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J. Cullen Brown

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THE MUNICIPALITY: ITS POWER TO ENGAGE IN PRIVATE BUSINESS

By J. CULLEN BROWN

In a recent case decided by the Supreme Court of Nebraska, that court held that a municipal corporation has the right to engage in the business of buying oil and of selling it at retail or at wholesale to the public.[1] This ruling is but a fitting climax to the decisions of courts rendered within the last seventy-five years, by which municipalities have usurped powers formerly held to be in the individual alone. Although in the abstract public ownership has been a scareword to the conservative citizen, in the concrete it has been accepted and approved. The word still retains a socialistic taint, yet, when the city offers to engage in a particular business enterprise, by which prices of certain commodities might be reduced, the citizen rushes to lend his support to this apparently philanthropic undertaking. A century ago, the municipality was a being of few and well-defined powers, and those strictly governmental. These powers have so grown that the future, unless there is put a check upon this encroachment, promises to produce the ideal socialistic state, a government wherein all business is owned by the public.

In beginning this brief, it is well to note the conflicting ideas held by two eminent jurists as to the nature of a municipal corporation. Judge Denio, in the case of *Darlington v. City of New York*,[2] decided in 1865, held that city corporations are emanations of the supreme law-making power of the state, and are established for the more convenient government of the people within their limits. He states that he is "unable to appreciate the difference between the public and private functions of the city government", and he refuses to sustain "the proposition that a city

1 Standard Oil Co. v. City of Lincoln et al., 207 N. W. 172.
2 31 N. Y. 164.

can hold property in the same manner, with respect to legislative control over it, as a private corporation, or individual."

Judge Cooley, however, in the case of the *People on the Relation of the Board of Park Commissioners of Detroit v. the Common Council of Detroit*,[3] holds, "The history of municipal corporations in the country from which we derive our institutions will show that they first came into existence by spontaneous action of their members, taken for their own benefit and protection, and that their recognition and employment as agencies of a character which can be called public, considered with reference to the realm at large, was later, and was based rather upon their local, and what may properly be called their private wealth, influence and importance, already existing and established, than upon any necessity that such corporations should be created and should exist for the purposes of general government. The government found convenient instrumentalities in existence, and it made use of them for its purposes but they were first brought into existence from considerations which addressed themselves to the interests of the corporators and concerned their individual protection, prosperity and welfare. As to the property that the municipality holds for its own private purposes, it is to be regarded as a constituent in State government, and is entitled to the like protection in its property rights as any natural person who is also a constituent."

It is interesting to note the fundamental difference in the conceptions of these two jurists as to the nature of municipal corporations: Judge Cooley regards a municipality as existing primarily for the benefit of the separate localities in the state, not simply for the convenience of the state as a whole; Judge Denio holds that a municipality exists only as an instrumentality of the state in the government of the people.

Dillon, in his work on Municipal Corporations, says that a municipality "possesses a double character, the one governmental, legislative or public; the other, in a sense proprietary or private. In its governmental or public character, the corporation is made by the state one of its instruments or the local depository of certain limited and prescribed political powers, to be exercised for the public good, on behalf of the state, rather than for itself

[3] 28 Mich. 228.

. . . but in its proprietary or private character, the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual."

"The governmental powers of a municipal corporation are exercised in the adoption of measures respecting the public health and safety. As a government, it establishes and maintains streets and thoroughfares, since it is one of the oldest functions of government to provide and maintain public highways. In the adoption of ordinances and regulations of this character, the municipality is exercising a part of the sovereign power. When it departs from these functions and engages in business in which private individuals or private corporations may and by common usage do engage, it is no longer in a governmental, but in a proprietary capacity. Thus, a municipal corporation which purchases or establishes an electric light plant or water plant, a gas plant, or a street railway plant, becomes the owner and proprietor of a business. It is then said to be acting in its private or proprietary capacity. Having chosen to engage in business, it is in respect to such business recognized by the courts as a private business institution." Chamberlain, speech to Am. Bar Ass'n., 1924.

The modern city is engaged in many private undertakings. Before they are enumerated, however, it would be well to consider what at least a few courts have held in regard to this deviation by the municipality into proprietary channels. In the case of *Low v. The Mayor and Common Council of the City of Marysville,*[4] the California court held, that the powers of municipal corporations are limited to the express grant of their charters; and the object of their creation is governmental, not commercial.

In *Laughlin v. City of Portland,*[5] the Maine court, although sanctioning an exercise by the city of Portland of a specific proprietary power, held that the principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained as it is one of the

4 5 Cal. 214.
5 90 Atl. 318.

main foundations of our prosperity and success.

In *Opinion of the Justices,*[6] a majority of the justices of the Supreme Court of Massachusetts held that, "There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the Constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the Constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the Commonwealth, or the 'towns, parishes, precincts, and other bodies politic', to undertake what had usually been left to the private enterprise of individuals."

Since the pronouncement of these decisions, the attitude of the courts seems to have undergone a complete change. What was withheld a half-century ago is distributed with a lavish hand today. The municipality is granted one power after another to engage in private enterprises. The basis for these grants is said to be overwhelming necessity at the particular time. But when that time has passed and the necessity has ceased to exist, the city retains the power thus granted. What it has, it holds.

By the great weight of authority, a city may erect and maintain its own waterworks. *Comstock v. Syracuse,* 5 N. Y. 874; *Gadsden v. Mitchell,* 40 So. (Ala.) 557; *State v. Tampa Waterworks Co.,* 47 So. (Fla.) 338; *Fawcett v. Mt. Airy,* 45 S. E. (N. C.) 1029. Over seven thousand cities, towns and villages in the United States own and operate municipal waterworks. The exact number is unknown, as the latest figures available were published in 1915, but taking into account the rate of growth in the number of works during the decades before 1915 and the fact that many of the plants now supply from two to fifty places each, it may be assumed that some 10,000 places, large and small, had piped water supplies in 1924, and that 70 to 75 per cent of these places and perhaps 90 per cent of the population were supplied from municipally owned works.

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[6] 30 N. E. 1142.

A city may own and operate an electric light and power plant. *Hequembourg v. Dunkirk,* 49 Hun. 550; *State ex rel W. J. Armstrong Co. v. City of Waseca et al,* 142 N. W. (Minn.) 319; *Colorado Springs v. Pike's Peak Hydro Electric Co.,* 140 Pac. 921. And in 1917 there were reported by the United States census 2318 municipally owned plants in the United States.

The following industries have been held to be within the power of the municipality:

Natural Gas Plant. *State v. Toledo,* 26 N. E. 1061. Heating Plant. *Jones v. City of Portland,* 245 U. S. 217. Rapid Transit System. *Sun Printing & Publishing Assn. v. New York,* 46 N. E. 499. Street Railways and Subways. *Admiral Realty Co. v. City of New York et al,* 91 N. E. 241; *Barsaloux et al v. City of Chicago et al,* 92 N. E. 525. Public Wharves. *Burlington v. Cent. Vt. R. Co.,* 71 Atl. 826. Fuel Yards. *Jones et al v. City of Portland, supra.* Ice Plant. *State v. Port of Seattle,* 177 Pac. 671.

A city may maintain a convention hall. *State ex rel Manhattan Const. Co. et al v. Barnes, Mayor et al,* 97 Pac. (Okla.) 997. It may construct a public memorial monument. *Parsons v. Van Wyck, Mayor of the City of New York et al,* 56 App. Div. 329. An opera-house may be erected by the municipality. *Egan v. City and County of San Francisco et al,* 133 Pac. 294. In the case of *Mayfield v. Phipps et al,* the court held that a city operating waterworks and an electric light plant could engage in the purchase, sale, and installation of plumbing, and electrical supplies and materials incidental to the supplying of water, light, and power to its customers.

In the case of *People v. Kelly,* 76 N. Y. 445, the court held that the cities of New York and Brooklyn had the power to construct the Brooklyn bridge.

A few cities own and operate telephone systems; also ferries. And many cities are now doing their own street repair work with the aid of their own municipal asphalt plants.

In *Standard Oil Co. v. City of Lincoln et al, supra,* the Supreme Court of Nebraska held, that the use by the city of public money to conduct the business of selling gasoline and lubricating oil to its inhabitants does not deprive the taxpayer and competitor of property for private purpose without due process contrary to the Constitution. The court summarizes the various uses to which

such oil is put in this modern age and holds that "a commodity, of use so universal, may come within the purview of 'public purpose'." The California court in *Egan v. City and County of San Francisco et al, supra,* laid down the rule that "anything for the amusement or recreation of the people" may be classed as a public utility.

One cannot but "view with alarm" the possibilities called into being by these two decisions. If a commodity has an universal use then, by the ruling of the Nebraska court, it is a public utility, and the manufacture or sale of this commodity may be engaged in by the municipality. If we consider the number of commodities in universal use, and grant the power to manufacture or sell the same to the city, the prospect of a socialistic state looms before us. And following the reasoning of the California court, the operation of theaters, and the like, may well fall within the power of the municipal corporation.

There are many reasons why this encroachment by the municipality should be cut off in its prime, among which are the following: The fact that it violates the spirit, if not the express prohibition, of the Constitution; that it can but lead to public ownership of all business; that through it there arises the incongruous condition of a citizen paying taxes in order that he might be deprived of the right to engage in a particular business.

The Supreme Court of Massachusetts has handed down four opinions adverse to the whole principle and policy of public trading. The ground the court took for deciding against the proposition of municipal fuel yards was that the Constitution did not contemplate empowering municipalities to raise money by taxation for commercial purposes. The line of argument sustains an obvious interpretation of the fundamental law and would seem to apply with equal force to the municipal ownership and operation of street railways, gas works, and nearly all forms of public utilities.

The public ownership of one public utility necessarily leads to the public ownership of others and finally of all utilities and industries. Mr. Hoover phrases this argument as follows: "Either we are to remain on the road of individual initiative, enterprise and opportunity regulated by law, on which American

institutions have so far progressed, or we are to turn down the road which leads through nationalization of utilities to the ultimate absorption into government of all industry and labor." Government Ownership.

The Massachusetts court, in one of its opinions addressed to the Legislature, declared, "There may be some now who believe it would be well if business were conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make conrtibutions of money for their own impoverishment; for, if the coal yard of the city or town was conducted economically, they would be driven out of business." *In re Municipal Fuel Plants,* 66 N. E. 25.

A consideration of the foregoing decisions and statements must necessarily lead one to adopt the individualistic theory of the least amount of state interference, the least amount of public ownership possible consistent with the highest and greatest good of all and the largest degree of freedom and achievement for the individual, as the only theory that is consistent with American ideals of government. The necessity of keeping open to private ownership the largest possible fields of enterprise and initiative consistent with the general welfare has been seemingly forgotten by legislatures and courts. But it should not be forgotten by the citizen. Little would remain of the assurance which the fundamental law gives to minorities that private property may be taken only for uses which are public, if the proceeds of industry and thrift may be seized for the establishment and operation of oil stations, theaters and all other imaginable purposes no more remote from the functions of government.