PUBLIC PURPOSES FOR WHICH TAXATION IS JUSTIFIABLE

It inheres in the very nature of a tax, which has been defined as the enforced contribution from persons and property for the support of government and for all public needs, that it shall be levied for a public and not a private purpose. It has therefore come to be a fundamental canon of the law of taxation, recognized and enforced by the courts, that the tax be so levied for public purposes. It was the Divine mandate that we render unto Cæsar the things which were Cæsar's. Our Cæsar is the Public, and we therefore render to the public the things that are the public's, that is, what rightfully belongs to the public. Some State constitutions provide in express terms that taxes shall only be levied for public purposes. But such declarations are unnecessary, as the rule enforced by the courts would be the same without them. Due process of law, which requires that a tax shall be levied for a public as distinguished from a private purpose, is now guaranteed under the Fourteenth Amendment by the Federal Government against the exercise of State authority.

The taxing power of Congress is limited to paying the debts, providing for the common defense and general welfare of the United States. The question over which there was so much animated controversy in the past, as to whether the words, "general welfare," included not only the enumerated powers specified in the Constitution, but also whatever Congress might deem to be for the general welfare, has now become academic rather than practical, in view of the established doctrine that Congress has the right in the appropriation of the public funds to use its best judgment in the selection of means which are adapted to the ends, provided the means are not prohibited and the ends sought are within the scope of the Constitution.

Thus the taxing powers of both Congress and the State Legislatures are limited to public as distinguished from private purposes. As the power of taxation is legislative and not judicial, the determination of what are public purposes for which taxes may be levied is primarily a matter of determination by the legislature. But this

legislative determination is not conclusive and is subject to judicial review. The Supreme Court of the United States declared in *Loan Association v. Topeka,* 20 Wallace 655, that while it was not easy to decide what was a public purpose, and that the court was justified in interposing only when the case was clear, affirmed in most positive terms this inherent and essential limitation of the taxing power. This case involved the validity of a tax levied for the payment of bonds in aid of manufacturers located in a Kansas town, and the court declared that this was not a lawful public purpose. The difficulty of laying down a general rule as to what is a public purpose was recognized by the court in these words:

> In deciding whether, in the given case, the subject for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But it was said that, in the case at bar, no line could be drawn in favor of the manufacturer, which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

While the legislative declaration that a tax levied for a public purpose is thus subject to judicial review, it is the universal ruling that while the courts are justified in interposing only when it appears that the Supreme law, which, governing both the legislature and the judiciary, would be violated by the enforcement of the legislative purpose.

Questions relating to the public purpose of taxation can seldom be raised in regard to general levies for State taxes for State Purposes, as such taxes are assessed and collected under general laws wherein the specific objects for which taxes are to be expected are not set forth and the courts cannot look behind the declared purposes of the tax to ascertain the intent of the legislature as to the appropriation of the proceeds of the tax. This is also true in Federal taxation. Under the comprehensive revenue system of the government, taxes are levied, not for specific purposes, but by continuing laws establishing the rate of customs, duties and internal revenue taxes. Questions relating to the lawful purposes of taxation, therefore, do not arise in the levying of Federal and State taxes, but in the appropriation of public funds for public needs.

Sometimes a tax may be levied for an ostensible public purpose, as for public revenue, while the real purpose may be other than revenue, and private purposes may then be subserved. Thus a tax may be so excessive in amount as to destroy the interest of the business upon which it is levied, by taxing it out of existence. The tax upon the State bank notes was imposed by Congress for that purpose so as to open the means for circulating the notes of the National Banks. Duties on imports are sometimes levied, not for the purpose of obtaining a revenue from the imports, but for the purpose of excluding imports. Conceding that this is an abuse of the taxing power, it is an abuse which, as a rule, cannot be remedied by the judiciary. It was said by Chief Justice Marshall in *McCulloch v. Maryland,* that it is a perplexing inquiry, unfit for the judiciary department, what degree of taxation is the legitimate use, and what degree may amount to an abuse of the power.

When public money has been collected under general or continuing tax laws, as all State and Federal taxation, is as a rule collected, the expenditure of such money is made through appropriations by the legislative power, and it is seldom that the lawful exercise of this power of appropriation can be judicially questioned. Thus the validity of the bounty granted by Congress to the producers of sugar in the Tariff Act of 1890 was gravely doubted, as it was claimed to be in effect an appropriation of the public funds to private use. Such was the ruling of some of the State courts upon bounty legislation. The Supreme Court of the United States, however, held that an apropriation by Congress to sugar manufacturers who had produced and manufactured sugar upon the faith of this bounty prior to its repeal was valid, *United States v. Realty Company,* 163 U. S. 427. The court said that the question was not whether the original bounty was constitutional, which it declined to decide, but whether Congress had a right to recognize claims founded upon equitable and moral considerations; and that such claims constituted "debts" within the meaning of the Constitution.

Thus the United States, in the absence of express Constitutional inhibition, may recognize the claims of equity and justice and may recognize and pay obligations resting only upon moral considerations; and it was said in this opinion that upon this general principle the Federal Congress stands upon a level with the State legislatures. An eminent authority, Justice Cooley of the Supreme Court of Michigan, in *People v. Salem,* 20 Mich. 452, said that in determining the objects of a State expenditure, a wise statesmanship is not confined to expenditures that are absolutely needful to continue the existence of the government; but it may include those which

may tend to make the government subserve the general well-being of society and advance the prospective happiness and prosperity of the people.

Questions relating to the lawful purpose of taxation can, as a rule, therefore, only be raised in the courts when a tax is levied for a specific declared purpose. Such a case was presented in Missouri a few years ago and involved the determination of what was a lawful public purpose in the promotion of higher education. A tax was levied upon inheritances and other subjects, the proceeds whereof were to be applied in defraying the expenses at the State University of students without means, who should be awarded scholarships of merit through competitive examinations. This was held by the Supreme Court of the State to be invalid, *State ex rel. v. Switzler,* 143 Mo. 287, as involving a tax for private persons, not for a public purpose. The Constitution of the State of Missouri directs the maintenance of a State University, and it was urged upon the court that as scholarships were a recognized and historic incident of university endowment, this method of maintaining the university and making it serviceable in the education of the talent of the State, was within the discretion of the legislature, which could not be reviewed by the courts. It is difficult to see any difference in principle between building dormitories for students to live in and paying professors to teach them, and endowing scholarships so that deserving students without means can have the benefit of instruction. This case is illustrative of the intensely conservative position of some courts in recognizing that on this subject the law is a developing science. The standard of public opinion of one generation as to the proper limits of public education at public expense is not that of another. It is interesting to note that Mr. Jefferson in the founding of the University of Virginia suggested the selection from the elementary schools of subjects of the most promising genius, whose parents were too poor to give them further education, to be carried on at public expense through colleges and universities. (See letter to Mr. Carrear of November 25th, 1817, 7 *Jefferson's Complete Works,* p. 93.)

While some of the State Constitutions provide expressly that taxes shall only be levied for public purposes, which, as before stated, the law would imply without such declaration, only two of them, as I find, contain any specification of what constitutes a lawful public purpose. These States are, Louisiana and Georgia, and both of these include the pensioning of disabled Confederate soldiers and their widows and orphans as lawful subjects of taxation, and the former includes also the establishment of monuments upon the bat-

tlefields commemorated by the services of soldiers from the State on such fields. With these exceptions the question of what is a lawful public purpose is left by our Constitutions to be determined by the judicial process of inclusion and exclusion.

Questions as to the lawful purposes of taxation have been frequently raised, however, in local and municipal taxation. Here there is no such difficulty of procedure in reviewing the legislative discretion as there is in regard to general levies by Congress and the State legislatures, and it is a local and municipal taxation that we have the greatest pressure for extended governmental activity involving the exercise of the taxing power. We find numerous cases both in the State and Federal courts involving the question of what is a lawful public purpose in statutes authorizing municipal taxation. Thus a statute authorizing the issue of municipal bonds for the purchase of seed corn to be given to farmers after a crop failure was held invalid in Kansas. *State v. Osawkee Township,* 14 Kans. 418; but a similar statute was held valid in *North Dakota v. Lenson County,* 1 No. Dak. 188. The development of our jurisprudence was illustrated in the latter decision, which, in referring to the former decision, said: "In our view it is not certain or even probable in the light of subsequent experience in the West, that the court of last resort of the State of Kansas would enunciate the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the Western States has been attended with difficulties and adverse conditions, which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those States. . . . It is the boast of the common law that it is elastic and can be adjusted to the development of new social and business conditions."

The proper limits of this paper will not permit an extended review of the numerous decisions of the State and Federal Courts on this subject of the lawful public purpose of taxation irrespective of charter restrictions. Thus there has been much litigation over the extension of municipal boundaries and the taxation of annexed suburban property for municipal purposes. The aid of railroads has been held to be a lawful public purpose in the absence of constitutional restrictions, while the promotion of private business enterprise, though incidentally of public benefit, have been held not to be a lawful public use. Thus, in a recent decision, the United States Court of Appeals of this Circuit held that public sorgum mills were not a lawful public purpose of taxation, *Dodge v. Mission Township,*

46 C. C. A. 61. The court in this case distinguished the decision of the Supreme Court of the United States in *Burlington Township v. Beasley,* 94 U. S. 310, which sustained municipal bonds for the erection of custom grist mills, and said that that decision was the outgrowth of a more primitive state of society where there were no railroads and few good highways and where custom grist mills in the immediate neighborhoods of productive fields to grind grain for bread for the people and food for the cattle, were a public necessity. On the other hand, it has been held that the promotion of patriotism by public memorials and public expositions are so promotive of the general welfare as to be a lawful subject of taxation.

The State of Massachusetts has furnished a number of recent illustrations of the development of the law upon this subject and its close association with the growth of public opinion. Thus, in that State it was held that a municipality could be authorized to build a memorial to the memory of the soldiers and sailors of the Civil War, but that such a building could not be used in part by a Post of the Grand Army of the Republic. *Kingman v. Brocton,* 153 Mass. 255. The justices of the Supreme Court in that State advised the legislature under a provision of the State Constitution authorizing the justices to be interrogated as to the lawful powers of the legislature, that cities and towns could be authorized to manufacture gas and electricity for use in their public streets and buildings, and for sale to the inhabitants. Opinion of Justices, 150 Mass. 593, and 155 Mass. 598. But subsequently the justices were asked the further question whether power could be conferred by the legislature upon cities and towns to buy and sell coal and wood for fuel for their inhabitants. Five out of seven justices said that such a power could not be lawfully conferred; that the Constitution did not contemplate this as one of the ends for which the government was established, and that they must go back to the time when the Constitution was adopted to determine its construction as to the proper limits of governmental activity. Justice Holmes, however, of that court, who is now of the Supreme Court of the United States, dissented, holding that the question was purely one of legislative discretion and that the purpose was no less public, when the article was wood or coal, than when it was water or gas or electricity or education, to say nothing of cases like the support of paupers or the taking of lands for railroads or public markets.

The scope of governmental activity in a great modern city is necessarily vastly greater than it was in the comparatively small municipal communities when the Federal Constitution was adopted. Public education as a training of citizenship, the preservation of the

public health through public sewers, public parks and boulevards and even public baths, and the scientific treatment of the removal of garbage and the prevention of contagion, have involved a vast extension of governmental powers with an enormous increase of the burden of taxation. Public opinion recognizes and endorses this extension as necessitated by the changed conditions of our times.

But apart from this there is a new and distinct demand for a great enlargement of the scope of governmental activities through an assumption by the public of what have heretofore been distinctly private enterprises; that is, a substitution of public for private ownership. As to some of these, it must be admitted there is no distinct line of principle for determining of what shall be public and what private. Some cities in our countries have public water works, others have private. Some have public lighting, others private. Public libraries and public museums are now becoming recognized as a branch of public education, when they were practically unknown a generation ago. Thus, in Great Britain, the telegraph is owned by the public, conducted as the post-office is in this country; while in some of the continental countries the railroads are owned by the State. In some of the cities of Great Britain as well as on the continent, street railroads are owned and operated by the public. On the continent of Europe it is recognized that public support of amusements is a legitimate public function. In one or more States of this country the sale of liquor has been put under distinct public ownership and management.

It is not within the scope of this paper to comment upon the wisdom of these extensions of governmental activities. It is sufficient to point out that there is no department of the law where its intimate association with, and its dependence upon the development of opinion are more obvious than in this question of the requirement of a public purpose of taxation. Our system of jurisprudence is based upon the doctrine of judicial precedent. Ours is a land as was our mother country where "freedom broadens slowly down from precedent to precedent." Our courts in drawing the line between what is public and what is private in taxation and governmental expenditure, necessarily look to what is sanctioned by time and the acquiescence of the people. Thus the Supreme Court of Massachusetts in the case cited, in denying the power of legislature to authorize towns to go into the business of buying and selling fuel, looked back several generations to determine what was the limit of government activity at the time of the adoption of the Constitution. But on this subject more than on any other we must recognize that the law is a developing science. It must progress as

civilization itself progresses, and the judicial view must tend to harmonize with the prevailing and controlling enlightened public opinion. Who can predict the public opinion of the next generation as to the limits of governmental activity? In this sense the words of Mr. Lowell become profoundly significant: "Our written constitutions are an obstacle to the whim, but not to the will of the people."

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