

## THE PEOPLE v. SALEM.

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

GRAVES, J. (Dissent)

As I cannot concur in holding the statute in question, in this case, unconstitutional, I proceed to state some of the reasons which compel my dissent. But before coming to the main subject to be considered, it seems expedient to make some observations respecting the position of the Court upon questions of this character, and also to relieve the case as far as practicable from all irrelevant matter.

A statute of the State is upon trial, and it is not an isolated act which, in the haste and flurry of legislation has escaped scrutiny; but it belongs to a series of measures alike in principle and design, which have engaged the deliberate attention of several Legislatures and been debated for years in the press and before the people. The act before us neither owes its place upon the statute book to accident, inadvertence, or chicanery. It is not the product of party machinery, or the fruit of petulant or hateful authority. Whatever its infirmities, it involves a principle which the people, by their representatives, have deliberately declared after ample discussion. So long as the measure was before the Legislature it challenged debate upon all the grounds of constitutionality, wisdom, and expediency, and it was the duty of the Legislature, before adopting the measure, to be satisfied of its wisdom and justice as well as its constitutionality. In this tribunal, the door is closed to all debate except upon the single question of constitutional validity. As judges, we have no ears to hear, nor minds to consider, any argument which does not bear upon this legal point. We have no right to be influenced by any appeal, however forcible, based upon apprehensions, however reasonable, that momentous evils will be caused by the act if declared valid, or will follow its annulment if pronounced invalid. Neither can we listen to any argument drawn from the liability of the Legislature to abuse the power of taxation. The question is upon the *existence* of the power as applied to the particular subject, and not upon the degree to which it would be possible to carry it. All power is subject to abuse, and if this circumstance is to be taken as an argument against its existence, we are irresistibly driven to results fatal to the existence of all government. The same argument can be employed to beat down all original, as well as delegated authority. All human agencies are fallible, and the wisdom of man has never been able, and never will be able, to devise a system of government incapable of abuse. Every department may exceed its authority or pervert its power.

The judiciary has no pre-eminent claim to infallibility, and so long as judges are but men, they must continue to be subject to all the infirmities which waylay and beset the rest of mankind. We can find no sanctuary in any utopian theory from the ills and imperfections of human agency. According to the arrangement of our system, the principal safeguard against marked delinquencies must be found in the knowledge and rectitude of the people, and in official accountability. In this respect, the checks and correctives are quite as efficient in ease of the Legislature, as in that of the judiciary.

It is, of course, admitted on all hands that no branch of the government has the right to abdicate its duty, or arrogate to itself any function committed to another, or to exercise any authority which has been withheld or denied. The Legislature must make the law, the courts must construe and apply it, and the Executive enforce it. And when the constitutionality of an act is questioned, the case must be so decided by the courts as to recognize the supremacy of the Constitution. But there are some rules which govern in the investigation of constitutional questions which are too important to be overlooked. This matter is well explained by the majority of the Court in *Sears v. Cottrell*, 5 Mich., 251. The question then was, whether the act was constitutional which allowed the goods of a stranger, in the possession of a delinquent tax-payer, to be levied on for the tax. And the following passage, which received the assent of my brother Christiancy and Chief Justice Martin, is found in the opinion of Judge Manning: "If it be said, the law is unnecessarily severe, and may sometimes do injustice without fault in the sufferer under it, our reply is: These are considerations that may very properly be addressed to the Legislature, but not to the judiciary; they go to the expediency of the law, and not to its constitutionality. When courts of justice, by reason of such objections, however well founded, seek for some hidden or abstruse meaning in one or more clauses of the Constitution to annul a law, they encroach on the

power of the Legislature, and make the Constitution, instead of construing it. They declare what the Constitution should be,—not what it is. The tendency of courts at the present day, we think, is too much in that direction. Hence, to some extent, the great number of constitutional questions that are constantly being brought before the courts for adjudication. The time was, and the period not very far distant, when courts were reluctant to declare a statute void, and did not feel warranted in doing it, unless they could lay their finger on the particular clause that was violated, and the conflict between the statute and Constitution *was obvious*. The judiciary is not above the laws and Constitution. Its province is to declare what the Constitution and laws are; giving a pre-eminence to the former, and declaring the latter void, only when repugnant to it. And while performing this duty, it should be recollected that its powers are as clearly limited by the Constitution and laws, as those of the executive and legislative departments of the government. When they exceed their powers, their acts may be declared void by the courts; but there is no power given to any department of the government to annul the acts of the judiciary, when it exceeds its powers; for which reason, if no other, it should always be careful to keep clearly within them.”

In the same case, my brother Christiancy, after stating that the question was one of legislative power, and not of expediency, proceeded to contrast the principle, upon which the Federal and State governments were founded, in so far as material to exhibit the different courses to be pursued in investigating their powers, and held, as all the courts in the United States have held, and now hold, that in respect to questions of constitutional authority under the *former* the *inquiry* is, has the power in question been granted? and under the *latter*, has it been *prohibited*? Having made this entirely clear, he came to the conclusion that an act of the State Legislature not prohibited by the express words of the Constitution, or by necessary implication, could not be declared void as a violation of that instrument. He then stated the following proposition: “No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a State legislature are *to be presumed constitutional* until the contrary is shown; and it is only when they *manifestly* infringe some provision of the Constitution that they can be declared void for that reason. In cases of *doubt*, every *possible presumption*, *not clearly inconsistent* with the language and the subject matter, is to be made in favor of the constitutionality of the act.” Numerous authorities are cited in support of this proposition, and many others could easily be added. The doctrine there stated is maintained by an overwhelming weight of authority in this country, and it has hitherto been considered as the law in this State. I do not understand that my brethren mean to depart from it.

But there is another passage in this opinion which I cannot forbear citing in this connection. It also bears upon the degree of evidence of unconstitutionality, which a court should require, before adjudging an act void on constitutional grounds. It is as follows: “No one who has alleged the unconstitutionality of this law has been willing to trust it to any *one* provision of the Constitution *alone*, but it is contended that, if not forbidden by one, it must be by another. This attempt to base its unconstitutionality upon several distinct and separate provisions of the Constitution, in effect, concedes its constitutionality, as it necessarily implies a *reasonable doubt* whether it falls within any of the several prohibitions of the Constitution. To *doubt* which provision of that instrument is violated by it, is *to doubt* whether it is a violation of any, and if the case be not clear from a *reasonable doubt*, then, within the principles of all the authorities, the law must be sustained.”

These views were reaffirmed by my brother Christiancy, in *Twitchell v. Blodgett*, 13 Mich., 127, and, in this last case, my brother Cooley declared that where a repugnancy is claimed to exist between an act of the Legislature and the Constitution, the courts must examine and construe the provisions of each in the light of the other. “*And they must sustain the law, if they have reasonable doubts of the conflict, even though the doubts spring from a construction of the Constitution itself.*” The language of Judge Manning, and of my brethren Christiancy and Cooley, expresses with force and clearness the idea almost universally entertained by jurists in this country, respecting the degree of evidence required to show an act unconstitutional, and there is no occasion for citing cases in this and other States in its support.

The inquiry respects the validity of an act of a coordinate department of the government, — an act framed and passed by legislators and approved by a chief magistrate, sworn to obey the Constitution, and presumed to know and to regard their duties. In favor of the validity of an act so made, every reasonable presumption is due, and no court has the right to convict it of illegality, except upon evidence so clear and solid as to remove all reasonable doubt of its invalidity. My brethren are of opinion that the act allowing the township of Salem to aid in building the Detroit and Howell Road is palpably unconstitutional; that its invalidity is so clear and manifest, that no room for doubt on the subject remains. The *fatal objection in their minds is, that it*

*attempts to authorize a tax on the people of the township for a mere private purpose*, and they first assume that this railroad corporation is a private one, and then argue that the power to aid it by municipal taxation is denied. In debating this question, they are compelled to prove that the exercise of the power of eminent domain, in favor of the corporation, does not admit any public quality in the corporation, or any relation between the corporation and the public which could, as a question of constitutional power, justify the exercise of the power of taxation to help build the road; and to maintain this position, an elaborate effort is made to prove the absurdity or incongruity of a contrary doctrine, by putting a great number of extreme cases, and cases assumed to be analogous. These supposed analogies are relied on with great confidence, and they furnish the principal argument, if not the only one, for the result which my brethren have reached. They deserve to be carefully noticed, in order to ascertain whether they are so constituted, as to make them answer the end they are supposed to establish. Now, in all the instances presented, in which it may be conceded that no tax could be levied to aid enterprise or business, however beneficial to the public, and however similar in character and incidents to the character and business of railroads, there is one fatal difficulty in the parallel. In none of the examples relied on, has the enterprise or business been stamped by authority of the State, with the public quality or character accorded to railroad corporations in this commonwealth.

Whatever direct or indirect advantages accrue to the public from any of the enterprises cited, to whatever extent any of them may at any time have been subject to local or State regulations, they have never been invested with that public character, which in this State has been impressed on and accorded to railroad corporations, and whether, upon principle, they were entitled to the same consideration and the same recognition, is of no consequence in this discussion, because we are not inquiring about what ought to have been, but about what is. We are not concerned to inquire whether the Legislature and the courts have been consistent in giving to the railroad corporations a standing in their relations to the public, which has not been given to other corporations or enterprises resting on the same foundation and animated by the same principle. The point is whether the State has not by its Legislature and its courts given these corporations a *status* in their relations to the public, not possessed by the other bodies referred to.

We are often compelled to adopt this course, and however unreasonable to us, may appear the numberless discriminations which abound everywhere and have no support in principle, we are driven to accept the fact, and are not permitted to argue, that because a peculiar quality or privilege has not been bestowed upon some of a class of enterprises, alike in merit and in principle, it has therefore been denied to all. However closely, in many things, the business of hack companies, draying companies, printing companies, and the like may compare with the business of railroad corporations, and whatever the similitude between these companies, the argument is not advanced, unless it appear that the comparison holds good in the particular quality or attribute upon which the controversy turns. A printing corporation is private. It operates beneficially for the public, and in these respects it agrees with the railroad corporation. But, until it is proved that the two corporations are alike private in all their relations and attributes,—until it appear that they are elementally the same in reference to that quality which in this State is said to determine the right to aid by taxation,—no admission of the validity or a tax to aid the printing company, can be urged against the existence of the power to raise money by tax to help build the railroad.

The exposition of my brethren, it appears to me, has not succeeded in showing that printing companies, hack companies, and the like, stand on the same footing in their relation to the public with railroad corporations; nor has it satisfactorily shown upon what grounds a railroad corporation is to be considered *public* in this State, in respect to the exercise of the power of eminent domain, and *private*, in respect to the exercise of the power of taxation.

Nobody, I believe, has ever supposed that printing companies and other similar bodies were so related to the public, as to justify the exercise of eminent domain in their favor. Certainly no such doctrine has ever been advanced in this State, and I suppose neither of my brethren would countenance it for a moment. From the time, however, of our territorial existence to the present hour whatever our organic law, our legislatures and our courts have always considered that the power of eminent domain could be lawfully exercised in favor of railroad companies, and my brethren fully concede that the power may be so employed. There are difficulties in the opinions and views of my brethren on this subject, which, I think, have not been surmounted.

If, from the analogy between the relations and duties to the public of railroad corporations, and the relations and duties to the public of printing, hack and dray companies, and the fact that no tax can be levied to aid or foster the latter, we ought to infer that no tax can be levied to aid in constructing the roads of the former, we

may with equal propriety contended either, that the right of eminent domain may be exercised *in favor* of the printing, hack and dray companies, contrary to all opinion, or that it cannot be exercised in favor of railroad corporations, which would be equally opposed to all opinion; and this would follow, because the argument actually rests upon the theory, that perfect equality exists between all these bodies in respect to the right to exercise any constitutional power in their favor, when the exercise of such right depends on their relations and duties to the public. All reasoning, therefore, against the power to aid the construction of a railroad by taxation, based upon the analogy between railroad corporations and other companies not entitled, will be likely to carry us to a result, as to the employment of the power of eminent domain, which all confess to be untenable.

In the observations which have been made, some topics have been alluded to which require more particular notice.

I do not contest the proposition that a tax must be imposed for a public and not a mere private use, and I admit that a corporation may be private in one sense and with reference to one power of government, while it is public in another sense, and with reference to another power of government. My brethren concede, that the relations of a railroad corporation to the public are such as to justify the exercise of the power of eminent domain in their favor, and this admission carries with it the further concession, that such corporations are public to that extent, and in that sense and relation, which will warrant the employment of that power in their favor under our Constitution. But having made this broad admission, they deny that these corporations are public to that extent, and in that sense and relation, which will allow local or general taxation to aid in constructing their roads. The admission, however, is conclusive that railroad corporations are not wholly private in the strict technical sense, nor even in that sense in which printing companies, hack and dray companies and the like are private.

My brethren must, therefore, be understood as maintaining that railroad corporations hold a middle or anomalous position, and possess a mixed or double character, and they are therefore required to show, that in this State the kind of public character which will allow the exercise of the power of eminent domain is distinct and different from that which will allow the power of taxation to be exercised in the manner contemplated by the railroad aid acts, and that the railroad corporation possesses that kind which will justify the exercise of the former, and is wanting in that which will allow the employment of the latter. They are obliged to contend that the public quality of railroad corporations in this State, to which the exercise of the power of eminent domain is referable, is by the law of this State, a public quality to which the exercise of the power of taxation as proposed cannot be referred. This has been attempted, but, with respect, I am compelled to say that the reasoning resorted to has failed to satisfy my mind. Unless some solid ground can be discovered, on which to rest the distinction we must conclude, either, that all our legislation and all our judgments in favor of allowing the power of eminent domain to be exercised in favor of railroad corporations have been illegal; and that the admission of my brethren in favor of the validity of such legislation, and such adjudications, is founded in error, or that the character accorded to these bodies, as a basis for allowing the enjoyment of the power of eminent domain, is a character which will equally warrant the exercise of the power of taxation to aid in building the roads.

The exercise of the power of eminent domain is limited and restrained by our Constitution. Under it the property of no one can be taken, except for *public use*, and it is admitted to be settled law that the *use* for a railroad corporation is a *public one* according to the Constitution. The Legislature and the courts have made no such distinction in favor of printing companies and the like. No court has decided that private property could be taken for their use, or that the taking of it for their use could by any possibility be justified, as a taking for public use within the meaning of the Constitution. As already stated, the Legislature and the courts have declared that the use of property for railroads is a public one, and that private property may be taken therefor, and in so doing they have, with the acquiescence of all the departments of the government and of the whole people, wrought into the very stamina of railroad corporations a quality of a public nature, not possessed by any other class of corporations called private; and this doctrine, although not unassailable or irreversible like a constitutional provision, is as much a part of the law of the State, while it continues, as a section of the Constitution itself.

The State not only recognizes these corporations as qualified to be aided by the power of eminent domain, but actually gives the aid and provides the official instruments deemed appropriate to work out the result. The companies are not merely incorporated and regulated. The State assists in getting the ground for the road. It provides that the machinery of the courts may be used therefor, and casts some portion of the expense in many, if not most cases, on the tax-payers. This is done, and confirmed as a proceeding under the Constitution. A

court of justice can as well justify the exercise of the power of taxation, as the exercise of the power of eminent domain, upon grounds of extra constitutional necessity. But the fact is, that the exercise of neither can be so justified. Both powers spring from political organization and rest upon the fundamental law of such organization. We cannot conceive of the existence of either power, independently of the organic arrangement which constitutes the corporate entity known as the Territory or State. My brethren do not propose to recede. They agree to stand upon the ground that it is settled, and wisely settled, that the power of eminent domain may be exercised in favor of railroad corporations, under a constitutional inhibition to take private property for any other than the *public use*. But has it not been long practically settled in this State, that under our laws the exercise of the power of eminent domain in favor of railroad corporations, can be justified only upon the ascription to them of the same public character or quality, or the same relation to the public, which my brethren hold to be necessary to justify the exercise of the taxing power to aid in the building of the roads, and which for this latter purpose are said to be wanting?

In the case of *The People v. The Mayor of Brooklyn, 4 Comstock, 419*, Judge Ruggles, when considering the distinction between the taking of property under the power of eminent domain and under the taxing power, said: "Private property may be constitutionally taken for *public use in two modes*; that is to say, by taxation and by right of eminent domain. These are rights which the people collectively retain over the property of individuals, to resume such portions as may be necessary for *public use*. The right of taxation and the right of eminent domain rest substantially on the same foundation." After having thus declared that both powers have substantially the same basis, and that under each the taking is for *public use*, he pointed out the vital and material distinction between them in these words: "Taxation exacts money, or services from individuals, as and for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share."

This view has received the approbation of this Court both under its present and former organization, and the language quoted has been often cited and approved. It received the approval of a majority of this Court in *Sears v. Cottrell, 5 Mich., 251*, and was quoted and expressly approved by my brother Campbell, in his dissenting opinion in that case; and the difference between the two powers, as here defined, was again referred to by my brother Campbell with approval in the *Woodbridge case, 8 Mich., 274, 291*, and also by my brother Christiancy in the same case at page 304.

It is true that neither Judge Ruggles, in the *People v. The Mayor of Brooklyn*, nor my brethren in the other cases were contrasting the two powers for any purpose like the present. But it is evident that Judge Ruggles intended to mark the substantial difference, and the only substantial difference between these powers, and it appears equally plain to me that my brethren, in adopting the view of Judge Ruggles, accepted it as marking the sole fundamental distinction between them. An examination of the different opinions will, I conceive, make this quite clear. It will be noticed that no hint is given, that the power of eminent domain bears any relation to the police power, or that under a Constitution forbidding its exercise except to take property for *public use*, its employment to take property for a *private use*, or for the *private use* of a *private corporation*, could be justified on the *plea of necessity*. Nor is it suggested that the *private use* of a *private corporation* which *could not be aided by taxation*, could be so essential to the public interests, local or general, as to create a lawful necessity. But it was declared that the two powers rested substantially on the same foundation, and that under each the taking must be for public use, while the distinction, defined as the only material one, hid no relation to any difference between one kind of public use and another. There is no intimation that the subject, which as a public one, could call into exercise the power of eminent domain, would relapse into a private one, when the power of taxation should be invoked. And I am unable to discover any solid ground for admitting the right to take the property of the citizen against his consent, to make the road-bed of a railway corporation because the use is public, and at the same time, for denying to a township, under a statute, the right to tax its citizens to help to build the road on the ground that the tax would be raised for a *private object*. The taking by eminent domain, positively and conclusively implies, that the property so taken is for public use, and when it is remembered that the exercise of this power, in favor of railroad corporations, was originally resisted upon the same ground upon which my brethren base their objection to municipal aid by taxation, namely, — that the corporations were private, and the property sought to be taken for a private and not a public use, the admission of the right to exercise the power of eminent domain in their favor presses with great force against the position now assumed, and when it is considered, that such exercise of the power has been vindicated and

established by conceding to railroad corporations the very quality in question, it appears to me that the theory of my brethren become more than questionable.

In *Swan v. Williams*, 2 Mich, 427, decided more than eighteen years ago, our predecessors had occasion to consider whether the Territorial Legislature had authority to authorize the appropriation of property for the use of the Pontiac Railroad Company. It was contended in that case that certain lands taken in the usual way for the company, were not taken for *public use*, because as was argued, they were taken for the private profit and advantage of the company, without any provision in the charter to secure any right in the public to use the road, or to require it to lie used for public benefit.

The opinion of the Court, delivered by Chief Justice Martin, appears to have been unanimous; and, as the right to take the lands under the power of eminent domain, was maintained upon the ground of the peculiar relation which railroad companies bear to the public, I shall quote the most material part of the opinion bearing upon that point. The Court say: "The object of strictly private corporations is to aggregate the capital, the talents, and the skill of individuals, to foster industry and encourage the arts. Private advantage is the ultimate, as well as the immediate object of their creation, and such as results to the public is incidental, growing out of the general benefits acquired by the application of combined capital, skill, and talent to the pursuits of commerce and of trade and the necessities and conveniences of the community.

"But the object and the origin of that class of corporations represented by the defendants in this case, and *which might with far more propriety be styled public than private corporations*, are of an altogether different nature and character. Their very *existence* is based upon the delegation to them of the sovereign power to take private property for public use, and upon the continued exercise of that power in the use of the property for the purposes for which it was condemned. They are the means employed to carry into execution a given power. That private property can be taken by the government from one and bestowed upon another for private use, will not for a moment be contended, and *these corporations* can only be sustained upon the assumption that the powers delegated, are to a public agent, to work out a public use. To say, as has been too often carelessly said, that "the acts done by these corporations are done with a view to their own interests, from which an incidental benefit springs to the public" is to admit their private character, and the private use of the property condemned to their use. But it is obvious, that the object which determines the character of a corporation is that *designed* by the Legislature, rather than that *sought* by the company. If that object be primarily the private interest of its members, although an incidental benefit may accrue to the government therefrom, then the corporation is private, but if that object be the public interest, to be secured by the exercise of powers, *delegated for that purpose*, which would otherwise repose in the State, then, although *private interest* may be incidentally promoted, the corporation is in its *nature public*. It is essentially the trustee of the government for the promotion of the objects desired,—a mere agent, to which authority is delegated to work out the public interest, through the means provided by government for that purpose, and broadly distinguishable from one created for the attainment of no public end, and from which no benefit accrues to the community except such as results incidentally, and not necessarily from its operation. In the creation of this class of corporations, *public duties and public interests are involved*, and the discharge of those duties and the attainment of those interests are the private objects to be worked out through the powers delegated to them. To secure these, the right of pre-eminent sovereignty is exercised by the condemnation of lands to their use, *a right which can never be exercised for private purposes*. How, then, can they be regarded as *private associations*, from the acts of which an incidental benefit only springs to the public? It argues nothing that compensation is required to be made for property taken before it can be used, for this is made by the Constitution a condition to the exercise of this right by the government itself, and the delegation of the power necessarily carries the incident with it.

"Nor can it be said that the property, when taken, is not used by the public, but by the corporators, for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators, but it is none the less true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the service. If this be not the correct view, then we confess we are unable to find any authority in the government to accomplish any work of public utility through any private medium or by delegated authority; yet all past history tells us that governments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. The grant to the

corporation is in no *essential* particular different from the employment of commissioners or agents. The difference is in degree rather than in principle, in compensation, rather than in power. The fact that the company receives the toll or compensation for the transportation of persons and property over the road is conceived to be a reason, and in fact the prominent reason, why these associations should be considered as private corporations: but the purpose designed by the government in the construction of these roads is the use of the public, the expeditious communication and transit from point to point and not revenue. It would not be contended for a moment that private property could be taken to be used for the latter purpose. The appropriation of the tolls, therefore, can be regarded only as compensation, and affords no basis upon which to construct an argument respecting the character of the company, or the validity of its charter.

“It is true, also, that the mode of conveyance and of travel is different upon this road, from that upon turnpikes and common highways, but this difference springs from the character and construction of the road, and the vehicles employed, and not in the use designed. The one is equally intended, however, to open good and easy communications, with the other; and so far as travel and the transportation of property is concerned, the public have the same rights in the one case as in the other, with this difference, that the means employed are varied with the mode of travel.

“The fact that upon railroads, individuals do not travel or transport property in their own vehicles, furnishes no argument, in this particular, from the fact that the nature of the road, as well as the personal safety of individuals, renders it impossible that they should do so. If the right existed, it would not be exercised. Public security requires that the mode of travel and the means employed should be limited within, and subject to, the control of the company, and the Legislature would have but indifferently secured the public interest in extending the privilege to all.”

I do not bind myself to all the *reasoning* embraced by this quotation, but I cite the passage to show precisely what our predecessors decided in 1852, and the grounds of that decision. For eighteen years this judgment has been accepted as decisive of the grounds upon which the power of eminent domain could be exercised in favor of railroad corporations in this commonwealth. But without assuming to overturn the judgment or to disturb it, my brethren now decide against the validity of municipal aid, on the exact ground that these corporations *do not possess* that specific character, in relation to the public, which our predecessors, in order to sustain, and as the sole ground, in their judgment, on which they could sustain the exercise of the power of eminent domain, *expressly and explicitly decided that they did possess*. Our predecessors emphatically placed their approval of the exercise of the one power exclusively upon reasons, which my brethren are obliged to repudiate in order to reach their conclusion that the other power cannot be exercised. If the Court was right in 1852, then the position now taken cannot be supported; and on the other hand, if the substantial position, assumed by the Court in 1852, as a justification of the exercise of the power of eminent domain in favor of railroad corporations was fundamentally wrong, and was based upon reasons having no existence, then I am unable to discover in the able opinions of my learned brethren, or elsewhere, any satisfactory grounds upon which private property can be taken for the use of those corporations against the will of the owner.

In view of all the circumstances, may it not be fairly contended that in this State at least, railroad corporations have, by legislative and judicial action, acquired a stamp which distinguishes them from the companies and enterprises mentioned by my brethren as private, and as producing many public benefits?

Have they not been recognized and held as possessing a *quasi* public character which entitled them to privileges, immunities and aids, and subjected them to regulations and conditions not applicable to other organizations denominated private? These questions must be answered in the affirmative. Our legislative and judicial history required it; and, indeed, the course of legislation and of judicial action on this subject has not been singular.

It was hardly to be expected that legislatures and courts, when dealing with these new and anomalous creations, would adhere critically to the technical and refined distinctions, found in the books between corporations public and private, or attempt to fit these refractory bodies to impracticable definitions or classifications. It was very obvious to the common sense of legislatures and courts that railroad corporations must necessarily bear relations to the public, local and general, quite different from those borne by the corporations theretofore designated as private by text writers.

They were at once recognized as important auxiliaries to the business and social advancement of the countries they traversed, and as possessing an extraordinary capacity for usefulness to the government; they were seen to develop the resources of the community, increase the wealth of the people, and augment the public

revenues. They were observed to furnish the means for cheap and rapid intercommunication; they were perceived to be efficient ministers of the public in peace and in war. In the carriage of the mails, in the transportation of commodities, and in the movement of men and munitions of war, they were discovered to be agencies at once powerful and nearly indispensable. They were thought to possess no mean influence in binding the different sections of the country together, and it was believed to be quite impracticable to completely subject these organizations to the theories and distinctions which had sufficed for hack companies and kindred organizations.

My brethren are of opinion that the benefits and advantages which have been mentioned, and all others, general and local, which accrue to the public are merely incidental, and that taxation to aid a railroad corporation in building its road cannot be justified by the fact, that when built it will confer such benefits. Is the proposition as stated and applied perfectly clear and correct?

These corporations originate in two concurring but different interests: one private and the other public. The corporators represent the former and the public the latter. The direct purpose of the corporators is to make private gain, and as to them, the benefits and advantages received by the public, are incidental. The direct purpose of the public is to benefit and help the public, and whatever of private gain may accrue to the corporators is incidental as to the public. Whatever the public does is performed to advance the public interests only. The conferring of corporate life, the exercise of the power of eminent domain to procure a roadway and other needful things, and the raising of money by tax to help work the roadway into shape, are all acts which the public does exclusively for the public advantage. The private emolument of the corporators is not the object of the public, and the assumption that it is so, begs the question. Indeed, I am unable to see how the purpose of the corporators, however personal and private, can convert the public object into a private one. It is one of the usual and ordinary expedients of original society, to work out the public good through the instrumentality of personal and private interests, and to make the cupidity and ambition of individuals the sources of advantage to the public, and I have never supposed that the end, on the side of the community, would be any the less public because the agency employed was influenced by private views.

It is unnecessary to enlarge on this topic, or to cite opposite examples. They are ever present. The State in order to promote the public good, brings these corporations into existence. On the same ground, it aids in bringing the road itself into existence; and in keeping with the policy which dictates these things, it subjects the corporations to peculiar regulations, and clothes them with extraordinary immunities and privileges. Whether this is wise or not, is not the question. It is enough for us to know what is settled in this respect. I am led to conclude upon the best consideration I can bestow, that it has been settled, that these corporations are public, in the sense which will allow private property to be taken for their use; and I am unable to discover how we can refuse the aid of taxation on the ground that they are not public, in the sense to justify that. This opinion is longer, *much* longer, than I intended it should be; and I am as conscious as any one that it does not follow that much is proved, because much is said. The law requires me to state reasons for my dissent. I have written to justify myself, — not to convince others. I have this consolation, that if I am in error, my mistake can work no public mischief. My views carry with them no authority, and while I am unable to yield my assent to the doctrine announced by my brethren, I cheerfully bear my testimony to the thoroughness of their investigations, and the ability of their opinions.