

stitution, and that a part of this evil may sometimes be remedied by the assumption by the judiciary of a power to declare such acts void; but the assumption of this power may lead to greater evils than it can cure. At the best, it gives but an appeal from the judgment of one branch of the government to that of another, with no certainty that the latter will be better than the former. And the destruction of vested rights, which comes from the setting aside by the judiciary of an act generally acted upon as valid, may often produce greater injustice than the sustaining of the law, however contrary to fundamental principles. The mistakes made by the legislature can generally be easily corrected. New legislators can be speedily elected, who will repeal a law generally regarded as opposed to right principles of government, and a new constitutional amendment may be made without much difficulty to restrain future legislatures. But the mistakes of the judiciary in exercising powers to which they are not entitled are not so easily corrected. The acknowledged power of the judiciary to set aside acts of the legislature in conflict with constitutional provisions is fraught with such serious danger of evil that it is admitted by all that it should be exercised only in very plain cases. But how much greater is the danger if such acts may be set aside because in conflict with principles so vague that it is impossible to define them beforehand, and so unsettled that an inquirer cannot be told where to look for them!

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#### COUNTY SUBSCRIPTIONS TO RAILROAD CORPORATIONS.

Is the subscription of stock to a railroad corporation, by a county, legal and valid because a majority of those voting at an election held in pursuance of a special statute, to determine whether such subscription shall be made, have voted in favor of the proposition?

We assume, in connection with the above query, that the election was held in accordance with the law authorizing it, all its provisions having been complied with.

The foregoing question, we think, demands a more particular consideration and more extended investigation than has heretofore been given it.

In some of the States—as Illinois—that character of procedure cannot in the future be adopted to procure aid to railroads, because it has been inhibited by the Constitution recently adopted. In many of the States, however, no constitutional prohibition, in express terms, exists, and in those in which it does the question may still be important, because such subscriptions may have been made or attempted before the adoption of recent constitutions.

It may also be important in view of the fact that counties, cities or towns may in that way have attempted to give aid to railroad enterprises, and yet be entitled to relief, because their bonds may not have issued, or if issued, not passed into the hands of the company or purchasers.

If bonds may have been issued, delivered and sold, and a portion of the accruing interest paid, the question may, nevertheless, become one of serious import, as the courts might feel authorized to determine that they were not valid, even in the hands of purchasers, because at no time any constitutional authority existed, by which contracts of that character could be upheld or enforced.

The plan of procuring money to construct railroads by county subscriptions, voted by the people by virtue of some act of a legislature authorizing it, seems to have met with much favor by those engaged in such enterprises.

Much litigation has been had of the many perplexing and difficult questions, growing out of procedures of that character, and while the decisions of the courts have not been uniform upon the matters directly considered and passed upon, there is a more important principle, which has, so far as we have observed, received very little attention from the judicatures of the country. It is a question which we think lies at the foundation of every subscription to roads voted by the people of a municipality.

Is any subscription of municipal aid to a railroad corporation, based upon a taxation of the property of the people, in accordance with the spirit of the Constitution of the United States, or of any of the individual States, or the genius of the government?

If the answer should be in the affirmative, then upon what principle is it so?

Before proceeding to give our views very briefly on this question, we may indulge the remark that at a time when railroads were few, and their benefit to the country of great importance, because of their scarcity, those constituting the population of counties or cities cared very little whether the aid which they may have voted was strictly legal or not, so long as the effect of it was to make what would develop the resources of the country, and add to its material prosperity the advantages of having the road being regarded a fair equivalent for all they would ever be required to pay.

Now, however, the country is interwoven with railroads like network. Many of the new ones now being projected, while they may be of some public benefit, are, it is very apparent, mainly intended to subserve the private interests of a few individuals, and to make wealth for Wall street operators, and such others as may be enabled to get into their ring by transferring the benefit of the speculation over to them. This is peculiarly the case with short lines, in countries already well supplied with railroad facilities, to aid which the people of counties, cities and towns have, by the use of means and influences of at least doubtful propriety, been induced to vote for such enterprises, and tax themselves heavily, for the benefit of a few individuals.

The great question is, the propriety or validity of the taxation system to aid in the construction of railroads. To comprehend this fully we must understand the objects to be obtained and the purposes to be subserved by the system of taxation, as we have it in our government, and the principles involved in the exercise of the right of suffrage by a people in a free government like ours, and the object of a government which guarantees to the citizen so much of rights as pertain to or may be drawn from our Constitution.

The object of our government is to promote the happiness and prosperity of the people. This consists in their right to be protected in the enjoyment of life, liberty of person and conscience, and the acquisition and protection of property.

These principles run through every department of the government, from that of the nation down to the frontier township with but a few score of inhabitants. To afford the protection required, these governments must be administered by persons elected or appointed for that purpose. Being representative democracies, with constitutions defining the rights of the people, the citizens are required to obey only such laws as may be enacted for their good, in accordance with the Constitution or the principles on which it is founded.

The governments are sustained by taxation in some form, imposed upon the people. Tax assessments are legal without any previous vote of the people, if made in obedience to law for legitimate purposes, and are neither burdensome nor oppressive.

There is a principle underlying that of the imposition of duties, sometimes called the "higher law," which, we suppose, simply means that when the integrity or stability of the government is threatened, it has the power to inaugurate and carry out such measures as may be necessary for its preservation, even should it involve the taking or destruction of the property of citizens; but even this principle must be so enforced as to avoid an unnecessary destruction of property, or the imposition of oppressive burdens, and it cannot possibly have any connection with the principle of taxation to build railroads in times of peace.

We maintain that any principle of taxation that is not in some way to sustain the government, which secures to us the rights enumerated as its objects, is illegal. If this premise is correct, all minor questions connected with it can be solved without any difficulty.

The people must have highways, court-houses and other public improvements for their use. Such property belongs to them. To procure or construct them, the government may take private property, paying a fair equivalent therefor, and the sums necessary to be expended for them may very pro-

perly be levied on their property, because such improvements are absolutely necessary to the enjoyment of public and private rights. Such property, when thus acquired, belongs, however, to the people as a body politic, and no power exists having the right to deprive them of it.

A limit may be fixed to the amount of taxation that may be assessed upon the property of citizens for the support of the government. A necessity exists for the erection of a public building. It cannot be done, and the expense of it promptly paid, without imposing heavy taxation, running far beyond the limit prescribed by the Constitution or laws. The legislature, therefore, may, and frequently does, enact laws enabling the municipal authorities to contract such debt as may be necessary to make the improvement, and provide for its payment by the issue of bonds, running a long time, with interest payments and subsequent redemption, provided the people, by a majority vote, sanction it. This is proper, because such property is necessary to a proper administration of government, and when erected belongs to the entire people.

A few men, a portion of them being capitalists, owning extensive railroad interests, desire to construct some new line for profit. The proposed road may be of benefit to one-half of the inhabitants of a county through which it will be located, but none whatever to the remaining population. It is not expected that stock will be subscribed to the enterprise by individuals, but a company will construct it provided a county will furnish them three hundred thousand dollars in bonds in aid of the work. A charter is obtained, incorporating the company, and a law enacted authorizing the people to vote on the question of giving this large sum to the company. A bare majority of those who take sufficient interest in the matter to exercise their right of suffrage, vote in favor of the proposition, and the county authorities are asked to issue the bonds contemplated by the enactment.

These questions are generally carried by the votes of those who reside near the line of the road, and in cities or towns in existence or prospective. An oppressive assessment is thus

made upon the property of thousands of citizens, who cannot possibly ever derive benefit from the road.

The railroad company is a corporation, a powerful one, composed of many persons, but nevertheless operating a private enterprise and owned by private individuals. The owners take and control the county bonds and the funds realized from their sale. They may sell the road, with all the property interests pertaining to it, or so encumber it with mortgages or other liens, that it will necessarily at some time pass into other hands, probably those for whose benefit, under a secret agreement, the enterprise was commenced.

Can a tax, imposed under circumstances such as we have enumerated, be legal or valid?

It cannot be sustained upon the principle of eminent domain, nor of benefits. If so, it would be proper to tax the people, to sustain a merchant mill, or some other manufacturing establishment, because it would be useful to the community. It cannot be made legal, by virtue of laws authorizing private property to be taken for public use, because the people do not own or control the property, and just compensation cannot be made to many who derive no benefit from it, and yet are compelled to pay large sums to support the enterprise.

As the road may benefit portions of the community, it may be allowed to take such ground, as may be necessary for the track and depot buildings, paying therefor just as the person desiring to erect a water mill or ferry may condemn and pay for ground necessary for an abutment to his mill-dam or a ferry landing, but the people can no more be required to assist in making the road, than in erecting a mill or ferry.

Should a county become nominally a stockholder to the extent of the money subscribed, by virtue of a provision under which the vote was taken, the rights or emoluments arising in consequence thereof, could amount to nothing, it being generally understood that such provisions are merely formal, and practically confer no rights.

It may be said, however, that we should not take a view of the question last stated in conflict with the letter of the law. Very well, we apply to it other principles to which we

have alluded, and maintain that no doctrine exists in the Constitution or any law enacted in accordance with its provisions, whereby a citizen and tax-payer can be compelled to become a stockholder against his desire in any company organized to promote private or individual enterprises.

The minority, who may be opposed to the assessment of the tax, may own much the largest proportion of the property of the county, and whether they do or not the majority have no right to compel the minority to expend their substance in constructing the road.

If people can legally be compelled to give their property to assist others in ascending to pecuniary aggrandizement, the foundation of all property rights is undermined.

If each property owner in a county was in favor of the subscription, it might be said that no injury would be done by voting the tax. There would not be if no law was violated, but whenever law, or the principles on which it is founded, are set at naught, injury in some shape will be a necessary consequence. If, however a people should be so unanimous in support of an enterprise, they could likely be induced to aid it by voluntary subscription or taking individual stock.

The plan of asking that the stock be subscribed by a vote of the people is based upon a knowledge of the fact that very many are opposed to it.

If, because a majority have voted for the imposition of a tax, it is right to burden unwilling men with its payment, it amounts to an assertion of the principle that a portion of a community may force their neighbors to pay large sums, not for government purposes, or the public good, but to sustain a private corporation organized for the benefit of the individuals.

Taxation takes from the citizen a portion of his property. He will however submit to it cheerfully when he is required to pay no more than his just proportion of what is necessary to protect guaranteed rights. It is equally the duty of the government to protect the people, and require from them no more than is necessary to an economical administration of municipal affairs. Beyond this, exactions are unjust and become oppressive in proportion to the amounts taken. It is

especially the duty of those who make and execute the laws, to see that no person is required to pay assessments for improper purposes or in violation of law.

If railroads were branches or departments of government, then taxation for their construction or support might be just. That they are beneficial to the people, is no argument.

Other large enterprises of a private character are known to be also advantageous to the prosperity of communities, to sustain which it has never for a moment been deemed proper or legal to compel citizens to pay their money.

Railroads are not operated alone for the benefit of the public, but are intended to benefit communities or individuals to the extent that they can be made to subserve the pecuniary interests of corporators, just as other large enterprises of a private character are conducted.

No persons understand this better than those who have used them much for travel or the transportation of freight.

It is a fact well known that short line roads universally, or very nearly so, pass under the control of large ones, and are operated in the interest of wealthy corporations or capitalists. Indeed, it is rare that they can even be constructed, except upon some arrangement effected in Wall street that will wholly absorb all the aid that the people of a county, city or town may have given to its construction or equipment, in which event, if it was ever intended or contemplated that a community should in that way become a stockholder, their stock is of no value whatever to them in the way of dividends.

There can be nothing in the argument, that because railroads facilitate trade and commerce, and enable farmers to transport their produce to market, they ought therefore to assist in making them, and that such assistance should be coerced. If the wealth of the producer is to be promoted, then convince him of its importance and induce him to voluntarily invest his money in it.

We might pursue these thoughts further, but desist.

Railroad corporations being no parts of the government, we maintain that, like all other private enterprises, those desiring to construct and operate them should be required, or



rather permitted, to do so, with means furnished voluntarily by individuals, and that any tax imposed for their aid, even by the votes of the people of a municipality, is illegal and void.

These views have nothing to do with another question; that of donating alternate sections of the public domain, and lending the aid of the United States government to construct such roads, as that leading across the continent to the Pacific. The principles involved in such an enterprise as that rest upon an entirely different basis. The government largely controls them. They are military and postal necessities, but in the case of that class of roads to which we in this article refer, the government cannot transport a soldier or send a mail-bag over them, in times of peace, without paying therefor.

We have prepared this article because the burdens resting upon the people in many sections of the country, in consequence of railroad taxation, have become oppressive, and because, further, we think the question of the constitutionality of the taxation system referred to has so seldom been directly before the courts for adjudication, that we have no, or at least very few, reliable decisions in which the question has been fully presented and passed upon.

We fully believe that such decisions as intimate opinions favorable to the validity of the system, will soon only be read and referred to as overruled cases.

We hope to awaken inquiry and research, but cite no authorities, believing, however, that the views presented are sustained by the organic laws of the land.