

## THE PEOPLE v. SALEM.

THE PEOPLE EX REL. THE DETROIT AND HOWELL RAILROAD  
Co. v. THE TOWNSHIP BOARD OF SALEM.

CAMPBELL, CH. J. (Concur)

The questions presented in this case are brought within somewhat narrow bounds, as its decision depends on very plain principles. It is admitted by every one that the validity of the action of the towns in voting aid and levying taxes depends entirely on the power of the State to compel such action wherever it can permit it, and that no power can be delegated to the towns in excess of what can be exercised without delegation by legislative compulsion. The inquiry is reduced to the simple question whether taxes can be imposed at the pleasure of the Legislature against the people of local municipalities, to furnish aid to railroad companies in carrying out their enterprises.

It cannot be claimed that there is no limit to the power of taxation, which can prevent the imposition of taxes for all purposes which the Legislature may choose. There are purposes the illegality of which would be so manifest that, although not mentioned in any constitution, no one could hesitate to say the burden was not validly imposed to further them. The purposes for which taxes are imposed must be public purposes, and however close some things may be to the dividing line, yet whenever any subject lies clearly on one side or the other, the courts must sustain or reject the tax accordingly, whether the purpose be laudable or not.

It has been said to be too clear to need argument that it would be usurpation and not legislation to take the property of A and give it to B. It must be on the same ground equally illegal to tax A for the benefit of B; for the amount of property taken against his will cannot make any difference in the principle, neither can it make the wrong any less that he has companions in misery. Taxation for private purposes is no more legal than robbery for private purposes. And where an enterprise is conducted by private persons for their own private benefit, the public authorities having no control over the expenditure, and no share in the profits, it is a private enterprise and not a public one, whether large or small, and whether profitable or unprofitable. No enterprise can be properly regarded as a public enterprise in which the public has no voice. For the expenditure of public money the Constitution and laws provide public officers and put them under adequate control and security. The money of the people belongs in the custody of the agents of the people. Governments cannot delegate public responsibilities to private and irresponsible hands.

Unless railroad companies can be regarded as in some way representing the public, then they cannot stand before the law on any other footing than private citizens. So far as their business is concerned, they furnish on a large scale, and in a more perfect way, the same benefits which are extended to the population by other carriers, by land or by water, and benefits quite similar in principle to those conferred by enterprising hotel-keepers, millers, and others who find it to their profit to entertain all applicants impartially. They benefit the municipal corporation or the State in their corporate capacities in no way whatever beyond paying their taxes, for which they are presumed in law to get a full equivalent. They benefit the neighborhood large or small in the same way that all other business and enterprise aid it, by increasing population, and stimulating commerce and industry. They do on a large scale what every industrious settler does on a smaller scale, and they do it, just as every private person is supposed to conduct his affairs,—primarily for his own benefit, and incidentally for any advantages that may follow or attend their private success to the benefit of others. There is nothing in the nature of their business which distinguishes them from any other persons, so as to make it in any legal sense a public undertaking.

It is said, however, that by the exercise of the right of eminent domain they are affected with a public character, and become invested with public functions.

If the exercise of this power is never valid except on behalf of some public agency, then it might follow that it could not be used on behalf of these companies. It is reasoning in the wrong direction to determine the character of the beneficiary from the fact of its use. But it has been customary from time immemorial to allow lands to be taken for turnpikes and canals in the hands of private corporations, because the land could not otherwise, as a general thing, be obtained for the whole line. The fact that the work was one of general utility,

and that no work of that description was possible without the exercise of this power, has created precedents which were readily applied to railroads. They were always founded on necessity, and were the extreme application of a power, which, in a much smaller degree, has frequently compelled private owners of property to submit to some obligations whereby their neighbors might be enabled the more securely and conveniently to use theirs. In some cities of England, by ancient custom, there were regulations concerning party walls, drains and the like, which rested on similar principles, and in some cases, modern legislation has followed the same road. The courts, when railroads were first invented, recognizing the necessity and endeavoring to find some plausible basis for it, carelessly said that the railroads must be regarded as agents of the State, and in this apparently simple way solved the difficulty. But it was a mere figure of speech, and made them no more State agents, than the decision that many things are lawful because devised by the government as necessary to carry out some governmental power makes every one who avails himself of the privileges of the law a government agent. Such a theory would make agents of pre-emptioners, and national bankers, and ocean captains, all of whom receive certain powers and privileges in order to further the policy of the United States, and some of whom have duties to perform as the conditions of their privileges, just as every citizen, in a smaller way, has certain duties laid upon him as a consideration for his legal rights. It might be difficult to trace out to any distinct and entirely satisfactory origin, in the theoretical system of human government, the propriety of allowing railroads to resort to compulsory means to obtain lands for their tracks. But we perceive its necessity, and it has been provided by our Constitution, under which we hold all our tenures, that railroads may be organized. We are not required, therefore, to trouble ourselves in accounting for what we must accept as the law of the land. And we certainly are not required to explain an anomaly by resorting to a manifest fiction, which would lead to the most dangerous results.

When land is taken for railroad purposes it costs the State nothing, and the owner is supposed to obtain its value from the company. The taxable community, therefore, can never be injured or burdened by the process. The persons engaged in the enterprise pay themselves for their own property and privileges, and if the burden falls heavily on any one else, it is on the private citizen as landowner and not as tax-payer. When the company, therefore, has completed its road, the public has lost nothing, and has incurred no responsibilities. Thenceforward the private corporation elects its own officers, appoints its own agents, makes its own regulations subject to the law, collects its own revenues, and, if the work pays, divides the profits among its stockholders. The public who travel are not a fixed or resident public, and must not be confounded with the political public represented by the authorities and controlling the taxation. The tax-paying community has no voice or interference in the management of the road, so long as the law is obeyed, any more than in any other private business. It is undertaken for private profit, and is in private and public hands. The company and its officers are agents of no one but the stockholders, and such legal obligations and privileges as they possess are attached to their business as corresponding rights and duties attach under the law, and according to their nature, to all kinds of private callings.

Taxation in their behalf is as essentially taxation for private purposes as it would be for any person or business whatever. If the Legislature can raise money by taxation to be spent by them for their great enterprise, it can do the same thing to enable any private citizen to become a producer of values for his own emolument. All industry helps general prosperity. No line can be found which can, in law, make one business more public than another. The power to resort to taxation to set men up in any business is a power that is foreign to the purposes of government. It is not legislative power, but unlimited sovereign will, that can compel one private citizen to furnish means to another. Taxation is only lawful to enable the government to fulfill its public duties, and to pay such expenses as are incident to public business. There is necessarily a considerable discretion to determine what means may be desirable to enable the government to do its work creditably, but a power to tax one citizen for the private emolument of another, upon any theory of mere incidental advantage to the general prosperity of large or small communities, can only rest on a foundation of absolute and irresponsible power to make favored classes and citizens, and make the whole body of tax-payers tributary to them. No such power can be tolerated in a republic, and no hint of such a power is to be found in our constitution. As far as it speaks at all on the subject it prohibits State aid to private persons or enterprises, and if there is no specific prohibition of taxation for private purposes, it was on the same principle which left out prohibitions against giving private property away to private persons,—that is to say, the principle which renders it unnecessary to forbid powers which could not exist without clear and express grant.

For these reasons, and for those more fully expressed by my brother Cooley, I think no *mandamus* should issue.