§ 152 (103). **Public Defence; Loans and Taxation to pay Bounties.** — During the Rebellion acts were passed by many of the legislatures of the adhering States in effect authorizing municipalities *to raise money by loans and taxation, to pay bounties to volunteers to enable the municipality to fill its quota* under the calls of the President for troops, and thereby avoid an anticipated draft. The constitutional principles involved in legislation of this character will be found learnedly discussed in the cases below cited, which fully establish the validity of such legislation.[1] But without express authority a municipality possesses no such power;[2] yet if exercised, it may be validated by subsequent legislative action.[3]

§ 153 (104). **Aid to Railroad Companies; Municipal Subscriptions and Bonds, and Taxation to pay the Same.** — The most noted of extraordinary powers conferred upon municipal and public corpo-

man has a right to presume that his neighbor will hereafter build a house adjoining to his, and erect half of his outside wall on his neighbor's ground in consequence of such presumption. Barlow *v.* Norman, 2 W. Bl. 959. An external wall cannot be said to be a party-wall. Sims *v.* Estate Company, 14 L. T. N. S. 55. A party-wall is a wall which belongs to two persons as part-owners, or divides two buildings one from another. Weston *v.* Arnold, L. R. 8 Ch. Ap. 1084. The English Stat., 14 Geo. III. ch. lxxviii., was held not to make party-walls common property. Matts *v.* Hawkins, 5 Taunt. 20. If one proprietor added to the height of such a party-wall, and the other pulled down the addition, the first might maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on his own soil. *Ib.* The property in a wall, though erected at joint expense, follows the property of the land whereon it stands. *Ib.* Power to pass ordinances "to authorize the erection of party-walls, &c., and to regulate them," has been held to include the power to authorize their erection upon the application of either owner, and without the consent of the other. Hunt *v.* Ambruster, 17 N. J. Eq. 208; Harrison's Municipal Manual, 4th ed. Further as to party-walls: McAdam on Landlord and Ten. 145–160, and works on Easements.

[1] Speer *v.* School Directors, 50 Pa. St. 150, two judges dissenting. See Hilbish *v.* Catherman, 64 Pa. St. 154 (1870), where the prior cases in that State are commented on by *Agnew*, J. State *v.* Richland Township, 20 Ohio St. 362; Thompson *v.* Pittson, 59 Me. 545; Broadhead *v.* Milwaukee, 19 Wis. 652; State *v.* Tappen, 29 Wis. 664; s. c. 9 Am. Rep. 622; Sperry *v.* Horr, 32 Iowa, 184; Booth *v.* Woodbury, 32 Conn. 118; Shackford *v.* Newington, 46 N. H. 415; Lowell *v.* Oliver, 8 Allen (Mass.), 247; Freeland *v.* Hastings, 10 Allen, 570; Comer *v.* Folsom, 13 Minn. 219; Dayton *v.* Rounds, 27 Mich. 82; Cooley, Const. Lim. 219–229. Cooley on Taxation (2d ed.) 136, collects the cases and states the result. Veazie *v.* China, 50 Me. 518; Clark Co. *v.* Lawrence, 63 Ill. 32; *Ib.* 40; Bowles *v.* Landaff, 59 N. H. 164; Gould *v* Raymond, *Ib.* 260.

[2] Stetson *v.* Kempton, 13 Mass. 272; Fiske *v.* Hazzard, 7 R. I. 438; Shackford *v.* Newington, *supra; ante*, sec. 30. It is not the duty or function of a town to *procure the passage of an act* by the legislature, authorizing it to pay bounties. An appropriation for that purpose is illegal. Mead *v.* Acton, 139 Mass. 341.

[3] Booth *v.* Woodbury, 32 Conn. 118; Kunkle *v.* Franklin, 13 Minn. 127; Comer *v.* Folsom, 13 Minn. 219; Hilbish *v.* Catherman, 64 Pa. St. 154 (1870); State *v.* Richland Township, 20 Ohio St. 362 (1870); *ante*, sec. 79.

rations is *the authority to aid in the construction of railways* by subscribing to their stock, issuing negotiable bonds as a means of paying their subscription, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. Legislation of this kind belongs to a period comparatively recent, and has been more or less resorted to at times, by almost every State in the Union. As it is an author's duty to state what the law is rather than what, in his judgment, it ought to be, he is constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the States has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, the construction of railways running near, or to, or through its territory. The cases on the constitutional validity of such legislation are referred to in the note.[1] Notwithstanding the opinion of so many learned and

[1] Goddin *v.* Crump (act authorizing the city of Richmond to subscribe stock in a company incorporated to improve the navigation of the James River, and to build a road to the falls of the Kanawha River). 8 Leigh (Va.), 120 (1837). This is the earliest case of the class. Bridgeport *v.* Railroad Co., 15 Conn. 475 (1843); Society, &c. *v.* New London, 29 Conn. 174; Douglass *v.* Chatham, 41 Conn. 211 (1874); Nichol *v.* Nashville, 9 Humph. (Tenn.) 252 (1848); Powers *v.* Superior Court, 23 Ga. 65 (1857); Talbot *v.* Dent, 9 B. Mon. (Ky.) 526 (1849); Slack *v.* Railroad Co., 13 B. Mon. (Ky.) 1 (1852); Maddox *v.* Graham, 2 Met. (Ky.) 56; Commonwealth *v.* McWilliams, 11 Pa. St. 61 (1849); Sharpless *v.* Mayor, etc., 21 Pa. St. 147; *Ib.* 188; Commonwealth *v.* Perkins, 43 Pa. St. 410; 47 Pa. St. 189; Cotton *v.* County Comm'rs, 6 Flor. 610 (1856); Railroad Co. *v.* Comm'rs, 1 Ohio St. 77 (1852); Cass *v.* Dillon, 2 Ohio St. 607 (1853); Ohio *v.* Comm'rs, &c. 6 Ohio St. 280; 7 Ohio St. 327; 8 Ohio St. 394; 12 Ohio St. 596, 624; 14 Ohio St. 569; Strickland *v.* Railroad Co., (Miss.) MSS.; City *v.* Alexander, 23 Mo. 483 (1856); 39 Mo. 485; Leavenworth County *v.* Miller, Supreme Court of Kansas (1871), 7 Kan. 479; s. c. 12 Am. Rep. 425. The opinion of *Valentine*, J., covers the whole ground of controversy. *Kingman*, C. J., concurred, and *Brewer*, J., dissented. Clarke *v.* Rochester, 24 Barb. 446 (1857); Bank of Rome *v.* Rome, 18 N. Y. 38 (1858); Starin *v.* Genoa, 23 N. Y. 439 (1861); People *v.* Mitchell, 35 N. Y. 551 (1866); Police Jury *v.* Succession of McDonough, 8 La. An. 341; Aurora *v.* West, 9 Ind. 74 (1857); 22 Ind. 88; Mt. Vernon *v.* Hovey, 52 Ind. 563 (1876); Robinson *v.* Bidwell, 22 Cal. 379; Stein *v.* Mayor, &c., 24 Ala. 591 (1854); Gibbons *v.* Railroad Co., 36 Ala. 410; Prettyman *v.* Supervisors, 19 Ill. 406 (1858); s. p. 24 Ill. 75, 208; Butler *v.* Dunham, 27 Ill. 474 (1861); Robertson *v.* Rockford, 21 Ill. 451; Chicago, &c. Railroad Co. *v.* Smith (donation to Railroad Co.), 62 Ill. 268 (1871); s. c. 14 Am. Rep. 99; Sibley *v.* Mobile, 3 Woods C. C. 535; and see also as to authority to precinct to levy tax to maintain a bridge, Shaw *v.* Dennis, 5 Gilm. (Ill.) 405; San Antonio *v.* Jones, 28 Tex. 19; Copes *v.* Charleston, 10 Rich. (S. C.) 491 (1857); Augusta Bank *v.* Augusta, 49 Me. 507; Clark *v.* City, &c., 10 Wis. 136; *Ib.* 195 (1859) (compare Whiting *v.* Sheboygan Railroad Co., *infra*). The Supreme Court of *Wisconsin*, in an opinion delivered in Phillips *v.* Albany, 28 Wis. 340 (1871), say the power of the legislature to authorize municipal subscriptions to the stock of railroads is settled by former decisions in this State, as well as in other States, though the majority of this court would be disposed to deny the power, if it were

eminent judges, there remain serious doubts as to the soundness of the principle, viewed simply as one of constitutional law. Regarded

a new question. S. P. Rogan *v.* Watertown, 30 Wis. 259 (1872); Lawson *v.* Railway Co., 30 Wis. 597; U. S. *v.* New Orleans, 2 Woods C. C. 230. The Supreme Court of the United States have decided that the power may be conferred by the legislature. *Infra*, sec. 158; Thompson *v.* Lee County, 3 Wall. 327; Knox County *v.* Aspinwall, 21 How. (U. S.) 539, 547 (1858); Zabriskie *v.* Railroad Co., 23 How. 381; Amey *v.* Mayor, 24 How. 365, 376; Gelpecke *v.* Dubuque, 1 Wall. 175 (1863); Mercer County *v.* Hacket, *Ib.* 81; Meyer *v.* Muscatine, *Ib.* 384; Baldwin *v.* Otoe County, 111 U. S. 1; Caldwell *v.* Justices, 4 Jones (N. C.) Eq. 323; Taylor *v.* Newberne, 2 Jones, 141 (1854); S. P. Hill *v.* Forsythe Co., 67 N. C. 367 (1870). In *Iowa* the constitutionality of railroad subscriptions by municipalities was first (1853) affirmed in Dubuque County *v.* Railroad Co., 4 G. Greene (Iowa), 1; afterwards (1862) denied, State *v.* Wapello County, 13 Iowa, 388; denial adhered to down to 1869, Hanson *v.* Vernon, 27 Iowa, 28; but note the virtual, yet not acknowledged overthrow of the line of decisions denying the power, in Stewart *v.* Polk County, 30 Iowa, 1 (1870); Renwick *v.* Davenport, etc. Railway Co., 47 Iowa, 511; Snell *v.* Leonard, 55 Iowa, 553. The legislative and judicial history of the subject is fully stated in King *v.* Wilson, 1 Dillon's C. C. R. 555 (1871). By the Constitution of *Tennessee*, the legislature has power to authorize counties and incorporated towns to impose taxes for "county and corporation purposes." In Nichol *v.* Mayor, &c. of Nashville, 9 Humph. 252 (1848), it was held, notwithstanding this provision, that the legislature possessed the power to authorize municipal corporations to subscribe for the stock of railway companies whose roads run to or near such corporations, and that this *was a legitimate corporate purpose*. So in *Florida*, held to be a "county purpose," within the meaning of the Constitution; but *quære*. There is nothing in the Constitution of *Alabama* prohibiting the legislature from authorizing a municipal corporation to levy a tax on the real estate within the corporation to aid in the construction of a railroad, even though the road extends beyond the limits of the corporation, or even of the State. So held in Stein *v.* Mobile, 24 Ala. 591 (1854). An act authorizing a municipal corporation to borrow money to aid in the construction of a railroad, upon the written assent of two-thirds of the resident taxpayers, or upon the approval of two-thirds of the taxpaying electors, is constitutional and valid; and it is not open to the objection that it submits a legislative question to the town. Starin *v.* Genoa, 23 N. Y. 439 (1861); Gould *v.* Sterling, *Ib.* 439, 456; Bank of Rome *v.* Rome, 18 N. Y. 38; People *v.* Mead, 24 N. Y. 124; Horton *v.* Thompson, 71 N. Y. 513; affirmed in Town of Scipio *v.* Wright, 101 U. S. 665; s. c. 21 Alb. L. Jour. 476. These cases distinguished on this point from Barto *v.* Himrod, 4 Seld. (8 N. Y.) 483. *Ante*, sec. 44. Since the common law does not favor the principle that a majority of taxpayers of a municipal corporation may encumber the property of a minority against their will, in aid of a railroad or other corporation, the requirements of statutes authorizing such aid must be strictly observed. People *v.* Hulburt, 46 N. Y. 110; Cowdrey *v.* Town of Canadea, 16 Fed. Rep. 532. In Smith *v.* Fond du Lac, 8 Fed. Rep. 289, *Harlan*, J., decided that a statute authorizing a city to subscribe for railroad stock and issue its bonds therefor, after a vote passed by a majority of the voters, without limiting the amount, was not in conflict with a constitutional provision in *Wisconsin* restricting the power of municipalities to borrow money, contract debts, and loan their credit.

The Supreme Court of *Minnesota* has affirmed the validity of compulsory aid to railways, saying that it is wholly for the legislature to determine whether the aid shall be *by subscribing* to the stock and issuing bonds in payment, *or by a donation of money or bonds* to secure their construction, the court in either case regarding the *use* to be a *public use* for which taxation may be authorized. Davidson *v.* Ramsey County, 18 Minn. 482 (1872). And

in the light of its effects, however, there is little hesitation in affirming that this invention to aid the enterprises of private corporations has proved itself baneful in the last degree.[1]

§ 154. **Municipal Indebtedness; Negotiable Bonds.** — It is estimated that *the indebtedness of municipal and public corporations in this country* has already reached the enormous sum of $1,000,000,000, and it is constantly increasing. A large portion of this indebtedness is evidenced by *negotiable bonds*, which are held by thousands of persons, at home and abroad, as an investment. These bonds have been issued for a great variety of purposes, such as the erecting of public buildings, the making of municipal improvements, and in payment of subscriptions for the stock of railway corporations, or as donations to aid them in the construction of their roads located in or near the municipality or public corporation thus extending its assistance.[2]

§ 155. **Same subject.** — The power conferred upon municipal and public corporations *to issue commercial securities for such purposes* is of comparatively recent origin, and it has undeniably been attended with very serious, and it is perhaps not too strong a statement to add, disastrous consequences. One of these is the stimulus which the long credit commonly provided for effectually supplies to over-indebtedness. The bonds usually fix a time, twenty or thirty years distant, for payment of the principal. Those who vote the debt, and the councils or bodies which create it and issue the bonds, do so without much hesitation, as the burden is expected to fall principally on *posterity*. A learned justice of the Supreme Court of the United States[3] has very fitly described the effect witnessed as a *mania* for running in debt for public improvements. It has elsewhere been characterized as an "epidemic insanity" inducing extravagant corporate subscriptions to public works.

the validity of such legislation has also been affirmed by the Supreme Court of *Nebraska*, *Crounse* and *Lake*, JJ., concurring, and *Mason*, C. J., dissenting, — the opinion of *Crounse*, J., reviews the principal cases; Hallenbeck *v.* Hahn, 2 Neb. 377; and by the Supreme Court of *California*, Stockton, &c. Railroad Co. *v.* City of Stockton, 41 Cal. 147 (1871); and in *Alabama*, Opelika *v.* Daniel, 59 Ala. 211; Selma & Gulf Railroad, *In re*, 45 Ala. 696 (1871); and in *Kentucky*, Allison *v.* Lou., H. C. & W. Railway Co., 10 Bush (Ky.), 1 (1873). Text approved. Jacksonport *v.* Watson, 33 Ark. 704; Richeson *v.* People, 115 Ill. 450.

[1] Cooley, Const. Lim. 5th ed. 264 *et seq.*, discusses the constitutional principles involved in such legislation with his accustomed clearness and ability.

[2] As to coupon bonds, see Daniel on Neg. Instr. sec. 1486 *et seq.* *Post*, chapter xiv. on Contracts, where the subject of Municipal Bonds is considered at large. The mode of enforcement is presented in ch. xx. *post*, on Mandamus.

[3] Mr. Justice *Davis*.

§ 156. **The Abuse of the Power.** — In many parts of the country, and particularly in the West, this mania has become general in cities, counties, townships, and school-districts, and large and burdensome debts have been thoughtlessly created. The author has known new counties in a western State not containing over 10,000 inhabitants, vote for a single railway, bonds to the amount of $300,000, drawing ten per cent interest, payable annually; and instances are not infrequent where bonds have been issued greater than the assessed value of all the taxable property at the time within the municipal or territorial subdivision. No check against the incurring of over-indebtedness is so effectual as the one *that you must pay as you go;* but this is wholly disregarded in the legislation which authorizes bonds payable at a remote period. Another serious consequence of this policy is that even the *interest* on these bonds often proves to be a heavy burden upon the community, and in many instances the bonds have been issued fraudulently by the public or municipal officers, and no consideration or none of value has been in fact received therefor. They may, indeed, have the stock of the railway company; but in most cases, under the prevailing mode of constructing railways, the stock is utterly valueless. When the sting of taxation is felt, and when the taxpayer knows that the bonds were fraudulently issued, and even when he feels that their issue was improvident, experience shows that repudiation, or attempted repudiation is the next stage, involving a forfeiture of the public faith pledged for their payment. Occasionally it has been witnessed that the *State* in all its departments has actively sympathized with the repudiating municipality, and the public faith has been redeemed only, if at all, through the coercion of the Supreme Court of the United States. In a few instances, indeed, the *States* have set the example of repudiating their own obligations issued in aid of railways; and it was in a case of this kind that the Supreme Court at Washington felt itself bound to declare "that the faith of the State [of Minnesota], solemnly pledged, has not been kept; and were she amenable to the tribunals of the country, as private individuals are, no court of justice would withhold its judgment against her." Examples of this kind are demoralizing, and cannot safely become general or frequent.

§ 157 (105). **Constitutional Principles involved.** — It is not proposed here to enter into a discussion of the *constitutional principles* involved in such legislation. The arguments in favor of the power are fully presented in the leading case of Sharpless *v.* The Mayor,[1]

[1] Sharpless *v.* Mayor, 21 Pa. St. 147. See, also, Am. Law Rev. Oct. (1870); *infra*, sec. 158.

and against it in Hanson *v.* Vernon,[1] in Whiting *v.* Sheboygan Railway Company,[2] and in The People *v.* Township Board of Salem,[3] to

[1] Hanson *v.* Vernon, 27 Iowa, 28 (1869).

[2] Whiting *v.* Sheboygan Railway Co., 25 Wis. 167 (1870), opinion by *Dixon*, C. J.; s. c. 3 Am. Rep. 30; s. c. 9 Am. Law Reg. (N. S.) 156, and note; Rogan *v.* Watertown, 30 Wis. 259 (1872).

[3] People *v.* Township Board of Salem, 9 Am. Law Reg. (N. S.) 487, and notes (1870); s. c. 20 Mich. 452. "Bonds like these are of modern invention, and when counties and towns were decoyed into the use of them for the purpose of railroad corporations they had to obtain enabling statutes before they could prostitute municipal seals to any such purpose. And as soon as the people [of *Pennsylvania*] began to feel the consequences of applying the fundamental principle of commercial paper to their bonds, they altered their organic law so as to render such bonds and enabling statutes impossibilities in the future." *Per Woodward*, C. J., County *v.* Brinton, 47 Pa. St. 367 (1864). The evil of these subscriptions was the cause of the amendment to the Constitution. *Per Read*, J., Pennsylvania Railroad Co. *v.* Philadelphia, *Ib.* 193. The *Constitution of Pennsylvania* (1874) provides: "The General Assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual." This is in substance the amendment to the Constitution made in 1857. Construed in Pennsylvania Railroad Co. *v.* Philadelphia, 47 Pa. St. 189; Wheeler *v.* Philadelphia, 77 Pa. St. 338; Wilkesbarre Hospital *v.* Luzerne County, 84 Pa. St. 55. Bounty tax to volunteers not within the prohibition. Speer *v.* School Directors, 50 Pa. St. 150.

The *Ohio Constitution* (art. viii. sec. 6) provides that "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to, or in aid of, any such company, corporation, or association;" and this was held not to prohibit the legislature from authorizing a municipal corporation to engage in building a railroad mainly outside of the State on its own account. Walker *v.* Cincinnati, 21 Ohio St. 14 (1871); s. c. 11 Am. Law Reg. (N. S.) 346, and note of Judge *Redfield;* s. c. 8 Am. Rep. 24. Considering the evil which this provision of the Constitution was aimed at, it seems difficult to avoid the conclusion that this construction thwarts the intention and purpose for which the provision was designed and adopted.

This case illustrates the dangerous nature of the invention of bringing the taxing power to aid in the building of railway lines, and particularly does it subvert all previous notions of the appropriate powers, functions, and duties of municipalities. Here a single city, in the face of the Constitution, was authorized to borrow $10,000,000, and issue its bonds in payment, to be appropriated to the construction of a long railroad line by itself and for itself, lying chiefly in other States; and yet the validity of the act giving the authority was sustained. In May, 1873, the same constitutional provision was before the Supreme Court of the State, and the act of 1872, mentioned below, was held to be in conflict with it, since the legislature could not do indirectly what it was prohibited from doing directly. The court held: 1. Taxation can only be authorized for public purposes. When, therefore, a statute authorizes a county, township, or municipality to levy taxes not above a given per cent on the taxable property of the locality for the purpose of building so much of a railroad as can be built for that amount, and the part of a railroad so to be built can be of no public utility unless used to accomplish an unconstitutional purpose, such tax is illegal and cannot be enforced. 2. Where public credit or money is furnished by any of the subdivisions of the State named in the Constitution, to be used in part in the construction of a work which, under the

which, and to the other cases before cited, the reader is referred. The judgments affirming the existence of the power have generally met with strong judicial dissent and with much professional disapproval, and experience has demonstrated that the exercise of it has been productive of bad results. Taxes, it is everywhere agreed, can only be imposed for *public* objects, and taxation to aid in building the roads of *private railway companies*, even if the use is a public use, is hardly consistent with our traditional respect for the inviolability of private property and individual rights. Fraud often accompanies the exercise of the power, and extravagant indebtedness is the result; and, sooner or later, the power will be denied by constitutional provision, as it already is in Pennsylvania, Ohio, Illinois,[1]

statute authorizing its construction, must be completed, if completed at all, by other parties out of their own means, who are to own, or have the beneficial control and management of the work when completed, public money or credit thus used can only be regarded as furnished for or in aid of such parties. The act of April 23, 1872, to authorize counties, townships, and other municipalities therein named to build railroads, &c. [59 O. L. 84], authorizes the raising of money by taxation, which is equally applicable to the unlawful purpose of aiding railroad companies and others engaged in building and operating railroads, as it is to any lawful purpose, and gives to the officers entrusted with the control and operation of the money thus raised no means or power of discrimination as to the lawfulness of the work or purpose to which it is to be applied; and this is in contravention of sec. 6. art viii. of the Constitution, and therefore void.

By amendment of the *Constitution of New York*, which took effect January 1, 1875, "No county, town, or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association, or corporation." People *v.* Ft. Edward, 70 N. Y. 28 (1879).

The *Constitution of Indiana* provides that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription." Art. x. sec. 10. What is an "incorporated company," and how and when stock may be paid for, see Lafayette, &c. Railroad Co. *v.* Geiger, 34 Ind. 185 (1870), where the subject is very elaborately considered by *Buskirk*, J. John *v.* Cin., &c. Railroad Co., 35 Ind. 539; Aspinwall *v.* Jo Daviess Co., 22 How. 364. The new *Constitution of Missouri* cuts up the business by the roots. Art. iv. sec. 47.

[1] The *Constitution of Illinois*, which went into effect July 2, 1870, provided that no municipality should "ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation. *Provided, however*, That the adoption of this article shall not be construed as affecting the right of such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption." It has been held that the effect of this section was to withdraw a power, previously conferred by the legislature, to issue bonds in payment of subscriptions and donations duly voted to railroads, when the power had not been exercised before it went into effect; but that subscriptions and donations legally voted before that time could be completed after it. Concord *v.* Robinson, 121 U. S. 165. As to the power of the legislature of *Illinois* under the Constitution of 1848 to validate the action of a town in voting a subscription to railway stock without authority, see Bolles *v.* Brimfield, 120 U. S. 759. The *proviso* includes *donations* as well as subscriptions. Fairfield *v.* County of Gallatin, 100 U. S. 47, overruling Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Enfield *v.* Jordan, 119 U. S. 680.

New York, Missouri, and possibly some of the other States, or by legislative enactment. It is too late to expect, in view of the line of decisions referred to, that the courts in the States which have already passed upon the question will retrace their steps, and too much to hope that the courts in other States will have the boldness successfully to stem the strong tide of authority, strengthened, as it will be, by temporary popular feeling and corporate influence.

§ 158 (105 *a*). **Same subject. Decisions of the Supreme Court of the United States.** — Since the first edition of this work, the Supreme Court of the United States, following repeated intimations of its judges in previous cases, *have directly sustained the validity of legislative acts authorizing municipal aid to railways.*[1] In view of the prior adjudications of that tribunal in the municipal bond cases, hereafter referred to in the chapter on Contracts, and of the almost uniform holding of the State courts, no other result could have been anticipated. This ends judicial discussion if it does not terminate doubts. The Supreme Court, in reaching this result, places its judgment upon the ground that highways, turnpikes, canals, and rail-

This section did not take away the power, which the legislature had under the previous Constitution, of passing a curative act declaring an election in favor of authorizing a subscription to a railroad valid and giving power to issue bonds therefor, when the election was held under a mere power to borrow money and issue bonds, the statute being insufficient to warrant a subscription to a railroad. Jonesboro City *v.* Cairo & St. Louis R. R. Co., 110 U. S. 192. The section held not to invalidate township bonds, which were issued in pursuance of a vote held on the same day the new Constitution was adopted (July 2, 1870). Louisville *v.* Savings Bank, 104 U. S. 469.

The *Constitution of Mississippi* of 1869, art. xii. § 14, provides that, "The legislature shall not authorize any county, city, or town to become a stockholder in, or lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto." Under this provision it is held that the legislature of that State has no authority to pass an act validating an issue of bonds, illegally issued before the provision went into effect, under a law which, though constitutional when enacted, was not within the terms of the provision. Katzenberger *v.* Aberdeen, 121 U. S. 172. *Held*, also, under the same provision, that an act ratifying all subscriptions to the capital stock of a corporation "made by any county, city, or town in this State, which were not made in violation of the Constitution," did not with sufficient certainty ratify a subscription made in pursuance of a vote, when neither the election nor the subscription had been authorized by the legislature; and that bonds issued under authority of the pretended act of ratification were void for want of power to issue them. Hayes *v.* Holly Springs, 114 U. S. 120. This provision requires the assent of only two-thirds of those actually voting, not two-thirds of all those qualified to vote. Carroll County *v.* Smith, 111 U. S. 556.

[1] Olcott *v.* Supervisors, 16 Wall. 678 (1872); Railroad Co. *v.* Otoe County, 16 Wall. 667 (1872); s. c. reprinted, 2 Neb. 496; St. Joseph Township *v.* Rogers, 16 Wall. 664 (1872); s. c. 7 Albany Law Journal, 362; Rogers *v.* Burlington, 3 Wall. 654; Mitchell *v.* Burlington, 4 Wall. 270.

ways, although owned by individuals under public grants or by private corporations, are *publici juris;* that they have always been regarded as governmental affairs, and their establishment and maintenance recognized as among the most important duties of the State, in order to facilitate transportation and easy communication among its different parts; and hence the State may put forth, in favor of such improvements, both its power of eminent domain (as it constantly does) and its power to tax, unless there be some special restriction in the Constitution of the particular State. These powers may, in the judgment of the court, be lawfully exerted, because the use is in its nature a public use, and these works are subject to public control and regulation (except so far as this right has been lawfully parted with by valid legislative contract), notwithstanding they may be exclusively owned by private persons or corporations. It must be admitted that compulsory taxation in favor of railways and like public improvements owned by individuals or companies is an exercise of power going quite to the verge of legislative authority. Although it is a doctrine that must now be considered as judicially settled, still it is one which has, as we think justly, encountered a vigorous opposition, both on the ground of expediency and of power; and the exercise of authority has, as before noticed, been so disastrous as already, in some of the States, to have led to constitutional provisions for the protection of the citizen.

§ 159 (105 *b*). **Principle does not extend to Compulsory Taxation for Private Enterprises.** — It is obvious, from the foregoing statement of the grounds upon which the validity of such legislation is made to rest,[1] that it furnishes no support for the *validity of taxation* in favor of enterprises and objects which are *essentially private.* We consider the principle equally sound and salutary, that the mere incidental benefits to the public or the State, or to any of its municipalities or divisions, which result from the pursuit by individuals or corporations of ordinary branches of business or industry, do not constitute a *public use* in the legal sense, which justifies the exercise either of the power of eminent domain or of taxation. It would have been well, in our judgment, if this doctrine had been extended in its application to railway companies; but the doctrine that private enterprises or objects cannot be aided by taxation is so fundamental that it cannot be denied or disregarded without unsettling the foundations of individual rights, without recognizing legislative omnipotence over private property, or the irresponsible despotism of a local majority, and unwisely opening the way for frauds and

[1] *Supra*, sec. 157.

abuses which, in view of the past, cannot be contemplated without deep anxiety.[1]

[1] The doctrine of the text finds interesting illustrations and authoritative support in several adjudged cases determined by courts of great respectability. One is Lowell *v.* Boston, decided by the Supreme Judicial Court of Massachusetts in 1873. 111 Mass. 463; s. c. 15 Am. Rep. 39. After the great fire in Boston, in 1872, the legislature enacted that the city might issue its bonds to the amount of $20,000,000, the proceeds of which three commissioners, appointed by the mayor, were authorized *to loan* in a safe and judicious manner "in such sums as they shall determine *to the owners of land, the buildings upon which were burned by the fire in said Boston* on the ninth and tenth days of November, 1872, upon the notes or bonds of said owners secured by first mortgages of said land; said mortgages to be conditioned that the rebuilding shall be commenced within one year from the first day of January, 1873, and said commissioners to have full power to apply the proceeds of said bonds in making said loans in such manner, and to make such further provisions, conditions, and limitations in reference to said loans, and securing the same, as shall be best calculated, in their judgment, to ensure the employment of the same in rebuilding upon said land burned over, and the payment thereof to the said city."

It will be seen that the object of this act, as shown by its provisions, was "to ensure the speedy rebuilding on land the buildings upon which were burned" by the great fire; and the question was as to the right of the State to impose any taxes for this object, and this depended upon the further question, whether this object was, in a legal sense, a public object.

The court distinctly held, to use the language of the rescript sent down in the case, that taxes can only be laid "for some public service or some object which concerns the public welfare;" that "the preservation of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. . . . That the incidental advantages to the public or to the State which result from the promotion of private interests, or the prosperity of private enterprises or business, does not justify their aid by taxation. . . . That, as a judicial question, the case is not changed by the magnitude of the calamity which has created the emergency." And finally the court say, "The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature, and the city cannot legally issue the bonds for the purposes named in the act." 111 Mass. 463. This case is followed and approved in State *v.* Osawkee Township, 14 Kan. 418 (1875), and the "*relief bonds*" which the township was authorized to issue were held not to be for a public purpose, and therefore void. s. c. 19 Am. Rep. 99; McConnell *v.* Hamm, 16 Kan. 228; C. B. U. P. Railroad Co. *v.* Smith, 23 Kan. 745.

Another case is Allen *v.* Inhabitants of Jay, 60 Me. 124 (1871); 12 Am. Law Reg. (N. S.) 481. The legislature authorized the town of Jay to lend $10,000 to enable the borrowers to build a saw-mill and grist-mill, and to exempt the mills from taxation for ten years. On the ground that the purpose was not a public one, the act was adjudged unconstitutional. See opinions of the judges, 58 Me. Appendix, 590 *et seq.*, given to the House of Representatives. The doctrine was adhered to in Brewer Brick Co. *v.* Brewer, 62 Me. 62 (1873); s. c. 16 Am. Rep. 395, and ably vindicated by *Appleton*, C. J.; Bissell *v.* Kankakee, 64 Ill. 249 (1872); Mather *v.* Ottawa, 114 Ill. 659, noted *supra*, sec. 127, note.

Another case is The Commercial National Bank *v.* City of Iola, decided by the U. S. Circuit Court for the district of Kansas, June, 1873, reported in 2 Dillon, C. C. 353, affirmed 20 Wall. 655 (1874). For the same reasons the act of the legislature which authorized the city of Iola to appropriate $50,000 to aid private persons in *the erection and equipment of buildings,*