to their decrees; it interferes with the freedom of contract, sustains statutes against usury, and regulates and controls all forms of public service corporations. No authority, judicial or otherwise, ever has attempted to prescribe its limits or boundaries except in the general way of declaring that it extends to all matter of public regulation reasonably necessary for the public weal. Chief Justice Shaw, the great Massachusetts jurist, said: "It is much easier to perceive and realize the existence and source of the power than to mark its boundaries or prescribe limits to its exercise." Judge Bradley of the federal supreme bench remarked, and we find here about as accurate and comprehensive a definition as can be given, that "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it extends to the protection of the lives, health and property of the citizen, and the promotion of good order and public morals." Blackstone defined it as the "due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." Other definitions are found in the books, all reaching the same general conclusion that the police power is an attribute of sovereignty

to be exercised upon all phases of human affairs whenever the interests of the public demand or require it.

It differs from the power of eminent domain in this, that by the exercise of that power private property is taken from the citizen without his consent and devoted to a public use, but the owner is entitled under the constitution to compensation for his loss or damage. In the exercise of the police power, though private property be taken or destroyed in the public interests, no compensation can be claimed by the owner. Every citizen holds and enjoys his property subject to such reasonable regulations and restrictions as an exercise of the police power may justify, and for the loss or destruction of private property in the exercise of the power the owner has no redress. This may be illustrated by reference to provisions of the law requiring the total destruction of diseased animals to the end that the disease, if contagious, may not spread and contaminate the animals of others, or that the carcass of the diseased animal may not reach the market as food. The remediless situation of the owner is also illustrated where a conflagration is raging in one of our large cities, which, if not checked, is likely to spread and destroy large amounts of property. In such a case the police power sanctions the destruction of buildings in the path of the fire to the end that the conflagration may be brought under control. In neither of these cases is the owner entitled to compensation for his loss. The theory of the law is that benefits to the community at large are shared equally by the owner of the property so taken and he cannot complain. This may seem harsh to the property owner, in the case of the conflagration, for instance, for to him his property is with one arbitrary blow wrested from his possession and control that the property of others may be saved. But such is the police power.

It differs from taxation in the fact that the taxing power is exercised for the purpose of raising revenue for the support and maintenance of the government and its institutions and is subject to certain constitutional restrictions. It often happens that police regulations impose upon the citizen desiring to

follow a particular occupation a license fee, illustrated by the saloon keeper's license, the hawker's, and peddler's, and other like callings, but this is not a tax, within the meaning of the law. The fee is imposed for the purpose of defraying the expense incident to enforcing the particular regulation, and does not therefore come within the constitutional restrictions on the subject of taxation. Where license fees or charges are imposed for the purpose of revenue the courts hold them invalid as unequal taxation and the police regulation falls. But unless the fees or charges imposed be out of all proportion to the expense incident to an enforcement of the regulations they are sustained.

In the early days in England, and for centuries, police legislation covered an exceedingly wide range and the acts of Parliament disclose the strong paternal character of the government as then existing. Many classes of citizens in those times were deprived of the right of contract by the scope and effect of express legislation. Dealings and transactions concerning articles of clothing and food were regulated and the value thereof prescribed by law, as well as the selling price for many other articles of personal property. Methods of manufacture were controlled, and the wages of laborers and artisans definitely scaled and fixed. These laws covered practically all subjects appropriate for contract in the ordinary affairs of life and the classes affected had no alternative but submission and were thus in effect denied that liberty and freedom of contract now so highly prized and carefully guarded and protected. Numerous enactments of like character are to be found in the early colonial days of this country. A statute of Massachusetts Bay defined the size of merchantable shingles, and regulated the time and place of sale, declaring that all shingles offered on the market which did not conform to the regulations should be forfeited to the poor. Another act defined the size, weight, and price of loaves of bread, with like penalty, forfeiture to the poor, of all bread not of standard size and weight. Another act, after reciting "that many persons are so extravagant in their expenses at taverns and other houses of common entertainment, that it greatly hurts their families and makes

them less able to discharge their just debts," enacted, "that if any Innholder, Retailer, or Ale House Keeper, shall, after the publication of this act, trust or give credit to any person for more than ten shillings * * * such Innholder or Retailer * * * shall forfeit all such sums so trusted."

But legislation of this character, in the evolution of the times, has undergone a marked change. To-day, both in England and this country, the utmost liberty of contract is extended to the citizen, high or low, restricted only in the interest of humanity and the public good. The change was brought about in this country by the adoption of state and federal constitutions guaranteeing to the citizen life, liberty, and the pursuit of happiness. The change did not, however, wholly suspend police legislation, and statutes intended to remedy wrongs, correct and prevent frauds and abuses of various sorts are found scattered all through the codes of the different states.

In more recent times the exercise of the power has been most strenuously contended against on the ground that particular regulations have so far invaded the natural or constitutional rights and liberties of the citizen as to be wholly void. Conspicuous examples of legislation of this nature are found in statutes concerning the rights and liabilities of employer and employee, and those regulating the conduct and affairs of corporations.

In a state of natural liberty, every person is permitted to act in harmony with his individual notions, provided he does not transgress those limits which are assigned to him by the law of nature. In a state of constitutional or civil liberty he is allowed to act according to his personal inclinations, provided he does not transgress those limits prescribed by municipal law enacted for the general welfare of society. Governments are made for the comfort of man and to afford him security in the enjoyment of life, liberty and property. And though many things permitted by natural liberty are prohibited by civil law, under the wise and just government, every citizen will gain greater liberty and society will be better protected by whole-

some restrictions upon both natural and constitutional rights. Yet the police power is not omnipotent. It has its limitations, and constitutional or natural rights can be invaded only in the interests of the community at large.

It may be stated as a sound general proposition of constitutional law that the right of a person to engage in and pursue any lawful calling in a lawful way cannot be abridged by legislation. Yet this is not without its qualifications. The right does not extend to the pursuit of professions or avocations of a nature requiring peculiar skill or knowledge, and in which the public have an interest. Many a life has been sent to its long home by the ignorance of the medical quack; property and liberty sacrificed by entrusting litigation to the unlearned and untrained lawyer; health impaired by the incompetent pharmacist, and various other injuries inflicted by the lack of knowledge, experience, and skill in the different occupations and professions. Legislation has taken note of this condition and limited the right to follow a particular profession, such as counsellor-at-law, physician and surgeon, pharmacist, and the like, to those whose qualifications fit them for the particular work.

The violent strife in recent years between employer and employee respecting the rights and obligations of each to the other has brought from the legislatures of many of the states numerous enactments designed to ameliorate the condition of the employee on the one hand and protect the property and property rights of the employer on the other. Public attention has been called repeatedly to the alleged wrongful and malicious conduct of employers in interfering with the free exercise of the will of the employee in pursuing his calling, particularly in efforts to prevent his from obtaining employment when and where he may, of which the system of blacklisting furnishes an illustration; and to the equally wrongful and unlawful conduct of employees in coercing employers by the boycott and other unlawful means. Statutes tending to remedy evils of this character have been sustained under the broad doctrine that it is a legitimate exercise of the

power of legislation to prescribe rules defining and establishing distinctions respecting the rights, obligations, and duties of employers and employees as a class. Legislation of this character has, however, been fruitful of much litigation, and the courts are in violent conflict in their conclusions. In Massachusetts, a statute forbidding the employer to withhold from his employee his wages for imperfections in his work, whether the same was authorized by contract or not, was held unconstitutional as invading the right of freedom of contract. Similar decisions were made in Pennsylvania and Illinois, though a contrary conclusion was reached in Indiana and other state courts, and perhaps in the federal supreme court. Statutes forbidding the employment of young children in factories are sustained by all the courts. Laws limiting the hours of labor have in some instances been sustained and in others held void. Such statutes, however, have been sustained uniformly when directed to common carriers, such as railroad and steamship companies. Where statutes are directed to and attempt to regulate the hours of labor or compensation in matters of private employment, a serious constitutional question is presented as to their validity. "But in so far as the question of controlling by law contract relations between employer and employee is removed from its relation to our own affairs, so that it becomes less and less influenced by our prejudices and self-interest, the contemplation of the social inequalities of life and the harsh, if not iniquitous oppression which is afforded by reason of these inequalities; when we see, more and more clearly each day, that the tendency of the present process of civilization is to concentrate social power into the hands of a few, who, unless restrained in some way, are able to dictate terms of employment to the masses, who must either accept them or remain idle; when at best they are barely enabled to provide for the more pressing wants of themselves and families, while their employers are, at least apparently, accumulating great wealth; when all this apparent injustice exists, or seems to, the impulse of a generous nature is to call loudly for the intervention of the law to protect the wage earner from the grasping cupidity of the employer." Yet from the viewpoint of legislative interference the assistance of the

laborer is surrounded with grave constitutional questions. In England the settlement and adjustment of strikes and labor controversies is provided for by law. By Statute 30 and 31 Vict., Chap. 105, enacted in 1867, "equitable councils of conciliation" composed of delegates selected by masters and workingmen are empowered to settle and adjust all disputes and determine the rate of wages to be paid the workman. We have no such statute in this country, and whether the police power would sustain such legislation cannot be here determined, though it may be confessed and admitted that all our social affairs cannot be regulated nor all industrial controversies solved by legislative enactments.

Under the principle, first announced by Lord Chief Justice Hale over two hundred years ago, that private property devoted to a public use ceases for the time being to be private property, the legislative department of government has, under the police power, authority to regulate and control the affairs of all public service corporations, to prescribe compensation for services rendered, impose restrictions upon contracts to be entered into, create liability where otherwise none would exist, and all regulations in this respect, when not arbitrary or unreasonable, are valid and enforcible. Legislation along this line in the past few years has been directed more particularly to insurance and railroad corporations and has been the occasion of no inconsiderable strife in and out of our courts. In years gone by the insurance company prepared its own contract which the applicant for insurance was obliged to accept or go without indemnity. The contracts were skillfully drawn, and with an evident view to the protection of the company from liability, rather than the indemnity of the insured. As expressed by that eminent jurist, Justice Miller of the supreme court of the United States, in a case on trial before him in this state, the company by the coarse print contained in its policy fully agreed and contracted to indemnify the insured in the event of the destruction of his property by fire and then deliberately "took it all back in that portion of the policy in fine print." He ruled in that case that the "coarse print" should prevail and judgment was awarded against the insurance company. Much injustice

was perpetrated by those contracts, and the court reports are full of decisions exonerating the insurance company on technical grounds, based on the letter of the contract and on the theory of the law that the parties must be conclusively presumed to have contracted as disclosed by the written language of the policy. The legislature of this and other states finally took cognizance of the matter and enacted statutes prescribing a form of contract or policy to be used by all companies and forbidding the use of any other. This policy was plain and unambiguous and fully and completely expressed the rights and obligations of the respective parties. The authority of the legislature to enact such a law and to force upon the interested parties a contract prepared by the state was immediately brought before the courts by the insurance companies. It was urged not only that the freedom of contract was infringed, but that the parties were thereby denied the equal protection of the law. The legislation was sustained and the policy so framed by the statute is now the standard for all insurance contracts in this and other states.

Equally effective legislation has been upheld respecting railroad companies. The nature and character of their business, the methods of conducting it, the numerous hazards and risks connected with the operation of their roads, render the law applicable to the individual inappropriate and inefficient, and the lawmaking power has by methods of differentiation evolved new and appropriate rules for the determination of their obligations, rights and liabilities. They are required by law to maintain without compensation all necessary safety devices to prevent injuries to the traveling public; the speed of their trains may be regulated in villages and cities, and they may be required to stop all trains at particular stations. The general rule of the common law is that a master is not liable to his servant for injuries caused by the negligence of a fellow-servant, but the rule has been abrogated as to railroad companies, and legislation to that effect has been sustained. Freight and passenger rates may be fixed and prescribed by law, though on the theory that all police regulations must be reasonable, a prescribed rate which is confiscatory will not be

sustained. The question of legislative rate making has been for the past few years conspicuously prominent and is now engaging the attention of the courts in suits brought to prevent the enforcement of rates recently made by this and other states. Prominent in this great contest is the present distinguished attorney general of our state, who follows me, and will undoubtedly enlighten you upon some phases of that subject.

Such is the police power and an incomplete outline of its scope. It is a prerogative of the legislative department of government, and the guiding star of its exercise has always been in this country the rule of right and wrong. Its proper use demonstrates the wisdom of its sweeping authority, for it preserves health, prevents frauds, trickery, and chicanery, elevates morals, maintains peace, and protects life, property and happiness. It can be delegated to municipal corporations, but can never be bargained or contracted away. The legislature, the agent of the sovereign people, can neither by affirmative action nor inaction divest itself of the right and duty to exercise the power whenever public interests may require. *Solus populi suprema lex*. ■

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