

**OPINIONS OF THE JUDGES
OF THE SUPREME
COURT OF MICHIGAN;
MANDAMUS; PP. 3-51**

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Opinions of the Judges of the Supreme Court of Michigan; mandamus; pp. 3-51 by Authority

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AUTHORITY

**OPINIONS OF THE JUDGES
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OPINIONS

OF THE JUDGES OF THE

Supreme Court of Michigan,

IN THE CASE OF

THE PEOPLE *ex rel.* THE DETROIT AND HOWELL
RAILROAD COMPANY *vs.* THE TOWN-
SHIP BOARD OF SALEM.

MANDAMUS.

April Term, A. D. 1870, at Detroit.



BY AUTHORITY.

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1870.

MUNICIPAL AID TO RAILROADS.

OPINION OF JUDGE COOLEY.

*The People ex rel. the Detroit and Howell Railroad Company
vs. The Township Board of Salem.*

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

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

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

Under this act it appears that the township of Salem voted aid to the extent of five per centum of its assessed valuation;

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

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

It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. It is not doubted by any one that the power of the Legislature to determine for what purpose taxes shall be levied, and what districts of territory and what classes of persons and property shall bear the burden is

very broad, and it must be confessed that in describing or defining it words are sometimes employed by the courts which import an absolute and unlimited discretion, such as might exist in an irresponsible government, or in the people, if acting in their sovereign capacity, without any written constitution, and which consequently could not be brought to the test of any restrictive rules. For many purposes these broad and loose definitions of the power of taxation are not objectionable, but they cannot be regarded as careful and precise enough to be tests of constitutional authority, and whenever they are employed in the law, the modifications by familiar constitutional principles are always to be understood.

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

1st. It must be imposed for a public, and not for a mere private purpose. Taxation is a mode of raising revenues for public purposes only, and, as is said in some of the cases, where it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. (*Sharpless vs. Mayor, etc.*, 21 Penn. St., 168; *Grim vs. Weisenberg School District*, 67 Penn. St., 433; *Broadhead vs. Milwaukee*, 9 Wis., 652.)

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

3d. As a corollary from the preceding, if the tax is imposed upon one of the municipal subdivisions of the State only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local, that is to say, the people of that municipality must have a special and peculiar interest in the object to be accomplished, which will make it just, proper, and equitable that they should bear the burden, rather than the State at large, or any more considerable portion of the State. (*Wells vs. Weston*, 22 Mo., 285; *Covington vs. Southgate*, 15 B. Mon., 491; *Morford vs. Unger*, 8 Iowa, 82.)

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

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

I do not understand that the word *public*, when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the Legislature from taking broad views of State interest, necessity or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of State authority in this direction are to be defined,