

THE POWER OF TAXATION.

AN INTRODUCTION TO A STUDY OF THE NATURE OF THE
TAXING POWER.

BY H. H. MCMAHON, OF THE COLUMBUS, OHIO, BAR.

As a general rule, lawyers consider the subject of taxation as a mere matter of law; economists as a mere economic problem; legislators as a mere question of expediency; courts as a mixed question of law and expediency, and property owners as one of disagreeable necessity.

Such habits of thought almost necessarily lead to one-sided views of a subject which has many sides, and, as a result, few people have any realization of the true nature of the power of taxation, its extent and its limitations. Current suggestions for reform in methods of taxation not only disregard, but positively violate, the fundamental principles of the subject. This is not necessarily intentional. It most frequently arises from gross ignorance of the real nature of the power of taxation. This ignorance is, however, in some measure, wilful. A consideration of the nature of the power of taxation must necessarily be largely theoretical and there are many men who absolutely refuse to have anything to do with theories, believing that they thus demonstrate their own superiority.

It is not intended to assert that the nature of the power of taxation has not been considered. On the contrary, the literature of the law and economics shows that the subject has received the careful consideration of some of the ablest minds which the world has known and the profoundest truths as to the nature of the power of taxation can be gathered from many and various sources. It is, however, asserted that the general treatment of the subject is more or less one-sided, as the writer is influenced by his own specialty or the immediate purpose of the consideration involves but a single phase of the subject.

JUDICIAL OPINIONS.

The courts have at times discussed, in the most able manner, some of the fundamental principles of the subject, but the very nature of judicial action limits the discussions to some one or two points involved in and necessary to the decision of the particular case before the court. The theoretical character of some of these discussions might well astonish the so-called practical men who despise all theory and are able to find no expression of their disapproval stronger than to characterize any suggestion as being theoretical.

A half a century ago judicial opinions contained many interesting and valuable discussions as to the true nature of the taxing power. It would be wise for the present-day tax reformers, as well as the courts, lawyers and citizens generally, to study some of those opinions with great care and diligence. The prevalent

confusion of thought upon the subject makes it apparent that a re-examination of the fundamental principles and nature of the power of taxation is needed. Perhaps no other introduction to such a consideration of the subject would prove to be as interesting and valuable as a reprint of some of the earlier judicial discussions of the subject.

AN IOWA OPINION.

A letter from the Hon. John F. Kinney, published in a recent issue of *The Conservative*, calls attention to a dissenting opinion delivered by him, in 1853, while a member of the Supreme Court of the state of Iowa, in the case of *Dubuque County vs. the Dubuque & Pacific Railroad*, reported in 4 G. Greene's *Iowa Supreme Court Reports*, p. 6.

The question before the court was whether under the then constitution and laws of Iowa a majority of the voters could, at an election held for that purpose, tax the people to build a railroad. The majority of the court sustained the validity of such a tax and Judge Kinney dissented. Some years later in the case of the *State vs. Wappelo County*, the Supreme Court of Iowa held unanimously that bonds issued for such a purpose were void absolutely.

While it is apparent from the report of the later decision that Judge Kinney's discussion of the nature of the power of taxation was not necessary to a decision of the question before the court, and while his discussion was contained in a dissenting opinion, that discussion itself is of great value as the protest of a trained jurist, seeking to marshal all of the objections to an invalid and unjust use of the taxing power.

The interesting portions of Judge Kinney's opinion are found in the following paragraphs, which he quoted in the letter above referred to, to which is added another paragraph taken from the report itself:

"Taxation is an arbitrary power. It is a high prerogative. It is an element of sovereignty. It can only be levied by express law or the will of the monarch.

"It is based upon public necessity, and proceeds upon the ground that it is essential to the public welfare and safety. It should only be resorted to when required for this purpose. Unless confined within its legitimate sphere it will become despotic and subversive of those liberties which it was ordained to protect. It is insidious and demands constant watching or under the assumed name of public good, general prosperity, etc., it will invade and destroy the rights of the people. It is that power which the mother country attempted to exercise over the infant colonies, at which met with such a signal rebuke from the stern men of those days; who taught the world that they knew well how to discriminate between the rightful and oppressive exercises of this power; and it well becomes our government to prevent its exercise for any other purpose than support, defense and security. It is a rule necessary to the existence of society that many of our natural rights must be surrendered for the public good. In exchange for these, we obtain protection to life and liberty, security in acquiring, possessing and enjoying property. Members of this society

are bound to contribute their proportion of the expense in sustaining an organization which affords these great blessings. For the great object of protection, national, state, county and city organizations are established. With a wise national constitution, clearly defining the rights of the several states, and planting important landmarks in the cause of civil and religious liberty, with our state constitution embracing principles applicable to the situation, and promotive of the happiness of the people; these constitute the foundation of organized society, and here has the citizen the right to look to ascertain the extent of the rights yielded and acquired by his membership. Here he finds that the object of government is to take from him only such natural rights as are inconsistent with the enjoyment of civil liberty, and to demand by way of taxation only so much as is necessary for the support of that government. He also finds in the state constitution a power delegated to the Legislature to create political and municipal corporations; hence counties and cities are organized for the sole purpose of rendering the enjoyment of life, liberty and property more perfect and complete. Now, as a member of the government, what taxes is he compelled to pay? He must assist in the support of a national and state government because these make and execute the laws which afford protection. He must bear his share in the necessary county expenses, because this organization is but a refined branch of the government, placing life, liberty and property upon a more secure and permanent basis, and bringing protection more perfectly within his reach. This, then, is the object of government, and its support, the only cause for which the citizen can legitimately be taxed. * * * The Iowa state constitution declares that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property; if this property is to be held by the citizen subject to the will of the majority, and if by that majority it can be taxed, sold and appropriated toward building works of internal improvement, where is the enjoyment, possession and protection guaranteed by this article of the constitution? Is a man protected in the possession of his property when public clamor may at any time demand it for what a majority may please to call public purposes? Do the people of Iowa hold their land by so feeble a tenure? * * * In my concluding sentences I say, in the examination of this question, I have endeavored to meet and decide all the points fully and fairly. I have not been insensible of the weighty consequences suspended upon the decision of this case. I have endeavored in vain to prevent a decision which I believe erroneous, and which must sooner or later be so declared. Counties have voted stock for railroad purposes from fifty to four hundred thousand dollars each with indifference as to payment, which, to my mind, is most alarming. But few of the counties in comparison to the entire number intrusted have as yet voted, and it is but a fair deduction, unless this spirit is soon checked, that the state will not be

less than ten millions of dollars in debt within the next five years for railroad purposes alone. The interest upon this enormous sum will not be less than seven hundred thousand dollars per annum, all of which must be raised by direct tax upon the people. In these times of feverish excitement, when the public mind is jostled off from its true balance, when public and private economy, as well as natural justice, are lost sight of in the clamor for public improvements, would it not be well to pause, to refer back to first principles and reflect upon consequences which involve a sacrifice of constitutional rights, loss of private property and an utter perversion of county and city organization."

"In my opinion, a person is not subject to this kind of involuntary taxation. It does not contribute in any way to support the government, nor is it promotive of that welfare and security for which governments were established. To allow a majority by their vote to tax a minority to build railroads, is repugnant to every principle of civil liberty, and tends directly to despotism. If this doctrine is to obtain then it is in the power of a bare majority of voters, destitute of property, to saddle a tax upon a minority, the only property holders in the county. How is this power to be kept within reasonable limits and who is to draw the dividing line between a tax for support and protection and that which may be said to be for the public good, unless the tax be confined to the legitimate purposes of government?"

secured thereby, save such as are herein expressly exempted, upon which the tax has not been paid as required by Section 290, or as herein allowed, shall continue to be governed, notwithstanding anything in this article contained, by the laws heretofore in force.—
Mail and Express, New York, Jan. 14, 1902.

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