FIFTIETH LEGISLATURE.

HOUSE. No. 47.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES,
January 23, 1871.

Ordered, That the Justices of the Supreme Judicial Court be requested to furnish the House with their opinions upon the following questions:

Has the Legislature authority under the Constitution to pass laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said towns? And if towns thus authorized may assist private parties, may they go further and establish manufactories entirely on their own account and run them by the ordinary town officers or otherwise?

JANUARY 25, 1871.

Read and passed.

S. J. CHADBOURNE, *Clerk*.

A true copy—Attest:

S. J. CHADBOURNE, *Clerk*.

OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT.

BANGOR, February 10, 1871.

To the House of Representatives of the State of Maine:

To the questions proposed by the Legislature, we have the honor to answer as follows:

(1.) "Has the Legislature authority under the constitution to pass laws enabling towns, by gifts of money * * to assist individuals or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said towns?"

As the proposed gifts can only be raised by taxation the question really is, can the Legislature constitutionally authorize towns to assess taxes upon their inhabitants and collect the same, for the purpose of giving the proceeds to some favored manufacturer or manufacturing corporation. And as some of the inhabitants may be indisposed to such generosity, the inquiry will arise whether the Legislature can authorize the majority by vote to give away the estates of the minority or any portions thereof, not merely without but against their consent?

Taxation, by the very meaning of the word, is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxes are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the State for the support of government and for all public needs. They are the property of the citizen, taken from the citizen by the government, and they are to be disposed of by it. The necessities of government are more or less extensive according to the greater or lesser extent of governmental interference. Taxation originates from and is imposed by the State. The proceeds are for the government to enable it to carry into effect its mandates and to discharge its manifold functions.

The line of demarcation may not always be clear and distinct, and well defined between what is for public and governmental,

and what for private purposes—between the general legislation for the whole people and the special for the individual. But the questions proposed leave no doubt as to the special phase of legislation to which they refer. They are obviously limited by and embrace what is special and private, excluding by their very terms whatever may or can by the most enlarged and liberal construction be regarded as relating to municipal, governmental or public objects of any description whatsoever.

Individuals and corporations embark in manufactures for the purposes of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic, or the day laborer. They engage in the selected branch of manufactures for the purpose and with the hope and expectation—not of loss—but of profit. By the very assumption of the interrogatory, they are engaged in private and corporate undertakings for private and corporate emolument. All municipal, police, educational, public, or governmental purpose, whether of peace or of war, is excluded from our consideration by the manifest purport of the inquiry.

Capital naturally gravitates to the best investment. If a particular place or a special kind of manufacture promises large returns, the capitalist will be little likely to hesitate in selecting the place and in determining upon the manufacture. But whatever is done, whether by the individual or the corporation, it is done with the same hope and expectation with which the farmer plows his fields and sows his grain—the anticipated returns.

Now the individual or corporate manufacturing will in the outset promise to be, and in the result will be, either a judicious and gainful undertaking or an injudicious and losing one. If the manufacturing be gainful, there seems to be no public purpose to be accomplished by assessing a tax on reluctant citizens and coercing its collection to swell the gains of successful enterprise. If the business be a losing one, it is not readily perceived what public or governmental purpose is attained by taxing those who would have received no share of the profits, to pay for the loss of an unprosperous manufacture whether arising from folly, incapacity or other cause. The tax payer should not be compelled to pay for the loss when he is denied a share of the profit.

It is true the inquiry is whether the legislature can authorize a town by a major or any vote to give away the property of an unwilling minority to an individual or manufacturing corporation

whom or which such majority may select as donees. The question relates only to manufactures, but if the right of confiscating the private property of individuals for the purpose of giving it away to one branch of industry can be conferred upon towns, one does not easily see when or what bounds can be imposed or limitations made.

The general benefit to the community resulting from every description of well directed labor is of the same character whatever may be the branch of industry upon which it is expended. All useful laborers, no matter what the field of labor, serve the State by increasing the aggregate of its products—its wealth. There is nothing of a public nature any more entitling the manufacturer to public gifts than the sailor, the mechanic, the lumberman, or the farmer. Our government is based upon equality of rights. All honest employments are honorable. The State cannot rightfully discriminate among occupations, for a discrimination in favor of one branch of industry is a discrimination adverse to all other branches. The State is equally to protect all, giving no undue advantages or special and exclusive preferences to any.

The constitution provides that "private property shall not be taken for *public* uses without just compensation; nor unless the public exigences require it." But here the question is, whether private property can be taken for private purposes without just or any compensation. No public exigency can require private spoliation for the private benefits of favored individuals. If the citizen is protected in his property by the constitution against the public, much more is he against private rapacity. If the public cannot take private property against the consent of the owner without just compensation, and only when it is required by some public exigency, most assuredly private property cannot be taken for private purposes without just or any compensation, and when it is not needed to meet any public exigency.

If it were proposed to pass an act enabling the inhabitants of the several towns by vote to transfer the farms or the horses or oxen, or a part thereof from the rightful owner or owners to some manufacturer whom the majority might select, the monstrousness of such proposed legislation would be transparent. But the mode by which property would be taken from one or many and given to another or others can make no difference in the underlying principle. It is the taking that constitutes the wrong, no matter how taken. Whether the cow or ox be taken from the unwilling owner

and given to a manufacturer, or the gift be of the money obtained by a sale made by the collector or by the payment of the tax to avoid such sale, does not and cannot change the principle. In either case the cow or the ox, or the value thereof, is taken from the owner and is given away by others without the owner's consent. If a part of one's estate may be given away, another and another portion may upon the same principle be given away, until all is gone. What is this but manifest and undisguised spoliation?

The farmer and the mechanic may as well be donees as the manufacturer, and they alike equally labor for the general benefit in laboring for themselves. If a tax were to be assessed upon estates to be re-distributed *per capita*, it would be plain spoliation. Is it any better, any the less spoliation because the gift is to *one* man or to one corporation rather than to all the inhabitants?

The legislature by the constitution are empowered "to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States."

By the declaration of rights, "All men * * have certain natural, inherent and unalienable rights, among which are those of acquiring, possessing and protecting property," &c. But what inducement is there to acquire property, if the tenure of the acquisition is the will of others? How can one possess and protect property if the legislature can enable a majority to transfer by gift, through the medium of direct taxation for that end, such portions or the whole of one's estate as it may deem expedient? Such a law may be for the benefit of the donee, but it cannot be for that of the people. Grant this power to the legislature, and let it be exercised and all security for property is at an end. The motive to acquire is destroyed. The enjoyment of possession is taken away. The power to protect is gone.

The constitution provides that no person shall "be deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land." Property taken by taxation is not taken by the judgment of our peers. A statute in direct violation of the primary principles of justice is not "the law of the land" within the meaning of the constitution. Every citizen holds life, liberty and property by the law and under its protection. Every enactment is not of itself and necessarily a law or the law of the land. Such is not a statute passed for the very purpose of working a wrong and in violation of the constitution. To declare it to

be so would render this part of the constitution nugatory and nonsensical. The phrase is one adopted from Magna Charta. "As to the words from Magna Charta," observes Mr. Justice Johnson in Bank of Columbia *vs.* Oakley, 4 Wheat. 235, * * "after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

The objects for which money can rightfully be raised must be such as conduce to the public interest, and are for the well being of the people. The true principle is thus stated by the Supreme Court of Pennsylvania in the case of Sharpless *vs.* Mayn, &c., 21 Penn. 168, in which the right of taxation to aid railroads was affirmed: "The legislature has no constitutional right to * * levy a tax or to authorize any municipal corporation to do it, in order to raise funds for any private purpose. No such authority passed to the assembly by any grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest in welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them." These views as to the right of imposing taxes seem to have received the sanction of the different courts in which the questions have arisen. It would be simply an act of despotic power to sequestrate the property of an individual or individuals directly or indirectly by the means of taxation, for the purpose of giving it away against the will of the owner and to those whom others than he may select.

(2.) Has the legislature authority under the constitution to pass laws enabling towns, by * * loans of bonds, to assist individual or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said towns?

As the bonds of the town should be paid at maturity, and the payment must be met by taxation for that purpose, the issuing the bonds or the raising the money in the first instance for the objects contemplated present one and the same question.

The inquiry is of the same character and involves the same con-

siderations as the one already discussed. True, the money is not given and there is a remote and possible contingency of ultimate repayment. But towns are not banking corporations. The issuing of bonds or the raising of money by taxation for the purpose of assisting individual or corporate enterprise, whether on manufacturing within or without the town, is the simply fostering individual and private enterprise. It is taking one's money without his consent, to be loaned to an individual whom its owner would not trust, for a time which might be inconvenient—for a purpose which he might deem injudicious, and at a rate of interest at which he would decline lending to any one. All security of private rights, all protection to property, is at an end when one's money may be taken to be given away or loaned without his permission and at the will of others. It is no answer that the loan may be repaid. It is the owner's money, and its protection is guaranteed to him by the constitution, subject only to the higher rights and needs of the State.

(3.) May towns "establish manufactories entirely on their own account, and run them by the ordinary town officers or otherwise?"

Towns were a part of the political organization of New England long before the formation of the constitution of this State. They are created by the government for specific purposes. They are a part of it. They are among its most efficient instrumentalities in carrying out successfully the objects of its very existence. Through their agencies the taxes required for the needs of the State are raised. Extensive powers are conferred on these corporations—but they are public corporations for public purposes. They may purchase or build town-houses—where the meetings of the inhabitants are to be held—school-houses, where the youth are to receive instruction—poor-houses, where the pauper is to be supported—police stations, where the criminal may be temporarily restrained, for these are among the recognized functions of government. So, in case of insurrection or war, they may coöperate with the general government in suppressing the one or in bringing the other to a successful termination. These are only among the illustrations of the exercise of corporate powers and duties. They are public corporations, created and existing only for public purposes, not private corporations for the purposes of traffic or manufacturing.

The entering into a contract is a consensual act. The forma-

tion of a partnership is a contract The consent of the partners is necessary thereto. The legislature could not by any statute compel individuals without their consent to be partners and to assume the liabilities of partnership—and give the control of the funds to those who do not and take it from those who do furnish the capital. But giving the town authority to establish manufactories is thus coercing a partnership. It is despotically taking the control of capital from its owners and transferring it to others. It is enabling the majority of a town to incur unlimited indebtedness. If the towns can embark in manufacturing, they can create a partnership, by which all the property of the inhabitants is pledged to meet the contingencies of business. If they can embark in manufacturing, why not in mercantile pursuits of any and every description? What conceivable limits are there to the spirit of reckless speculation, especially when those without means may have the power to dispose of and control the estates of those who have?

Capital is the result of foresight, intelligence and frugality. It is not created by the issuing of bonds. It is the fruit of saving. Men only save when protected in the enjoyment of their accumulations. When not so protected, one of the strongest motives to save ceases, and with the cessation of the motive, the accumulation of capital ceases. When the government is despotic, when private right is disregarded, when there is no security for and no protection of property, men will cease to accumulate, for they will not save to be robbed.

If it were the special object to lessen industry, to diminish capital and to prevent its increase, the most sure and effective mode to accomplish the result—there could be none more so—would be to withdraw the control of capital from its owners and to transfer its management to others, thus creating the greatest possible insecurity. The more numerous the body of men controlling its use and employment, the greater the chances of mismanagement, fraud, waste, and consequent loss. The less the State interfers with industry, the less it directs and selects the channels of enterprise, the better. There is no safer rule than to leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital. If it were not so, as a general rule, or the giving of notes, guardians should be appointed, and who would guard the guardians?

To give the power suggested would be to enable the majority, according to their own will and pleasure, to give, lend and invest the capital of others, and to the extent of the power exercised, it would be to deprive the owners of the ability to give, lend or invest their own funds. Let this be done, and the remaining rights of property would be hardly worth the preserving.

To do this, would be to impair or take away the inherent and unalienable right of "acquiring, possessing and protecting property;" to deprive men of their property neither "by the judgment of their peers" nor "by the law of the land;" to take private property for private uses without compensation, and to undermine the very foundations upon which all good governments rest.

We therefore answer the questions proposed in the negative.

JOHN APPLETON,
C. W. WALTON,
CHAS. DANFORTH.

Regarding the question submitted to be substantially this—Can the Legislature authorize towns, by gifts of money or loan of bonds, to aid purely private enterprises, in nowise connected with the public use or public exigencies?—we answer in the negative.

EDWARD KENT,
RUFUS P. TAPLEY.

To the House of Representatives:

In answer to your request I have the honor to remark, that I concur in the opinion drawn by Chief Justice Appleton, provided his conclusions are drawn from premises rightfully assumed—which are, whether the legislature can constitutionally authorize towns to assist individuals or corporations to carry on individual enterprises for their own private benfit without regard to any public advantage.

If your enquiries were so restricted and limited, then it may be questionable whether that "solemn occasion" has occurred which would require an opinion from this Court; for I apprehend that no member worthy of a seat in your House, would for a moment hesitate to answer the enquiries in the negative.

Yet I apprehend (although doubtingly) that your questions were intended to include such legislation as would embrace the public interest. If so they would include the past as well as future enactments. We should not be required to settle by solemn decision constitutional questions, *ex parte*, where millions of dollars are involved, in the absence of the parties directly interested; and in cases too where no complaint has ever been made to us by any party directly or indirectly concerned.

Ordinarily, courts are required to pass upon the constitutionality of acts already passed; if called upon before that time to express an opinion, they either become *quasi* lobby members, or a component part of the legislature, thereby abolishing one independent and co-ordinate branch of the government.

In conclusion, and in answer to your enquiries, so construed as I have intimated, I reply, that I shall consider all special or private Acts to be constitutional, which have passed the ordeal of the House and Senate, been approved by the Governor and accepted by the corporation assumed to be benefitted thereby, and which the legislature considered to be of public advantage, until an aggrieved party in a court of law or equity appears and shows to the contrary.

Respectfully, &c.

JONAS CUTTING.

To the Honorable Speaker of the House of Representatives of the State of Maine:

I have the honor herewith to transmit my answers to the interrogatories propounded to me, as one of the Justices of the Supreme Judicial Court, by an order of the House of Representatives, passed January 25, 1871.

The duty of expounding the constitution of the State is the most delicate and important one that the constitution devolves upon the justices of this court. The gravity of this duty, and the responsibility for its intelligent, upright and independent performance are, perhaps, on no occasion more conspicuous than when the members of the court are solemnly called upon to pronounce, beforehand, upon the authority of an equal, co-ordinate, and independent branch of the government, under the constitution. While the momentous nature of such an occasion makes this duty by no means less imperative, it oftentimes renders it far more dif-

ficult of performance, by intensifying the necessity for a more careful analysis of the principles of interpretation, and a more thorough scrutiny of the authorities.

It was, therefore, with unaffected diffidence that I approached the consideration of the subject of the interrogatories propounded; and whatever estimate may be put upon the correctness of the conclusions to which I have arrived, I am conscious that they are not formed without deliberate consideration, and are such as reason, authority, and a proper regard for the public welfare compelled me to adopt.

It is to be observed, at the outset, that there is a marked distinction between the legislative authority of the National government, and that of the State government, resulting from the distinctive nature of the two governments. The National government being one of derivative and limited powers, Congress can only exercise those powers that are conferred upon it by the constitution. On the other hand, the State government, representing the sovereignty of the people, the State Legislature possesses all powers of a strictly legislative character which reside either in the State or the people, not limited or restricted in the State or National constitutions. With these qualification, the legislative functions of the several state legislatures are as absolutely unlimited as those of the British Parliament. Hence the legislative powers of the respective state legislatures differ according to their several state constitutions; and before the decision of any state court, in regard to the constitutionality of an act of the legislature thereof, is receivable as authority for a like statute in another state, it is necessary first to ascertain whether the grant of legislative authority in the two states is the same.

The restrictions upon the authority of the Legislature in this State are three-fold. 1, A law must be "reasonable." 2, It must be "for the defence or benefit of the people of this State." 3, It must not be repugnant to the constitution of this State or that of the United States.—Con., Art. 4. Part 3, Sec. 1.

Whether a proposed enactment is reasonable or not, in the purview of the constitution, is a question primarily addressed to the sound discretion and intelligent judgment of the legislature; and in general its decision of that question is conclusive. While there are exceptions to this proposition, they are not among the probabilities of legislation, and must be of an extraordinary character to warrant the interference of the judiciary. But when there is

a clear excess or abuse of legislative authority, in this respect, the court will not abdicate its prerogative, but will interpose its constitutional right to check or control it.

Whether a law is "for *the benefit* of the people of this state," *in the sense of that word when the sovereign power of taxation is to be invoked for its accomplishment,* is, perhaps, a question more difficult of solution. This language is broad and comprehensive, and is to be construed in no narrow or illiberal sense, but in a manner that shall enable the legislature to take enlarged views of State policy, State interests and necessities, to employ the public revenues to give effect to these views, and authorize towns and cities to fulfil the legitimate purposes of their organization by taxation or otherwise.

The benefit sought may be preventive or remedial, moral or sanitary, pecuniary or educational, but *the purpose* of the law that involves the necessity of taxation must be *public.* This is the intendment of the constitution, as well as the essence of the meaning of the word *taxation,* which has for its only legitimate object the raising of money for *public purposes and the proper needs of government.* The contemplated benefit may not reach to all parts of the State; it may be *local* in its character, applying to the people within certain specified territorial limits, who may reasonably be expected to derive some peculiar or special advantage or benefit from a proposed legislation, or work of public convenience and necessity which will not be enjoyed to the same degree by other portions of the State.

Such are the laws providing for the survey of lumber, the inspection of lime, hay, and other articles, the taking of fish in certain waters, the establishment of local tribunals, sanitary and police regulations, public parks and public libraries, the making of roads and bridges, the building of drains and aqueducts, the support of the poor, the widening of streets, the supplying of gas or water to towns or cities, and the erection of public halls and public institutions of learning. It is not the *purpose* of these laws to confer pecuniary benefit upon private individuals, or increase the value of private property, or furnish employment for the people, in a particular district, but it is to subserve the *public* convenience, and promote the *general* welfare. The benefits, too, of such laws may be accessible, in general, to all who reside in the territorial limits to which they apply. They are *public* laws in their design, purpose, mode of application and effect; and, for the most part, meet

wants which private enterprise cannot supply. These laws, too, are administered by officers appointed by State authority, or elected by the local constituencies. Laws of this description have for a long period been enacted by the wisest legislators, upheld by the most learned courts, and sanctioned by the most eminent statesmen of the land.

There is, however, a broad and well defined distinction between the *purpose* to be subserved by these laws and the *purpose* of "laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to carry on manufacturing."

The *direct purpose* of the laws I have been considering is *public*. How is it with the law proposed? The argument in support of the constitutionality of such a law is, that the establishment of the business of manufacturing in a town or city promotes the public prosperity, by increasing the value of private property, inviting in capital and population, and furnishing employment for the people. The direct purpose of the proposed law is thus *private* in its character; it is to increase the means and improve the property of some, and furnish employment to some, while the benefit, if any, to the *public* is only reflective, incidental or secondary. Can a tax be constitutionally imposed by municipal corporations to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom?

Another argument in favor of such legislation is that certain existing local enterprises will not be self-supporting, and that certain others will not be established, if such compulsory aid is not furnished—an argument in conflict with the theory that a business that cannot stand alone might as well not stand at all, and that the law of demand and supply is the safest regulator of business. But does the inability of A to carry on or establish manufacturing afford any constitutional ground for taxing B to help A do so? Besides, what guaranty is there that A's business will be self-supporting with *one* instalment of B's property, and that he may not call for another, and yet another? And what claim has manufacturing to such preference over other branches of industry, commerce, trade, agriculture and the mechanic arts? These are honorable and beneficial pursuits, and the constitution of this State will be searched in vain to find any powers given to the legislature to authorize towns and cities to discriminate against these employments and in favor of manufacturing, in the matter of taxation. If municipal corporations may assess a tax upon their citi-

zens, by authority of law, to encourage one, it may each and all the branches of necessary industry; and the question is reduced to this: has the legislature the constitutional authority to authorize the towns and cities in this State to tax their inhabitants for the purpose of aiding, establishing or carrying on, not only manufacturing, properly so called, but, also, farming, ship-building, trading, inn-keeping, printing, banking, insurance, and any other branch of beneficial industry?

The fact that such legislation is of recent origin is, at least, calculated to cast doubt upon its constitutionality; and it is so inconsistent, too, with the common law doctrine of the purposes, powers and duties of municipal corporations, the generally conceived notions of legislative authority, and of the inviolability of the right of private property, that the statement of this question almost instinctively elicits a negative answer. The object sought by this legislation is confessedly to be accomplished by municipal taxation. The tax, when collected and bestowed upon the favored individual or corporation, becomes at once the private property of the recipient. Henceforth it is such party's to use, control and dispose of. If this may be done, what becomes of the freedom of industry and the security of private property? If the Legislature may authorize towns and cities to raise a thousand dollars for such purpose, by taxation, it may an indefinite sum, limited only by its own discretion, and the will, cupidity or caprice of the required majority of the municipality. Under such legislation, what citizen can of a truth say, "My property is my own, to use, control and dispose of at pleasure, and is not subject to the *paramount right* of my neighbors, to divest me of, and bestow upon another, or appropriate to *their own* benefit?" To exact such a tax is to compel A to pay a bounty to B, for B's private benefit, on the ground that B's use of it *may* secondarily result in some indefinite benefit to A. Such a tax lacks the distinguishing characteristic of legitimate taxation—*a public purpose.* By inhibiting the taking of private property for public use, without just compensation to the owner, and then only when the public exigencies require it, the constitution impliedly prohibits the taking of private property for *private* use. The tax in question violates the rights of private property. It is a tax for *private purposes,* and, therefore invalid—an illegal exaction, under another name, and clearly repugnant to the constitution.

The class of cases under consideration differs in principle mate-

rially from those where towns and cities are authorized by the legislature to aid railroad enterprises by loan of their credit or subscription to the stock of railroad corporations. The constitutionality of such legislation has for a long time been sustained by the court in this State and by the courts in more than twenty other States, and their decisions have been approved by the Supreme Court of the United States, that court having repeatedly held that the inhibition against taking private property for public purposes without compensation, contained in the constitution of the United States, does not extend to State legislation, but is restricted to the legislation of Congress, and that it is the exclusive right of State courts to determine the constitutionality of State laws, when they are not repugnant to the constitution of the United States, or the constitutional enactments of Congress.

The reason for the distinction between these two classes of cases is obvious. Railroads are manifestly of great *public* convenience, and necessary not on the ground that they incidentally serve to develop the resources of the country, and increase the local value of private property in the municipalities through which they pass, or at which they terminate, but because they primarily and directly afford the necessary facilities to the public for intercommunication between remote sections of the country as *public highways*, which in general can only be furnished through the exercise of the right of eminent domain. The primary *purpose* of railroads is thus a *public* one, and on this ground the courts of the several States have held, with singular unanimity, that it is competent for the State legislatures to authorize railroad corporations to exercise the right of eminent domain over the private property needed for their use. It is *only* on the ground that *the purpose* of railroad corporations is *public* that the constitutionality of such legislation has been upheld, or that it can be maintained. The enhancement of local values and the development of local resources, the multiplied demand for labor and the increase and concentration of capital and population, brought about by the instrumentality of railroads, are *incidental* considerations, and afford no sufficient warrant for conferring upon railroad corporations the right of eminent domain.

Not only is the *public* character of railroad corporations established by their office, as public highways, and by the grant of the right of eminent domain to them, but it further appears from the various legislative enactments in regard to the construction of these roads, the provisions for the safety of the public, the con-

stant supervision to be exercised over their management by the railroad commissioners of the State, and the penalties imposed for their neglect or violation of these regulations.

I am aware of the recent decisions in some of the western States against the constitutional right of the State legislatures to authorize municipal corporations to loan their credit to, or take stock in railroad corporations. But after the earlier, oft repeated, and, as it seems to me, better considered opinions of the courts of other States, in support of this right, I do not feel at liberty to accept the conclusions of the courts in Iowa, Wisconsin and Michigan upon this subject. I am, however, disposed to adopt the language of the Supreme Court in Pennsylvania in *Hammond* vs. *City of Philadelphia*, Am. Law Reg. for July, 1869: "We must say at some time to this tide of special taxation, 'Thus far shalt thou go, and no farther.' To our own decisions, so far as they have gone, we mean to adhere. We are now asked to take a step much in advance of them. This we would not be justified, by the principles of the constitution, in doing."

In discussing the questions propounded, I have not taken into consideration the authority of the Legislature to determine conclusively whether a law "is for the benefit of the people of this State," in respect to general matters of legislation, but *only where a law requires the exercise of the power of taxation.* The power of taxation is a sovereign power; and it has been uniformly held that it is the province of the Supreme Court in the last resort to decide whether this power has been exercised in derogation of the constitution. Without such authority in the Court, it is difficult to see what power it has, under the constitution, to prevent, check or control the excess or abuse of legislative authority, in respect to matters of the gravest import to the people.

Neither have I, by any means, considered the case of laws designed to meet the public exigencies, when, by some extraordinary calamity, the homes, houses, places and means of business in a town or city have been destroyed, and its inhabitants have thereby been rendered houseless, homeless, and destitute of employment.

I have, therefore, to answer the several interrogatories proposed in the negative.

I have the honor to be, yours faithfully,

J. G. DICKERSON.

BELFAST, February 13, 1871.

BRUNSWICK, February 10, 1871.

To the Honorable Speaker and House of Representatives of the State of Maine:

It is obvious that the scheme of legislation referred to in the questions propounded by you, under date of January 23, 1871, involves, in some of its phases, a *necessity* for taxation, and, in all the others, a *liability* to be obliged to resort to it.

We are called upon, therefore to consider and discuss the constitutional limits of this power of taxation.

I answer the first question in the negative, because—

(1.) It is against common right, and beyond the legitimate sphere of legislation, to raise, under color of taxation, any sums of money except those which are required to promote the appropriate objects for which the government was instituted. These objects are defined in the preamble to the constitution of our State.

To that constitution, which is the source and origin of the authority which the legislative department may exercise, we must look to ascertain the nature and limitations of the power of legislation in this respect.

The preamble declares that the people of Maine entered into that compact which lies at the foundation of our government, "in order to establish justice, insure tranquility, provide for our mutual defence, promote our *common* welfare, and secure to ourselves and our posterity the blessings of liberty." Any object which cannot be classed under one or other of these heads is beyond the proper scope of legislation. To raise money for the purposes above enumerated is the proper and the only legitimate exercise of the power of taxation.

"The revenues of the State are a portion that each subject gives of his property in order to *secure* or to *have the agreeable enjoyment of* the remainder. To fix these revenues in a proper manner, regard should be had both to the necessities of the State and those of the subject. The real wants of the people ought never to give way to the imaginary wants of the State.

"Imaginary wants are those which flow from the passions and from the weakness of the governors, *from the charms of an extraordinary project*, from the distempered desire of vain-glory, and from a certain impotency of mind rendering it incapable of with-

standing the attacks of fancy. Often has it happened that ministers of a restless disposition have imagined that the wants of their own little and ignoble souls were those of the State."—*Montesquieu, Spirit of Laws.* Book XIII., chap. 1.

Here, where all citizens are in a certain sense "governors" and "ministers" as well as "subjects," and projects for legislation looking mainly to private gain and emolument, though well cloaked under specious pretences of regard for the public weal, are as numerous as the locusts in Egypt, these suggestions of the wisdom and prudence of our old days ought to be carefully regarded; and it is especially becoming in our legislators to be cautious not to overstep the constitutional boundaries of their authority, nor to inaugurate a system of legislation the manifest end and aim of which is to enhance private gain at the public expense.

See now how the whole body of our legislation during the fifty years that we have existed as a State, ranges itself under one of the heads enumerated in the preamble to the constitution, "to establish justice, insure tranquility, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the benefits of liberty."

For these purposes taxation is legitimate, and as to some of them, at least, where the power can be more conveniently and intelligently exercised in the primary assemblies of the people, in their town meetings, the power of the legislature to authorize the towns to raise the sums necessary within their own borders, cannot be doubted.

But under which of these heads can projects like those referred to in your interrogatory be classed? Doubtless the specious but deceptive claim of their advocates will be that they tend to promote the common welfare. But to know for a certainty that that claim cannot be allowed, we have only to look at the definition of the word common when used in such a connection. "Common—belonging to the public; having no separate owner; general; serving for the use of all—universal; belonging to *all.*"—*Webster's Dictionary.*

It is to promote the common welfare as thus defined, that you have authority to legislate and to raise money by taxation, and you can confer upon towns no delegated authority exceeding this. In fine, it is a principle that lies at the very foundation of all legitimate exercise of the power of taxation that the revenue shall be raised for public purposes alone, and not for private profit and

advantage. This alone makes the distinction between lawful taxation and public plunder.

But the subtle and sophistical argument of those who are seeking their own private advantage by the use of the public purse, is that the successful establishment of a manufacturing business, though the profits of it enure to private individuals or corporations, is indirectly a benefit to the community. But this is not an answer—it is simply a pretext for an evasion of the fundamental principle above stated. What is the object of the proposed legislation? There can be but one answer.

It is proposed "to pass laws enabling towns by gifts of money or loans of bonds *to assist individuals* or corporations to establish or carry on manufacturing of various kinds." The business and its emoluments are to belong to and be controlled by the individuals or corporations to whom these gifts of public money or loans of public credit are to be made. It is obvious that the aid to the individual or corporation is the primary and proximate object of the law, and that the public benefit is incidental and secondary—too remote to be termed an object of the law even if it were not also merely contingent upon the skill and good fortune in business of the party to whom the donation is made.

All productive employments honestly carried on are creditable to their projectors, and if prudently managed with due heed to the inexorable laws of demand and supply are likely not only to make ample returns to those having the control of them but to be incidentally advantageous to the community in which they are located; but it passes the limits of constitutional legislation to make any one of them a pensioner upon the public funds derived from unwilling contributions levied upon the rest in the form of taxes. This violates the cardinal principle that the State shall give all alike the benefit of equal laws without favoritism or partiality.

In testing the constitutionality of a law imposing a public burden, the naked question is—Is the object one of those which the government was instituted to provide for according to the terms of the compact into which the people entered when they formed their constitution, or is it one which by long settled usage has been left to be fostered by private enterprise, industry and liberality, because its profits flow directly into the pockets of private individuals or corporations, and the benefit which it confers on the community is only incidental and secondary? If it falls within the latter class it is without the pale of constitutional legislation.

It is the plain legal duty of those who seek a profit for themselves out of the carrying on of a manufacturing employment to furnish the capital or credit necessary to maintain it. If the undertaking is too great for a single individual, the State stands ready to furnish to all alike the means of combining for the purpose under liberal and equal laws as an association or as a corporation, but under our constitution as it stands, it is not at liberty to go further and assess the moneys with which the experiment is to be tried upon those who are entitled to no part of the dividends, if any accrue. In Freeland *vs.* Hastings, 10 Allen 570, one of the questions before the Supreme Court of Massachusetts was, whether it was competent for the legislature to pass a law authorizing towns to reimburse those who had procured substitutes. Bigelow, Chief Justice, giving the opinion of the court, remarks as follows: "It is obvious that money paid by an individual to procure a substitute in his stead is not paid primarily or chiefly for a public object, but to purchase a personal exemption from a duty or liability to which he is subject by law." And he stated the conclusion of the court upon the question in these terms: "We know of no rule or principle on which a valid authority to raise money by taxation to be appropriated to the re-payment of money expended by individuals for such a purpose could be granted by the legislature. A statute conferring such a power would be obnoxious to the objection that it authorized the raising of money by taxation for the exclusive benefit of particular individuals; that it relieved one citizen from the performance of a legal duty at the public expense, and appropriated money for a private purpose which could only be raised and used for public objects. It is hardly necessary to say that a statute designed to accomplish such purposes would be against common right, and would transcend the authority conferred on the legislature by the constitution."

The law which contemplates the raising of money by taxation to aid individuals or corporations in establishing or carrying on a manufacturing business for their own benefit and behoof, is liable to the same objections, and equally transcends the authority conferred on the legislature by the constitution.

Is it said that the rule laid down is not an inflexible or universal one—that there are exceptions—that the law providing for the support of paupers is one? Not so. Among the rights declared natural and inherent in all human beings by our constitution, is the right to life, and that necessarily includes and carries with it

a right to the means of sustaining life. It is not merely common humanity, but common justice, that demands that no one shall be suffered to languish for lack of food, clothing and other necessaries of life. To provide the means of preventing it is strictly within the line of public duty.

Thus far we may safely proceed toward an agrarian distribution of the fruits of the earth and the products of human industry; and in doing so we are only establishing justice and insuring tranquility. But this is no precedent for going further, and furnishing to any beggar, however wealthy, influential or clamorous, (and these are they whose applications are likely to be successful,) out of the public treasury the means of trying some pet scheme for adding to his own gains at the public risk.

Neither can it be said that the statutory provisions for education, nor the occasional grants made to seminaries of learning, are liable to objection on the same score. One of the declared objects of the constitutional compact is to secure to ourselves and our posterity the blessings of liberty. The most effective instrumentality to this end is found in our schools and seminaries. Indeed, the nearest approach to an exception to the fundamental principle we have adverted to that has ever been in any manner recognized as valid by the courts, is to be found in the acts authorizing towns to loan their credit for the purpose of aiding in the construction of railroads.

It would be easy to make a distinction between that class of acts and those which are now proposed, in the very vital matter of the relation which railroads bear to those objects which are confessedly public and expressly recognized in the constitution as the objects for which the government was formed, and to the whole people, as a means of intercommunication, but more especially because they are becoming almost indispensable in order "to provide for our mutual defence," affording as they do means of transportation for men and munitions of war in numbers and quantities and at a rate of speed which can be attained in no other way.

But the question of the validity of these acts is not the one now before us, and the true answer to those who rely on their analogy to the system of legislation here and now under consideration as an argument in favor of the validity of the latter, is that the fact that one step of doubtful propriety has been taken is never a good reason for taking a further step in the same direction,

but rather, on the contrary, it should induce us to pause and revert to fixed principles.

I have thus far been considering the class of acts referred to in your first question authorizing towns to make gifts of money or loans of credit to assist individuals and corporations to establish or carry on manufacturing business of various kinds within or without the limits of such towns; and I have called attention to a fundamental principle regulating the power of taxation which forbids it for any but public objects; and have shown that those are not public objects which cannot be classed with those to secure which government was instituted, nor can those burdens be said to be imposed for public purposes which enure primarily to the advantage of private individuals or corporations, affording to the community only a secondary and incidental benefit.

We are now to consider the question of the constitutional validity of the class of proposed acts referred to in your second question—acts authorizing towns to establish manufactures on their own account, and run them by the ordinary town officers or otherwise. It seems hardly possible that any one will be found to affirm that undertakings of this description can, by even the greatest latitude of construction, be included among the objects for which the government, and the power to raise money by taxation to meet the wants and accomplish the aims of the government, were created. What has been already said about the invalidity of assessments made for any other than the legitimate purposes of government applies to the legislation referred to in the second question.

But I answer both these questions in the negative, because—

(2.) Such legislation would be utterly subversive of so much of Art. I, Sec. 1, of the constitution as affirms the right of our citizens as individuals to acquire, possess and protect property—a right which may be conveniently designated as the right of private property.

Taxation, however heavy, if limited to the objects which the government was instituted to secure, does not infringe this right, because its very existence depends upon the maintenance of civil government; but taxation for any other purpose is a practical denial of the right, and a handing over of every man's property to those who can command a majority of the votes in his State or precinct.

It seems unnecessary to elaborate or illustrate these positions, or to attempt to prove the self-evident proposition that government was not instituted for the purpose of engaging in manufactures or trade. The right of private property is not only declared in the constitution to be one of the natural rights of all men, but its security is guarded by further constitutional provisions forbidding the taking of such property, even for public uses, without just compensation, nor unless the public exigencies require it.

Touching this right, Weston, C. J., remarks in Comins *vs.* Bradbury, 10 Maine, 449, most truthfully as follows: "And the history and experience of mankind prove that it is essential to individual and to public prosperity, that every man should be secure in the enjoyment of the fruits of his own industry. The force of this principle cannot in any degree be impaired, without relaxing the springs of exertion and enterprise."

What must necessarily be the effect of this proposed intrusion of municipal organizations, backed by the power of taxation, into the field which immemorial usage has hitherto reserved to private energy and enterprise? What private operator could venture to compete with those who should be made the recipients of the public favor, or with the municipality in which he lives controling all the property taxable in that precinct, for the support of its own operations in the same line? Government monopolies in manufactures and trade have sometimes existed in despotic or semi-despotic governments; but the inevitable effect of them is "to relax the springs of exertion and enterprise."

It is true it may be said that this consideration bears upon the expediency rather than upon the constitutionality of these schemes; but behind this stands the fatal objection to any legislation of the description proposed, that when you compel a man to contribute, at the fiat of a town meeting, to objects other than those which the government was framed to secure, you destroy his constitutional right to possess and protect property, which he can thereafterwards only hold subject to the determination of a majority of his towns-people.

The people of Maine have not yet adopted a constitution which, upon any reasonable interpretation, makes the tenure of private property so uncertain.

WILLIAM G. BARROWS.

To the House of Representatives of the State of Maine:

I have the honor herewith to submit the following communication in answer to the interrogatories annexed.

RUFUS P. TAPLEY.

OPINION BY TAPLEY, J.

These inquiries do not leave my mind entirely clear as to the information sought by them. If they relate to purely private enterprises in nowise connected with public uses or the public exigencies, I answer without hesitation in the negative. This conclusion is so clear to my mind and so free from all doubt that I can hardly persuade myself that the House of Representatives really needed or desired the opinion of any one upon the subject. Coupled with this fact is the fact somewhat notorious that an opinion is somewhat prevalent that the aid referred to may legitimately be given when the enterprise is regarded as beneficial both to the public, and the private individual. If the inquiry relates to those cases where the public interest as well as private benefit is to be subserved, something more than a simple affirmative or negative answer seems to be required. The doubt which remains in my mind as to the real design and purpose of the inquiry must be my apology if I go beyond their scope and purpose.

In the determination of questions of law the court always receive great aid from the researches and discussions of able counsel acting for interested parties, and when questions are presented in the manner these now come to us we proceed to their determination with some hesitation and embarrassment.

The reflection also that the same questions may arise between party and party in the course of legal proceedings in the courts, together with the fact that other official duties limit and circumscribe us in the time to be devoted to the investigation, still farther increase the embarrassments of such occasions.

We can only proceed in the investigation upon the views of the law appertaining to the question as they appear to us upon first presentation, and anticipate as well as we can, the ground which may be urged for or against the proposition presented, never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion.

Under whatever form of proceeding the aid contemplated is furnished in any given case, I think if justified its justification must

be found in that principle of all governments which invests the sovereign power with the right to take and use any property within its jurisdiction for necessary public uses. This is a principle not peculiar to our government or our form of government, but one existing in all governments, and one not resting upon edict but one resulting from necessity. It is sometimes termed the Right of Eminent Domain.

Eminent Domain.

Chancellor Kent says of this right,[1] "Private property must in many instances yield to the general interest. The right of eminent domain, or inherent sovereign power, gives to the legislature the control of private property for public uses, and for public uses only."

Judge Story says,[2] "The right of eminent domain is usually understood to be the ultimate right of the sovereign power to appropriate not only the public property, but the private property of all citizens within the territorial sovereignty to public purposes."

Numerous definitions of this right might be cited, all of which convey the same idea. Under our constitution a limitation is imposed upon this right; it is in these words: [3] "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."

Under this provision of the constitution it has been said by the Supreme Court of this State in one case that[4] "the right of eminent domain is an attribute of sovereignty, and confers upon the Legislature authority to take private property for public uses when the public exigencies require it, subject only to that provision in our constitution which exacts just compensation."

In another case it is said,[5] "except for public uses private property may not be taken by the dominant power of the State, nor for public uses without just compensation; nor even then unless the public exigencies require."

Without entering at this time into a discussion or recapitulation of the reasons for the rule, and the necessities which require it, I hold that the taking of private property against the will of

[1] K. Com. Vol. II, page 333.

[2] 11 Peters R. 641.

[3] Laws Maine, Art. 1, Sec. 21.

[4] 47 Me. 345.

[5] 40 Me 317.

the owner must find a justification in some public use and under some public exigency, and accompanied by a just compensation, and this is true whether the property be taken by a direct seizure of it in specie and irrevocably committing it to a use, or by the indirect method of a loan, accompanied by some fancied or real security for a subsequent reimbursement.

Some distinction has been sought to be made between the right to seize specific articles of property for a public use, and obtaining money through the ordinary forms of taxation, and we sometimes hear of a justification under the taxing power of the government. I am not able to perceive the soundness of the distinction. I understand that the right and power of taxation rests upon the right as described by Judge Story, "of the sovereign power to appropriate, not only the public property, but the private property, of all citizens within the territorial sovereignty, to public purposes." The difference is in the mode of *taking* only.

The use in both instances is a public one, and in both instances the right is founded upon the same principle. Certain principles govern the modes of procedure in each case, but the elemental authority rests upon the principle that the property within the sovereignty is held subservient to the necessities of the sovereignty.

Public Use.

What is a public use is abstractly a question of law, and like many other unambiguous expressions having a technical meaning is not so easily defined in other terms as one would ordinarily suppose. It must undoubtedly be a use designed to subserve some public interest or demand, an interest or need of a public character as contra distinguished from that of a private character. It need not be a use in which all the individuals of the public are equally interested. One may be benefited very much more than another, and yet it may be a public use within the meaning of the constitution. Numerous cases have decided this point, and it matters not that some private interest may be subserved to a much higher degree than the public, it may nevertheless be, within the purview of the constitution, a public use.

Public Exigency.

So it may be said that what is a public exigency may be regarded as a question of law. Exigencies may be of very different

degrees. Very different circumstances may produce exigencies. One may present an imperative demand and absolute necessity, an indispensable want and need, another may show that a certain use or object is highly desirable and will result in a manifest advantage and benefit to the public. The degree of exigency is not declared by the constitution. It is stated in general terms, but it being in the nature of a limitation upon the general law of eminent domain I think it may well be assumed that something beyond a possible or probable advantage or benefit of a slight character was designed. That the mere fact that some unimportant use or benefit might be received is not enough, but that it must be such an use as the public needs and requires for its welfare and safety; a substantial thing it ought to be possessed of.

Just Compensation.

This term is so clear that it needs no comment by the court at this time. If any questions can arise concerning it, they arise rather upon the mode of determining what will amount to a just compensation rather than the meaning of the term.

This constitutional provision,[1] of which I have spoken as imposing a restriction or limitation upon the general law of eminent domain, evidently refers to the power to take the property in specie of one man and use it for the public, rather than that power possessed by the sovereign to seize in the *form* of taxation a ratable proportion of the whole for the benefit of the whole. When the property of one man is seized and used for the benefit of the whole community it is just and equitable that the community should compensate him for his loss and their gain. He among others of the community contributes ratably to that compensation. When, however, for the ordinary purposes and expenses of the government all are called upon to contribute according to the property they possess, the burden is equally borne by all, and each has his compensation in the general good promoted.

So far there is no difficulty in giving an answer to the inquiry proposed. The difficulties which arise are of a different character and are upon questions of fact rather than questions of law. The perplexing question in some cases is, whether or not the object is a public one; whether the uses to which the means sought, are to be applied are public uses; and if property in specie is to be

[1] Sedgwick on Con. Law, 554.

seized whether a public exigency exists requiring it. If these facts exist, the *right* to take is established, and the only remaining question is one of policy and propriety under the circumstances.

As before remarked, whether or not these facts exist is not a question of law for the court. The result of such an investigation must depend upon circumstances made apparent by proof. In one instance clearly and indubitably shown, in another less clearly shown and of doubtful existence, and in another wanting entirely in all those elements necessary to bring it within the rule.

When facts are agreed, the results which legally flow from them are those produced by an application of the law, and what the results are thus flowing from the facts agreed, are questions of law. Were we here to give a simple affirmative or negative answer to the inquiries made we must decide not only the law (unless the first construction we have given your inquiry is the right one,) but the fact. We must go beyond the judicial line of inquiry and enter upon another. The decision of the one would be *judicial*, and as such entitled to respect coming from the court of last resort. The decision of the other would be *extra* judicial, that of so many citizens, founded upon facts happening to be within the knowledge of those who form the opinion, and entitled to no more consideration than that of other persons equally intelligent, formed upon an imperfect knowledge of the facts, and as courts are human, arriving in many instances to widely different conclusions.

The *law* is not thus uncertain; it rests upon certain well defined and unquestioned principles.

The inquiry arises, then, who shall determine the question of fact? In my opinion it is the Legislature: "All power is inherent in the public, and instituted for their benefit," is the language used in the "Declaration of Rights." They must determine, through the legislative department, when a law becomes necessary, and what has become necessary. They must determine whether a thing is or not needed for a public use, and whether the public exigency requires it. Having so determined, there is no appeal to the judiciary. The judiciary are but a co-ordinate department of the government. They cannot make or unmake laws. When a case arises for the application of the law, they determine what the law is applicable to the case. If they should find two laws laid down relative to the matter, one a legislative enactment, and the other a constitutional provision made by the

people before the legislature was formed, the law declared in the constitution is to them the paramount law, and the case is decided by that paramount law.

In this there is no conflict of action. It is a simple determination of each cause as it arises, upon the laws as they exist. The common law must yield to the statute, and the statute to the constitution.

In Mr. Cooley's work upon Constitutional Limitations, he says: "The authority to determine in any case whether it is needful to exercise this power (of taking private property) must rest with the State itself."[1]

Mr. Justice Denio, in the case of people *vs.* Smith, 21 N. Y., says: "The necessity for appropriating private property for the use of the public, or of the government, is not a judicial question. The power resides in the legislature. * * * The exercise of the right of eminent domain stands on the same ground with power of taxation. Both are emanations of the law-making power. They are attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts."

Chancellor Kent says, "it undoubtedly must rest as a general rule in the wisdom of the legislature to determine when public uses require the assumption of private property."[2]

In the case of Spring *vs.* Russell, 7 Gre. Rep. 273, Chief Justice Mellen giving the opinion of our court, says, "It is the unquestioned province of the legislature to determine as to the wisdom and expediency of a law, and how far the public interest is concerned."

When they arrive at the practical point of determining whether in a given instance the case is shown to be within these rules, the constituent must rely upon the intelligence and integrity of his representative. It is upon these he must rely in regard to all matters of legislation; with respect to the confiscation of his own property, in undue and unequal proportions compared with the contributions of others, he may rest securely upon the constitutional requirement of compensation when one mode is pursued, and an equal apportionment upon all according to value, when the mode of taxation is pursued.

[1] Page 528.

[2] 11 Kent's Com. Sec. 34, p. 415.

Power of Taxation.

Perhaps something should be said concerning the general power of taxing possessed by the government—or rather something concerning the limitations, if any, imposed upon it.

Taxes should be imposed or levied for those purposes which properly constitute the public burthen. They are levied to secure the performance of public duties, and relieve public necessities. These public burthens, public duties and necessities, are often the call of the public good and general welfare of the people, to be promoted through a great variety of channels, and the legislative department being the judge of those, the uses for public purposes has no limitation, but that dictated by legislative wisdom, discretion and conscience. A few citations of the opinions entertained by eminent men may serve to throw some light upon it.

In the same work from which I have before cited, Cooley's Constitutional Limitations, it is said: "The power to impose taxes is one so unlimited in force, and so searching in extent that the courts can scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use and enjoyment; to every species of possession; and it imposes a burden which in case of failure to discharge, it may be followed by seizure and sale, or confiscation of property. No attribute of government is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life, than through this power."[1]

Chief Justice Marshall said, "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised in the object to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the

[1] Page 479.

legislature and on the influence of the constituents over their representatives to guard them against its abuse."[1]

In another case the same learned jurist said: "This vital power may be abused, but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."[2]

Mr. Cooley says, "in determining this question the legislature cannot be held to any narrow or technical rule. Certain expenditures are absolutely necessary to the continual existence of the government, but as a matter of policy it may sometimes be proper and wise to assume other burthens which rest entirely on considerations of honor, gratitude or charity. The officers of the government must be paid, the laws printed, roads constructed and public buildings erected; but with a view to the general well being of society, it may also be important that the children of the State should be educated, the poor kept from starvation, losses in public services indemnified, and incentives held out to faithful and fearless discharge of duty in the future, by the payment of pensions to those who have been faithful public servants in the past. There will, therefore, be necessary expenditures, and expenditures which rest upon considerations of policy alone, and in regard to the one as much as to the other, the decision of that department to which alone questions of State policy are addressed must be accepted as conclusive."[3]

In one case it is said, "if there be the least possibility that the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice, and the determination of the legislature is conclusive."[4]

The history of the State for the half century of its existence furnishes me no evidence of a want of intelligence, integrity or just regard for the reserved rights of the people existing in their representatives. They need no opinion of mine as to whether the measures contemplated by the inquiry are politic or impolitic. It is to their judgment and not mine to which this question is addressed. The corrective, if any is needed for their acts, lies not in the courts if the act is within the line of constitutional authority, but with the people.

[1] 4 Wheaton, 428. [2] 4 Peters, 563. [3] Page 488. [4] 32 Crom. 138.

The various enactments, public and private, now found upon our statute books show that the people of the State as a body have not been unmindful of the means necessary to promote the general good, whether it be by fostering institutions of learning, developing the natural and material resources of the State, encouraging agriculture and arts, or aiding in constructing ready and easy means of communication and intercourse with each other. While some of these statutes seem to some to have gone to the very verge of constitutional limitation and authority, their results as a whole have exhibited the wisdom of those who designed them. As the State advances in population and available means of the enjoyment of a higher degree of civilization, old necessities no longer exist, and new ones take their place, and as before remarked, when and where they exist must be and will be determined by the people acting through the legislative department of the government; and when the legislative department has declared that certain uses are of public utility, importance and necessity, or that a public exigency has arisen, the courts, as a coördinate branch of government, ought not, and I trust will not, substitute their own judgment for that of the people thus expressed, and render nugatory their solemn acts performed under the solemn engagements they assume in the execution of duties devolving upon them.

The experience of the past will furnish some guide for the future. The deliberate judgment of others, formed under similar circumstances, is entitled to some consideration, at least, in forming our opinions. Changing conditions of men bring with them new demands; demands that must be granted or refused upon the application of old principles; principles although of long standing yet designed to meet the varying conditions of society; so inflexible as to preserve the rights of all, and yet so flexible as to meet all the requirements of a government designed to promote, to the highest degree, political equality in government and intelligence and morality in the people.

If the aid contemplated relates to purely private enterprises, in nowise connected with public uses or public exigencies, I answer in the negative. If, however, it relates to public uses and necessities connected with private, I answer, there may be cases where such aid may be legitimately authorized.

RUFUS P. TAPLEY.