CHAPTER XIX.

MUNICIPAL TAXATION AND LOCAL ASSESSMENTS.

§ 735 (586). **Subject outlined.** — We have elsewhere had occasion to refer to the *subject of taxation* in relation to the powers and duties of municipalities.[1] It is chiefly in virtue of this power that the revenues are acquired by which municipal expenses are borne, and debts and liabilities paid.[2] And it is, as we shall presently see, by virtue of a branch of this great power that local assessments upon property benefited, or legislatively declared to be specially benefited, are imposed, in order to meet the cost of making local improvements of a public nature within the municipality, adjoining or near the property assessed. It does not belong to the present work to treat at length of the power of taxation by the State, and the limitations upon it. We shall confine ourselves to a consideration of the subject as connected with municipal corporations, and to the peculiarities which are impressed upon the power when exercised by municipalities under authority conferred upon them by the legislature.[3]

[1] *Ante*, chap. i. sec. 10, note; chap. ii. sec. 30; chap. iv. secs. 60, 62, 63, 69, 75; chap. v. secs. 100, 101; chap. vi. sec. 162; chap. xii. secs. 357–361; chap. xvi. sec. 584. *Post*, chap. xx. on Mandamus.

[2] Lyon *v.* Elizabeth, 43 N. J. L. 158.

[3] The constitutional aspects of the subject have been well treated, by Mr. Sedgwick (Statutory and Const. Law, chap. x.), by Mr. Hare (late treatise on American Constitutional Law), and by Judge Cooley (Const. Lim. chap. xiv., and in his valuable work on Taxation). Mr. Desty, since the last edition of the present work, has published his treatise on the American Law of Taxation (2 vols. pp. 1427), in which, with characteristic industry, he has examined, as he states, "about 10,000 cases, and has exhausted, as he believes, the reports of the courts of last resort in all of the States and Territories." Mr. Burroughs' work on the Law of Taxation with its Supplement, digests, as he states, 4578 cases relating to taxation, Federal, State, and Municipal. These special treatises must be referred to for details on many points relating to a subject so vast. Perhaps its vastness may make a chapter which confines its treatment within the limited scope indicated in the text, the more convenient, if not more useful. Mr. Blackwell's treatise on the subject of Tax Titles is well known to the profession, and chap. xxxi. of that work is upon the subject of tax sales by municipal and other corporations.

The power to tax all the property and vocations within the State is an essential attribute of its sovereignty; there is no restraint upon its exercise, when within constitutional limits. Robinson, *In re*, 12 Nev. 263; No. Mo. R. R. Co. *v.* Maguire, 20 Wall. 46; Hagar *v.* Yolo Co. Sup., 47 Cal. 222; Coite *v.* Soc. for Sav., 32 Conn. 173; McCulloch *v.* Maryland, 4 Wheat. 316; St. Louis *v.* Wiggins Ferry Co., 11 Wall. 429; Perkins *v.* Milford, 59 Me. 315; Davenport *v.* Miss. & Mo. R. R. Co., 16 Iowa, 348; Van Antwerp, *In re*, 56 N. Y. 261; Pullen *v.* Wake Co. Comm'rs, 66 N. C. 361. *Infra*, sec. 739. The constitutional inhibition against taking private property for public use without compensation applies only to property taken under the right of eminent domain, not to taxation. Norris *v.* Waco, 57 Tex. 635. *Infra*, sec. 738.

736 (587). **Taxes defined; Scope of Taxing Power.** — The taxing power of the State consists in its authority to levy and collect taxes and assessments which are in the nature of special taxes. *Taxes* (including, in the term, assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons and property, to raise money for *public*, as distinguished from *private purposes*, or to accomplish some end or object *public in its nature*. There can be no legitimate taxation to raise money unless it be destined for the uses or benefit of the government or some of its municipalities, or divisions, invested with the power of auxiliary or local administration. A public use or purpose is of the essence of a tax.[1] Theoreti-

[1] Hanson *v.* Vernon, 27 Iowa, 28, 47 (1869); s. c. 1 Am. Rep. 215, and see authorities there cited, defining *taxes;* People *v.* McCreery, 34 Cal. 432; Doyle *v.* Austin, 47 Cal. 360 (1874); Perry *v.* Washburn, 20 Cal. 318; Weismer *v.* Douglas, 64 N. Y. 91 (1876); s. c. 21 Am. Rep. 586; Hilbish *v.* Catherman, 64 Pa. St. 154 (1870); Glasgow *v.* Rouse, 43 Mo. 489; Warren *v.* Henly, 31 Iowa, 31, *per Beck*, J.; s. c. 5 West. Jurist, 101; Stockton & V. R. R. Co. *v.* Stockton Council, 41 Cal. 149; Opinion of Judges, 58 Me. 591; Allen *v.* Jay, 60 Me. 124 (1871); s. c. 12 Am. Law Reg. N. S. 481, and note of Judge *Redfield;* Feldman *v.* Charleston, 23 S. C. 57. See *ante*, sec. 508, note.

"I concede," says *Black*, C. J., in Sharpless *v.* Philadelphia, 21 Pa. St. 147, 167, "that a law authorizing taxation for any other than public purposes is void. . . . A tax for a *private* purpose is unconstitutional, though it pass through the hands of public officers." Hilbish *v.* Catherman, 64 Pa. St. 159. "A tax for a private purpose," says *Lowe*, J., in the case of Wapello County, 13 Iowa, 405, "is a solecism in language." What is a *public purpose* sufficient to support the power has been much discussed during late years, particularly in connection with the authority conferred upon municipalities to aid in the building of railways. See chap. vi. *ante;* secs. 153, 157, 161 *et seq.* In the case of Cit. Sav. & Loan Assoc. of Cleveland *v.* Topeka, 20 Wall. 655 (1874), it was held to be beyond the legislative competency to authorize municipalities to aid enterprises essentially private; that taxes can be levied only for public purposes. The opinion of *Miller*, J., is the ablest and most satisfactory discussion of the subject to be found in the books. See Parkersburg *v.* Brown, 106 U. S. 487, 501; Cole *v.* La Grange, 113 U. S. 1; Lowell *v.* Boston, 111 Mass. 454.

The expression "public purpose" or "public use" is not to be taken in any narrow sense, but as distinguished from *private* purpose or uses; and therefore the Supreme Court of *Wisconsin* has properly held that, in the absence of special constitutional restriction, the legislature may authorize a town or other municipality to levy taxes therein for public purposes not strictly of a municipal character, but from which the public have received or will receive some direct advantage; or where the tax is to be expended in defraying the expenses of the government, or in promoting the peace, good order, and welfare of society, or in paying claims founded upon natural justice and equity, or upon gratitude for public services or expenditures, or in discharging the obligations of charity and humanity. See interesting views on this subject by *Folger*, J., in Weismer *v.* Douglas, 64 N. Y. 91 (1876); s. c. 21 Am. Rep. 586, and by *Appleton*, C. J., in

cally, the taxpayer is compensated for the taxes he pays in the protection afforded to him and his property by the government which imposes the tax; but the substantial foundation of the power is political, civil, or governmental necessity, and taxes are largely, if not wholly, as Mr. Mill insists, sacrifices for the public good, "equality of sacrifice" being the rule dictated by justice.[1] Equality, indeed, so far as practicable, is inherent in the very idea of a *tax*, as distinguished from arbitrary exaction, and in many of the States is enjoined, as we shall presently perceive, by constitutional provision.

§ 737 (588). **Elements of Public Use and of Apportionment.** — Whatever limitations exist upon the legislative authority to wield, in its full scope, the taxing power of the State at its will, must be sought in the nature of the power itself, as thus briefly explained, and in express or implied restrictions of the National and State Constitutions.[2] Taxation implies, as we have seen, an imposition

Brewer Brick Co. *v.* Brewer, 62 Me. 62 (1873); s. c. 16 Am. Rep. 395; State *v.* Tappan T. Clerk, 29 Wis. 664; *ante*, secs. 75, 544; Eureka Basin W. & M. Co., *In re*, 96 N. Y. 42; English *v.* People, 96 Ill. 566; Desty Taxation, sec. i. p. 1, sec. viii. p. 14. Mr. Hare (1 Am. Const. Law, 278–287) discusses the question what constitutes a public use or purpose.

The act of the legislature of *Georgia*, authorizing the levy and collection of a tax to compensate lot-owners in a certain town for damages sustained by the removal of the county seat to another town, was held valid and constitutional. Wilkinson *v.* Cheatham, 43 Ga. 258 (1871); Cooley Const. Lim. chap. xiv. 487 *et seq.* Where the legislature authorized the city of Charleston *to issue its bonds and lend them to persons desiring to rebuild in the district destroyed by the great fire* in 1866, it was held that, as authority to issue bonds necessarily involved the power to levy taxes to pay them, and as the taxing power of the legislature could only be exercised under the Constitution of that State for a public purpose, and as the object named was private and not public, the act of the legislature was unconstitutional and the bonds void. Feldman *v.* Charleston, 23 S. C. 57. Boston fire. See *ante*, sec. 159, note; *post*, sec. 746, note.

[1] Mill Political Economy, vol. ii. pp. 370, 372; Warren *v.* Henly, 31 Iowa, 31; s. c. West. Jurist, vol. v. p. 101, opinion of *Beck*, J.

[2] Subject to constitutional restrictions, it is within the *power of the legislature* of a State to ascertain the public burdens to be borne and the persons or classes of persons who ought to bear them, and its determination, within the limits of the Constitution, is not judicially reviewable. *Ante*, secs. 70, 71, 74, 75, 77, and the authorities there cited; People *v.* Brooklyn, 4 N. Y. 419 (1851); followed in Brewster *v.* Syracuse, 19 N. Y. 116, 118 (1859); in Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 241, 251; in Guilford *v.* Chenango Co. Sup., 13 N. Y. 143; People *v.* Dayton, 55 N. Y. 367, 389 (1874); in Litchfield *v.* Vernon, 41 N. Y. 123 (1869); and in Scovill *v.* Cleveland, 1 Ohio St. 126, 135 (1853); Warren *v.* Henly, 31 Iowa, 31, *per Beck*, J.; Veazie Bank *v.* Fenno, 8 Wall. 533; Weston *v.* Charleston Council, 2 Pet. 449; Carroll *v.* Perry, 4 McLean, 25; Lane County *v.* Oregon, 7 Wall. 71; Kirby *v.* Shaw, 19 Pa. St. 258; Pittsburgh, Ft. W. & C. Ry. Co. *v.* Commonwealth, 66 Pa. St. 73; Hanna *v.* Allen Co. Comm'rs, 8 Blackf. (Ind.) 352; State *v.* Newark, 26 N. J. L. 515; Talman *v.* Butler County, 12 Iowa, 531; State *v.* Stephens, 4 Tex. 137; Young *v.* Hall, 9 Nev. 212; Williams *v.* Cammack, 27 Miss. 209; De Pauw *v.* New Albany, 22 Ind. 204 (1864); No. Mo. R. R. Co. *v.*

for a *public* use; and it also implies that the imposition shall be upon some system of *apportionment*, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment;[1] and hence we may readily conceive of acts of the legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the Constitution should be infringed. But where the imposition is properly a tax, and no specific or express constitutional limitation exists, the power of the legislature is supreme, and without any theoretical bounds. "If the right to impose a tax exists," says the Supreme Court of the United States,[2] "it is a right which, in its nature, acknowledges no limit;" and the reason is, that the needs of the public or of the government can ordinarily have no bounds set to them. Unless, therefore, there is some limit fixed in the Constitution, the State may tax the property within the State to its full value; in other words, it has unlimited power over the *rate*

Maguire, 49 Mo. 490 (1872). Compare Weismer *v.* Douglas, 64 N. Y. 91 (1876).

"I admit that the power to tax is unbounded by an express limit in the Constitution" of *Pennsylvania;* "but nevertheless taxation *is* bounded in its exercise by its own nature, essential characteristics, and purpose." *Per Agnew*, J., in Washington Av., 69 Pa. St. 352, 363; Erie *v.* Reed's Ex., 113 Pa. St. 468.

The legislature, in the exercise of the taxing power, may impose a tax to build a bridge, or to pay debts incurred for one already constructed, for the public accommodation; and the legislature (in the absence of constitutional restriction upon its power) may define how large that local community shall be that is made subject to the tax, whether the State, or a county, or a city, or one or more of its wards. Shaw *v.* Dennis, 10 Ill. 416; Philadelphia *v.* Field, 58 Pa. St. 320, referred to, *ante*, sec. 74. If there be no special restriction on the legislature, it may create taxing districts without reference to existing civil or political districts. Shelby County Judge *v.* Shelby R. R. Co., 5 Bush (Ky.), 225; *ante*, chap. iv. *passim*. Authority to tax property *outside* of corporate limits, to pay bonds issued in aid of a railroad, sustained. Langhorne *v.* Robinson, 20 Gratt. 661 (1871). See, also, Waterville *v.* County, 59 Me. 80 (1871). But in Wells *v.* Weston, 22 Mo. 384 (1856), followed in Cameron *v.* Stephenson, 69 Mo. 372, it was held that the legislature cannot constitutionally authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the limits of the corporation. In St. Charles *v.* Nolle, 51 Mo. 122 (1872), *Adams*, J., *arguendo*, approves Wells *v.* Weston, and admits that it is inconsistent with Langhorne *v.* Robinson, *supra*. Although the act authorizing the issue of municipal bonds provided for the levy of a special tax on all the *real estate* within the municipal township making the subscription, still it is competent for the legislature, after the issue of the bonds, to amend the act and provide that the levy for that purpose shall be made *on personal as well as real property*, and a *mandamus* will issue in the proper case, on the relation of the bond creditor, commanding the levy to be made on both classes of property. Cape Girardeau Co. Court *v.* Hill, 118 U. S. 68; *infra*, chap. xx.

[1] 1 Hare Am. Const. Law, 303, 310; 1 Desty Taxation, sec. 10, p. 28, and cases. *Infra*, sec. 761.

[2] Weston *v.* Charleston Council, 2 Pet. 449; McCulloch *v.* Maryland, 4 Wheat, 316, 431; Hanson *v.* Vernon, 27 Iowa, 28, 49; Meriwether *v.* Garrett, 102 U. S. 472, noted more fully *ante*, chap. vii.; Munday *v.* Rahway, 43 N. J. L. 338.

of taxation and the *objects* (the property, persons, or things subject to be taxed) of taxation.

§ 738 (589). **Taxation and Eminent Domain discriminated.** — The power of *taxation* and the power of *eminent domain*, subject to both of which all private property is held, although they both originate in political necessity, are in their nature materially different. For taxes paid, or money exacted under the taxing power, no direct specific compensation is made; but where property is *taken* under the right of eminent domain, this can be done, as we have already seen, only to the limited extent required by the particular object or enterprise in favor of which it is exercised, and then only on the condition of making to the owner direct and full compensation in money for the *particular* and *unequal* sacrifice which he would otherwise be obliged to make for the public benefit. Most of the courts have concurred in the view that the usual constitutional provision prohibiting the taking of private property for public use without compensation, is a limitation on the exercise by the State of the right of eminent domain, and not a limitation on the taxing power.[1]

§ 739 (590). **Municipal Authority to levy Taxes.** — In the general power of the legislature, as well as in its power to create municipal corporations,[2] may be found the right to authorize them, when created, *to impose or levy local rates, taxes, and assessments* upon their inhabitants, and upon all property within the limits of the designated taxing district, which is ordinarily co-extensive with the territorial limits of the municipality.[3] Indeed, it is one of the distinguishing

[1] People *v.* Brooklyn, 4 N. Y. 419 (1851). The difference between *taxation* and *eminent domain* is here discriminated with great clearness and precision in the learned opinion of Mr. Justice *Ruggles*. Adhered to and followed: Litchfield *v.* Vernon, 41 N. Y. 12 (1869. See, also, Gilman *v.* Sheboygan, 2 Black (U. S.), 510 (1862); Moale *v.* Baltimore (opening street), 5 Md. 314 (1854); *ante*, chap. xvi. on Eminent Domain; Hanson *v.* Vernon, 27 Iowa, 28, 54, (1869); Stewart *v.* Polk Co., 30 Iowa, 9; Williams *v.* Detroit, 2 Mich. 565; People *v.* Salem, 20 Mich. 477; No. Ind. R. R. Co. *v.* Connelly, 10 Ohio St. 165; 1 Desty Taxation, sec. 11, p. 31, and cases; 1 Hare Am. Const. Law, 332. *Ante*, sec. 735, note.

[2] *Ante*, secs. 21, 37.

[3] Hope *v.* Deaderick, 8 Humph. (Tenn.) 1 (1847); Smith *v.* Aberdeen, 25 Miss. 458; Washington *v.* State, 13 Ark. 752; Goddin *v.* Crump, 8 Leigh (Va.), 120; Bull *v.* Read, 13 Gratt. 78, 98 (1855); Thompson *v.* Floyd, 2 Jones L. (N. C.) 313, 316; Wilmington *v.* Roby, 8 Ired. L. (N. C.) 250 (1848); Caldwell *v.* Burke Co. Jus., 4 Jones Eq. (N. C.) 323; Taylor *v.* Newberne Comm'rs, 2 Jones Eq. 141; Alexander *v.* Baltimore, 5 Gill (Md.), 383 393 (1847), *per Martin*, J.; Burgess *v.* Pue, 2 Gill, 11; s. c. *Ib.* 254 (1844); State *v.* Noyes, 30 N. H. 279; Cheaney *v.* Hooser, 9 B. Mon. (Ky.) 330; Slack *v.* Maysville & Lex. R. R. Co., 13 B. Mon. 1; Bradley *v.* McAtee, 7 Bush, 667; *Ib.* 599; Marion Int. &c. *v.* Chandler, 6 Ala. 899; State *v.* Estabrook, *Ib.* 653; Battle *v.* Mobile, 9 Ala. 234; Osborne *v.* Mobile, 44 Ala. 493; Hurford *v.* Omaha, 4 Neb. 336 (1876);

features of our municipal institutions that local rates shall be locally imposed by those who have to pay them or bear their burden; and this power, from very early periods, has, in the different States, been constantly delegated to, and exercised by, the local authorities.[1]

§ 740. **Same subject.** — In the absence of special constitutional restriction, the legislature may *confer the taxing power upon municipalities* in such measure as it deems expedient, — in other words, with such limitations as it sees fit, as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons and property) which shall be subjected to taxation; but it cannot, of course, confer any greater power than the State itself possesses, and it must observe the restrictions and limitations of the organic law.[2]

People *v.* Kelsey, 34 Cal. 470; Harrison *v.* Vicksburg, 11 Miss. 581; Shreveport *v.* Jones, 26 La. An. 708 (1874); Butler's Appeal, 73 Pa. St. 448; Kinney *v.* Zimpleman, 36 Tex. 554; St. Louis *v.* Laughlin, 49 Mo. 559; People *v.* Hurlbut, 24 Mich. 44; Steward *v.* Jefferson, 3 Harr. (Del.) 335; Stein *v.* Mobile, 24 Ala. 591; Desty Taxation, sec. 98, p. 472–479, cites other cases. Taxes on the same species of property should be equal, and assessed according to the value of the property taxed. When a tax is levied by a municipal corporation, it must be levied on all the taxable property within its limits, according to its value, and not upon the property of a few only. Mobile *v.* Dargan, 45 Ala. 310 (1871); Mobile *v.* Royal St. R. R. Co., 45 Ala. 322 (1871); Lebanon *v.* Ohio & Miss. R. R. Co., 77 Ill. 539 (1875); Turner *v.* Omaha, 6 Neb. 54 (1877); *supra*, sec. 737, note. As to the right of a city council to change the appraisement adopted under the power of equalization, see Jones *v.* Columbus, 62 Ind. 422; Delphi *v.* Bowen, 61 Ind. 29.

"The State has an undoubted power to tax persons and property within its limits, and it may delegate such power to a civil corporation, so far as it may be necessary for the good government of the corporation." Harrison *v.* Vicksburg, 3 Sm. & Marsh. (11 Miss.) 581, *per Sharkey*, C. J.; Smith *v.* Aberdeen, 25 Miss. 458. *Supra*, sec. 735, note. Improvements made by a lessee upon land owned and leased by the municipality are, for the purposes of taxation, his property. San Francisco *v.* McGinn, 67 Cal. 110. A building erected by a lessee upon land owned by a church, whose property is exempt from taxation, is taxable as real estate. Russell *v.* New Haven, 51 Conn. 259.

[1] Caldwell *v.* Burke Co. Jus., 4 Jones Eq. (N. C.) 323 (1858), *per Ruffin*, J., quoted *ante*, sec. 9, note; Burgess *v.* Pue, above cited; Perry *v.* Rockdale, 62 Tex. 457, quoting text. In cases which have appeared as this work is going through the press the Supreme Court of Indiana has asserted the constitutional right of local government in that State with decisiveness and vigor. State, *ex rel.* Jameson *v.* Denny, 118 Ind. 382; Evansville *v.* State, *Ib.* 426; State, *ex rel.* Holt *v.* Denny, *Ib.* 449; *ante*, sec. 58 *a*.

[2] Alexander *v.* Baltimore, 5 Gill (Md.), 383, 393 (1847), *per Martin*, J.; Primm *v.* Belleville, 59 Ill. 142 (1872); No. Mo. R. R. Co. *v.* Maguire, 49 Mo. 490, 500; Erie *v.* Reed's Ex., 113 Pa. St. 468; Reineman *v.* Cov., C. & B. H. R. R. Co., 7 Neb. 310; *Ex parte* Montgomery, 64 Ala. 463; and see Weightman *v.* Clark, 103 U. S. 256; *post*, sec. 773. Taxes levied by municipal corporations, which are for this purpose instruments of the State, are in legal effect levied by the State. The lien for such taxes is of equal rank with that for taxes levied by the State. Justice *v.* Logansport, 101 Ind. 326; *post*, sec. 821.

"The State cannot authorize a muni-

§ 741. **Same subject. Authority may be implied.** — The *legislative branch of the government* has the exclusive power of taxation, but may delegate it, as above stated, to municipal corporations.[1] When such corporations are created, the power of taxation, though generally conferred in express terms, may be held to exist by necessary or fair intendment. When, for example, such corporations have, in order to execute a public work, been vested with authority to borrow money or incur an obligation, they have, unless the contrary appears,

cipal corporation to impose a tax which she herself would have no right to levy." O'Donnell *v.* Bailey, 24 Miss. 386 (1852); Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600; Union Bank of Tenn. *v.* State, 9 Yerg. (Tenn.) 490; Memphis *v.* Hernando Ins. Co., 6 Baxter, 527; 1 Desty, Taxation, pp. 479, 481.

The legislature, in providing for a local improvement, cannot charge the property holders affected by the improvement by a course of proceedings unknown to the common law, and differing from that provided by the city charter for cases of like nature. Granger *v.* Buffalo, 6 Abb. (N. Y.) N. Cas. 238.

A *city corporation* cannot tax a bank wholly owned by the *State*, though there be no express provision exempting the property of the bank from taxation. Nashville *v.* Bank of Tenn., 1 Swan (Tenn.), 269. Nor can it tax, without express statute authority, the *public property* of a *county* situate within the limits of the municipality. Piper *v.* Singer, 4 Serg. & R. (Pa.) 354; Nashville *v.* Bank of Tenn., 1 Swan (Tenn.), 269; Worcester County *v.* Worcester, 116 Mass. 193. It is a general proposition that public property, whether belonging to the United States, to the State, or to any of its civil or municipal divisions, is not taxable. Mr. Desty, chap. iii. pp. 34–49, collects the cases on this subject. Construction of special constitutional provision requiring the legislature to *restrict* the power of taxation of incorporated towns and cities. *Ante*, sec. 50. If not specially restricted in the Constitution, the legislature may authorize municipalities to levy and collect taxes in a mode different from that provided for State and county taxes. State *v.* Blundell, 24 N. J. L. 402. When rights of creditors are not infringed, the legislature may change the power of taxation delegated to municipal corporations. Richmond *v.* Rich. & D. R. R. Co., 21 Gratt. 604. A *constitutional restriction* that all taxes *shall be levied by general laws* does not repeal the provisions of municipal charters authorizing taxation. Kansas City *v.* Johnson, 78 Mo. 661; *ante*, secs. 86, 87; *infra*, secs. 770–773. The Constitution of *Virginia* does not authorize the *county* authorities to assess property for taxation and levy taxes upon it independent of the action of the legislature, and under the legislation of the State the county authorities can only levy a tax upon such property as by law is assessed with State taxes in the county; they cannot levy a tax on the real estate of railroads in the county, either for county, township, school, or road purposes. Va. & Tenn. R. R. Co. *v.* Washington County, 30 Gratt. (Va.) 471. A statute requiring a city council to pass within the first quarter of each year an ordinance in which they *may* appropriate money to defray necessary expenses and liabilities, is mandatory; it is the duty of such council to make the needful appropriations. Cairo *v.* Campbell, 116 Ill. 305. Under the General Incorporation Act of *Illinois* there must first be passed an act making appropriations, and after it has been published and has become final, there must be passed an ordinance levying the amount of the appropriations upon the taxable property; the appropriation and levy of taxes cannot be made by the same ordinance. People *v.* Peoria, D. & E. R. R. Co., 116 Ill. 410.

[1] A municipal corporation has no power to levy taxes except under express authority or necessary implication. State *v.* Maysville, 12 S. C. 76; Meriwether *v.* Garrett, 102 U. S. 472; *ante*, chap. viii.; *post*, secs. 741, 763 *et seq.*, 769.

the power to levy a tax to raise revenue wherewith to pay the money or discharge the obligation, without any special mention that such power is granted.[1] A limitation imposed by statute upon municipal corporations, restraining them from creating any indebtedness without providing at the same time for the payment of principal and interest, was held not to control a subsequent statute, which, without prescribing such limitation, authorizes them to incur a special obligation.[2]

§ 742. **Federal Limitations on the Taxing Power.** — The prohibition upon the States to pass *laws impairing the obligation of contracts is a limitation upon the taxing power of the State*, as well as upon its other legislative powers; and it disables a city, when it borrows money and issues an absolute promise to repay it, from passing an ordinance directing its officers to retain the amount of a tax levied by the city upon such debt, out of the interest thereon as the same falls due.[3]

§ 743 (591). **Same subject.** — The power of the States and of their municipalities to levy taxes is subject to certain other express and implied restrictions in the Federal Constitution, which may be here briefly mentioned. Thus States cannot, without the consent of Congress, lay any *imposts or duties on imports or exports* except what may be absolutely necessary for executing their inspection laws; nor can they, without the consent of Congress, lay any duty on *tonnage*, as they are expressly prohibited from so doing by the Con-

[1] United States *v.* New Orleans, 98 U. S. 381. In *Illinois* it is held that the act of conferring power upon a municipal corporation to incur a liability, by implication also confers the power to levy taxes to discharge it. Peoria, D. & E. Ry. Co. *v.* Scott, 116 Ill. 401. The Supreme Court of the United States has, in a still more recent case than the one in that court above cited, decided that a power to borrow money and to issue bonds therefor, implies the power to levy a tax for the payment of the obligations unless the contrary clearly appears. Ralls Co. Ct. *v.* United States, 105 U. S. 733; *ante*, chap. xiv.; *post*, secs. 763, 769.

[2] United States *v.* New Orleans, 98 U. S. 381; compare Knox *v.* Baton Rouge, 36 La. An. 427; *ante*, chapter on Contracts.

[3] Murray *v.* Charleston, 96 U. S. 432 (1877). *Miller* and *Hunt*, JJ., dissented, on the ground that the contract was made subject to the then existing power of taxation in the city, which entered in and became part of the contract. See also Case of State Tax on Foreign-held Bonds, 15 Wall. 300; No. Central Ry. Co. *v.* Jackson, 7 Wall. 262, for instances of taxing powers which are held to impair the obligation of contracts. Desty, Taxation, sec. 30, pp. 136–141. A State tax upon bonds of a debtor within the State held by a person outside of the State, is unconstitutional, though secured by a mortgage of land within the State. Cleveland, P. & A. R. R. Co. *v.* Pennsylvania (*sub nom.* State Tax on Foreign-held Bonds), 15 Wall. 300 (1872). Local assessments acts held not to be in conflict with the 14th Amendment to the Federal Constitution. *Post*, sec. 760 *b*.

stitution.[1] Nor does the power of taxation by the States extend to the *instruments of the Federal government*, or to the *constitutional means* employed by Congress to carry into execution the powers conferred in the Federal Constitution.[2] Taxes may be imposed by a State on all sales of merchandise or property made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but a tax discriminating against the commodities of the citizens of the other States of the Union is inconsistent with the provisions of the Federal Constitution, and a law imposing such a tax would be unconstitutional and invalid.[3] And the Supreme Court of the United States has expressly decided that an act of the legislature of Maryland, levying *discriminating taxes against non-residents of the State*, was void (reversing the judgment of the Court of Appeals of Maryland), because repugnant to the provision of the Federal Constitution which guarantees to the citizens of each State all the privileges and immunities of the citizens of the several States.[4]

[1] See *ante*, sec. 103, and cases cited; Desty on Taxation, chap. viii., where numerous cases are cited.

As to passenger tax. Smith *v.* Turner, 7 How. (U. S.) 283 (1849); Crandall *v.* Nevada, 6 Wall. 35; Smith *v.* Marston, 5 Tex. 426; State *v.* Fullerton, 7 Rob. (La.) 210 (1844); Rabassa *v.* New Orleans, 3 Martin, o. s. (La.) 218; s. c. 10 Am. Law Reg. N. S. July, 1871; Norris *v.* Boston, 4 Met. (Mass.) 282; *ante*, sec. 103, note; Reading R. R. Co. *v.* Pennsylvania (*sub nom.* State Freight Tax), 15 Wall. 232; Same *v.* Same (*sub nom.* State Tax on Railway Gross Receipts), 15 Wall. 284. The United States Congress may, as the local legislature of the District of Columbia, tax different classes of property situated there, at different rates. Gibbons *v.* District of Columbia, 116 U. S. 404 (sustaining an act which discriminated between city and rural lands), *citing* Loughborough *v.* Blake, 5 Wheat. 318; Welch *v.* Cook, 97 U. S. 541; Mattingly *v.* District of Columbia, 97 U. S. 687.

[2] McCulloch *v.* Maryland, 4 Wheat. 316, 424; Weston *v.* Charleston, 2 Pet. (U. S.) 449 (1829), reversing s. c. 1 Harper Eq. (S. C.) 340; First Nat. Bank of Louisville *v.* Commonwealth, 9 Wall. 353; Osborn *v.* Bank of U. S., 9 Wheat. 738; Desty Taxation, sec. 20, p. 67, and cases. The Union Pacific R. R. Co. and the Central Pacific R. R. Co. are taxable by the States in respect of property situate therein. Union Pac. R. R. Co. *v.* Peniston, 18 Wall. 5 (1873); Thomson *v.* Union Pac. R. R. Co., 9 Wall. 579; Union Pac. R. R. Co. *v.* Lincoln County, 1 Dillon C. C. R. 314 (1871); *post*, sec. 775; State *v.* Central Pac. R. R. Co., 10 Nev. 47; People *v.* Central Pac. R. R. Co., 43 Cal. 398 (1872).

[3] Woodruff *v.* Parham, 8 Wall. 139; Hinson *v.* Lott, *Ib.* 151; Ward *v.* Maryland, 12 Wall. 418 (1870), *per Clifford*, J.; Osborne *v.* Mobile (taxation of Express Co.) 16 Wall. 479 (1872); Welton *v.* Missouri, 91 U. S. 275 (1875); Reading R. R. Co. *v.* Pa. (State Freight Tax), 15 Wall. 232; Wiley *v.* Parmer, 14 Ala. 627; Pacific Junction *v.* Dyer, 64 Iowa, 38; Marshalltown *v.* Blum, 58 Iowa, 184; *post*, sec. 775.

[4] Ward *v.* Maryland, 12 Wall. 418 (1870) (s. c. in State court, Ward *v.* State, 31 Md. 279); s. p. Guy *v.* Baltimore, 100 U. S. 434. Giving the judgment of the court, *Clifford*, J., observed: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. Cooley Const. Lim. 16; Brown *v.* Maryland, 12 Wheat. 449. Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale, in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents. State *v.* North, 27 Mo. 464; Fire Department *v.* Wright, 3 E. D. Smith (N. Y.), 478; Paul *v.* Virginia, 8 Wall. 177." *Bradley*, J., regarded the act of the *Maryland* legislature as being also in violation of the commerce clause of the Constitution. Ward *v.* Maryland was distinguished in Osborne *v.* Mobile, 16 Wall. 479 (1872), where a license-tax upon an express company doing business which extended beyond the limits of the State was sustained, the case being regarded as falling within Woodruff *v.* Parham, *supra*. *Infra*, sec. 744, note. In a later case the court say: "An ordinance of Baltimore, whereunder vessels laden with the products of other States are required to pay, for the use of the public wharves of that city, fees which are not exacted from vessels landing thereat with the products of *Maryland*, is in conflict with the Constitution of the United States. Such fees so exacted must be regarded, not as a compensation for the use of the city's property, but as a mere expedient or device to foster the domestic commerce of *Maryland*, by means of unequal and oppressive burdens upon the industry and business of other States. So far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin, the power of the national government over commerce with foreign nations and among the several States reaches the interior of every State in the Union." Guy *v.* Baltimore, 100 U. S. 434. *Infra*, sec. 792.

In sustaining the validity of a corporation tax on sales of produce within the limits of the city by flat-boat traders, Mr. Chief Justice *Sharkey* observes: "The ordinance imposed no tax for the privilege of introducing the article, but a tax on the amount of sales. The power of a State to tax the merchandise of its own citizens has never been questioned, nor can it be. When a citizen of *Ohio* comes into this State, and makes sales of his merchandise here, there can be no reason why he should be exempted from the operation of the State laws. This position, carried to its utmost extent, would defeat the power of the State over all sales of merchandise within its territory; it would only be necessary for the merchant to claim a residence in some other State, and the power of the State would be at an end." Harrison *v.* Vicksburg, 3 Sm. & M. (11 Miss.) 581, 586 (1844); Daniel *v.* Richmond Trs., 78 Ky. 542; *Ex parte*, Taylor, 58 Miss. 478. A State cannot tax property in transit to another State (Desty on Taxation, sec. 19, pp. 54–60; 1 Hare Am. Const. Law, 321), or interstate commerce, interstate telegrams, interstate ferries, and interstate sleeping cars. 1 Hare Am. Const. Law, 271, 323, 482, where the cases on these points are collected. An ordinance of *New Orleans* assessing a tax upon persons owning and running tow-boats to and from the Gulf of Mexico and New Orleans held not to be a tax upon such boats as property, and not to be a tax upon the income derived from the

§ 744. **Same subject.** — The legislature, if it does not make discriminations in violation of the State Constitution, may authorize

municipal corporations *to tax transient traders or itinerant dealers and peddlers*; and such tax is not in violation of the Constitution of the United States, although the property be brought from another State, provided, it must be added, it does not unlawfully discriminate in favor of the resident, and against the non-resident, citizen.[1] But State laws exacting a license tax from *commercial travellers*, "*drummers*," *and others*, or imposing local burdens upon interstate commerce by taxing occupations directly concerned therein, violate the Federal Constitution, and are void. They are burdens on such commerce, and therefore regulations of it.[2]

business, but to be a regulation of commerce, contrary to art. i. sec. 8, of the Constitution of the United States, and hence void. Moran *v.* New Orleans, 112 U. S. 69 (1884). Taxation of steamboats owned by railway company under the Constitution of California, see California *v.* Central Pac. R. R. Co., 127 U. S. 1; San Francisco *v.* Same, 63 Cal. 467, 469. So an incorporated village has no power to tax property in transit from one State to another, over rivers or public highways, even if detained by natural causes. Burlington Lumber Co. *v.* Willetts, 118 Ill. 559.

[1] Wynne *v.* Wright, 1 Dev. & B. L. (N. C.) 19 (1834); Cowles *v.* Brittain, 2 Hawks (N. C.), 204; Wilmington Comm'rs *v.* Roby, 8 Ired. L. (N. C.) 250 (1848); Whitfield *v.* Longest, 6 Ired. L. (N. C.) 268; Plymouth Comm'rs *v.* Pettijohn, 4 Dev. (N. C.) 591; Corfield *v.* Coryell, 4 Wash. C. C. 380; State *v.* Charleston Council, 10 Rich. L. (S. C.) 240 (1857); State *v.* Pinckney, *Ib.* 474; Charleston Council *v.* Ahrens, 4 Strob. (S. C.) 241; Keller *v.* State, 11 Md. 525 (1857); Ward *v.* Morris, 4 H. & McH. (Md.) 340; Ward *v.* Maryland, 31 Md. 279; reversed, Ward *v.* Maryland, 12 Wall. 418 (1870); Oliver *v.* Washington Mills, 11 Allen (Mass.), 268; State *v.* North, 27 Mo. 464; Wiley *v.* Parmer, 14 Ala. 627; Wiggins *v.* Chicago, 68 Ill. 372 (1873); Morrill *v.* State, 38 Wis. 428 (1875); *Ex parte* Thomas, 71 Cal. 204; following Welton *v.* Missouri, 91 U. S. 275 and Webber *v.* Virginia, 103 U. S. 344; Warren Bor. *v.* Geer, 117 Pa. St. 207; Burr *v.* Atlanta, 64 Ga. 225; Marshalltown *v.* Blum, 58 Iowa, 184, where the ordinance was declared to be a regulation of commerce not within the power of the State to enforce. A license tax is not void for being class legislation, making unjust discriminations, being partial and oppressive in its operation, or as being inconsistent with public policy. Cherokee *v.* Fox, 34 Kan. 16. An ordinance, which is void for discriminating against citizens of other States, will not be made valid by the fact that the discrimination is also against the citizens of the State who reside outside the city. Fecheimer *v.* Louisville, 84 Ky. 306.

[2] Robbins *v.* Shelby Co. Tax Dist. (Tennessee Drummer Act), 120 U. S. 489; Asher *v.* Texas (Texas Drummer Act), 128 U. S. 129 (1888); Leloup *v.* Port of Mobile (license tax on telegraph companies), 127 U. S. 640. *Bradley*, J., *Ib.* p. 648, cites the numerous cases on the subject, denying, if not overruling, Osborne *v.* Mobile, 16 Wall. 479; *supra*, sec. 743, note; Ratterman *v.* West. Union Tel. Co., 127 U. S. 411; West. Union Tel. Co. *v.* Texas, 105 U. S. 460. The validity of the Massachusetts statute imposing an "excise tax" on the franchises of domestic and foreign telegraph corporations was sustained as an excise tax as to domestic corporations, and also as to foreign corporations doing business in that State. Commonwealth *v.* Hamilton Manuf. Co., 12 Allen, 298; Commonwealth *v.* Cary Improvement Co., 98 Mass. 19, 22; Commonwealth *v.* Berkshire Ins. Co., 98 Mass. 25; Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146; Boston Manuf. Co. *v.* Commonwealth, 144 Mass. 598. See on this subject, Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530. *Quære*, whether in this last case the tax was regarded as a "property" or as a "franchise" tax.

But such exemption from State regulation does not prevent the States from taxing the property of those engaged in such commerce who are located within the States, as the property of other citizens is taxed. Leloup *v.* Port of Mobile, 127 U. S. 649, *per Bradley*, J.; West. Union Tel. Co. *v.* Mass. Atty.-Gen., 125 U. S. 530. "*Hawkers and Peddlers*" defined. Graffty *v.* Rushville, 107 Ind. 502; State *v.* Hodgdon, 41 Vt. 139. A "*drummer*" or "*commercial traveller*" who sells from samples goods which are to be delivered by his principal, is not a "peddler" (Kansas *v.* Collins, 34 Kan. 434); but one who sells milk from house to house has been held to be a peddler. Chicago *v.* Bartee, 100 Ill. 57.

An ordinance of a city, passed under a general power conferred by its charter, which exacts a license for selling goods, and fixes one rate of license for selling goods which are within the corporate limits, or *in transitu* to the city, and another and much larger license for selling goods which are not in the city, or *in transitu* to it, is invalid, because it is unjust, unequal, partial, oppressive, and in restraint of trade. Frank, *In re*, 52 Cal. 606.

[1] Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212; Slaughter's Case, 13 Gratt. (Va.) 767; Tatem *v.* Wright, 3 Zabr. (23 N. J. L.) 429; Paul *v.* Virginia, 8 Wall. 168 (1868); Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; Doyle *v.* Continental Ins. Co., 94 U. S. 535; West. Union Tel. Co. *v.* Lieb, 76 Ill. 172; Cincinnati Mut. Health Ass. *v.* Rosenthal, 55 Ill. 85; Ducat *v.* Chicago, 48 Ill. 172; Walker *v.* Springfield, 94 Ill. 364; Leavenworth *v.* Booth, 15 Kan. 627 (1875); Hughes *v.* Cairo, 92 Ill. 339; Ducat *v.* Chicago, 10 Wall. 410; Desty, Taxation, sec. 71, p. 343. License tax upon *express companies*, held not to be a tax upon interstate commerce. Osborne *v.* Mobile, 16 Wall. 479 (1872); see *supra*, sec. 744, note; Southern Exp. Co. *v.* Mobile, 49 Ala. 404 (1873); Walker *v.* Springfield, 94 Ill. 364; Desty, Taxation, 227. As to *telegraph companies*, see Port of Mobile *v.* Leloup, 76 Ala. 401; *supra*, secs. 698, note, 744, note; Desty, Taxation, 226.

§ 745. **Same subject.** — State legislatures have, under the circumstances shown in the cases cited, been held to have the *power to authorize a tax on all foreign corporations* to whatever extent they may in their discretion choose as the condition upon which such corporations shall be allowed to exercise their franchises and privileges in such States, although similar local corporations are not subject to the same tax.[1]

§ 746 (592). **Construction of Provision of State Constitution as to Taxation for "Corporate Purposes" by the "Corporate Authorities" of Cities.** — In this connection it will be convenient to notice some specific *State constitutional provisions* in their bearing upon the subject of taxation and local assessments by municipal corporations. The late Constitution of Illinois contained a provision that "the corporate authorities of . . . cities . . . may be vested with power to assess and collect taxes for corporate purposes." It is held by the Supreme Court of the State that this provision had the effect to limit taxation by municipalities to local or corporate purposes; and also to restrict the legislature from granting the right of local or