§ 760 b. Local Assessment Acts not in conflict with the Fourteenth Amendment. — The Supreme Court of the United States, in

day *v.* Rahway, 43 N. J. 338; s. c. *Ib.* 395.

In 1883, all efforts to adjust the debt of Elizabeth having failed, an attempt was made to enforce payment of the judgments against the city, amounting to about $2,000,000, by compelling the board of assessment to levy a special tax for that purpose, under the act of 1878, mentioned above. Thereupon the members of the board resigned. In this emergency, which had to be met and dealt with, the legislature, in 1884, doubtless at the instance of the city, passed two acts, which, as they are novel in their provisions and as the principal act was sustained by the highest courts of the State, we have thought it worth while to state the substance of them with some fulness.

New Jersey Insolvent Municipalities Relief Acts: — One of these acts gave the county board of assessors power, in case of vacancy in the office of assessor or board of assessors in any township or city, to appoint a committee of three to levy the State, State school, and county taxes therein. P. L. N. J. 1884, p. 72; Sup. to Rev. 985. The other act was entitled "An act to provide for and secure the raising of revenue for the execution of the public duties of maintaining public schools, preventing the destruction of property by fire, preserving the public health, supporting the poor, maintaining police, and keeping the highways and streets in a safe condition for public use, within the limits of incorporated cities, towns, and municipalities in cases where the local or municipal authorities or officers fail to provide for the performance of such duties." In this latter act it was provided that wherever in any city, town, or municipality the local boards or officers authorized by law to assess and levy the taxes mentioned in the title to the act should not be in existence and qualified to act, at the time when by law assessments or valuations of taxable property may be commenced in any year, or whenever such local boards or officers should, for any cause whatever, neglect or fail to commence the assessment or valuation of property for the purpose of taxation for the space of ten days after the time fixed by law when taxes become a lien upon land in such municipality, or should neglect or fail to levy the taxes specified in said act at the time required by law, it should be the duty of the governor to cause a notice to be given to the mayor of such municipality, or to the president or chairman of the legislative or governing body, if there was no mayor, calling attention to the fact that the local authorities, boards, or officers authorized to levy such taxes are not in existence and qualified to act, or that they have neglected to commence the assessment or valuation of property, or that they have neglected or failed to levy said taxes; which notice should further state that unless proceedings be duly taken to make the assessment or valuation within ten days after the giving of the notice, the governor would appoint commissioners of taxation under the act to make the assessment and levy of taxes as therein provided. If the governor, at the expiration of ten days from the service of such notice, should be satisfied that the vacancy still existed, or that the local boards or officers had not commenced the assessment of valuations of property for taxation, or that said taxes had not been levied at the time required by law, it should thereupon become his duty to appoint and commission three freeholders, residents of such municipality, to be known as Commissioners of Taxation, whose duty it should be, "under the authority of said act, to levy taxes for such sums as they should deem expedient for the following, and no other purposes: 1. For the support of public schools and the repair of school-houses. 2. For protecting property within such city, town, or municipality from fire. 3. For the protection and maintenance of the public health within such city, town, or municipality. 4. For the maintenance and support of the poor. 5. For the support and maintenance of a police force within such city, town, or municipality. 6. For keeping the highways and streets within the limits of such city, town, or municipality in a

cases from various States presenting the question in different phases, have held that State laws imposing upon the property or persons

safe condition for public use. 7. For the expenses of assessing and collecting the taxes levied under this act, and in addition thereto a sum to meet deficiencies not exceeding ten per cent of the sums required to be raised for the above-stated purposes." The statute further provided that "all taxes levied in pursuance of this act shall be applied solely to the purposes for which they were levied; and it shall be unlawful to appropriate or use, or direct or order their appropriation or use, for any other purpose or purposes whatever." And it was further provided that the taxes levied by the commissioners should be collected, paid over, distributed, appropriated, and apportioned *pro rata* among the objects therein named, and expended by the same officers or bodies, and in the same manner, as if they had been levied by the boards or officers whose duty it was under existing laws to levy the same; and it was further provided that the commissioners and all officers, boards, or bodies who should be concerned in the collection, holding, disbursing, paying over, and expending or directing the expenditure of the taxes or the proceeds of the taxes levied in pursuance of the act, should be for all purposes of the act, and as respects said taxes and their proceeds, the officers of the State, and any official bonds given, or to be given by them, should enure to the benefit of the State as well as to any person or corporation interested therein.

Under this statute and the other statutes for levying State and county taxes, the city of Elizabeth was practically enabled to obtain money for all necessary purposes, without at the same time being required to assess and levy any taxes to pay any of its outstanding obligations. No litigation arose over the validity of the act providing for levying State and county taxes, *but creditors of the city assailed the other statute from two directions.* One obtained a writ of *certiorari*, charging that the act was not a general law such as the Constitution requires; another applied for a writ of *mandamus* to compel the commissioners to levy a tax to pay his judgment, in addition to the taxes specified in the act. The Supreme Court, however, held, in the case of Reid *v.* Wiley, 46 N. J. L. 473, that the act was a general law and constitutional; and in the case of Thompson *v.* Wiley, *Ib.* 476, the same court held that the commissioners had no power to levy taxes to pay debts of the city. The decisions of the Supreme Court in these cases were afterwards unanimously sustained by the Court of Errors, for the reasons given by the Supreme Court. The decision of the Court of Errors was not reported. Under these acts the city continued to perform its essential functions as a municipality without disturbance from its creditors.

Concurrently, however, with the passage of the statutes to protect the city from its creditors, *other acts were passed providing for the compromise and adjustment of the debt.* In the year 1881 (P. L. N. J. p. 127), "An act in relation to encumbered cities" was passed, which recited that some cities of the State were encumbered with debt to an extent in excess of their ability to pay the interest thereon, and providing for a declaration of insolvency to be made by the governing body of the city, and authorizing a settlement to be made by agreement. Some creditors of Elizabeth expressed their willingness to reduce the amount of, and adjust, their claims; but others declined to do so. The city, however, promulgated a plan of settlement, and issued adjustment bonds to be used in refunding the debt. In order to raise money to pay interest on the new bonds issued to assenting creditors, an act was passed in the year 1885 (P. L. N. J. p. 75) making it the duty of the boards or officers having power to assess and levy taxes for State and county purposes in any city, to levy an additional tax therein for the purpose of securing the payment of the interest and principal on all bonds issued, and that might be issued, under the act which provided for making settlement of the debt of encumbered cities; such additional tax to be applied by the city officers exclusively for those purposes. In this way the new bonds of the assenting cred-

legislatively determined to be benefited, the cost, in whole or in part, according to legislative discretion, of local improvements, and providing a mode of judicially contesting the charge or tax, and for notice appropriate to the case, *did not deprive the owner of his property without due process of law* within the meaning of the Fourteenth Amendment.[1]

§ 761. **General Result summed up.** — The general results of the foregoing extended reference to the judgments of the courts of the several States concerning local improvements, and assessments in respect thereof, are here summed up by the author, accompanied with some critical and explanatory observations: —

1. A local assessment upon property immediately and specially benefited by a local improvement of a street, although resting for its foundation upon the taxing power, is distinguishable in many respects from a tax levied for the general purposes of the State or the general purposes of the municipality.

> The soundness or reasonableness of this proposition is recognized by the legislation of Parliament, which has constantly distinguished between taxes for the benefit of the whole kingdom and those laid for the improvement of a particular district.[2]

itors were protected, and non-assenting creditors were left without any practical means of enforcing their claims against the city. At present nearly all of the debt has been compromised; but the city is still at this date (1890) acting under the statutes mentioned above.

As to rights of creditors, see *ante*, chaps. iv., vii., xiv.; *post*, chap. xx.

[1] Davidson *v.* New Orleans, 96 U. S. 97, 104 (1877), (assessment for draining swamps). County of Mobile *v.* Kimball, 102 U. S. 691 (1880), where the county of Mobile was compelled by the legislature to loan its credit for a local work, public in its character, of general benefit to the State, and of especial benefit to the county. Hagar *v.* Reclamation District, 111 U. S. 701 (1883), reclamation of lands in *California*, laying the burden on the districts and persons benefited. Similar legislation in *New Jersey* sustained. Wurts *v.* Hoagland, 114 U. S. 606 (1884); s. c. below, 41 N. J. L. 175, 179, distinguished Keen *v.* Driggs Drainage Co., 45 N. J. L. 91. United States *v.* Memphis, 97 U. S. 284, 292 (1877). Walston *v.* Nevin, 128 U. S. 578 (1888), sustaining judgment of Court of Appeals of *Kentucky*, that an act of that State authorizing street improvements to be made at "the exclusive costs of the owners of the lots in each fourth of a square, to be equally apportioned by the general council of the city according to the number of square feet owned by them respectively, except that corner lots shall pay twenty-five per cent more than others," was valid. Acts of this kind are sustained by the courts of Kentucky. Preston *v.* Roberts, 12 Bush, 570, 587; Beck *v.* Obst, 12 Bush, 268; Broadway Baptist Church *v.* McAtee, 8 Bush, 508, 516. *Ante*, sec. 754, and note; *post*, sec. 802 *a*.

[2] Viner's Abr. "Sewers"; Comyn's Dig. "Sewers"; Bedford Union Poor Guard. *v.* Bedford Impr. Comm'rs, 7 Exch. 777; Boston Seamen's Fr. Soc. *v.* Boston, 116 Mass. 181 (1874); s. c. 17 Am. Rep. 153, *per Devens*, J. That local assessments while made by virtue of the taxing power are not "taxes" as that word is generally used in constitutions, charters, and revenue statutes, see Cooley, Taxa-

> It is also recognized by the legislation of perhaps every State in the Union.[1] Hence, as is elsewhere shown, a statutable exemption of designated property from "taxation" does not include an exemption from local assessments.[2] Hence, also, as we have already seen, provisions in State Constitutions concerning equality of "taxation" are generally, although not invariably, held not to apply by their intrinsic force to local assessments.[3]

2. A local assessment or tax upon the property benefited by a local improvement may be authorized by the legislature.

> Where the Constitution of a State treats local assessments as taxes, and includes them in its provisions as to the manner in which taxes shall be laid, its requirements in that behalf must, of course, be observed.[4]
>
> Where there is no special constitutional restriction, the expense of the local improvement may be authorized by the legislature to be apportioned on some other basis than that of value of the property within the taxation district.

3. Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest;[5] and to the extent of special benefits it is every-

tion, 636; Burroughs, Taxation, 435; Borough of Greensburg *v.* Young, 53 Pa. St. 280; Hoyt *v.* Saginaw, 19 Mich. 39; s. c. 2 Am. Rep. 76; Maloy *v.* Marietta, 11 Ohio St. 636; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 497; Uhrig *v.* St. Louis, 44 Mo. 458; Lockwood *v.* St. Louis, 24 Mo. 20; Garrett *v.* St. Louis, 25 Mo. 505; Crowley *v.* Copley, 2 La. An. 329; Wilmington *v.* Yopp, 71 N. C. 76; Hayden *v.* Atlanta, 70 Ga. 817; Egerton *v.* Green Cove Springs, 19 Fla. 140; Wright *v.* Chicago, 46 Ill. 44; Hines *v.* Leavenworth, 3 Kan. 186; Motz *v.* Detroit, 18 Mich. 495; Williams *v.* Cammack, 27 Miss. 209; Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513; King *v.* Portland, 2 Oreg. 146; Tidewater Co. *v.* Coster, 18 N. J. Eq. 519; People *v.* Lynch, 51 Cal. 15; s. c. 21 Am. Rep. 676; Richmond & A. R. R. Co. *v.* Lynchburg, 81 Va. 473; Norfolk City *v.* Ellis, 26 Gratt. 224; McGeehee *v.* Mathis, 21 Ark. 40; Merrick *v.* Amherst, 12 Allen, 500; Boston Seam. Soc. *v.* Boston, 116 Mass. 185; s. c. 17 Am. Rep. 153; Wright *v.* Boston, 9 Cush. 233, 241; Yeatman *v.* Crandall, 11 La. An. 220; Allen *v.* Galveston, 51 Tex. 302; Austin *v.* Gulf, Col. & Santa Fe R. R., 45 Tex. 234; Roundtree *v.* Galveston, 42 Tex. 613, 626; Palmer *v.* Strumpf, 29 Ind. 329; *ante*, sec. 746 *et seq.*

[1] *Ante*, sec. 616, and note; sec. 752, and note.

[2] *Post*, sec. 776, and cases cited.

[3] *Ante*, secs. 754–759, 762.

[4] McBean *v.* Chandler, 9 Heisk. (Tenn.) 349 (1872); s. c. 24 Am. Rep. 308, cited *ante*. Illinois rule, *ante*, sec. 759, note.

[5] Barnes *v.* Dyer, 56 Vt. 469, citing text. See also Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1; Hanscom *v.* Omaha, 11 Neb. 37; *post*, sec. 809, and note. The proposition of the text coincides with the conclusion reached by Mr. Hare, after a very full review of the course of American decisions upon the subject. 1 Hare Am. Const. Law, 286–315.

where admitted that the legislature may authorize local taxes or assessments to be made.

4. When not restrained by the Constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned.

This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York[1] have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it *legally impossible* that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority.

5. The assessments may be made upon all the property *specially* benefited by the particular improvement according to the exceptional benefit each lot or parcel of property *actually and separately* receives. This is, perhaps, the method most generally adopted by the

[1] People *v.* Brooklyn, 4 N. Y. 419 (1851); *ante,* secs. 616, 752. See cases from the States named, and others referred to in the last note to this section. If the reader will compare the opinion of Chief Justice *Gibson,* in Kirby *v.* Shaw, 19 Pa. St. 258 (1852), with that of Chief Justice *Agnew,* in the Washington Avenue Case, 69 Pa. St. 352 (1871), and in Seely *v.* Pittsburgh, 82 Pa. St. 360 (1877), referred to *infra,* he will discover how widely they differ (although the actual judgments may not conflict) concerning the amplitude of legislative power in respect of taxes and impositions. In the case of Guest *v.* Brooklyn, 69 N. Y. 506 (1877), *Church,* C. J., not denying the power of the legislature to authorize local assessment against the owner's consent, condemns the system, as authorized and practised in New York and Brooklyn, "as unjust and oppressive, unsound in principle, and vicious in practice. The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement [against the consent of the owners, or a majority of them] upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretence of a corresponding *specific* benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection [aside from constitutional restraints] against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves."

legislation in this country, and it is the one which, in the author's judgment, is right in principle and the most just in its practical workings.

6. Where the property is urban, and has been platted into blocks, with lots of equal depth which abut the local improvement for which the assessment is made, and there are no special constitutional restrictions in the way, and nothing in the nature and circumstances of the particular case to make an assessment in proportion to the *frontage* of the lots upon the improvement work manifest injustice, it is generally, but not always, regarded as within the competency of the legislature to provide that it may be so made.

As to sidewalks, this is scarcely disputed or open to dispute. As to grading, paving, and sewers, the basis of frontage, where sustained, is regarded as a convenient, practicable, and in most cases in the long run a just method of ascertaining the benefits severally received, since the benefits actual and probable to the abutters is generally proportioned to the length of their respective fronts; and hence this rule, as a rule of apportionment, is one which, on the conditions above named, the legislature may, in its discretion, prescribe.[1]

7. Under the same conditions and restrictions, the legislature may authorize the assessment upon the lots benefited, in proportion to their *superficial area.*

But if other than abutting lots are assessed in this mode, and especially if the property thus assessed cannot as of right participate in the benefit and use of the local improvement, and the extent of the assessment district is such as to include lots directly and largely benefited with those only indirectly and slightly benefited, then, since, on this basis, all lots are to be assessed by the same rule, viz., that of superficial area, this mode of assessment will not, under such circumstances, be sustained.[2]

8. Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the

[1] Thomas *v.* Gain, *infra;* Washington Avenue Case, *infra; supra,* sec. 752, note, where the decisions in *Pennsylvania* and elsewhere are referred to. *Supra,* sec. 760 *a,* where the course of decision in *New Jersey,* and the present doctrine therein, are stated. *Post,* sec. 809, and note.

[2] Thomas *v.* Gain, *infra;* Seely *v.* Pittsburgh, *infra;* Preston *v.* Rudd, 84 Ky. 150.

extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed.[1] Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the State Constitutions, requiring *uniformity and equality of taxation*, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property, was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.[2]

[1] *Supra*, secs. 752, note, 760 *a*, and notes. *Post*, sec. 809, and note.

[2] Seely *v.* Pittsburgh, 82 Pa. St. 360 (1877); s. c. 22 Am. Rep. 760; Washington Avenue Case, 69 Pa. St. 352 (1871); s. c. 8 Am. Rep. 255, in both of which Judge *Agnew* discusses the subject, and vindicates the two propositions laid down in the opinion of *Sharswood*, J., in Hammett *v.* Philadelphia, 65 Pa. St. 146; s. c. 8 Am. Law Reg. (N. S.) 411; s. c. 3 Am. Rep. 615, viz.: "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of these benefits. They [local assessments] cannot be imposed when the improvement is either expressed, or appears to be for the general benefit." Hammett's Case followed. Orphans' Asylum Appeal, 111 Pa. St. 135; Wistar *v.* Philadelphia, 111 Pa. St. 604.

In *Hammett's Case*, on the principle that *repaving* a street is a general benefit, it was decided that the expense could not be met by a local assessment, although it is admitted that the expense of the original paving may be thus defrayed. This particular application of the principle is of doubtful correctness, and it has been denied to be sound in *Missouri*. See, *infra*, sec. 780, note. In Wistar *v.* Philadelphia, 80 Pa. St. 505 (1876); s. c. 21 Am. Rep. 112, the exact point decided was that under power to the city to "prescribe by ordinance that paving of streets and of footways should be done at the expense of the owners of the ground" the city could not tear up a pavement which was good, had been built at the abutter's expense only three years before, and needed no repair, and require it to be replaced at the owner's expense with a new and costly one [granite curb, &c.], the right to do this not being deemed sufficiently explicit; and the case was distinguished from one of *repair*. The point decided in the Washington Avenue Case is stated, *ante*, sec. 752, note. Seely *v.* Pittsburgh, *infra*, was similar to the case of Washington Avenue; and it was held that the cost of paving Penn Avenue in Pittsburgh, which extended along platted lots and also beyond and along suburban and unplatted property, could not be authorized by the legislature to be assessed by the *frontage* rule. After

§ 762 (604). **Road Taxes and compulsory Street Labor; Poll-Taxes.** — In a previous chapter, the subject of municipal authority

stating the cost of the improvement to have been $350,000, and the character of the avenue, *Agnew*, C. J., says, with emphasis: "This blending of city and country, of city lots and farm lands, of the residences of the living and the graves of the dead [St. Mary's Cemetery], constitute a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage, or per-foot rule cannot be applied to it. It is so plainly, palpably, rankly, and ruinously unjust, it must be pronounced no proper or lawful mode of special taxation, but an injustice so gross as to be void against the rights of property as protected by the Bill of Rights" (the indefeasible right to acquire, possess, and protect *property*, &c. See opinion in Washington Avenue Case for the enumeration of these rights). A statute authorizing the assessment of property in the rural district used as farm land, by the foot-front rule, for grading or other local improvements upon a public avenue upon which it abuts, held unconstitutional. Scranton *v.* Pa. Coal Co., 105 Pa. St. 445 (1884); following Washington Av. Case, 69 Pa. St. 352; Seely *v.* Pittsburgh, 82 Pa. St. 360; Craig *v.* Philadelphia, 89 Pa. St. 265; City *v.* Rule, 93 Pa. St. 15. *Infra*, sec. 794.

The judgment in the Seely Case, in view of the facts, must be admitted to be right by all except those who ascribe a practical omnipotence to the legislative power in such matters, — a view which overlooks the substantial difference between general taxation and the imposing of a special burden upon particular property, irrespective of political or municipal districts. This distinction is clearly stated by *Beasley*, C. J., in State *v.* Newark, 37 N. J. L. 415; s. c. 18 Am. Rep. 729 (1875); *supra*, sec. 760 *a*; *post*, sec. 809, and note. In this case the city of Newark had been authorized by the legislature to repave the roadbed of any of its streets, and to assess two-thirds of the cost on the abutting property, and the remaining third on the public at large. It improved a street accordingly. No point was made that the work was *repaving*, instead of original paving. There was no special provision of the Constitution applicable. The Chief Justice says: "It thus appears that the statute in question [city charter] undertakes to fix at the mere will of the legislature the ratio of the expense to be put upon the owner of the property along the line of the improvement; and the question is, whether such an act is valid." The Court of Errors and Appeals decided it was not. The basis of the judgment, affirming the principle of The Tidewater Co. *v.* Coster, 18 N. J. Eq. 519, was "that cost of a public improvement might be imposed on particularized property to the extent to which such property was exceptionally benefited, and that any special burthen beyond that was illegal." This is the only theory, it is maintained, upon which local assessments can be sustained; and the judgment of the court necessarily implied that the amount or proportion of special benefits could not be arbitrarily determined by a legislative act and charged upon the abutters, but would have to be ascertained and apportioned in some other mode, as by an estimate of such benefits, to be separately made by a proper board of officers. In the subsequent case of the New Brunswick Rubber Co. *v.* N. B. Street Comm'rs, 38 N. J. L. 190; s. c. 20 Am. Rep. 380 (1875), the Supreme Court held the very strict view that a sewer act which authorized the Commissioners of Streets and Sewers, upon the completion of any sewer, "to ascertain the whole cost thereof and the size of all the lots drained thereby, and to fix the amount to be paid for each in such *proportions as may, in the judgment of the commissioners, be just and equitable*," was unconstitutional, because it failed specifically to determine the mode of distributing the burden; that is, as we understand it, since no assessments can be made except for special benefits, the act ought distinctly to require the assessments to be made on this basis. But the act did not exclude this basis, and it would probably be held elsewhere as sufficient to support an assessment which was in fact made upon the right principle. See Thomas *v.* Gain,

over streets, and also over roads and highways within the corporate limits of municipalities, has been considered.[1] Special provision for *road or street labor* is not unfrequently made in charters; and unless there be some restrictive constitutional provision, the legislature may empower the municipal authorities to require the inhabitants to pay road taxes, or perform road labor, which is in effect a tax. Not only so, but the legislature has the constitutional power to authorize a city corporation to levy taxes or expend money to improve public roads outside of, but leading into, the city.[2] And the

infra. Neither absolute certainty nor exact equality is practicable in such matters, and cannot be judicially exacted. A similar provision to that condemned in *New Jersey* may be found in many of the States. See *supra*, sec. 760 *a*.

Thus the General Municipal Incorporation Act of *Indiana*, in respect of sewers, drains, and cisterns, provides that the assessment of the cost thereof shall be upon the owners of the property benefited thereby "in such equitable proportion as the common council may deem just," not to exceed ten per cent of the value of the property. First Presb. Church *v.* Ft. Wayne, 36 Ind. 338 (1871); s. c. 10 Am. Rep. 35.

In *Vermont* a statute empowering a city to make local assessments on the property fronting upon sidewalks "for so much of the expense thereof as *they shall deem just and equitable*" was held to be unconstitutional, because it did not fix a certain standard of assessment, the court, *per Veasy*, J., saying, "the words *just and equitable* do not import with reasonable certainty, a limitation to particular benefits to property benefited." Barnes *v.* Dyer, 56 Vt. 469.

In *Michigan* the court was of opinion that a sewer assessment on the *basis of frontage* could not as a *matter of law* be held to be illegal because not laid in proportion to actual or probable benefits. Warren *v.* Grand Haven, 30 Mich. 24. The subject of such assessments was elaborately discussed by *Cooley*, C. J., in the subsequent case of Thomas *v.* Gain, 35 Mich. 155 (1876); s. c. 24 Am. Rep. 535, in which, while the court did not deny that with proper provisions a sewer assessment might be authorized to be made upon the basis of *superficial area*, yet, as in the case before it, this plan was made to apply to all property (irrespective of its character and the amount of benefits actually received) which the city council might *resolve* had been benefited, it was considered to be unconstitutional, because it was legally impossible that it could "apportion the burden justly, or with such approximate justice as is usually attainable in tax cases, and that it must fall to the ground like any other merely arbitrary action which is supported by no principle." See, also, McBean *v.* Chandler, 9 Heisk. (Tenn.) 349 (1872); s. c. 24 Am. Rep. 308; in which the frontage rule was held to be in conflict with the provisions of the Constitution of *Tennessee* requiring taxation according to value; *ante*, sec. 760. N. Y. & N. H. R. R. Co. *v.* New Haven (what constitutes special benefits), 42 Conn. 279 (1875); s. c. 19 Am. Rep. 534; State *v.* Ramsey Co. Dist. Ct., 33 Minn. 295, holding also that grading, filling, &c., in several streets may be so connected as to be properly prosecuted as one improvement for which one assessment may be made. Mode of making *sewer assessments* further discussed, *post*, secs. 806–808.

[1] *Ante*, chap. xviii. secs. 676–679.

A uniform road land "tax of four dollars to each quarter section of land," irrespective of value, was sustained, there being no constitutional limitation in respect to the rule of apportionment of the public burdens. Burl. & Mo. R. R. R. Co. *v.* Lancaster County, 4 Neb. 293 (1876).

[2] Skinner *v.* Hutton, 33 Mo. 244 (1862). The legislature of the State has the power, unless expressly restrained by the Constitution, to authorize a municipal corporation to levy a tax upon, or require a license from, persons using the

grant in the charter of a city of a power to require road labor from all male residents, between certain ages, is not an infringement of the provision of the State Constitution which requires "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of his property," the court being of the opinion that this clause was intended to direct a uniform mode of taxing property, but not to deprive the legislature of the power to resort to other species of taxation if it saw fit to do so.[1] Power to the corporate authorities of a town "to make such rules, orders, regulations, and ordinances as to them shall seem meet for repairing streets," was held, in view of the general legislation on the same subject, to give authority to require the inhabitants *compulsorily to labor on the streets* for the purpose of repairing them, and this, although there was also express power (regarded by the court as cumulative) to levy a tax, to be expended, among other purposes, for street repairs.[2]

Under a constitutional provision requiring "all taxes to be as nearly equal as may be," the legislature may authorize *the levy of poll-tax* by municipal corporations, and may exempt the members of fire companies from the payment of such tax, — this construction being aided by the long acquiescence of the people in laws and charters authorizing such taxes.[3]

§ 763 (605). **Power to Tax must be plainly Conferred.** — It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the *power be plainly and unmistakably conferred*.[4]

paved streets of a city, for the purpose of keeping the same in repair. Chess *v.* Birmingham, 1 Grant (Pa.) Cas. 438 (1857); Brooklyn *v.* Breslin, 57 N. Y. 591 (1874). See Bennett *v.* Birmingham, 31 Pa. St. 15 (1850); *ante*, sec. 682; *post*, sec. 792.

[1] Sawyer *v.* Alton, 4 Ill. 130; Tipton *v.* Norman, 72 Mo. 380.

[2] State *v.* Halifax Comm'rs, 4 Dev. L. (N. C.) 345 (1833).

[3] Faribault *v.* Misener, 20 Minn. 396 (1874).

[4] Caldwell *v.* Rupert, 10 Bush, 182 (1873), where the text is quoted and doctrine approved and applied. Kniper *v.* Louisville, 7 Bush, 599; M. E. Church, *In re*, 66 N. Y. 395 (1876); Sewall *v.* St. Paul, 20 Minn. 511 (1874), citing text; Vance *v.* Little Rock, 30 Ark. 439 (1875); Heine *v.* Levee Comm'rs, 19 Wall. 660; State *v.* Maysville, 12 S. C. 76; Zanesville *v.* Richards, 5 Ohio St. 589; Swamp Land Dist. *v.* Haggin, 64 Cal. 204; Green *v.* Ward, 82 Va. 324; English *v.* People, 96 Ill. 566; State *v.* Van Every, 75 Mo. 530; Peters *v.* Lynchburg, 76 Va. 927; Schoolfield *v.* Lynchburg, 78 Va. 366.

A municipal corporation cannot levy a tax in the absence of delegated authority from the State (*ante*, sec. 741; Meriwether *v.* Garrett, 102 U. S. 472), and the power to contract indebtedness does not by implication confer authority to levy taxes for the payment of the debt. Jeffries *v.* Lawrence, 42 Iowa, 498 (1876). But see limitation on this last proposition, *ante*, sec. 741, and the judgment of the Supreme Court of the United States, in United States *v.* New Orleans, 98 U. S. 381; Ralls Co. Ct. *v.* United States, 105 U. S. 733.

It has, indeed, often been said that it must be specifically granted *in terms;* but all courts agree that the authority must be given either in express words or by necessary or unmistakable implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor can it be deduced from any consideration of convenience or advantage. It has, however, been held by the Supreme Court of the United States that the power to levy a tax may be implied from an express power to incur an obligation, where the authority to tax must have been intended by the legislature as the means of payment, and there is nothing in the legislation applicable to the case to rebut the implication.[1] It is important to bear in mind that the authority to municipalities to impose burdens of any character upon persons or property is wholly statutory, and, as its exercise may result in a divestiture and transfer of property, it must be clearly given and strictly pursued.[2] This rule applies, as we have already seen, to proceedings[3] by municipal corporations under the delegated right of eminent domain, and it extends equally to proceedings under the taxing power, including special assessments for local improvements.[4]

[1] *Ante,* sec. 741; United States *v.* New Orleans, 98 U. S. 341; Ralls Co. Ct. *v.* United States, 105 U. S. 733; *infra,* sec. 769.

[2] Text approved in St. Mary's Industrial School *v.* Brown, 45 Md. 310; and Vansant *v.* Harlem Stage Co., 59 Md. 330.

[3] *Ante,* chap. xvi. sec. 605 *et seq.*

[4] Sharp *v.* Spier, 4 Hill (N. Y.), 76 (1843); Sharp *v.* Johnson, *Ib.* 92; Mays *v.* Cincinnati, 1 Ohio St. 268 (1853); Zanesville *v.* Richards, 5 Ohio St. 589; Beatty *v.* Knowles, 4 Pet. 152; Dyckman *v.* New York, 1 Seld. (5 N. Y.) 434; Leavenworth *v.* Norton, 1 Kan. 432 (1863); Burnes *v.* Atchison, 2 Kan. 454; Henry *v.* Chester, 15 Vt. 460 (1843) (nature of authority discussed by *Redfield,* J.); Asheville Comm'rs *v.* Means, 7 Ired. L. (N. C.) 406 (1847); Jonas *v.* Cincinnati, 18 Ohio, 318 (1849); Oregon S. Nav. Co. *v.* Portland, 2 Oreg. 81; Harmony Tp. Trs. *v.* Osborne, 9 Ind. 458 (1857); Howell *v.* Buffalo, 15 N. Y. 512; Burnett *v.* Buffalo, 17 N. Y. 383; Manice *v.* New York, 8 N. Y. 120; Fairfield *v.* Ratcliff, 20 Iowa, 396 (1866): Henderson *v.* Baltimore, 8 Md. 352 (1855); Rathbun *v.* Acker, 18 Barb. 393; State *v.* Jersey City, 26 N. J. L. 444; 1 N. J. L. 309; Columbia *v.* Hunt, 5 Rich. L. (S. C.) 550; Chicago *v.* Wright, 32 Ill. 192; Taylor *v.* Donner, 31 Cal. 480; Emery *v.* San F. Gas Co., 28 Cal. 345; St. Louis *v.* Laughlin, 49 Mo. 559 (1872); Dwarris on Statutes, 749; Murray *v.* Tucker, 10 Bush, 240 (1874), approving text; Mobile *v.* Baldwin, 57 Ala. 61; Stone *v.* Mobile, 57 Ala. 61; State *v.* Guttenberg, 39 N. J. L. 660; Va. & Tenn. R. R. Co. *v.* Washington Co., 30 Gratt. 471; Richmond *v.* Daniel, 14 Gratt. 385.

Where a *general tax* is authorized by statute and a rate prescribed, the tax cannot be levied by *special taxation,* nor can the rate be exceeded; power to impose a special tax or a special assessment cannot be exercised by imposing a general tax. Webster *v.* People, 98 Ill. 343; Dubuque *v.* Chicago, D. & M. R. R. Co., 47 Iowa, 201.

A statute delegating power to charge the property of individuals with the expense of local improvements must be strictly pursued; whatever step the legislature has prescribed to be taken therein cannot be declared by the courts to be merely directory or immaterial. Merritt *v.* Portchester, 71 N. Y. 309.

§ 764 (606). **Same subject.** — Therefore, the *power to tax* (using the word in its strict and proper sense, as a means of raising municipal revenue) *cannot be inferred* from the general welfare clause in a charter;[1] nor is it usually to be implied from authority to license and regulate specified avocations;[2] nor from legislative authority permitting certain improvements to be made, or liabilities to be created, unless such appears on the whole to have been the clear legislative intent;[3] nor is it included in the police power.[4]

§ 765 (607). **Same subject. Special Powers construed.** — So, conformably to the *principles adopted for the construction* of this

"The burden is upon the corporation to show the grant [to lay taxes] by express words or necessary implication. For otherwise it cannot be justified in the exercise of this high prerogative of sovereignty." *Per Lumpkin,* J., in Savannah *v.* Hartridge, 8 Ga. 23–26 (1850). Statutes authorizing the levying of taxes are strictly construed, and if there is much doubt, that doubt exempts the citizen from the burden. *Ib.;* Lot *v.* Ross, 38 Ala. 156, 161 (1861). "The law [authorizing local assessments] must be strictly followed as to all its substantial requirements." *Per Lawrence,* J., Scammon *v.* Chicago, 40 Ill. 146. "Possessing, as these municipal corporations do, the power of assessment and sale of private property, often wielded by the indiscreet and selfish, the grossest abuses would inevitably follow, if they were not held strictly within the powers granted and the means prescribed for the execution of these powers." *Per Stuart,* J., Kyle *v.* Malin (relating to power to tax for local improvement), 8 Ind. 34–37 (1856). "It is undoubtedly true, as held by this court in Richmond *v.* Daniel, 14 Gratt. 387, that laws conferring the power of taxation upon a municipal corporation are to be construed strictly; and so, too, are exemptions from taxation to be construed strictly, and when the power of taxation has been once conferred, it is not to be crippled or destroyed by strained interpretation of subsequent laws." *Per Joynes,* J., Orange & A. R. R. Co. *v.* Alexandria Council, 17 Gratt. (Va.) 176 (1867). Tax levied by *de facto* aldermen valid. Dean *v.* Gleason, 16 Wis. 1–17 (1862); *ante,* chap. ix. sec. 276.

[1] *Ante,* secs. 357–365; Mays *v.* Cincinnati, 1 Ohio St. 268 (1853). If the objects or subjects of taxation are expressly designated, the right to tax for other objects or subjects cannot be derived from the general power, though expressly conferred, to enact by-laws for the good government of the town. Asheville Comm'rs *v.* Means, 7 Ired. L. (N. C.) 406 (1847).

[2] *Ante,* chapter on Ordinances, secs. 281–365, 398. And see Mays *v.* Cincinnati, *supra;* Cincinnati *v.* Bryson, 15 Ohio, 625 (1846), approving Boston *v.* Schaffer, 9 Pick. 419. Compare Cincinnati *v.* Buckingham, 10 Ohio, 261, and 1 Ohio St. 268–274, as to correctness of which *quære;* Mobile *v.* Yuille, 3 Ala. 137; Collins *v.* Louisville, 2 B. Mon. (Ky.) 134; State *v.* Roberts, 11 Gill & J. (Md.) 506, *per Archer,* J.; Columbia *v.* Beasly, 1 Humph. (Tenn.) 240; *infra,* sec. 768.

[3] Leavenworth *v.* Norton, 1 Kan. 432 (1863); Burnes *v.* Atchison, 2 Kan. 454; *ante,* sec. 162, and cases cited. The power to make an improvement does not imply or carry with it the power to levy a special assessment upon property benefited to pay for the improvement. Such assessments can only be made where the power to do so is plainly conferred and strictly followed. Wright *v.* Chicago (assessments for deepening river), 20 Ill. 252 (1858); Columbia *v.* Hunt (curbing assessment), 5 Rich. (S. C.) 550; Chicago *v.* Wright, 32 Ill. 192; Annapolis *v.* Harwood, 32 Md. 471 (1870). Power "to regulate and improve sidewalks" does not authorize special assessments upon adjoining owner; but such improvements may be paid for out of the corporation treasury. Fairfield *v.* Ratcliff, 20 Iowa, 396.

[4] Jackson *v.* Newman, 59 Miss. 385.