THE PEOPLE v. SALEM.

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

Railroad aid by towns and counties: Taxation: For what purpose and by what rule. The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation; and unless the object to be promoted be such as may be provided for by taxation, the power to make the pledge does not exist; and the Legislature cannot confer it.

It is essential to a valid exercise of the power of taxation that it be for a public purpose:— that it be exercised according to some rule of apportionment throughout the State, — if it be a State purpose; or throughout the municipal subdivision interested or to be affected, if it be local. The term "public purposes," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish objects for which according to settled usage the government is to provide, from those which, by the like usage are left to private inclination, interest or liberality.

A corporation created for the purpose of constructing a railway to be owned and operated by the corporators is a private corporation; and the road when constructed will not be a public highway, except in a very qualified sense, as it accommodates the travel and traffic of the public; and it is therefore no more a public object than any other private enterprise, which also supplies a public want or furnishes to the public a convenience.

Although an incidental benefit may accrue to the public from a private enterprise, yet that will afford no ground for imposing burdens upon the public by way of taxation in behalf of such enterprise.

The fact that the State may exercise the power of eminent domain in behalf of associated parties who propose to accommodate some public used, does not determine its right to exercise the power of taxation in behalf of the same parties, in aid of the same object. The principles governing the eminent domain, correspond to those controlling the police power, rather than to those applying to the power of taxation; and its exercise has regard rather to the public need than to the public character of its object. Every necessary industry has a right to exist, and if private interests would otherwise preclude, the eminent domain may be employed to give the opportunity; and on this ground a private corporation proposing to establish a thoroughfare may have compulsory means of obtaining a right of way. But taxation can no more be employed in behalf of such corporation than in behalf of the projectors of a mill, a hotel, or any other private enterprise.

Heard April 7, 8, l2, 13, 14,15, *May* 24, 25. *Decided May* 26.

Application for *mandamus:*

By the Detroit and Howell Railroad Company to compel the Township Board of Salem, to execute and issue bonds to aid in the construction of the railroad proposed by the relator to be constructed through the township of Salem, as provided by act No. 49, of 1864, entitled "an act to authorize the several townships in the counties of Livingston, Oakland, Washtenaw and Wayne, to pledge their credit, and the County of Livingston to raise by tax a loan of money to aid in the construction of a railroad from some point near the city of Detroit to Howell, in the County of Livingston."

An issue of fact, raised by the answer of the defendant, was directed by the Court to be tried in the Circuit Court for the County of Washtenaw, namely:—Whether the relator had completed its work through the township of Salem, to the extent required by the resolution of the township meeting set forth in the relator's petition. This resolution provided that "no bonds, or other certificates of indebtedness shall be issued by said township to aid in the construction of the Detroit and Howell Railroad, unless the ties shall be furnished and delivered on the line of the road; and the road bed thereof, including all bridges, culverts, cattle-guards and road-crossings, shall be fully completed and ready for the iron, within the limits of the township of Salem, on or before the first day of July, A. D. 1868."

The issue was tried as directed, and the verdict of the jury was certified to this Court in favor of the relator.

H. J. Beakes and *G. V. 1V. Lothrop*, for defendants.

Townships have no power at common law, or under the general statutes of this State, to pledge their credit or make donations to private corporations or to individuals. They can exercise no powers except such as they enjoy by prescription, or are specially conferred upon them by statute.—*Lafayette v. Cox, 5 Ind., 38; People v. Supervisors of Blackman, 14 Mich., 336, 338; Cooper v. Alden, Harr. Ch., 86; Stetson v. Kempton, 13 Mass., 271, 278; Beatty v. Lessee of Knowles, 4 Peters, 152, 163; Sedgwick on Const. Law, 340, 341, 342, 346, 351 to 356; Pa. R. R. Co. v. Canal Commissioners, 21 Penn., 9; People v. Albany, 11 Wend., 544; 11 Pick., 396; 12 ib., 227; 19 ib., 485, 487; 1 Metcalf 284,* 287.—A township cannot appropriate money to celebrate the 4th day of July.—2 *Denio, 110; Hood v. Lynn, 1 Allen, 103; New London v. Brainard, 22 Conn., 552*.—Nor to celebrate the surrender of Cornwallis.—*Tash v. Adams, 10 Cush., 252*.—Nor to vote money for the purchase of uniforms for an artillery company.—*Claflin v. Hopkinton, 4 Gray, 502*.—Nor can a town be held liable on its corporate vote to pay the expenses of a field driver in defending a suit for taking up and impounding cattle running at large contrary to law.— *Vincent v. Nantucket, 12 Cushing, 105, 106*.—All the authorities which assert that towns may exercise the power in question seem to base the right entirely on special enabling statutes.—*Bridgeport v. H. R. R. Co., 15 Conn., 501; 49 Pa. State, 193; 19 Ill., 309; 36 Ala., 438; 2 Jones Eq., 144; 1 Sneed, 698.*

The Detroit and Howell Railroad Company is a private corporation.—*A. & A. on Corp.*, § *31, 32; 1 Red. on Railways, 53, 54, 3d ed; Dartmouth College v. Woodward, 4 Wheat., 468, 494; Whiting v. C. R. R. Co., Wisconsin Sup. Ct. Reported 1 Chicago Legal News, 378; State v. County of* Wa*pello, 13 Iowa, 400–12; Hansen v. Vernon, Iowa Sup. Ct., April term, 1869, in Western Jurist, June 1869, 150; 21 Penn. St. 169, per Black, C. J.; 21 Penn. St., 182 per Woodward, J.*

The Constitution prohibits the legislation in question.

1. A construction of Sections 3, 6, 8, and 9, of Article XIV, which shall leave it in the power of the Legislature to authorize or compel each city and township in the State to grant or loan its credit to, or subscribe to the stock of railroad companies or other corporations to the amount of a fixed and uniform percentage of the assessed valuation of property taxable therein, would render these sections nugatory.

State taxes are apportioned, in theory at least, among the cities and townships according to the amount of taxable property therein, and are collected by the city and township officers. The argument for the power in question seems to require the maintenance of this proposition: that what the State as a whole cannot do, *it* may compel its constituent parts to do in the same proportion as would have fallen to their respective shares, if the State *eo nomine* had done it. In other words, if the power in question exists, *the State* by *its* Legislature may, under the guise of a township tax or loan, make precisely the same loans or donations to private corporations, and create precisely the same public burdens, and subject each tax payer in the State to precisely the same taxation as if there were no such limitations to legislative power.

The meaning of "works of internal improvement," as used in this Constitution was railroads and canals and enterprises of that character.—*Act 104 of 1839; Act 116 of 1839; Act 63 of 1840, &c.*, See *State v. Wapello Co., 13 Iowa, 388*, and *People ex rel. McCagg v. Mayor, &c., of Chicago, in Illinois Sup. Ct., Sept. 1869, reported Chicago Legal News 2, 3, for construction of similar constitutional provisions in those States.*—If the *State* compels townships to issue their bonds for the construction of railroads, is it not engaged in carrying on works of internal improvement?" The township of itself has no power to engage in any such work. What the township does in the matter it does under the authority and as an instrumentality of the State—*18 Wend., 69, 70; C. &c., R. R. Co., v. Clinton Co., 1 Ohio State, 94–95-6-7, 101; Cass v. Dillon, 2 Ohio St., 635-6, 641; 21 Pa. St. 181; Cooley Const. Lim. 211.*

2. It is to be borne in mind in the construction of those provisions of the Constitution that prior to 1850 the legislation, and it is believed the history, of the State afforded no precedent of township donation or pledges of credit or subscriptions for the construction of railroads or canals. It seems to have been assumed that the State *alone* of governmental organizations had power to aid those enterprises by pecuniary contributions. The State had been engaged in works of internal improvement under which its credit had greatly suffered. Public sentiment had demanded and secured the sale or abandonment by the State of its railroads; and in 1850 it is believed the almost unanimous sentiment of the people was in favor of leaving the building and management of railroads wholly to private enterprise and speculation. The general financial prostration from which the people

were just recovering, and the weight of public burdens made them dread a public debt; and it is but fair to suppose that the prohibitions in question repeated so industriously, were intended to cut up the supposed evil by the root, and make it impossible to create a public debt for internal improvements, as they were called. Municipal donations under State authority were within the mischief intended to be guarded against.—See *16 Mich. 258.*

3. Section I, Art IV prohibits the creation of corporations by special act except for municipal purposes. The acts of February 5th, 1864, and of March 24th, 1869, are special acts. Can the Legislature by special act confer on townships already created, the power to raise money for other than municipal purposes, while it is prohibited from creating them with those powers originally?

4. The act of 1864 is not an exercise of "legislative power," and is, therefore, void, whether it comes within any of the express prohibitions of the conditions or not. It is not a *law,* but an attempted license to an act of spoliation. To compel A. to donate or loan his money to B. or to authorize a majority to compel the other citizens to donate or loan their property to private corporations or individuals, is not legislation. It is an imperial edict or *ukase,* inconsistent with the idea of a limited government,—and *a fortiori* inconsistent with the idea of legislative power in a government whose sovereignty is divided into independent departments, executive, legislative, and judicial.— §*2 Art. 3.*

Private property cannot be taken for private use even with compensation without the owner's *consent.*—*Taylor v. Porter, 4 Hill, 140; Powers v. Bergen, 2 Selden, 367, 39; Ill., 110, 114, 116; 53 Barb., 70; 1 Ohio St., 84-5; Wilkinson v. Leland, 2 Peters, 657; Ranson v. Vernon, 26 Iowa, 145; Bankhead v. Brown, 25 Iowa; Sedgwick Const. Law, 155* and note; *Cooley Const. Lim., 530.*

The Legislature is the mere creature of an organic law, —deriving all its powers from the Constitution. The " legislative power " being granted to it, its authority within the limits of that power, may be admitted to be plenary except so far as otherwise specially limited; but outside those limits it is as powerless as if specially prohibited. *—1 Ohio St. 84-5; 21 Pa. St., 168-9; Cooley Const. Lim., 46, note 1.*

5. Of course the legislation in question cannot be sustained as an exercise of the right of *eminent domain*—*Art. 18,* § *14; Art. 15 §* 15.—Compensation where property is taken by right of eminent domain can only be made in money.—*Cooley Const. Lim., 556; People v. Brooklyn, .4 Comst., 419.*—Money or *choses in action* cannot be taken under this power.—*Cooley Const. Lim., 526-7,* and *note 1.*—It can be exercised only when *necessary,* not when merely convenient. *Per. Woodbury, J., in West River Bridge Co. v. Dix, 6 Howard, 545,546; Smith's Stat. and Const. Law, § 325; Cooley Const. Lim.,* 539.—If sustainable at all, it must be under the taxing power.

6. Township taxation cannot be imposed except for township purposes.—*Ryerson v. Utley, 16 Mich., 276; Hammett v. Philadelphia, American Law Register for1869, 411, 415, 422.* The relator's proposed road is not a local or township road. It extends from Detroit to Howell, at least, if not to Lansing. The proposed bonds are not to be used in the town of Salem alone, but anywhere on the line at the relator's discretion. The town of Salem is to have no rights of property in the road when built, and no voice in its management. [Is] the construction of such a road by *private* stockholders, by whom alone it is to be owned and controlled, *a township* purpose? *21 Pa. St. 182.*

7. If this legislation is for a local purpose, § *45, Art. 4,* of the Constitution required the assent of two-thirds of the members of each house of the legislature to the passage of the bill. No such assent was had.—*House Journal of 1864, 163; Senate Journal of 1864, 219.*

8. This legislation cannot he sustained under the taxing power. There is no power in the State to authorize a tax for private purposes. Taxes can only be levied for public purposes or to accomplish some government end.—*Cooley Const. Lim., 487, 211, 212; Hansen v. Vernon, 27 Iowa; 3 Western Jurise. 145; 21 Pa. St. 168; 22 Wis., 666-7; 31 Pa. St., 189; 39 Pa. St., 82; 21 Pa. St., 169.*

9. It does not seem necessary to discuss in this case the question whether it is competent for townships under legislative authority to subscribe for stock in a railroad running through the township. The only question here is whether a forced loan or donation to a railroad company can be sustained.

That it cannot, has been decided in Wisconsin under a constitution more like ours in matters material to this question than any other, (see *Art. VIII. Constitution of Wisconsin, in Wis. Rev. Stat. of 1849,) in Whiting v. Sheboygan R. R. Co., 1 Chicago Legal News, 378, 379,* June term, 1869; in New York in *Sweet v. Hulbert, 51 Barbour, 316,* and in Iowa in an opinion of remarkable ability in *Hanson v. Vernon,* April, 1869, *3 Western Jurist, 145.* See also *Curtis v. Whipple, Wisconsin Sup. Ct. 1 Chicago Legal News, 345, 346.*

While there are a number of cases in other states sustaining the right to subscribe for stock, it is believed that no Supreme Court has yet decided that such a donation or loan can be enforced in view of the distinctions made in the above cases.

10. The leading cases in support of municipal subscriptions for railroads *(Sharpless v. The Mayor of Philadelphia, 21 Penn. State Rep. 171,* decided by three Judges against two; and *Cincinnati, Wilmington and Zanesville R. R. Co. v. Clinton Co., 1 Ohio State Rep. 77, 94, 95-6-7, 101,)* place their chief reliance on the ground that as the State might itself subscribe for railroad stock or build the railroad, it might do it indirectly through the agency of municipalities.—*Cessante ratione, cessat ipsa lex.—Bridgeport v. Housatonic R. R. Co. 15 Conn. 475, 500. Goddin v. Crump, 8 Leigh., 120,* was decided in 1837 by a divided court, under a constitution containing none of the restrictions cited from ours, and which expressly authorized the Legislature to delegate the power of taxation to local municipal governments for local municipal purposes. It was objected in that case that the work was so general that it could be aided only by the State, but the objection was not sustained, as according to *16 Mich., 276*, it should have been. *Nichol v. Mayor of Nashville, 9 Humphrey, 252*, and the case in *1 Sneed, 637*, were decided under a constitution which expressly provided that "a well regulated system of internal improvements ought to be encouraged by the General Assembly," and gave the Legislature "the power to authorize the several counties and incorporated towns in this State to impose taxes for county and *corporation purposes* respectively, in such manner as shall be required by law," and admitted that if the purpose was not local the *mandamus* should be denied.—See *1 Sneed, 662, 664.*

The New York Constitution contains no such restriction as § *9 Art. 14,* of ours. See *Clark v. Rochester, 24 Barb.* 462.—Reversing same cases in *13 Howard Prac. Rep.304; 5 Am. Law Reg.* (old series), *289.*

The Missouri Constitution provides in Art. 7 that "internal improvements shall forever be encouraged by the government of this State."—*R. S. Missouri of 1845, 40; Indiana Constitution,* see *1 R. S. Indiana, 64;* For Illinois Constitution, see § *38, art. 3, statutes of Illinois of 1856, 50;* See opinion *of Ranney, .J., in Cass v. Dillon, 2 Ohio State Rep. 630, 636; State of lowa v. Wapello County, 13 Iowa 388, 410, 417, 418, 419: Clark v. Des Moines, 19 Iowa, 224; McClure v. Owen, 26 Iowa; 13 Wis., 37; 13 Wis., 414, 418; Utley v. Ryerson, 16 Mich., 267, 274, 275-6; Cooleys Const. Lim., 234, 235; 2 Redfield on Railways, 397, 398* and note.

It is submitted that, if it were necessary to argue the question of municipal subscriptions to railroad stock, there is no ground of principle and, (when constitutions are compared with ours), very little in the decisions in other States, to warrant such subscriptions in this State.

It is, however, one thing to say that as the town may build highways, it may therefore build and control and own, in whole or in part, railroads as an improved highway, but it is a very different thing to say that the town may, at the public expense, donate money to build private roads or private schools or hotels for the benefit of private owners and with no municipal control.

It is a remarkable fact that in most of the states where municipal subscriptions to railroad stock have been maintained by the courts, the revulsion of public sentiment has been so strong as to lead to prompt prohibitory constitutional amendments, as in Ohio, (see *Cass v. Dillon*, per Ranney, J., 2 *Ohio St., 630, 631),* and in Pennsylvania in 1857, and finally, in 1869, the correctness of the decision in the Sharpless case was questioned by the tribunal that rendered it, *(Hammett v. Philadelphia, 8 Am. Law Reg., 411, 418,)* and in Indiana; and in every state in which such subscriptions have been allowed, wide-spread financial disaster and repudiation have followed.

D. D. Hughes, for relators.

The principal question involved in this case, and the only one we propose to discuss is:

The power of the Legislature of the State to authorize municipal corporations, counties, towns and cities, to aid railroad companies engaged in building roads to, through, or near to such corporations; and, in that behalf, to create debts which must be met by taxation.

The question, though new to the courts of this State, is one which, as is well known, has been for many years the subject of extended, and at times excited discussion and consideration, in the courts of quite a number of our sister states, and now stands the cause of a serious conflict between the Supreme Court of the United States and that of the State of Iowa.

I. It is happily unnecessary in this Court to discuss the principle upon which alone an act of the Legislature

of the State may, or ought by it to be held unconstitutional and void. A series of its own decisions has settled that subject. The principle established is this: An act of the Legislature to be declared by the courts unconstitutional, and for that reason void, must be prohibited by the express words of the Constitution, or by necessary implication. *Scott v. Smart's Executors,1 Mich., 295; People v. Gallagher, 4 Mich., 244; Sears v. Cottrell, 5 Mich., 251; Tyler v. The People, 8 .Mich., 320; People v. Blodgett, 13 .Mich., 126; People v. Mahony, 13 Mich., 481.* In the language of Manning, J., in *Tyler v. The People,* "the Court should be able to lay its finger upon the part of the Constitution violated, and the infraction should be clear and free from doubt."

II. The question for discussion, then, is this:

Are acts of the Legislature of this State of the nature of those under consideration so clearly prohibited by any express words of the Constitution, or by necessary implication, that the Court can lay its finger on the part of the Constitution violated by this enactment? Stated thus, we must confess that the question seems scarcely to admit of argument.

It will not, we think, be contended that such acts are prohibited by any *express words* of the Constitution. From what cause or causes arises the necessary implication? The only provisions in our Constitution similar to the provisions in the constitutions of other states which have been invoked against the validity of similar acts so far as we are aware, are the following, to wit: Art. XIV, §§ 6, 8, 9; Art. XV, § 13 ; Art. XVIII, § 14.

It would seem to demand a very strong and vivid imagination to discover the required "necessary implication" in either of the three sections quoted from Art. XIV, their application is to "the State;" and the distinction between the State as a corporate body and municipal corporations within the State is, or at least, seems to us to be very clear and broad, and this distinction is recognized over and over again in the Constitution. But it may be contended, as it has been, that the State cannot authorize its municipal corporations to do what it has no authority to do itself.

This proposition may be plausible, but it is nevertheless absurd, and its absurdity may be thus illustrated: 1. Sect. 3, of said Art. XIV of the Constitution provides, "The State may contract debts to meet deficits in the revenue, *such debts shall not in the aggregate at any one time exceed fifty thousand dollars."* Now, according to the proposition under discussion, the State cannot authorize any, or indeed all of its municipal corporations to contract debts, which shall at any one time exceed fifty thousand dollars. 2. Said section 9, of Art. XIV, must unquestionably be so construed as to prohibit the State from constructing, macadamizing, or paving roads or streets, or building bridges. According to the principle under consideration, therefore, the State cannot authorize any of its municipal corporations to construct, macadamize, or pave a road, or build a bridge.

Art. XV, § 13, 1. This section is by its terms, confined in its application to cities and villages.

2. All the "aid laws" that have been passed by the Legislature of the State, so far as we are aware, fix a limit to the debts which may be contracted in that behalf, and this, we submit, is a full and sufficient compliance with this section of the Constitution. *People v. Mahaney,13. Mich., 481*.

3. This section expressly recognizes the power of cities and villages to loan their credit, and this is a strong argument in favor, rather than against, the constitutionality and validity of acts of the Legislature, of the nature of those under consideration.

4. Section 14, of Article XVIII, has no application. The acts under consideration confer no power to take property for public use, within the intent and meaning of this section of the Constitution. The power conferred is to assume pecuniary obligations, to contract debts, and to raise money to meet such obligations or debts by taxation.

It will be contended: 1. That the power of taxation can only be used to raise money for some public purpose, and that, therefore, the Legislature cannot authorize its municipal corporations to raise money by taxation, except for public purposes. 2. And that money paid to a private corporation to aid it to build a railroad, which it is to own and operate, when built, is not used for a public purpose.

The first of these propositions is unquestionably true. The second is fallacious and untrue.

Property taken for use in the building of a railroad by a private corporation, which it is to own and operate when built, is in a certain sense taken for the benefit of such corporation. It becomes its property, as long as it is used for the purpose of the road. Yet the authorities all agree, — there is no one dissenting voice.— that the property thus taken by a private corporation is taken for public use, in a sense to authorize its seizure by proceedings *in invitum.*

The principle upon which these authorities rest is, that a railroad, although built by a private corporation, is

a public improvement, and the property is taken primarily and directly to enhance such improvement. The benefit to the corporation is merely an indirect and collateral result. So, in the case of aid extended by municipalities the primary and direct object is to advance the public improvement, not to benefit the corporation carrying it on.

Again; the proposition under discussion, if sound, would prevent the State, independent of any constitutional inhibition, from extending aid to any private corporation engaged in a work of public improvement. Yet, so far as we are aware, the power of the State in that regard has never been questioned, and express constitutional inhibitions have been deemed necessary to prevent its abuse.

Another objection against such laws sometimes urged is, that they confer power upon municipal corporations outside and beyond the scope of the purposes for which they are created. This objection rests upon the same fallacy as the one last under consideration, and the answer to it is similar to the answer to that.

1. One of the leading powers which has always been vested in and exercised by municipal corporations, is the power to make, and to aid in making public improvements, such as the construction and repairing of streets, roads, bridges, and the like. And, hence, if railroads are public improvements, to encourage and aid their construction would seem to be directly within the powers usually conferred upon municipal corporations.

This objection runs in the face of express provisions of the Constitution, to wit: Art. IV, § 38; Art. XI, §§ 1, 2; Art. XV, § 13.

These provisions of the Constitution seem clearly to give the Legislature authority to confer upon municipal corporations the power in question.

III. If decided cases are to have any effect, the constitutional authority of the Legislature to pass the acts under consideration, and similar acts, is established beyond controversy.

The question has been the subject of adjudication in the courts of *twenty States* of the Union; and, in all these States except two, the constitutionality of such acts is sustained by an unbroken current of decisions, and by the earlier cases, in the two excepted States—Iowa and Wisconsin. *Stein v. Mayor, Aldermen, &c., of Mobile, 24 Ala. 591; Wetumpka v. Winter, 29 Ala., 651; Gibbon v. Mobile and G. N. Railroad Co., 36 Ala., 410; Bridgeport v. The Housatonic Railroad Co., 15 Conn., 475; Pattison v. Yuba, 13 Cal.,175; Cotton v. Com. of Leon County, 6 Florida, 610; Winn v. Macon, 21 Georgia, 675; Towers v. Inferior Court of Dougherty County, 23 Georgia, 275; Prettyman v. Supervisors, 19 Ill., 406; Robertson v. Rockford, 21 Ill., 451 Johnson v. Stark, 24 Ill., 75; Perkins v. Lewis, 24 Ill., 208; Butler v. Dunham, 27 Ill., 474; Aurora v. West, 9 Ind. 74; Dubuque v. Rai*l*road Co., 4 Greene, 1; Clapp v. Cedar, 5 Iowa, 15; McMillan v. Boyle, 6 Iowa, 304; Ring v. Johnson, 6 Iowa, 265; McMillan v. County Judge, 6 Iowa, 391; Stokes v. Scott, 10 Iowa, 166; The State v. Wapello, 13 Iowa, 388; Talbot v. Dent, 9 B. Monroe, 526; The Justices, &c., v. Railroad Co., 11 B. Monroe, 143; Slack v. Railroad Co., 13 B. Monroe,1; Maddox v. Graham, 2 Met. Ky., 56; Police Jury v. Succession of John McDonough, 8 La., Ann., 341; New Orleans v. Graihle, 9 La., Ann., 561; Augusta Bank v. Augusta, 49 Me., 507; St. Louis v. Alexander, 23 Mo., 483; St. Joseph, &c., Railroad Co. v. Buchanan Co. Court, 39 Mo., 485; Grant v. Courter, 24 Barb., 232; Benson v. Mayor, &c., 24 Barb., 248; Clark v. Rochester, 24 Barb., 446; Bank of Rome v. Rome, 18 N. Y., 38; Starin v. The Town of Genoa, 23 N. Y., 439; People v. Mitchell, 45 Barb., 208; Taylor v. Com. of Newberne, 2 Jones Eq., 141; Caldwell v. The Justices of Burke, 4 Jones Eq., 323; Griffith v. Com. of Crawford County, 20 Ohio Appendix 1, Cincinnati, &c., R. R. Co. v. Com. of Clinton Co., 1 Ohio State, 77; Cass v. Dillon, 2 Ohio State, 607; The State v. Trustees, &c., 8 Ohio State, 394; Commonwealth v. McWilliams, 11 Penn., 61; Sharpless v. Philadelphia, 21 Penn. State, 147; Commonwealth v. Com. of Alleghany Co., 32 Penn., 218; The State v. Charleston, 10 Richardson, 491; R. R. Co. v. County Court of Davidson County, 1 Sneed, 637; Nichol v. Mayor, &c., 9 Humph., 252; Goddin v. Crump, 8 Leigh, 120; Clark v. Janesville, 10 Wis., 136; Bushnell v. Beloit, 10 Wis., 195.*

The Supreme Court of the United States not only recognizes and follows the doctrine established by these decisions of state courts, but expressly affirms its correctness. *Gelpicket v. City of Dubuque, 1 Wallace, 175; Thomson v. Lee Co., 3 Wallace, 327; Rogers v. Burlington, 3 Wallace, 654.*

IV. Opposed to this overwhelming current of authorities stand :

1. The cases in Iowa since 1859, commencing with the case of *The State v. Wapello County, 13 Iowa, 388;* the ground of the decision in which is that the Legislature cannot authorize municipal corporations to *become stockholders* in private corporations, and ending with the recent case of *Hanson v. Vernon*, not yet

reported, which holds that the Legislature cannot authorize municipal corporations to donate money to private corporations engaged in works of internal improvement, to aid such works.

2. The recent unreported case in Wisconsin of *Whiting v. The Sheboygan Railroad Company,* in which the Court draw[s] a distinction between acts which authorize municipal corporations to subscribe for stock of private corporations engaged in works of internal improvement, such as the building of railroads; and acts which authorize *donations* of money by such municipalities in aid of such works, sustaining the former acts, but holding the latter unconstitutional.

3. The case of *Sweet v. Hulbert, 51 Barb., 316,* entirely similar to the Wisconsin case above mentioned.

4. An occasional dissenting opinion in cases which sustain the acts in question.

V. The distinction taken in the case of *Whiting v. The Sheboygan Railroad Company,* and *Sweet v. Hulbert,* are unfounded. If the Legislature has power to confer upon municipal corporations authority to aid in building railroads, it is upon the ground that they are such public improvements as justify resort to the power of taxation to construct, and that the aid extended is to advance the improvement,—not to benefit the corporation engaged in making it. If this be so, it matters not in which form the aid is extended, whether by subscription to the stock of the corporation engaged in making the improvement or a donation of money.

It may be possible that the many learned courts and judges arrayed on the one side of the question under discussion, may be all wrong, and the few on the other side right; but we submit that any court, however able and learned, should distrust the soundness of its reasoning, if it tends to such a conclusion.

A. Pond, on the same side

I. In answer to the proposition, that acts of the nature of the one under consideration, are not legislative in their nature; and are, for that reason unconstitutional, although not in conflict with any express provision of the Constitution, I say:

1. That the power to raise money by taxation for the purposes of the government, and to appropriate such money, is legislative. This is not, and cannot be, disputed.

2. That the exercise of this power is not, and from the very nature of the case, cannot be controlled or limited by technical or definite rules, defining and designating the particular purposes for which money may be thus raised or appropriated. When raised, it is admitted that a very broad and uncontrolled discretion is vested in the Legislature.

3. That the power to raise money by taxation to be appropriated for other purposes than those connected either directly or indirectly with the carrying on of the machinery of the government and its various departments, has in all governments, at all times, been recognized, admitted and acted upon without question or challenge.

4. That the power of governments themselves to engage in works of so-called internal improvement, and to raise money by taxation for that purpose, and for other purposes intended to develop the resources of the state, etc., etc., has always been claimed, admitted and acted upon.

5. That the power to raise money by taxation and appropriate and pay it over to individuals and corporations, and for purposes in no way connected with the carrying on of the government in its various departments, has always, in all governments, been admitted and exercised. Money has been thus raised and appropriated:—1. To aid in building meeting houses and to support churches and religious societies. 2. To aid in the support of charitable and benevolent societies. 3. To aid in the support of schools and colleges established and carried on by individuals and corporations directly for their own private profit. 4. To aid in the support of agricultural and like societies. 5. To reward inventors and other supposed public benefactors. 6. As bounties to induce individuals and corporations to engage in some business supposed to be calculated to develop the resources of the State. 7. To corporations engaged in carrying on works of so-called internal improvement, such as constructing improved wagon roads, railroads, canals, bridges, etc., etc. 8. That to retain and limit this power, express provisions have been deemed necessary, and have been inserted in constitutions, such as in our Constitution: Art. IV, §§ 39, 40, 45; Art. XIV, §§ 6, 8, 9; Art. XV, § 13. And I submit that it is under these circumstances, too late now to question the existence of such power.

II. If the purpose for which the Legislature undertake to levy money by taxation, or to appropriate money, is in the least degree of a public nature, or hears any relation to the public prosperity, interest or good, whether such degree is sufficient to justify the taxation or appropriation is solely for the Legislature. The courts cannot

review; so are the authorities, and they are founded in reason. A court might with equal propriety, undertake to say that a Legislature had made a larger appropriation than the degree of public interest warranted, in a case in which the right to make some appropriation was conceded, as to pass upon the *degree* of public interest *necessary* to justify any appropriation.

Subsequently,—on the 24th and 25th of May, the cause was reargued by the same counsel, their attention having been specially directed by the Court to the following questions, as bearing upon the main question of the constitutionality of the law:

1. Did the proceedings which were had create a contract, or any relation or obligation in the nature of a contract, between the township and a railroad company? What was its precise character? If not, what is the specific ground upon which the company is entitled to the *mandamus* prayed for?

2. Could the Legislature, without the vote of the electors, compel the township to do what the act authorized it to do with reference to the issue of bonds and the levying of taxes to pay them? Or has the township any original or inherent power over the subject in question, except such as the Legislature has seen fit to allow them?

3. When the minority of the tax-payers of the township are compelled by a vote of the majority of the electors to pay the taxes in question, is it by any power existing in the township organization, or by the sovereign legislative power of the State?

4. Can the Legislature delegate to the township the power to determine for itself, as a local or legislative or administrative body, by a majority of the electors, what enterprises of a public nature are so far of local benefit or advantage to the township as to justify township aid, entering into contracts to secure such benefit and to furnish such aid, and the imposition of taxes to meet the obligation thus incurred?

5. If bonds are issued by the township and given to the company to encourage the building of a road which, in the opinion of a majority, would not be otherwise constructed, and no arrangement is made binding the company to repay the bonds or money or any part of them, is this to be treated as a donation or as a consideration which the township is allowed to give for benefits which, in the opinion of the majority, will fully compensate them for the outlay?

6. Is there any proper rule of apportionment of the taxes provided for by the act, and what is that rule? Is the whole railroad, or only that portion of it within the township to be taken as the object for which the tax is raised?

7. Do sections 6, 8 and 9 of Article 14 of the Constitution prohibit the Legislature from granting to the townships the right to give aid to railroads as provided by the act? How does this prohibition differ in this respect from those in the Federal Constitution upon the states in respect to laws impairing the obligation of contracts; against entering into treaties; keeping troops and ships of war in time of peace, etc.; or from the prohibition, in our own Constitution, against the invasion of religious liberty?

8. What is the extent of the term "internal improvements " in section 9, Article 14 of our State Constitution?

COOLEY, J.

The act of 1864, under which the proceedings in question were taken, provides that it shall be lawful for each of the several townships in the counties of Livingston, Oakland, Washtenaw and Wayne, to pledge their credit to aid in the construction of a railroad from some point near the city of Detroit to the village of Howell, for such sum or sums not exceeding five per centum of the assessed valuation for the time being, of the real and personal property in such township as the electors of such township shall, at a meeting or meetings called for that purpose, determine. The electors, it is also provided, may at such meeting or meetings, determine the terms, conditions, manner of executing the securities, and other particulars in regard to such pledge of credit, or they may empower some township officer or committee of electors to determine the same, and in case of no such determination or delegation of power to an officer or committee, then the several township boards of such townships are severally given power to determine all such particulars: *Provided*, That the amount of bonds that shall become due in any one year shall not exceed two per centum of the assessed valuation of such township at the time of issuing the same. The meeting of electors to decide upon such pledge is to be called by the Supervisor on a request signed by thirty tax-paying electors, and upon ten days' public notice, and the securi-

ties issued or made in pursuance of the act are declared to be a valid charge upon the taxable property of the township issuing or making the same, and it is made the duty of the township board to provide by tax for the payment of the principal and interest thereon, as fast as the same shall become due and payable by the terms thereof. But no bonds or other evidences of debt are to be delivered to the treasurer of any township, city or village for any railroad company, until all the terms and conditions required by the vote of the township, or by the proper authorities, shall have been complied with: *Provided*, That no bonds or other evidences of debt issued under the provisions of said act, or the moneys arising from the sale of the same, are to be delivered or paid over to the railroad company until the ties shall be furnished and delivered on the line of the road, and the road-bed thereof, including all bridges, culverts, cattle-guards, and road-crossings shall be fully completed and ready for the iron, "within the limits of the municipalities rendering such aid."—*Laws of 1864, p. 96.*

The act also provides for aid by the county of Livingston in its corporate capacity, to the same line of road, and there are expressions in it which seem to imply an understanding on the part of the Legislature, that they had conferred the like power on the city of Detroit; but the power is not given in express terms, nor is machinery provided for its exercise. And, although "the several townships" in the counties named appear to be authorized to pledge their credit for the purpose specified, it would seem to be the intention of the Legislature to limit the right to such townships as might lie upon the line of any road which should be laid out and commenced, inasmuch as the securities or money are to be retained until certain progress has been made upon such road within the limits of the municipality rendering the aid.

Under this act it appears that the township of Salem voted aid to the extent of five per centum of its assessed valuation; but the meeting at which the vote was taken was irregular for want of sufficient notice, and a special act of the Legislature was obtained to legalize the same. A condition was attached to the vote, which the railroad company has complied with, but the township board refuse to issue the securities voted, claiming that the act of 1864 was in excess of legislative authority, and therefore unconstitutional and void, and that the township vote was in consequence a nullity. The railroad company therefore apply for a writ of *mandamus* to compel the delivery of the securities, and an issue of law having been joined upon their application, we are required to consider the important constitutional question which the objection of the township board presents.

I suppose if the legislative net in question can be sustained at all, it must be so sustained under the general authority of the State to prescribe and determine the objects to be provided for, fostered or aided through the expenditures of the public moneys. In other words, it must be regarded as an incipient step in the exercise of the sovereign power of taxation. This power, we are told, is not, and from its very nature cannot, be controlled and limited by precise and accurate rules, which shall designate and do, fine in all cases the particular purposes for which alone moneys shall be raised, or to which they may be appropriated when raised, or the extent of the burden which may be imposed, and it is added that upon all these points a broad and uncontrollable discretion is necessarily vested in the legislative department of every government.

It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. It is not doubted by any one, that the power of the Legislature to determine for what purposes taxes shall be levied, and what districts of territory and what classes of persons and property shall bear the burden is very broad, and it must be confessed that in describing or defining it words are sometimes employed by the courts which import an absolute and unlimited discretion, such as might exist in an irresponsible government, or in the people, if acting in their sovereign capacity, without any written constitution, and which consequently could not be brought to the test of any restrictive rules. For many purposes these broad and loose definitions of the power of taxation are not objectionable, but they cannot be regarded as careful and precise enough to be tests of constitutional authority, and whenever they are employed in the law, the modifications by familiar constitutional principles are always to be understood.

I understand that, in order to render valid a burden imposed by the Legislature under an exercise of the power of taxation, the following requisites must appear:

1. It must be imposed for a public, and not for a mere private purpose. Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the cases, when it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder.—*Sharpless v. Mayor, etc., 21 Penn. St., 168; Grim v. Weissenberg School District, 57 Penn,. St., 433; Broadhead v. Milwaukee, 19 Wis., 652.*

2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. A State burden is not to be imposed upon any territory smaller than the whole State, nor a county burden upon any territory smaller or greater than the county. Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. *Weeks v. Milwaukee, 10 Wis., 258; Ryerson v. Utley, 16 Mich., 269; Merrick v. Amherst, 12 Allen, 504.*

3. As a corollary from the proceeding, if the tax is imposed upon one of the municipal subdivisions of the State only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local, that is to say, the people of that municipality must have a special and peculiar interest in the object to be accomplished, which will make it just, proper and equitable that they should bear the burden, rather than the State at large, or any more considerable portion of the State.— *Wells v. Weston, 22 Mo., 384; Covington v. Southgate, 15 B. Mon., 491; Morford v. Unger, 8 Iowa, 82.*

The three principles here stated are fundamental maxims in the law of taxation. They inhere as conditions in the power to impose any taxes whatsoever, or to create any burden for which taxation is to provide; and it is only when they are observed that the legislative department is exercising an authority over this subject which it has received from the people, and only then is that supreme legislative discretion of which the authorities speak called into action. No discretionary power in that department is so absolute, and no judgment it can pronounce is so conclusive, as to preclude the citizen's contesting it whenever he believes his rights have been invaded by a disregard of any of these conditions. The duty of considering such a question is both unwelcome and undesirable, but it is not a duty which can be avoided, and we have no disposition to postpone its performance.

I propose first to enquire whether the purpose to be accomplished by the act in question is a *public* purpose, in the sense implied when burdens are to be imposed under the legislative power over the subject of taxation.

I do not understand that the word *public*, when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the Legislature from taking broad views of State interest, necessity or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statemanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people. To erect the public buildings, to compensate the public officers and to discharge the public debts, are not the sole purposes to which the public revenues may be applied, but, on the contrary, considerations of natural equity, gratitude and charity are never out of place when the general good of the whole people is in question, and may be kept in view in the imposition of the public burdens. The sovereign legislative authority must judge of the force of such considerations, on a general view of the just and proper demands upon the public treasury, and of the ability of the people to provide for all; and when that authority determines that such payments will subserve the public good, the responsibility of the legislator for the correctness of his judgment must be to the people whose representative he is, and upon whom the burdens he imposes must rest.

Nor has it ever been doubted that where the object of taxation was one of general interest to all parts of the State, it was competent for the State, instead of assuming the burden directly, and providing for it by means of a general State levy, to apportion it among the several counties and towns, and to authorize and require them to provide for it by local taxation. Our own State pursues this course invariably as regards its general burdens; in this respect following what I understand to be the general system of the country; and the result demonstrates that it is practicable, wise and expedient to make use of the local machinery as the best means of reaching all the people without confusion and without exciting discontent. There is not only nothing in this course inconsistent with correct principles, but on the contrary it is in most perfect accord with other features of our governmental policy; the general purpose being to leave with the local communities, in managing the public affairs which concern them, the largest possible liberty of action which is consistent with the general public order and good government.

In the present case it appears that the object of the burden is not to raise money for a purpose of general State interest. Its object, on the contrary, is to create a demand which shall be a burden upon a small portion of the State only. On the ground of local benefit a small district of the State is to be taxed to encourage a local enterprise, which it is supposed will be of such peculiar local advantage that this district rather than the State at

large, or any greater or smaller portion of the State, should contribute to its construction. The road, when constructed, is nevertheless to be exclusively private property, owned, controlled, and operated by a private corporation for the benefit of its own members, and to be subject to the supervision and control of the State only as other private property is, with such few exceptions as the State in granting the corporate powers has stipulated for in order to secure impartiality in the management of its business, and to prevent extortion. Primarily, therefore, the money, when raised, is to benefit a private corporation; to add to its funds and improve its property; and the benefit to the public is to be secondary and incidental, like that which springs from the building of a grist-mill, the establishment of a factory, the opening of a public inn, or from any other private enterprise which accommodates a local want and tends to increase local values.

A railroad, however, it is said is a public highway, and as such its construction is a public purpose, which may be accomplished through the instrumentality of the sovereign power of eminent domain even when individuals, and not the State, are to own and control it. This argument is supposed to possess great force, and it therefore becomes our duty to examine it with some care. It is true that a railroad in the hands of a private corporation is often spoken of as a public highway, and that it has been recognized as so far a public object as to justify the appropriation of private property for its construction; but this fact does not conclusively determine the right to employ taxation in aid of the road in the like case. Reasoning by analogy from one of the sovereign powers of government to another, is exceedingly liable to deceive and mislead. An object may be *public* in one sense and for one purpose, when in a general sense and for other purposes, it would be idle and misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest. The sovereign police power which the State possesses is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the commonwealth. The conduct of every individual and the use of all property and of all rights is regulated by it, to any extent found necessary for the preservation of the public order, and also for the protection of the private rights of one individual against encroachments by others. The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles would suffer it to be resorted to; but each of these powers has its own peculiar and appropriate sphere, and the object which is *public* for the demands of one is not necessarily of a character to permit the exercise of another.

I have said that railroads are often spoken of as a species of public highway. They are such in the sense that they accommodate the public travel, and that they are regulated by law with a view to preclude partiality in their accommodations. But their resemblance to the highways which belong to the public, which the people make and keep in repair, and which are open to the whole public to be used at will, and with such means of locomotion as taste, or pleasure, or convenience may dictate, is rather fanciful than otherwise, and has been made prominent, perhaps, rather from the necessity of resorting to the right of eminent domain for their establishment than for any other reason. They are not, when in private hands, the *people's highways;* but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, for such pecuniary compensation as may be stipulated. These owners carry on for their own benefit a business which has indeed its public aspect inasmuch as it accommodates a public want; and its establishment is consequently in a certain sense a public purpose. But it is not such a purpose in any other or different sense than would be the opening of a hotel, the establishment of a line of stages, or the putting in operation of a grist-mill; each of which, may under proper circumstances be regarded as a local necessity, in which the local public may take an interest beyond what they would feel in other objects for which the right to impose taxation would be unquestionable. The business of railroading in private hands is not to be distinguished in its legal characteristics from either of the other kinds of business here named, or from many others which might be mentioned; but in the case of *Weeks v. Milwaukee, (10 Wis., 242*), the Supreme Court of Wisconsin justly treated with very little consideration the claim of a right to favor, under the power of taxation, the construction of a public hotel, though the aid was to be rendered expressly "in view of the great public benefit which the construction of the hotel would be to the city." The Court expressly declared that the public could not be compelled to aid such an enterprise from any regard to the incidental benefits which the public were to receive therefrom.

The right of eminent domain is a vital right in every government, and must often be called into exercise when a special necessity demands that the private right in a particular piece of property shall give way for the public good. This right, it has been held, may be exercised on behalf of railways in the hands of private parties. But

there can be no doubt, I think, that this holding was a considerable modification of common law principles, though at the same time it must be admitted that it was on such strong grounds of necessity and policy, and in view of considerations so entirely new, as fully to excuse, and indeed to justify it. No principle was older, and none seemed better understood or more inflexible, than that one man's property could not be taken under the power of the government and transferred to another against the will of the owner; but the State nevertheless is allowed to do so in the case of railroads, under the guise of a convenient fiction, which treats a corporation managing its own property for its own profit, as merely a public convenience and agency. Nothing but an overriding public necessity could ever have led the courts to this judgment, for when the relations between the proprietors of a railroad and the public are examined, we perceive at once that the idea of agency in a legal sense is inadmissible. They are public agents in the same sense that the proprietors of many other kinds of private business are, and not in any other or different sense. To illustrate this I might draw many exact parallels, but a single one will be sufficient for our purpose. The Michigan Central Railroad Company makes a business of transporting persons and property over its road for the profit of its stockholders, but at rates which the State has regulated, and on the condition which the State has prescribed, of furnishing impartial accommodations. It does so, moreover, under a charter from the State, from which it derives its authority, and for this charter it has rendered, or is supposed to have rendered a compensation. The hackmen of Detroit make a business of transporting persons and property over shorter routes, for their own profit, and in like manner at rates which the law regulates, and on the like conditions of impartiality. To render the analogy closer, they are required to obtain a license from the public authorities to follow this calling, and for this license a fee is exacted. Like the railroad corporation they supply a public want, and if the former can be called a public agency, the latter, it must be conceded, are entitled to stand in the same category.

If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step further, and that step is in the same direction. Every man has an abstract right to the exclusive use of his own property for his own enjoyment in such manner as he shall choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the center of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property in his own way is compelled to yield to the general comfort and protection of community, and to a proper regard to relative rights in others. The situation of his property may even be such that he is compelled to dispose of it, because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity that it cannot be tolerated in a densely settled neighborhood; and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. The butcher, in the vicinity of whose premises a village has grown up, finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood.

Eminent domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. Every branch of needful industry has a right to exist, and community has a right to demand that it be permitted to exist, and if for that purpose a peculiar locality already in possession of an individual is essential, the owner's right to undisturbed occupancy must yield to the superior interest of the people. A railroad cannot go around the farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare could never have existed if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him. The law interferes in these cases, and regulates the relative rights of the owner and of the community with as strict regard to justice and equity as the circumstances will permit. It does not deprive the owner of his property, but it compels him to dispose of so much of it as is essential on equitable terms. While, therefore, eminent domain establishes no industry, it so regulates the relative rights of all that no individual shall have it in his power to preclude its establishment..

It is proper, however, to add the remark, that even where the necessity is conceded, I do not understand that the right of eminent domain can be exercised on behalf of private parties or corporations, unless the State in permitting it reserves to itself a right to supervise and control the use by such regulations as shall ensure to the public the benefit promised thereby, and as shall preclude the purpose which the public had in view in authorizing the appropriation being defeated by partiality or unreasonably selfish action on the part of those who only on the ground of public convenience and welfare have been suffered to make the appropriation.

In the case of *Sadler v. Langham, 34 Ala, 311,* it was held by the Supreme Court of Alabama, that the right of eminent domain might be exercised on behalf of mills which ground grain for toll, and were compelled by law to render impartial service for all, when it could not be for other mills; and the distinction made is a very reasonable one. Except that the necessity is wanting, there would be the same justification for the condemnation of lands for stables for the public draymen of a city, as for a way for a railroad; the like power of regulating the use existing in each case, and the purpose in one being *public* in precisely the same sense as in the other.

But when we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the State imposes taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because on the whole it is deemed best by the public authorities that they should be. On the other hand certain things of absolute necessity to civilized society the State is precluded, either by express constitutional provisions, or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the State from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be, in a certain sense, to accomplish a "public purpose;" but it is not a purpose for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing, yet if the people should be taxed to hire one to locate there, the common voice would exclaim that the public moneys were being devoted to a *private* purpose. The opening of a new street in a city or village may be of trifling public importance as compared with the location within it of some new business or manufacture but while the right to pay out the public funds for the one would be unquestionable, the other by common consent is classified as a private interest, which the public can aid as individuals if they see fit, while they are not permitted to employ the machinery of the government to that end. Indeed, the opening of a new street in the outskirts of city is generally very much more a matter of private interest than of public concern; so much so that the owner of the land voluntarily throws it open to the public without compensation; yet even in a case where the public authorities did not regard the street of sufficient importance to induce their taking the necessary action to secure it, it would not be doubted that the moment they should consent to accept it as a gift, the street would at once become a public object and purpose, upon which the public funds might be expended with no more restraints upon the action of the authorities in that particular, than if it were the most prominent and essential thoroughfare of the city.

By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term "public purposes," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely *a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.*

It creates a broad and manifest distinction—one in regard to which there need be neither doubt nor difficulty—between public works and private enterprises; between the public conveniences which it is the business

of government to provide and those which private interest and competition will supply whenever the demand is sufficient. When we draw this line of distinction, we perceive immediately that the present case falls outside of it. It was at one time in this State deemed true policy that the government should supply railroad facilities to the traveling and commercial public, and while that policy prevailed, the right of taxation for the purpose was unquestionable. Our policy in that respect has changed; railroads are no longer public works, but private property; individuals and not the State own and control them for their own profit; the public may reap many and large benefits from them, and indeed are expected to do so, but only incidentally, and only as they might reap similar benefits from other modes of investing private capital. It is no longer recognized as proper or politic that the State should supply the means of locomotion by rail to the people, and this species of work is therefore remitted to the care of private enterprise, and cannot be aided by the public funds, any more than can any other private undertaking which in like manner falls outside the line of distinction indicated.

In the course of the argument of this case allusion was made to the power of the State to pay bounties. But it is not in the power of the State, in my opinion, under the name of bounty or under any other cover or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law of which this is the real nature is void, whatever may be the pretense on which it may be enacted. The right to hold out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions, stands upon a different footing altogether; nor have I any occasion to question the right to pay rewards for the destruction of wild beasts and other public pests; a provision of this character being a mere police regulation. But the discrimination by the State between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in State government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, but no further. Every honest employment is honorable, it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the State to make discriminations in favor of one class against another, or in favor of one employment against another. The State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business that cannot stand alone. Moreover, it is not a weak interest only that can give plausible reasons for public aid: when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger. I shall not question the right of the people, by their Constitution, to open the door to such discriminations, but in this State they have not adopted that policy, and they have not authorized any department of the government to adopt it for them.

It scarcely seems necessary to say that what the State as a political community cannot do, in cannot require the inferior municipalities to do. When the case is found to stand entirely outside the domain of taxation, State burdens and township burdens are alike precluded; no township vote and no township majority, however large, can affect the principle; any single individual has a right to insist that the public do not own or control his property for the purpose of donations.

It may be proper to mention the maxim which is pressed upon our consideration, that the Legislature must pass upon the proper objects as well as the proper extent of taxation, not only in the case of the State at large, but in case also of the several municipal corporations. Those corporations certainly have no inherent power of taxation, but take only so much as the State shall see fit to allow, and under such restrictions as the Legislature may think proper to impose. I shall concede also that they are not left to their own option to exercise the power or to decline to exercise it; for as regards alike the general purposes of the State and those of more local concern, they are to tax as they are bidden, and may be compelled to obey the legislative will. The power of coercion and control is nevertheless to be exercised in view of and in subordination to those maxims of local self-government which pervade our whole system, and which preclude arbitrary and unaccustomed impositions, however desirable, in the opinion of the Legislature, the object to be attained may appear to be.

If the township of Salem can be required to tax itself in aid of the Detroit and Howell Railroad Company, it must be either *first*, on the ground of the incidental local benefit in the enhancement of values; or *second*, in consideration of the facilities which the road is to afford to the township for travel and business. The first ground is wholly inadmissible. The incidental benefit which any enterprise may bring to the public, has never

been recognized as sufficient of itself to bring the object within the sphere of taxation. In the case of streets and similar public improvements, the benefits received by individuals have sometimes been accepted as a proper basis on which to apportion the burden; but in all such cases the power to tax is unquestionable, irrespective of the benefits. The question in such cases has not been of the right to tax, but of the proper basis of apportionment where the right was conceded.

The second ground is more plausible. To state the case in the form of a contract, it would stand thus: The township is to give or loan to the railroad company five per centum of its assessed valuation. In consideration whereof the railroad company agree to construct and operate their road, and to hold themselves ready at all times to give to the people of the township the facilities of travel and trade upon it, provided they will pay for such facilities the same rates which are to be charged to all other persons. In other words, the company agree, on being secured the sum mentioned, to take upon themselves the business of common carriers within the limits of the township.

If this consideration is sufficient in the case of common carriers, it must be sufficient also in the case of any other employment. There is nothing in the business of carrying goods and passengers which gives the person who conducts it a claim upon the public different in its nature from that of the manufacturer of the merchant. Neither is it of the least importance in a legal point of view that the carrier is usually a corporation, while the other kinds of business named are more commonly carried on by single individuals or partnerships. There are accidental circumstances, which may or may not exist in any particular case. But if the Legislature should pass an act providing that the township of Salem should give or loan a certain percentage of its taxable property to any merchant who will undertake to erect a store within the township, and hold himself ready at all times to sell goods therein to the people of the township on terms as favorable as those he would exact from others, he would be a bold man who should undertake to defend such legislation on constitutional principles. Yet the ease would possess all the elements of public interest which are to be found in the case before us; the public convenience would be subserved, and there would be a like tendency to increase local values. The difference in the cases would be in degree, and not in kind; and it would be easy to suggest enterprises as to which the comparison, even in degree, would not be to the advantage of the railroad. And when we have once determined that a municipal government can tax its citizens to make a donation to a railroad company, because of the incidental benefits expected from its operation, we do not go a single step further when we hold that it may use the public funds to erect a cotton or woolen factory, or a building suited to the manufacture of tobacco, and present it, on grounds of public benefit, to any person who will occupy it.

Such a case would not by any means be an extreme application of the principle contended for in the present proceeding. Newspapers are as much a public necessity as railroads. The city of Detroit contains several corporations which are carrying on the business of publishing such papers. Why should not the corporators, instead of furnishing from their own means the capital necessary to start themselves in business, have applied to the Legislature for an act authorizing the city to tax itself for that purpose? It is as difficult to make a success of a great newspaper as of a great railroad; the projectors do not more often make the business profitable to themselves; there are consequently all the same arguments to be advanced in favor of gratuities in their aid which are advanced here. We can go back to stage coaches as easily as we can dispense with the daily paper, which gives us the current new. It may be that, if this class of public benefactors were to be pensioned at the public expense, it would prove difficult for the Legislature to deal with the subject with entire impartiality; the political majority might regard those papers only as useful and deserving of encouragement which inculcated their own political views; but this would hardly be a question of law; and if they saw fit to allow those townships and cities which were disposed to do so, to vote aid to the party organs, the unwilling minority who did not believe in the benefits to be derived from such organs would be silenced by the decision we should render in favor of the present aid. The Legislature would have determined that the purpose was "public;" the need, in order to put an establishment upon a successful footing, would generally be very apparent and pressing; the benefits expected would be great, especially to the majority party, and we are not permitted to doubt that the local public, in very many cases, would sanction such legislation by voting the required aid. Newspapers are frequently started or aided by voluntary subscriptions when a concerted effort on the part of the subscribers would be very likely to induce the local majority to shoulder the voluntary burden upon the public. The farmer, the merchant, the manufacturer or the mechanic of the minority, who had been obliged when starting his own business to furnish his own capital, might think it unjust that he was now obliged to render compulsory aid in supplying the capital for the business of others, but the complaint would be unimportant if the majority could be

induced to acquiesce, and with the peculiar facilities which the favored interest possesses for the control of the public sentiment, we cannot doubt that it would be quite as successful as the "public good" would require in securing legislative action and favorable local votes.

I have stated the case on behalf of the railroad as strongly as is possible, for I have assumed that the road is certain to be constructed and to be operated afterwards, though the act in question makes no very effectual provision to that end, and the railroad company demand the bonds without expecting to give any security that the township will ever receive the expected benefit from its expenditure. The opposition to this proceeding may be based, for aught we know, upon a conviction that the enterprise cannot succeed, and that the money must consequently be wasted; but I prefer not to consider the case in any other light than that which is most favorable to the relator; and I shall therefore assume that the Legislature have established all possible safeguards against loss or disappointment, and that those safeguards would prove effectual. And regarding the case in that light it rests in my view upon fallacies which are transparent, and upon doctrines which, followed to their legitimate results, will leave us wholly at sea as regards the objects of taxation, and will justify a resort to that measure for almost any private purpose which can be suggested.

It is said, however, that there is an overwhelming weight of authority in support of this species of legislation. This statement is very often made with great emphasis, but without a foundation proportioned to the energy with which it is repeated. There is indeed a considerable number of cases which, for diverse and irreconcilable reasons, have supported local taxation for objects of general interest, but many of these cases have not the least relevancy to the point here contested. Such cases for instance, as *Thomas v. Leland, (24 Wend., 65),* and *Merrick, v. Amherst, (12 Allen, 504),* where local communities on the ground of special local benefit, have been allowed or compelled to tax themselves in aid of the public works or buildings owned by the State, are not at all analogous. Where the State itself is to receive the benefit of the taxation, in the increase of its public funds or the improvement of its public property, there can be no doubt of the public character of the purpose. Such of the other judicial decisions as are best reasoned rest plainly upon the doctrine that the State, having within itself unlimited authority to aid works of internal improvement, may use its municipal bodies as its agencies for that purpose,—a doctrine which is precluded by express provision in the Constitution of this State. If we set aside these two classes of cases, very little real authority remains to support the doctrine contended for. The right to vote municipal aid to railroads has been vigorously disputed from the beginning, and many eminent jurists have always denied it. I regard with the utmost respect the courts which have preceded us in considering this question, but we should be willfully blind if we shut our eyes to the fact that there have always been circumstances surrounding the consideration of this subject which have not been favorable to a complete and unbiased expression of views. It is easy to follow an apparent authority without stopping to question its soundness, when the popular desire is in the same direction; and upon this subject there are repeated decisions which do not, by any new reasoning, or by any attempt to examine the subject on principle, add at all to the authority of those which preceded them. When cases follow in line for no better reason than because they have a case to follow, the authority is to be found in the first decision, and not by counting up the number in the line. The leading case upon the subject has been the Pennsylvania case of *Sharpless v. Mayor, etc., (21 Penn. St., 147),* and we read the result in the language of the same Court in a subsequent case. "We know," say the Court, "the history of these municipal and county bonds; how the Legislature, yielding to popular excitement about railroads authorized their issue, how grand jurors and county commissioners and city officers were moulded to the purposes of speculators; how recklessly railroad officers abused the overwrought confidence of the public, and what burdens of debt and taxation have resulted to the people. A moneyed security was thrown upon the market by the paroxysm of the public mind." *(Diamond v. Lawrence County, 37 Penn. St., 353.)* The learned judges were quite too sanguine when they declared that the like could never happen again; but we are not concerned with their prophecy so much as we are with their manifest consciousness that these evils have come from a perversion of the law. The best judgment of the legal profession, so far as I have been able to judge, has always been against the lawfulness of this species of railroad aid, and there has been a steady and persistent protest which no popular clamor could silence, against the decisions which support it. This protest has of late been growing stronger instead of fainter, and if the recent decisions alone are regarded, the authority is clearly with the protest. But whether this is so or not is not of controlling authority here. We are embarrassed by no decisions in this State, and are at liberty, therefore, to consider this question on principle; and when the legal principle which should govern a case stands out in bold relief, it is manifestly more in accord with a proper discharge of judicial duty that we should reach to it with directness, than that we should shut our

eyes to the principle and blindly follow where others have blindly led.

I have not deemed it important to consider any of the minor objections to this act ; preferring as I do, to deal with the main and fundamental infirmity. The case before us is that of a private corporation demanding a gratuity which has been voted to it in township meeting upon the assumption that its business operations and facilities will incidentally benefit the township. I do not find that the meeting possessed any inherent authority to pass such a vote, or that any such authority could have been conferred upon it. The Legislature could not confer upon the majority there convened a jurisdiction to measure for the majority the demands upon their gratitude or liberality. Individuals as such must make their own donations, and decide for themselves how far any proposed enterprise of other individuals, can properly and justly, in view of the benefits they may receive therefrom, demand their aid and assistance.

As, therefore, it appears that the first and most fundamental maxim of taxation is violated by the act in question, it become superfluous to consider whether the act would also violate the maxim of apportionment, or be obnoxious in its application, because the burden, even if public, could not also be regarded as local, and peculiar to this township. Equally superfluous is it to consider in detail the several express provisions of the State Constitution which the respondents suppose to be violated. If the authority exercised is not within the taxing power of the State, it is quite needless to discuss whether, if it were within it, there are not restrictions which prohibit its exercise.

The *mandamus* applied for should, in my opinion, be denied.