class of powers, it is held that where a statute specifies certain purposes for which taxes may be levied by the municipal authorities, and adds "or for any other purpose they may deem necessary," these general words will authorize taxation only for purposes of the same general character with those already enumerated.[1] So, power "to levy and collect a special tax" for lighting a city does not authorize the council to add to the tax a percentage for collector's fees, nor the cost of proceedings before the mayor; these services must be paid for from the general revenue, unless otherwise specifically provided for by the charter.[2] So, power to make such by-laws as shall be necessary "to promote the peace, good order, benefit, and advantage" of the corporation, and to assess such taxes as shall be necessary for carrying the same into effect, does not authorize a tax for the payment of part of the expense to be incurred by a railroad company in bringing the line of their road nearer to the town than originally located.[3] So, where the power is granted with a proviso annexed, no greater authority is given than is contained within the limits of the proviso.[4]

§ 766 (608). **Legislature may change Revenue and Taxing Powers at will within Constitutional Limits.** — The power to levy taxes and to make local assessments conferred upon municipal corporations may, in the absence of constitutional restriction, and when the rights of creditors are not impaired, as we have heretofore shown, *be changed at the pleasure of the legislature*,[5] or resumed and be exercised by commissioners directly appointed by the legislature.[6]

[1] Drake *v.* Phillips, 40 Ill. 388 (1866). As to when assessments may be made, see Hyde Park *v.* Borden, 94 Ill. 26. Special assessments for local improvement cannot be enforced by fines or penalties imposed by ordinance. Augusta *v.* Dunbar, 50 Ga. 387 (1873); Gridley *v.* Bloomington, 88 Ill. 555; S. P. Ottawa *v.* Spencer, 40 Ill. 211. See Index, tit. *Fines and Penalties.*

[2] Jonas *v.* Cincinnati, 18 Ohio, 318–323 (1849); Nelson *v.* La Porte, 33 Ind. 258. Same principle as to local assessments. Bucknall *v.* Story, 36 Cal. 67; Williams *v.* Detroit, 2 Mich. 560; Minn. Linseed Oil Co. *v.* Palmer, 20 Minn. 468, 475, citing text. An enactment that *no costs* shall be recovered against a city in suits properly commenced against it was held unconstitutional. Durkee *v.* Janesville, 28 Wis. 464 (1871).

[3] McDermond *v.* Kennedy, Bright. (Pa.) 332; *ante*, chap. vi. secs. 161–163; Minn. Linseed Oil Co. *v.* Palmer, 20 Minn. 468 (1874).

[4] Methodist Church, *In re*, 66 N. Y. 395 (1876).

[5] *Ante*, chap. iv. sec. 57, note; secs. 60, 62, 63, 66, 69, 75; *ante*, chap. xiv.; Blanding *v.* Burr, 13 Cal. 343; Aspinwall *v.* Daviess Co. Comm'rs, 22 How. 364; Gilman *v.* Sheboygan, 2 Black (U. S.), 510; Lansing *v.* County Treasurer, 1 Dillon C. C. 522; Muscatine *v.* Miss. & Mo. R. R. Co., *Ib.* 536; Von Hoffman *v.* Quincy, 4 Wall. 535; Butz *v.* Muscatine, 8 Wall. 575; *ante*, sec. 737, note; Louisiana *v.* Pilsbury, 105 U. S. 301; Wolff *v.* New Orleans, 103 U. S. 358; State *v.* Cassidy, 22 Minn. 312 (1875); State *v.* Brewer, 64 Ala. 287; Desty Taxation, sec. 56, pp. 265–267, and cases.

[6] Baltimore *v.* Board of Police, 15 Md.

§ 767. **Same subject.** — Suppose, however, a tax has been levied by a municipal corporation, under and in pursuance of legislative authority, and not collected, is it within the competency of the legislature, as against the municipality and against its consent, *to release a specific class of taxpayers from the payment of such tax?* The general subject is discussed in a previous chapter, in which is considered the extent of legislative power over municipal corporations and their rights. As a general proposition the legislature has complete power over public revenues and their disposition, except where restrained by express constitutional limitations. In the Iowa case, cited in the note, it was held by a majority of the judges, but on different grounds, that an act of the legislature releasing railway companies from the payment of taxes, already levied by the municipality, but not collected, was unconstitutional and void.[1]

§ 768 (609). **Taxing and Police Powers distinguished; Scope of Power to license Occupations.** — The *taxing power* is to be distinguished from the *police power*, the general nature of which has been before adverted to.[2] The power to license and regulate particular branches of business or matters is usually a police power; but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes.[3] The authority to license and regulate various matters is very generally conferred upon the municipal councils, and there is, as we have seen in a former chapter, some difference of judicial opinion as to the extent of power thus conferred, particularly in reference to using it for purposes of revenue.[4] Ordinarily, the mere power to license, or to subject to police regulations, does not give the power to tax distinctly for revenue purposes; but it may give the power when such appears from the nature of the subject-matter, and upon the whole

376 (1859). See on this subject, chap. iv. *ante*; Philadelphia *v.* Field, 58 Pa. St. 320 (1868); *ante*, secs. 70–75.

[1] Dubuque *v.* Ill. Central R. R. Co., 39 Iowa, 56 (1874); Const. Iowa, Art. 8, sec. 2.

[2] *Ante*, chap. vi. sec. 141. The distinction between the two powers is well stated by *Depue*, J., State *v.* Hoboken, cited *infra*; *supra*, sec. 765.

[3] *Ante*, chap. xii. secs. 357–365; Ward *v.* Maryland, 12 Wall. 418 (1870), *per Clifford*, J.; St. Louis *v.* Spiegel, 75 Mo. 145. An ordinance prohibiting all persons, including druggists, from selling spirituous liquors without having first obtained a license, is not void as in restraint of trade; and such a license may be exacted as a condition of a druggist doing business, it being required not as a tax, but under the police power. Rochester *v.* Upman, 19 Minn. 108 (1872); *ante*, sec. 115.

[4] *Ante*, chap. xii. secs. 357–365, and cases there cited. *License fees* for carrying on a business or avocation is a tax only when revenue is the main object for which it is imposed. Desty Taxation, sec. 64, pp. 303–316, and cases.

charter or enactment, to have been the legislative intent, but not otherwise.[1]

§ 769 (610). **Prescribed Mode must be pursued; Limitation of Tax-Rate.** — As the authority to levy taxes or to make local assessments does not, as we have just seen, exist unless legislatively conferred, so it can be exercised no *further than it is clearly given*;[2] and if the *mode* in which the authority shall be exercised is prescribed, that mode must be pursued.[3] There is, however, some

[1] *Ib.* See, also, *ante*, sec. 115; Freeholders *v.* Barber, 2 Halst. (N. J.) 64. Power to license inns gives no power to tax. *Ib.* Same principle. Kip *v.* Paterson, 26 N. J. L. 298; New York *v.* Second Av. R. R. Co., 32 N. Y. 261; St. Louis *v.* Boatmen's Ins. & T. Co., 47 Mo. 150, 163; Commonwealth *v.* Markham (dog ordinance), 7 Bush, 486; Van Hook *v.* Selma, 70 Ala. 361 (license for selling goods); Davis *v.* Macon, 64 Ga. 128; *ante*, chap. xii. Thus, agreeably to the rule stated in the text, it was held in the State *v.* Hoboken, 33 N. J. L. 280 (1869), that the power given to a municipal corporation to *regulate streets* and the building of vaults will not authorize an exaction or assessment which amounts to a tax upon the owners of lots for permission to build vaults in the streets in front of their property, or to improve the streets for their more convenient use. *Supra*, sec. 764.

Power to license *vending of intoxicating liquors* within a short distance of the municipality valid as a police regulation. Falmouth *v.* Watson, 5 Bush, 660 (1869); Mason *v.* Lancaster, 4 Bush, 406. Where, by its charter, a city is authorized to assess a tax on licenses to do certain kinds of business, it may require the *payment* of the tax as *a condition precedent* to issuing the license. Sights *v.* Yarnalls, 12 Gratt. 292 (1855). Property taxed for revenue purposes may also be subject to license tax. St. Louis *v.* Bucher, 7 Mo. App. 169 (1878).

[2] Winston *v.* Taylor, 99 N. C. 210.

[3] *Ante*, secs. 89 *et seq.*, and notes; Sewall *v.* St. Paul, 20 Minn. 511, 520 (1874), citing text; D'Antignac *v.* Augusta, 31 Ga. 700; Lott *v.* Ross, 38 Ala. 156 (1861); Fitch *v.* Pinckard, 5 Ill. 78; Henderson *v.* Baltimore, 8 Md. 352 (1855); Rathbun *v.* Acker, 18 Barb. (N. Y.) 393; Chicago *v.* Wright, 32 Ill. 192; Crane *v.* Janesville, 20 Wis. 305; Knox *v.* Peterson, 21 Wis. 247; Collins *v.* Louisville, 2 B. Mon. (Ky.) 134; Cross *v.* Morristown (mode), 18 N. J. Eq. 305 (1867); State *v.* Jersey City, 24 N. J. L. 662, 666; State *v.* Plainfield, 38 N. J. L. 95; State *v.* Jersey City, 25 N. J. L. 309; State *v.* Crawford, 36 N. J. L. 394; State *v.* Perth Amboy, 38 N. J. L. 425; Brophy *v.* Landman, 28 Ohio St. 542 (1876); Leach *v.* Cargill, 60 Mo. 316 (1875); Butler *v.* Nevin, 88 Ill. 575 (1878); Churchman *v.* Indianapolis, 110 Ind. 259; Frost *v.* Leatherman, 55 Mich. 33; State, *ex rel. v.* Babcock, 20 Neb. 522; Green *v.* Ward, 82 Va. 324; Fort Worth *v.* Davis, 57 Tex. 225; 1 Desty Taxation, sec. 91, pp. 441–444.

Any departure in substance from the statute vitiates the proceedings for local assessments. Merritt *v.* Portchester (oath, notice, &c.), 71 N. Y. 309 (1877). The grant of powers to make local assessments is strictly construed, and must be strictly followed. There is no power to make assessments for local improvements except such as exists in the charter. Allen *v.* Galveston, 51 Tex. 302. The provisions in a city charter in regard to the steps required before the contracts for grading, &c., are let, are conditions precedent, and every requirement must be strictly complied with before there can be any liability of adjoining lots for such work. Massing *v.* Ames, 37 Wis. 645; Pound *v.* Chippewa Co. Sup., 43 Wis. 63; Allen *v.* Galveston, 51 Tex. 302. Where work was ordered and contracted to be done at the expense of adjoining lots, without taking the necessary steps to charge the lots, the contractor cannot recover from the city under a charter which declares that in no event, when work is ordered to be done at the expense of any lot, shall the city be held responsible on account thereof. Hall *v.* Chippewa Falls, 47 Wis. 267; s. p. Eilert *v.* Oshkosh, 14 Wis. 587; Smith *v.* Milwaukee, 18 Wis. 63; Whalen *v.* LaCrosse, 16 Wis. 270; Finney *v.* Oshkosh, 18 Wis. 220; Fletcher *v.* Oshkosh, 18 Wis. 229; Owens *v.* Milwaukee, 47 Wis. 461; but see, distinguishing this case, Benton *v.* Milwaukee, 50 Wis. 368; Harrison *v.* Milwaukee, 49 Wis. 247; Bouldin *v.* Baltimore, 15 Md. 18 (1859); Dwarris on Statutes, 749; Columbus *v.* Story, 35 Ind. 97 (1870). Under the special act in question in the case it was held fatal to a special assessment that the commissioners did not take the *oath* required by statute; and it was also held fatal that the commissioners did not, in fact, have any *meeting* at a public place at the time named in the notice of the assessment. Wheeler *v.* Chicago, 57 Ill. 415; State *v.* Perth Amboy, 38 N. J. L. 425.

All the steps required by law to *confer jurisdiction* to order improvement must be complied with. Eager, *In re*, 46 N. Y. 100; Hewes *v.* Reis, 40 Cal. 255; Himmelman *v.* Danos, 35 Cal. 441; Dougherty *v.* Hitchcock, *Ib.* 512; Nicolson Paving Co. *v.* Painter, *Ib.* 699; Himmelman *v.* Oliver, 34 Cal. 246; Fulton *v.* Lincoln, 9 Neb. 358; Hager *v.* Burlington, 42 Iowa, 661; Hurford *v.* Omaha, 4 Neb. 350 (1876); Lexington *v.* Headley, 5 Bush, 508; Welker *v.* Potter, 18 Ohio St. 85; Hawthorne *v.* East Portland, 13 Oreg. 271 (defective notice). The function of commissioners to assess damages and benefits for a local improvement is *judicial*, with the consequences which attach to this proposition, such as that the commissioners shall have no special interest in the assessment, &c. State *v.* Crawford, 36 N. J. L. 394. Where *mode* of making improvements is prescribed by statute, "*the mode in such cases constitutes the measure of power.*" *Field*, C. J., in Zottman *v.* San Francisco, 20 Cal. 102; approved by *Sanderson*, J., in Nicolson Paving Co. *v.* Painter, 35 Cal. 699; Murphy *v.* Louisville, 9 Bush, 189. Where the organic law of a city is silent as to the manner in which it shall express its determination to improve a street, this may be done by *motion or resolution as well as by ordinance.* Indianapolis *v.* Imberry, 17 Ind. 175 (1865); *ante*, secs. 290, 310; Moberry *v.* Jeffersonville, 38 Ind. 198; Terre Haute *v.* Turner, 36 Ind. 522; Delphi *v.* Evans, 36 Ind. 90 (1871). But where, by the organic law, an ordinance is expressly required or is implied by necessary inference, a mere *resolution* to improve a street is void. Newman *v.* Emporia, 32 Kan. 456. *Ante*, chap. on Ordinances. So also as to levying taxes, Warrensburg *v.* Miller, 77 Mo. 56; *ante*, chap. xii.

[1] A statute requiring a tax to be levied on a day named held directory, and the duty may be performed within a reasonable time thereafter. Gearhart *v.* Dixon, 1 Pa. St. 224 (1845). But in Williamsport *v.* Kent, 14 Ind. 306 (1860), an incorporating statute provided that "the board of trustees shall, *before* the third Tuesday in May, each year, determine the amount of general tax for the current year," and although it was not expressly declared by the statute that they should not exercise the power after the time named, it was nevertheless decided that a tax levied after the third Tuesday in May was void. *Sed quære. Post*, chap. xx. Description of the improvement. Steckert *v.* East Saginaw, 22 Mich. 104. Provision as to

difficulty at times to distinguish provisions which are imperative from those which are directory merely.[1] It is not unusual, in the organic acts of municipalities, for the protection of the citizens, to *limit the rate of taxation*, or the amount of taxes that may be raised during any one year; and where the power is thus limited, it is not ordinarily enlarged by implication by other provisions of the charter, general in their nature, conferring the power to make contracts or to incur liabilities, or even giving authority to make im-

provements, or to erect usual or ordinary buildings.[1] But *special authority* to borrow money for a designated purpose may, and if such be the legislative intention will, impliedly repeal, *pro tanto*, existing charter limitations upon the rate of taxation.[2] Where the

assessment roll held mandatory. *Ib.* As to mandatory provision, see Starr *v.* Burlington, 45 Iowa, 87 (1876). Provisions whose object is to protect the taxpayer are mandatory; those intended merely to promote despatch, method, system, &c., are generally directory. 1 Desty Taxation, sec. 106, pp. 515–521, and cases.

[1] Benoist *v.* St. Louis, 19 Mo. 179 (1853); Clark *v.* Davenport, 14 Iowa, 494; Learned *v.* Burlington, 2 Am. Law Reg. (N. S.) 394, and note; Leavenworth *v.* Norton, 1 Kan. 432; Burnes *v.* Atchison, 2 Kan. 454. But see Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Amey *v.* Allegheny City, 24 How. 364; Fosdick *v.* Perrysburg, 14 Ohio St. 472; Butz *v.* Muscatine, 8 Wall. 575 (1869); Quincy *v.* Jackson, 113 U. S. 332, noted *infra; ante*, secs. 162, 741, 763.

Statutory limitations on the rate or amount of taxation. Under the *Minnesota* statute as to *limitation upon the rate of taxation*, the plaintiff and a board of county commissioners entered into a contract in writing, whereby the former agreed to build a jail for the use of the county, to be completed by July 1, 1873, the latter party agreeing to pay therefor $1,300, in county orders, upon the completion. It was held: 1, that the agreement to issue the county orders, if valid, was the incurring of a pecuniary liability on the part of the county; 2, that in considering whether a given amount of pecuniary liability could be incurred, the county board was bound to inquire whether such amount of money could be raised by a levy of prescribed number of mills on a dollar of the taxable property of the county, as the same appeared upon the subsisting grand list of the county, which was in this case the grand list made in 1872; 3, that as $930.45 was all that could be levied on such grand list at the rate of ten mills on the dollar, the agreement for the building of the jail and payment therefor was void as respected the county. Johnston *v.* Becker Co. Comm'rs, 27 Minn. 64; 6 N. W. R. 411.

The statute of *Iowa* authorizes a tax of six mills on the dollar for ordinary county revenue. The Supreme Court of the United States held that where it appeared that the entire collection was needed for the current expenses of the county, the circuit court of the United States was not justified in awarding a *mandamus* to compel the levy of an amount to pay a judgment recovered against the county. Clay County *v.* McAleer, 115 U. S. 616. *Ante*, chap. on Contracts; *post*, chap. on Mandamus. Under the statute of *Georgia* limiting the power of municipal corporations to levy taxes for "ordinary current expenses," the cost of fitting up a building for city purposes was held to be a necessary expense which could lawfully be included in the tax. Rome *v.* McWilliams, 67 Ga. 106. Where by charter the right to tax was limited to one per cent per annum on all taxable property, and a levy of three mills was required to be made to meet interest on the bonded debt, the Supreme Court of the United States held that the disposition of the remaining seven-tenths was within the discretion of the council, and was not subject to judicial order in advance of an ascertained surplus. East St. Louis *v.* Zebley, 110 U. S. 321, and see East St. Louis *v.* Underwood, 105 Ill. 308; Weber *v.* Traubel, 95 Ill. 427. *Post*, sec. 851. *Ante*, sec. 162.

A special act authorizing a municipality to issue bonds in payment of a railroad subscription, held to confer authority to levy taxes for payment of the debt in excess of the limit of taxation authorized by the charter for ordinary municipal purposes; distinguishing United States *v.* Macon County, 99 U. S. 582; *post*, sec. 851; Quincy *v.* Jackson, 113 U. S. 332. See also on this subject, United States *v.* New Orleans, 98 U. S. 381, 393; Ralls Co. Ct. *v.* United States, 105 U. S. 733, 735; Parkersburg *v.* Brown, 106 U. S. 487, 501.

[2] *Ante*, sec. 162, and cases there cited. In The Commonwealth *v.* Pittsburgh, above cited, a city, by a special act of the legislature, was authorized to create a large debt for a particular purpose, to borrow money therefor, and to make provision for the payment thereof by the assessment and collection of such tax as might be necessary therefor; this was held, as respects the particular debt thus created, to be a repeal of any pre-existing restrictions upon the power of taxation. See *supra*, secs. 741, 761, 763; *post*, sec. 851, and cases.

charter limit as to the amount of taxes or rate of taxation for any given year is not exceeded, there may be different levies of taxes in the same year, which, where the charter is silent on the point, may be either a fiscal year or calendar year, in the discretion of the council.[1]

§ 770 (611). **General Revenue Laws and special Charter Provisions construed.** — The general statutes of every State contain elaborate *revenue laws*, declaring what property is taxable and in what manner it shall be taxed; but municipalities, as we have seen, must have a specific and clear grant of power to authorize *them* to levy and collect taxes, and the manner in which it is conferred often leaves it to be determined by judicial construction *how far the provisions of the general law apply to municipal corporations.* The ordinary principles of construction, where there is a conflict between the general and special legislation, have been referred to in a previous chapter.[2] In some instances, municipal charters have been held to authorize the corporations to tax in a different mode, or upon different principles, from that adopted by the legislature in respect to State taxation.[3]

§ 771 (612). **Same subject. General Law held not to limit Charter Power.** — In Virginia, the *general laws* imposing taxes for the support of the State government required railroad companies to pay into the State treasury, for every passenger transported, one mill for every mile of transportation, and then provided that "every company

[1] Benoist *v.* St. Louis, 19 Mo. 179 (1873). But, in the aggregate, the charter limit must not be exceeded. *Ib.* The levy of a municipal tax exceeding the aggregate amount limited by the charter for a single year is illegal, and cannot be sustained. Wattles *v.* Lapeer, 40 Mich. 624. Where there is no restriction in the charter as to the time or amount of levy, the city council, on ascertaining that the first levy will prove insufficient, may levy an additional tax during the same year. Municipality No. 2 *v.* Orleans Cot. Press Co., 6 Rob. (La.) 411.

[2] *Ante*, chap. v. sec. 87, and cases cited. State *v.* Branin, 23 N. J. L. 484 (1852).

[3] Adams *v.* Somerville, 2 Head (Tenn.), 363; Columbia *v.* Beasly, 1 Humph. 232, 240; Shoalwater *v.* Armstrong, 9 Humph. 217; Glass *v.* White, 5 Sneed (Tenn.), 475. *Instances of general law not applying to cities.* Langdon *v.* N. Y. Fire Dep., 17 Wend. 234; Furman *v.* Knapp, 19 Johns. 248; Municipality No. 2 *v.* N. O. & Car. R. R. Co., 10 Rob. (La.) 187; Municipality No. 2 *v.* Com. Bank of N. O., 5 Rob. (La.) 151. See Saunders *v.* McLin, 1 Ired. L. (N. C.) 572; City of Kansas *v.* Johnson, 78 Mo. 661; Savannah *v.* Jesup, 106 U. S. 563 (1882); *supra*, secs. 88, note, 740, note.

paying such tax shall not be assessed with *any tax* on its lands, buildings, or equipments." The charter of a city in that State gave it power to "raise money by taxes for the use of the city, provided the laws for that purpose be not repugnant to the laws of the State." It was held that the general tax law was intended to refer only to *State* taxation, and did not extend to municipalities; that the proviso in the city charter does not limit the power of the city to tax only such property or subjects as are taxed by the State; and that, under the above-mentioned power in its charter, the city could tax the real estate and personal property of the company permanently located therein; and the opinion was expressed that, as the residence or domicile of the company was in that city, it could also tax the rolling stock employed on the road of the company.[1]

§ 772 (613). **Charter Power held to refer to General Law.** — But authority conferred by the charter of a village corporation to assess taxes "upon the freeholders and inhabitants of said village *according to law*," means according to the provisions and principles of the general tax law in force at the time the assessment is made.[2] So authority in the charter of a city to "assess all *taxable* real and personal property within the city" refers to the general State law to ascertain what kind of property is subject to taxation, and the corporation has power to assess not only what was then taxable, but also whatever might afterwards be made subject to taxation by any general statute.[1]

[1] Orange & A. R. R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176; *ante*, sec. 87.

[2] Ontario Bank *v.* Bunnell, 10 Wend. 186 (1833); approved, Buffalo *v.* Le Couteulx, 15 N. Y. 451, 455 (1857); Am. Transp. Co. *v.* Buffalo, 20 N. Y. 381, 391, *per Denio*, J.; State Bank *v.* Madison, 3 Ind. 43 (1851); Gardner *v.* State, 21 N. J. L. 557; *ante*, sec. 87.

"There are numerous bodies in this State, like the village in question, which possess to a limited extent the power of local taxation, and, I presume, in every instance the principles and mode of imposing a tax are ascertained by reference to the *general law;* and we should lament to be obliged to give to their several powers such a construction as would prevent a participation in the improvements of the system of taxation which are made from time to time, and to be found only in the general law on the subject." *Per Nelson*, J., in The Ontario Bank *v.* Bunnell, 10 Wend. 186 (1833); *ante*, sec. 87.

How far the *general laws of the State* in regard to taxation *apply to villages, towns, and cities*, see Troy *v.* Mutual Bank, 20 N. Y. 387; Am. Transp. Co. *v.* Buffalo, *Ib.* 388, note. In this last case, p. 391, *Denio*, C. J., lays down this proposition: "Where the general law is made applicable [to municipalities] in this way [that is, by words of reference to the general laws contained in their charters], any change in the general law would produce a corresponding change in the method of taxation by municipal corporations, the reference being to the law as it shall exist for the time being." Same principle. Ontario Bank *v.* Bunnell, 10 Wend. 186 (1833); Buffalo *v.* Le Couteulx, 15 N. Y. 451; Davenport *v.* Miss. & Mo. R. R. Co., 16 Iowa, 348. The view of *Wright* and *Dillon*, JJ., in the case last cited, was subsequently adopted by the Supreme Court. Dunleith & D. Br. Co. *v.* Dubuque, 32 Iowa, 427 (1871); State *v.* Mt. Pleasant Council, 8 Rich. L. (S. C.) 214. Where a city is authorized "to levy a tax upon the taxpayers of the city, taxable under the revenue laws of the State," such tax must be levied upon the same persons and property as prescribed by the State revenue laws. The phrase "taxpayers of the city, taxable under the revenue laws of the State," designates both the person and subject of taxation. Barret *v.* Henderson, 4 Bush, 255.

§ 773 (614). **Municipal Property not taxable.** — The general statutes of the State upon the subject of taxing property undoubtedly *refer to private property*, and not to that owned by the State; and, in view of the public nature of municipalities, and the purposes for which they are established, heretofore explained,[2] the author is of opinion that such enactments do not, by *implication*, extend to any property owned by them, — certainly to none owned by them for public uses.[3] On this principle the city of Brooklyn cannot impose a tax upon land in that city owned and used by the city of New York and by its lessee *as a ferry landing* in connection with the ferry franchise granted, by its charters, to the last named city.[4] On the same ground it was held that a sale of lands, the

[1] Buffalo *v.* Le Couteulx, 15 N. Y. 451 (1857); The Ontario Bank *v.* Bunnell, 10 Wend. 186, *supra;* Davenport *v.* Miss. & Mo. R. R. Co., *supra;* s. p. Tackaberry *v.* Keokuk, 32 Iowa, 155 (1871); Lot *v.* Ross, 38 Ala. 156, construing the words "taxable property." But in *South Carolina*, in cases arising under the charter of the city of Charleston, which is authorized "to assess those who hold *taxable property* within the same," the words "taxable property" were construed "to mean *all property not exempt by law from taxation*," whether the State taxes the particular kind of property or not for State purposes. The words are not equivalent to the phrase, "property taxed by the State;" but *quære*. State *v.* Charleston Council, 10 Rich. L. 240 (1857); Charleston Council *v.* St. Philip's Church, 1 McMul. Eq. 139; State *v.* Charleston Council, 4 Strob. L. 217; State *v.* Charleston Council, 1 Mill Const. 40; State *v.* Charleston Council, 5 Rich. L. 561; Charleston Council *v.* Condy, 4 Rich. L. 254; State *v.* Charleston, 2 Speers L. 719; *Ib.* 623; 1 Desty Taxation, sec. 90, p. 436.

[2] *Ante*, chap. i. sec. 9 *et seq.;* chap. ii. sec. 18 *et seq.;* chap. iv. sec. 54 *et seq.*

[3] *Ante*, chap. xv., as to Corporate Property, secs. 575, 576; State *v.* Gaffney, 34 N. J. L. 131, 133 (1870), holding that land in good faith acquired by *the city for water-works* is not taxable though not actually in use for such purpose. Galveston Wharf Co. *v.* Galveston, 63 Tex. 14.

[4] People *v.* Brooklyn Assessors (citing text), 111 N. Y. 505 (1888). The substance of the reasoning of *Andrews*, J., who delivered the opinion of the court, is that the ferry franchise was granted to New York by its charters for public purposes. Its acceptance imposed upon the city a corresponding duty, which could not be performed without a landing-place on the Brooklyn side; and that the franchise to maintain the ferry, conjoined with the ownership of the landing, constitute together a ferry property belonging to the city devoted to public uses, and in the absence of special provision to the contrary is exempt from taxation. The fact that the city of New York operated the ferry through lessees, deriving its revenues from the rental, did not change the status of the property. Whether there is any distinction in principle between the taxation of property of a municipality strictly devoted to public uses, and property which it owns, though not acquired for a public use, although it may be held on the general trust applicable to all property of the

property of a city corporation, and constituting part of the *city cemetery*, for taxes, was void.[1] The sound principle is that property owned by the United States, by a State, or by a municipality for public uses, is not subject to be taxed unless so provided by positive legislation.[2]

§ 774 (615). **Same subject. Kentucky Decision.** — The view just expressed has not, however, received, in its full extent, the sanction of the Court of Appeals in Kentucky. Under the statute laws of that State, there was *no express exemption of municipal property from taxation*, and the State, for State revenue, assessed against the city of Louisville a large amount of property, including the city hall, market-houses, fire-engines, wharves, &c., and the case presented the question whether the property was or was not exempt, by implication, from taxation by the State. And the judgment of the court was, that whatever property was used and held by the city for carrying on its municipal government, or was necessary or useful for that purpose, was not taxable by the State, and this would include public buildings, prisons, and property dedicated to charity; but that whatever is not so used, but is owned by the city in its "social or commercial capacity," and for its own *profit*, such as vacant lots, market-houses, fire-engines, and the like, is subject to taxation.[3]

corporation, but the acquisition or holding of which has no essential connection with the public functions of the municipality, the court preferred to express no opinion. The court also observes that the tax was sought to be imposed on *the land as the property of the city*, and not on the lessees in respect of their interest.

So a *public wharf* owned by a municipal corporation, or the rights of a municipal corporation in a public wharf, cannot, in the absence of a statute authorizing it, be taxed, being property owned by the municipality for public purposes, and therefore not subject to the general laws applicable to taxation. Galveston Wharf Co. *v.* Galveston, 63 Tex. 14 (1884).

[1] People *v.* Doe, 36 Cal. 220 (1868); Doyle *v.* Austin, 47 Cal. 353 (1874); Tyler *v.* People, 66 Ill. 322 (1872); *ante*, sec. 739, note. The lands of a county used for a *court-house* and other county purposes cannot be taxed by the city in which it is situated, nor is it liable it was held to a sewer assessment. Worcester Co. *v.* Worcester, 116 Mass. 193 (1874); s. c. 17 Am. Rep. 159. See authorities cited in note, *Ib.* 161.

[2] Piper *v.* Singer, 4 Serg. & R. 354; Hall *v.* Marysville, 19 Cal. 391; People *v.* Doe, 36 Cal. 220; Low *v.* Lewis, 46 Cal. 549; People *v.* Shearer, 30 Cal. 645; People *v.* Salomon, 51 Ill. 37; Fort Dodge *v.* More, 37 Iowa, 388 (1873); State *v.* Gaffney, 34 N. J. L. 133; County of Erie *v.* Erie, 113 Pa. St. 360; Nashville *v.* Smith, 86 Tenn. 213; Rochester *v.* Rush, 80 N. Y. 302; Green *v.* Hotaling, 44 N. J. L. 347. See 1 Desty Taxation, chap. iii., entitled "*Property not Subject to Taxation*," and cases, pp. 48, 49. *Ante*, sec. 752, note.

[3] Louisville *v.* Commonwealth, 1 Duvall (Ky.), 295 (1864). The author, with deference to the learned court, ventures to observe that, in his judgment, the exemption should have been extended to all the property. Municipal corporations are not usually allowed to hold or deal in property directly for profit; and this is not the purpose for which authority is given to erect market-houses or wharves,

§ 775 (615 *a*). **Governmental Instrumentalities not taxable.** — It is settled by the Supreme Court of the United States that the general government has no authority to tax the means and instrumentalities employed by a State in conducting its governmental operations, and discharging its public duties.[1] In so far as municipalities are agencies of the State, the principle referred to extends to them, and so it has been decided by that court, where the point involved was the right of Congress to tax the income or property of a municipal corporation.[2] The question arose in this way: The city of Baltimore, under legislative authority, issued its bonds for a large amount, and made a loan of the proceeds to the railroad company defendant, taking a mortgage upon the road and franchises to secure the loan. The interest thus secured the United States sought to tax under the Internal Revenue Act.[3] The court held that the tax could not be collected; that the nature of municipal corporations was such, and such was their relation to the State in the business of municipal rule, that they partook of the State's exemption from the power of the general government to tax its agencies and instrumentalities; and that, as respects the transaction out of which the case before the court arose, the city was acting within the scope of its public or municipal duties as an arm of the

or to purchase and own fire-engines. Of course the State might provide for the taxation of property owned by its municipalities, but its revenue laws should not be construed to extend to such property unless the legislative intention to that effect be manifest. See People *v.* McCreery, 34 Cal. 432; Doyle *v.* Austin, 47 Cal. 353 (1874); Nashville *v.* Bank of Tenn., 1 Swan (Tenn.), 269. Under the Code of *Iowa*, exempting from taxation the property of incorporated towns "devoted *entirely* to public use and not held for pecuniary profit," lots devised in trust for the use and benefit of a town for the improvement of a public park were held to be for pecuniary profit, and subject to taxation; but *quære*. Mitchellville *v.* Polk Co. Sup., 64 Iowa, 554. In *Pennsylvania* it is held that property yielding a revenue is liable to taxation — under the statute of that State — although owned by a municipality and used for public purposes. Erie County *v.* E. Water Comm'rs, 113 Pa. St. 368; Sewickley Bor. *v.* Sholes, 118 Pa. St. 165. A "collateral inheritance" tax held not a tax upon property in the sense used in the Constitution of *Virginia*. Schoolfield *v.* Lynchburg, 78 Va. 366. See Cooley on Taxation, 132, note. The *general government* cannot tax bonds belonging to a municipal corporation and held for municipal purposes. United States *v.* Balt. & O. R. R. Co., 17 Wall. 322 (1872), *Clifford* and *Miller*, JJ., dissenting. A municipal corporation cannot levy a tax on the bonds issued by the State even though they be property within the corporate limits. It is not to be presumed that the State intended, without an express grant to that effect, to confer upon a municipal corporation a power thus to depreciate the State securities, and do what the State itself ought not to be presumed to have done, in the absence of clear language so declaring. Augusta Council *v.* Dunbar, 50 Ga. 387 (1873); *infra*, sec. 775, and note.

[1] The Collector *v.* Day, 11 Wall. 113 (1870); *ante*, sec. 743.

[2] United States *v.* Balt. & O. R. R. Co., 17 Wall. 322 (1872).

[3] Sec. 122 of the Act of 1862 as amended in 1864.

State, which might, if it had so chosen, have compelled the city, against its assent or that of its citizens, to have laid a tax, and made an appropriation of the proceeds to the railroad company.[1]

§ 776 (616). **Statutes which exempt Persons or Property from Taxation, strictly construed.** — As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied to exist unless it is so clearly granted as to be free from fair doubt.[2]

[1] United States *v.* Balt. & O. R. R. Co., *supra*. The following is an extract from the opinion of the court: "We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not, in that action, be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. It is not necessary, however, to speculate upon hypothetical cases. We are clear in the opinion that the present transaction is within the range of the municipal duties of the city, and that the tax cannot be collected."

But as to property held by a city for public objects, or upon charitable trusts of a public nature, there would seem, in the author's judgment, to be no ground for asserting a distinction and holding such property liable to taxation. *Ante*, sec. 567 *et seq.* Of course, if a corporation is acting purely as a "private trustee," an exemption from taxation could not be claimed. *Ante*, sec. 170.

[2] Crawford *v.* Burrell Tp., 53 Pa. St. 219; Lord Colchester *v.* Kewney, L. R. 1 Exch. 368; Platt *v.* Rice, 10 Watts (Pa.), 352; Providence Bank *v.* Billings, 4 Pet. 514; Delaware Railroad Tax, 18 Wall. 206; Trask *v.* Maguire, 18 Wall. 206; Baltimore *v.* State, 15 Md. 376; Hannibal & St. J. R. R. Co. *v.* Shacklett, 30 Mo. 550; Washington University *v.* Rowse, 42 Mo. 308; Pacific R. R. Co. *v.* Cass County, 53 Mo. 17; Stewart *v.* Davis, 3 Murph. (N. C.) 244; Anderson *v.* State, 23 Miss. 459; Balt. & O. R. R. Co. *v.* Marshall County, 3 W. Va. 319; State *v.* Bank of Smyrna, 2 Houst. (Del.) 99; Louisville & P. Canal Co. *v.* Commonwealth, 7 B. Mon. 160; St. Peter's Church *v.* Scott Co. Comm'rs, 12 Minn. 395; Portland, S. & P. R. R. Co. *v.* Saco, 60 Me. 196; State *v.* Parker, 32 N. J. L. 426; Biscoe *v.* Coulter, 18 Ark. 423; Harvard College *v.* Boston, 104 Mass. 470; Indianapolis Council *v.* McLean, 8 Ind. 328; Meth. E. Church *v.* Ellis, 38 Ind. 3; Washburn College *v.* Shawnee Co. Comm'rs, 8 Kan. 344; Vail *v.* Beach, 10 Kan. 214; No. Mo. R. R. Co. *v.* Maguire, 20 Wall. 46; 1 Desty Taxation, chap. vi.; Swan Point Cemetery *v.* Tripp, 14 R. I. 199; Austin *v.* Austin Gasl. & C. Co., 69 Tex. 180; South Bend *v.* Notre Dame Univ., 69 Ind. 344. "An intent to exempt any property, or any portion of the value of any property, from taxation must not be presumed, but must be found plainly expressed in the statutes." *Earl*, J. People *v.* N. Y. Tax Comm'rs, 95 N. Y. 554. An exemption from "*all public taxes and assessments*" held to include assessments for local improvements. State *v.* St. Paul, 36 Minn. 529; see *infra*, sec. 777. In *Louisiana* an unqualified exemption "from taxation during the period of fifty years" was held to imply an immunity from municipal as well as State taxes. "When the sovereign emancipates he does so munificently." *Per Bermudez*, C. J. New Orleans *v.* Carondelet Canal & Nav. Co., 36 La. An. 396. Yes; but to no greater extent than he plainly expresses.

Such statutes will be construed most strongly against those claiming the exemption.[1]

[1] Providence Bank *v.* Billings, 4 Pet. 514; Charles River Br. Prop. *v.* Warren Br. Prop. 11 Pet. 420; Phila. & W. R. R. Co. *v.* Maryland, 10 How. 393; Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.), 436; Phillips Exeter Acad. Trs. *v.* Exeter, 58 N. H. 306. Use, and not ownership, is the test as regards *churches*, *schools*, &c. Detroit Y. M. Soc. *v.* Detroit, 3 Mich. 172; St. Mary's Col. *v.* Crowl, Treas., 10 Kan. 442; Washburn College *v.* Shawnee Co. Comm'rs, 8 Kan. 344; Pierce *v.* Cambridge, 2 Cush. 611; Phillips Exeter Acad. Trs. *v.* Exeter, 58 N. H. 306; Cincinnati Col. *v.* State, 19 Ohio, 110; New Orleans *v.* St. Anna's Asylum, 31 La. An. 292; Old South Soc. *v.* Boston, 127 Mass. 378; Boston Soc. of Red. Fathers *v.* Boston, 129 Mass. 178; 1 Desty Taxation, 110, 132, 136. A *parsonage* and lot are not exempt. State *v.* Axtell, 41 N. J. L. 117; State *v.* Lyon, 32 N. J. L. 360; State *v.* Krollman, 38 N. J. L. 323; Meth. E. Church *v.* Ellis, 38 Ind. 3 (1871); 1 Desty Taxation, 112. Nor land upon which a church is being built, under the head of actual places of religious worship. Mullen *v.* Erie Co. Comm'rs, 85 Pa. St. 288; Orr *v.* Baker ("church property") 4 Ind. 86 (1853); Gordon *v.* Baltimore, 5 Gill, 231 (1847), and cases cited; State *v.* Newberry Council ("agricultural property"), 12 Rich. L. 339; Municipality No. 2 *v.* N. O. & Car. R. R. Co. (inter-corporate real estate), 10 Rob. (La.) 187; People *v.* Whyler, 41 Cal. 351 (1871); *post*, sec. 789, note. Power of State to exempt. Tomlinson *v.* Branch, 15 Wall. 460; Munic. *v.* Bank, 5 Rob. (La.) 151; Jacksonville *v.* McConnel (constitutional limitation), 12 Ill. 138; Northwestern Univ. *v.* People, 80 Ill. 333 (1875); Orange & A. R. R. Co. *v.* Alexandria, 17 Gratt. 176 (1867), *per Joynes*, J.; People *v.* McCreery, 34 Cal. 432; Life Assoc. of Am. *v.* St. Louis Co. Assessors, 49 Mo. 512; State *v.* Hannibal & St. J. R. R. Co., 75 Mo. 208; State *v.* Woodruff, 37 N. J. L. 139; State *v.* Newark, 26 N. J. L. 519; People *v.* Eddy, 43 Cal. 333 (1872). A subsequent statute exempting property from municipal taxation is valid against the municipality. Richmond *v.* Richmond & D. R. R. Co., 21 Gratt. 604 (1872). Remedy of owner where property exempt from taxation is assessed. Lee *v.* Thomas, 49 Mo. 112 (1871); Jefferson City *v.* Opel, *Ib.* 190; Walden *v.* Dudley, *Ib.* 419; St. Louis B. & Sav. Assoc. *v.* Lightner, 47 Mo. 393; Atl. & Pac. R. R. Co. *v.* Cleino, 2 Dillon, 175 (1873).

The *illegal exemption* of another from a tax or assessment is no ground for an injunction against the corporation, unless the plaintiff is injured thereby, as by being compelled to pay more than his proportion. Page *v.* St. Louis, 20 Mo. 136 (1854); Balfe *v.* Bell, 40 Ind. 337 (1872). The *omission of an assessor to assess* certain parcels of property subject to taxation, whether arising from a misapprehension of the law, — as by giving effect to void provisions of a statute, — or a mistake of fact, will not invalidate his general assessment list. People *v.* McCreery, 34 Cal. 43; Doyle *v.* Austin, 47 Cal. 353, 359 (1874). An omission by the assessors to assess a given individual because he is poor, and his property was of little value, does not invalidate the whole assessment. Williams *v.* Lunenburg Sch. Dist., 21 Pick. 75 (1838); Weeks *v.* Milwaukee, 10 Wis. 242; Kneeland *v.* Milwaukee, 15 Wis. 454; Bond *v.* Kenosha, 17 Wis. 284; Dean *v.* Gleason, 16 Wis. 1, 15; Hersey *v.* Milw. Co. Sup., *Ib.* 185; Hale *v.* Kenosha, 29 Wis. 599. But a person, whose local assessment for improvements is increased by the unlawful omission of lands liable to contribute, may restrain the enforcement of the assessment. Hassen *v.* Rochester, 65 N. Y. 516 (1875).

The *Wisconsin* cases assert the following rule as to the effect of the omission to tax property liable to taxation: "Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is intrusted, do not necessarily vitiate the whole tax. But intentional disregard of