§ 777. **Exemption from "Taxation" does not include Local Assessments.** — Although an "assessment" is in the nature of a tax, and is authorized by, or is a branch of, the taxing power, yet a general statute exempting certain property — as, for example, churches — from "*taxation* by any law of the State," does not exempt it from liability for a *street assessment*.[1] So, the exemption of property of a *cemetery company* from "any tax or public imposition whatever," does not exempt it from a paving-tax for improving a street in front of the property, the court (in an opinion elaborately examining the subject) holding that the intent of the legislature was to exempt the property from all taxes or impositions for the *purpose of revenue*, but not to exonerate it from charges inseparably incident to its location with respect to other property.[2] And the same view has

those laws, in such manner as to impose illegal taxation on those who are assessed, does." *Per Paine*, J., in Weeks *v.* Milwaukee, *supra*. The language was used in a case in which the city council, in view of the benefit which the construction of a new hotel would be to the city, intentionally omitted to cause the lots upon which it was being erected to be taxed. But *quære*, as to this effect of even an *intentional* omission by the city council. Dunham *v.* Chicago, 55 Ill. 357 (1870), lays down the true rule. If the illegal exemption does not increase the amount which others are taxed, they are not injured. If it does, should they not compel, by *mandamus*, the city authorities to assess all the property liable to taxation? At all events, it is a very serious doctrine to hold that the omission, even though directed by the council, should have the effect to vitiate and overthrow the *whole tax* list for the year. See Winters *v.* Montgomery, 65 Ala. 403; 1 Desty Taxation, 198, and cases.

As to *power of municipality* to exempt property from taxation in any case. State *v.* Addison, 2 S. C. 499; Hayzlett *v.* Mt. Vernon, 33 Iowa, 229 (1871); *infra*, secs. 781, note, 789, note. An exemption from municipal taxation granted to a private corporation is not affected by the dissolution of the municipal corporation and its being replaced by another. Mobile & S. H. R. R. Co. *v.* Kennerly, 74 Ala. 566. A clause in a charter of a street railway company making it subject to "all restrictions, limitations, and conditions" prescribed in a general statute, does not entitle it to a reduction of taxation to a rate specified in the statute. Dauphin & La F. Streets Ry. Co. *v.* Kennerly, 74 Ala. 583.

[1] *Re* Nassau Street, 11 Johns. 77. This is the leading case on the subject, and the point *decided* has been generally approved, although some of the reasons have been criticised. People *v.* Brooklyn, 4 N. Y. 419, 432, and cases reviewed; Bleecker *v.* Ballou, 3 Wend. 263; Sharp *v.* Speir, 4 Hill (N. Y.), 76, 82; Sharp *v.* Johnson, *Ib.* 92; Brick Presb. Church *v.* New York, 5 Cow. (N. Y.) 538; New York *v.* Cashman, 10 Johns. 96; Second Av. M. E. Church, *In re*, 66 N. Y. 395 (1876); Roosevelt Hosp. *v.* New York, 84 N. Y. 108; Sheehan *v.* Good Sam. Hosp., 50 Mo. 155 (1872); Boston Seamen's Fr. Soc. *v.* Boston, 116 Mass. 181; Beals *v.* Providence Rubber Co., 11 R. I. 381; Cooley on Taxation (2d ed.), 207; 1 Desty Taxation, 121; Bedford Union Poor Guard. *v.* B. Impr. Comm'rs, 7 Exch. 777; Queen *v.* Oldham Bor., L. R. 3 Q. B.C. 474; Broadway Bapt. Church *v.* McAtee, 8 Bush, 508 (1871).

[2] Baltimore *v.* Green Mt. Cem. Prop., 7 Md. 517 (1855). In thus holding, the court does not proceed upon the ground that it was an *assessment*, and not a *tax*, which was sought to be collected from the cemetery company; it admitted it was a *tax*, but held it was not such a tax as was meant by the exempting statute, which is the sound view of the subject. The Chief Justice observes: "The distinction, if any,

been taken in a variety of cases, mostly referring to *churches, public and charitable institutions*.[1] Where the charter of a charitable insti-

between a '*tax*' and an '*assessment*' is not very palpable. The meaning of the words is the same in our laws." *Per Le Grand*, C. J., *Ib.* 535. See, also, Dolan *v.* Baltimore, 4 Gill, 394. In *Kentucky* it was held that a cemetery could not be subjected by judicial decree to sale to satisfy liens for adjacent street improvements. Louisville *v.* Nevin, 10 Bush (Ky.), 549; s. c. 19 Am. Rep. 78 (1874), and useful note of Mr. Thompson.

In *New York* the cemetery property is held to be subject to local assessment. Buffalo City Cem. *v.* Buffalo, 46 N. Y. 503, 506; McBean *v.* Chandler, 9 Heisk. 349 (1872); *ante*, sec. 760; St. Joseph *v.* O'Donoghue, 31 Mo. 345 (1861). *Contra*, Olive Cemetery *v.* Philadelphia, 93 Pa. St. 129; s. c. 22 Alb. L. J. 349; 1 Desty Taxation, 112, and cases as to *Cemeteries*.

[1] Pray *v.* Northern Liberties, 31 Pa. St. 69 (1850); Northern Liberties *v.* St. John's Church, 13 Pa. St. 104 (1850), following 11 Johns. 77, *supra*; s. p. Boston Seamen's Fr. Soc. *v.* Boston (assessment for widening and grading street), 116 Mass. 181 (1874); s. c. 17 Am. Rep. 153, where the subject is well presented by *Devens*, J.; Lockwood *v.* St. Louis, 24 Mo. 20 (1856); Garrett *v.* St. Louis, 25 Mo. 505; Egyptian Lev. Co. *v.* Hardin, 27 Mo. 495. In the case of the St. Louis Pub. Schools *v.* St. Louis, 26 Mo. 468, following Lockwood *v.* St. Louis (local assessment on church property), 24 Mo. 20, it was held that the real estate of the board of *public* schools of a city (a distinct corporation) was liable to a local assessment for sewers, sidewalks, opening streets, &c.; but *quære*. See Hartford *v.* West Middle Sch. Dist., 45 Conn. 462, where, under the charter of Hartford, all land specially benefited by a city improvement is liable to be assessed for the expense of such improvement. *Held*, that a piece of land owned by a school district, upon which its school-house stood, and which was used solely for school purposes, and of which no other use was contemplated in the future, was not so benefited that it could be assessed for the expense of a street laid out by the city near it. The exemption of a charitable corporation by its charter from "taxation of every kind," does not exempt it from an assessment upon its land to pay for a street improvement in front of it. Sheehan *v.* Good Sam. Hosp., 50 Mo. 155 (1872); s. c. 11 Am. Rep. 412. See also Emery *v.* Gas Co., 28 Cal. 345 (1865); Taylor *v.* Palmer, 31 Cal. 240 (1866); Brightman *v.* Kirner, 22 Wis. 54. Exemption of an institution "from all *taxation* by State, parish, or city" is not an exemption from sidewalk or street *assessments*. Lafayette *v.* Male Orphan Asylum, 4 La. An. 1 (1849).

So a railroad charter exempting the company (in consideration of the payment of a certain tax) from "any other or further *tax* or *imposition* upon it," does not exempt it from liability for an assessment upon houses and lots owned by it, and benefited by the opening and widening of a street; but the corporation cannot, for such a purpose, be assessed without reference to the special benefit conferred upon property owned by it, since such an assessment would be, in fact, a *tax*, from which it is exempt. State *v.* Newark, 27 N. J. L. 185 (1858). Such property may be assessed for the construction of a public sewer (New York, N. H. & H. R. R. Co. *v.* New Britain, 49 Conn. 40); or for improving a street. Ludlow *v.* Cinc. So. Ry. Trs., 78 Ky. 357. So an exemption from "*taxes*, *charges*, and *impositions*" does not exonerate a private corporation from assessments on its property for opening or paving streets on which it fronts. Paterson *v.* Soc. for E. U. Manuf., 24 N. J. L. 385 (1854), following Nassau St., *In re*, 11 Johns. 77; State *v.* Newark, 36 N. J. L. 478; s. c. 13 Am. Rep. 464. Further illustrations, see, also, Paine *v.* Spratley, 5 Kan. 525; Chicago *v.* Colby, 20 Ill. 614; Bridgeport *v.* N. Y. & N. H. R. R. Co., 36 Conn. 255; Indianapolis, P. & C. R. R. Co. *v.* Ross, 47 Ind. 25 (1874); Marshall *v.* Vicksburg, 15 Wall. 146, as to "tax," and "wharfage charge." See, as to difference between "tax" and "assessment," and for views not coincident with those generally entertained, Chicago *v.* Larned, 34 Ill. 203 (1864); Ottawa *v.*

tution provided that its property "shall not be subject to *taxes or assessments*," it was held by the Court of Errors and Appeals of New Jersey that these words were not synonymous, and that they had the effect to exempt the property not only from ordinary taxes, public and municipal, but from an assessment for curbing and flagging a street on which the property abutted.[1]

§ 778 (617). **Distinction between "Tax" and "Assessment," as used in Constitutions and Statutes.** — But aside from the rule of strict construction which applies to exemptions from taxation, the cases cited in this and in the previous section will show that there is, in their ordinary use, a recognized *difference between the words "tax" and "assessment,"* and that the one does not always, or usually include the other. Thus, a constitutional provision that "taxation shall be equal and uniform throughout the State" does not apply to local assessments upon private property to pay for local improvements.[2] So, a provision of the Constitution of a State which requires "the rule of taxation to be uniform," in connection with another provision, that "it shall be the duty of the legislature to provide

Spencer, 40 Ill. 211; Burl. & Mo. R. R. Co. *v.* Spearman, 12 Iowa, 112; N. Y. & N. H. R. R. Co. *v.* New Haven, 42 Conn. 279 (1875); s. c. 19 Am. Rep. 534; McBean *v.* Chandler, 9 Heisk. 349 (1872); s. c. 24 Am. Rep. 308; *ante*, secs. 746, 759, 760, 761.

County court-house property held not liable to a sewer assessment made by a city. Worcester County *v.* Worcester, 116 Mass. 193 (1874).

[1] State *v.* Newark, 36 N. J. L. 478 (1873); s. c. 13 Am. Rep. 464, reversing the judgment of the Supreme Court in same case, 36 N. J. L. 157; 10 Am. Rep. 223; distinguishing Paterson *v.* Society, &c., 24 N. J. L. 385, where the language was "all taxes, charges, and impositions under the authority of this State," also distinguishing State *v.* Newark, 27 N. J. L. 185, where the exempting clause in the charter was "that no other or further tax or imposition shall be levied or imposed on said company." See First Presb. Church *v.* Ft. Wayne, 36 Ind. 338 (1871), where, however, the exact language of the Constitution and the statute is not given. Gould *v.* Baltimore, 59 Md. 378.

Where church property is exempted by statute from general taxation, and where it is held that local assessments do not come within the exemption, and where the act authorizing local improvements provided that the same should not in any year exceed ten per cent of the property as assessed and valued on the tax duplicate for State, county, and city taxes, it was decided that, as church property could not be valued and assessed on the tax duplicate, it could not, although otherwise liable, be assessed for the construction of a sewer. First Presb. Church *v.* Ft. Wayne, 36 Ind. 338 (1871); s. c. 10 Am. Rep. 35. See, however, in *New York*, Second Av. M. E. Church, *In re*, 66 N. Y. 395; Hebrew Benev. O. A. Soc., *In re*, 70 N. Y. 476 (1877); St. Joseph's Asylum, *In re*, 69 N. Y. 353.

[2] N. O. Draining Co., *In re*, 11 La. An. 338 (1856), where the subject is very fully examined. s. p. Surgi *v.* Snetchman (paving assessment), *Ib.* 387; Yeatman *v.* Crandall (levee tax), *Ib.* 220; *In re* Ford, 6 Lans. (N. Y.) 92; Taylor *v.* Boyd, 63 Tex. 533; Texas Trans. Co. *v.* Boyd, 67 Tex. 153; Cain *v.* Davie Co. Comm'rs, 86 N. C. 8; *supra*, secs. 750, 755, 756, note, *et seq.* But see *ante*, sec. 760.

for the organization of cities, and to restrict their power of taxation, *assessment*, &c., so as to prevent abuses in *assessments* and taxation," is construed not to apply to special *assessments* by municipal corporations, made by authority of the legislature, for local improvements.[1]

§ 779 (618). **Municipality cannot delegate its Power to Tax.** — We have already had occasion to refer to the principle that *public powers* conferred upon a municipality, to be exercised by its council, when and in such manner as it shall judge best, are, without legislative authority to that end, *incapable of delegation* by the municipality.[2] The principle extends to the authority conferred upon a municipal corporation to levy and collect taxes, or to determine upon the necessity and character of local improvements. Such authority

[1] Weeks *v.* Milwaukee (street assessment), 10 Wis. 282 (1860); Lumsden *v.* Cross (street assessment), *Ib.* 282; State *v.* Portage (street assessment), 12 Wis. 562; Bond *v.* Kenosha (harbor tax or assessment), 17 Wis. 284. The Supreme Court of *Wisconsin* profess to follow the construction given by the Supreme Court of *Ohio* to similar provisions in the Constitution of that State. Hill *v.* Higdon, 5 Ohio St. 243; Reeves *v.* Wood County, *Ib.* 333. See observations of Judge *Cooley*. Const. Lim. 510, note. But the principle of uniformity is considered by the court to apply to ordinary municipal taxes. Weeks *v.* Milwaukee, *supra*, *per Paine*, J.; Dean *v.* Gleason, 16 Wis. 1–16. General result of the cases concerning the nature of local assessments, see *ante*, sec. 761.

In Bond *v.* Kenosha, 17 Wis. 284 (1863), the Supreme Court of *Wisconsin* decided that the provision of the charter of the city of Kenosha, authorizing the council, for the purpose of constructing a harbor in the city, to levy a special tax on all lands within the city subject to taxation, *not including any improvements made thereon*, was in the nature of a special assessment for local improvements, and did not contravene any provision of the Constitution of the State. Hale *v.* Kenosha, 29 Wis. 599, distinguishing Bond *v.* Kenosha, *supra;* Weeks *v.* Milwaukee, followed Hurford *v.* Omaha, 4 Neb. 336 (1876). It is held in many States that local assessments are not within the meaning of the term *taxation* as usually employed in our Constitutions and statutes. Allen *v.* Galveston, 51 Tex. 302; Austin *v.* Gulf, Colo. & S. F. R. R. Co., 45 Tex. 234, 271; Roundtree *v.* Galveston, 42 Tex. 626; Taylor *v.* Boyd, 63 Tex. 533; Paine *v.* Spratley, 5 Kan. 525; Leavenworth *v.* Laing, 6 Kan. 274; Burroughs Tax. p. 435; Cooley on Taxation, p. 446, and cases cited, n. 2; *supra*, secs. 754, 758; *infra*, sec. 783; 1 Desty Taxation, sec. 4, pp. 5-7, and cases. "A *special assessment* differs from *special taxation* mainly in this, that the assessment cannot, in any case or under any circumstances, exceed the benefits the property will derive from the improvement, and the owner of the property assessed has the right, if dissatisfied with the assessment, to have this question passed upon by a jury, and if not content with their finding, to have it reviewed in an appellate tribunal, whereas, in cases of special taxation, the jury have nothing to do with the amount which is by ordinance assessed upon the contiguous property." *Per Mulkey*, C. J. Sterling *v.* Galt, 117 Ill. 11.

[2] *Ante*, sec. 96, and cases cited. Foss *v.* Chicago, 56 Ill. 354; Thompson *v.* Booneville, 61 Mo. 282; Indianapolis *v.* Lawyer, 38 Ind. 348; Johnston *v.* Macon, 62 Ga. 645 (1849); Macon *v.* First Nat. Bank, 59 Ga. 648; Macon *v.* Macon Sav. Bank, 60 Ga. 133; Hunt *v.* Booneville, 65 Mo. 620.

cannot be delegated unless such delegation is legislatively permitted.[1]

[1] *Ib.;* McInerney *v.* Reed, 23 Iowa, 410 (1867); Meuser *v.* Risdon, 36 Cal. 239; State *v.* Parker, 26 Vt. 362; State *v.* Swisher, 17 Tex. 441; Foss *v.* Chicago, 56 Ill. 354 (1870); Jenks *v.* Chicago, 56 Ill. 397 (1870); State *v.* Copeland, 3 R. I. 33; Murray *v.* Tucker, 10 Bush (Ky.), 240 (1874); Davis *v.* Reed, 65 N. Y. 566 (1875); Bellinger *v.* Gray, 51 N. Y. 610; Hitchcock *v.* Galveston, 96 U. S. 341 (1877); Sheehan *v.* Gleason, 46 Mo. 100; Lord *v.* Oconto, 47 Wis. 386. Approving text, also, Mathews *v.* Alexandria, 68 Mo. 115; Richardson *v.* Heydenfeldt, 46 Cal. 68 (1873); Thompson *v.* Schermerhorn, 6 N. Y. 92, approved in Phelps *v.* New York, 112 N. Y. 216 (1889); where it was held, under a charter making it the duty of the city to award a contract to the lowest bidder unless otherwise ordered by a vote of three-fourths of the council, that the power must be exercised by the council in *each case*, and could not be delegated to a public officer; St. Louis *v.* Clemens, 52 Mo. 133; People *v.* Clark, 47 Cal. 456; Randolph *v.* Gawley, 47 Cal. 458; Richardson *v.* Heydenfeldt, 46 Cal. 68; Ould *v.* Richmond, 23 Gratt. 471; Robinson *v.* Dodge, 18 Johns. 351; Trumbull *v.* White, 5 Hill (N. Y), 46; Davis *v.* Reed, 65 N. Y. 566; Schofield *v.* Lansing, 17 Mich. 437; East St. Louis *v.* Wehrung, 46 Ill. 392; Lake Shore & M. S. R. R. Co. *v.* Chicago, 56 Ill. 454 (1870); Walker *v.* Chicago, 62 Ill. 286 (1871); Moore *v.* Chicago, 60 Ill. 243 (1871); Bryan *v.* Chicago, *Ib.* 507. The above cases distinguished. Page *v.* Chicago, 60 Ill. 441. In Schwartz *v.* Flatboats, 14 La. An. 243 (1859), it was held (but *quære* as to its correctness) that the power to "alien, *lease*, *farm*, and dispose of all and every kind of property," and "to lay and collect taxes in *such a manner* as may be deemed expedient, on all steamboats, &c., landing at the levee of the corporation," gave the corporation power to lease, for a period of years, to a private person, the revenues of the port, with the privilege of collecting them in his own name and for his own benefit.

The principle stated in the text is thus enforced by the Court of Appeals in *Kentucky*, in a case arising in the city of Louisville. In substance, the court say, the general council of the city of Louisville, by ordinance as prescribed in the city charter, may direct or authorize the sidewalks in the city to be graded, paved, curbed, &c., at the cost of the owners of the property fronting thereon. The *council alone can determine the necessity* of such improvement, as well as its kind and character, and has no authority to refer the determination of these matters to any other body or person. The power to pass ordinances to improve streets is legislative, and cannot be delegated. It is in effect a power of taxation, which is the exercise of sovereign authority. To ordain generally that a street or square shall be graded and paved, or "*so much thereof as the engineer may direct, and according to specifications to be furnished by him*," is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things. To allow such an ordinance to bind the property-holder is, in the opinion of a majority of the court, to destroy all the safeguards thrown around him by law. Subsequent acts of affirmance by the city council cannot validate an invalid ordinance. Hydes *v.* Joyes, 4 Bush, 464. City council cannot ratify so as to impose obligation on lot-owner to pay. Murray *v.* Tucker, 10 Bush, 240 (1874); but see on this point Davis *v.* Read, 65 N. Y. 566; Hitchcock *v.* Galveston, 96 U. S. 341 (1877). But where the act of the legislature charged the burden of certain local improvements upon the adjoining lots, and directed the street commissioners to make out the assessment, it is not necessary that the city assess the tax by an ordinance, and an ordinance to that effect, if passed, is not a delegation by the corporation of its power of taxation. Schenley *v.* Commonwealth, 36 Pa. St. 62 (1859). In *South Carolina*, under a general power to the *city council* to make local assessments and to appoint officers to execute the corporate powers and duties, it is held not to be a valid objection to an assessment that it was made, pursuant to ordinances or regulations, by the officers of the corporation and not by the corporation itself; for the city council is to be regarded as a local legislative body for the purpose of making by-laws, with power to cause them to be carried out; and particularly is such an objection without force when the assessments have first to be submitted to and approved by the council. Cruikshanks *v.* Charleston Council, 1 McCord (S. C.), 360 (1821); *Ib.* 345. Compare Charleston Council *v.* Pinckney, 1 Tr. Const. 42 (1812); s. c. 3 Brev. 217. Where such a course is expressly authorized by the charter, a grade for a street need not be previously fixed by the council, but it may require the adjoining owners to make certain improvements according to the direction of the city paver, who may thus determine the grade. State *v.* New Brunswick, 30 N. J. L. 395 (1860). See further, *ante*, sec. 96; *infra*, sec. 811.

§ 780 (619). **Power a continuing one; Re-paving.** — Not only the power to tax, but the power to make local improvements at the expense of the property benefited, is, like all other legislative power of the municipality, a *continuing one*, unless the contrary appears; and hence it is not exhausted by being once exercised.[1] Therefore the power to compel property-owners to pave ordinarily extends to compelling them to *repave*, when required by the municipal authorities.[2]

[1] *Ante*, chap. xviii. sec. 686. McCormick *v.* Patchin, 53 Mo. 33 (1873); s. c. 14 Am. Rep. 440, and note of Mr. Thompson. A "street" includes sidewalks and gutters, and "paving" includes "flagging." The work, therefore, of setting curb and gutter-stones, and "flagging" the sidewalk of a street which has once been thus improved, is included in the phrase "repaving any street;" it is intended to embrace the whole street, and every kind of paving. Burmeister, *In re*, 76 N. Y. 174; Phillips, *In re*, 60 N. Y. 16; Burke, *In re*, 62 N. Y. 224; Smith, *In re*, 52 N. Y. 526; Levy, *In re*, 63 N. Y. 637; Folsom, *In re*, 56 N. Y. 60; Kokomo *v.* Mahan, 100 Ind. 242; Dickinson *v.* Worcester, 138 Mass. 555; Taber *v.* Grafmiller, 109 Ind. 206; Dooley *v.* Sullivan, 112 Ind. 451; Wiles *v.* Hoss, 114 Ind. 371 (1887); Warner *v.* Knox, 50 Wis. 429. Where a gutter is necessary for the protection of the sidewalk, the street being unpaved, its cost may be included in the assessment for constructing the sidewalk. State *v.* New Brunswick, 44 N. J. L. 116.

[2] Williams *v.* Detroit, 2 Mich. 560; Sheley *v.* Detroit, 45 Mich. 431; Wilkins *v.* Detroit, 46 Mich. 120; McCormick *v.* Patchin, 53 Mo. 33 (1873), citing text; s. c. 14 Am. Rep. 440, and note and cases there cited. Power to "repair or pave streets" authorizes a corporation to remove an old pavement and *replace it with a new one* of a different description. Gurner *v.* Chicago (Nicholson pavement), 40 Ill. 165 (1866); Kokomo *v.* Mahan, 100 Ind. 242 (raising grade of sidewalk); Jelliff *v.* Newark, 48 N. J. L. (19 Vroom) 101. In Municipality *v.* Dunn, 10 La. An. 57 (1855), the city sued to recover a portion of the cost of repaving a street in front of the defendant's lot. It appeared that the street had been previously paved with round stone, at the expense of the property. This, it was found, would not resist the heavy hauling, and was replaced by the one built of square block stone, for which suit was brought. The defence was, that although the right to assess the property for the first pavement was given, yet the corporation had no right to compel a contribution from the same property for the second pavement. The majority of the court held that the power to pave the streets was a continuing power, to be exercised when the public good requires it, and extended as well to the making of a new in the place of an insufficient pavement as to the one first built, the equity

§ 781 (620). **Powers cannot be varied by Ordinance.** — It is plain that the powers of taxation conferred upon the municipal authorities by the charter or organic act, and the mode of exercising such powers when prescribed therein, cannot be varied by ordinances or by-laws.[1] Therefore a city corporation cannot impose terms or conditions which can affect the validity of a tax-sale made within the authority conferred by the legislature.[2] So, under a charter constituting the city-marshal the collector of taxes, and making it his duty to receive and collect the taxes due the corporation, it is not competent for the council by ordinance to dispense with the duties which the charter imposes upon this officer, and devolve them upon another.[3] So, under a charter authorizing a town corporation "to collect taxes upon all real estate within the town, not exceeding one half per cent upon the assessed value thereof," it cannot pass an ordinance directing lots to be taxed, without considering the value of the improvements upon them; for since buildings are part of the land which the legislature had designated as the property to be taxed, such an ordinance makes a discrimination which the charter does not authorize.[4]

in both cases being regarded as the same. These cases are approved in the late case of McCormick *v.* Patchin, 53 Mo. 33 (1873); followed in Farrar *v.* St. Louis, 80 Mo. 379, and Estes *v.* Owen, 90 Mo. 113; and the power of the legislature to authorize local assessments for repaving admitted. As to *repaving*, compare Hammett *v.* Philadelphia, 65 Pa. St. 146; s. c. 3 Am. Rep. 615; 8 Am. Law Reg. N. S. 411, cited *supra;* followed Orphan Asylum's Appeal, 111 Pa. St. 135; Wistar *v.* Philadelphia, 111 Pa. St. 604; and see Lafayette *v.* Fowler, 34 Ind. 140; State *v.* Jersey City, 34 N. J. L. 277 (1870). In McCormick *v.* Patchin, *supra*, *Wagner*, J., makes the following reference to the case of Hammett *v.* Philadelphia, *supra:* "The only cases which I have been able to find sustaining the views urged by the appellant are those decided in the Supreme Court of *Pennsylvania*. The first and principal case is Hammett *v.* Philadelphia, 65 Pa. St. 148, in which a majority of the court held that, although the original paving of a street was a local improvement, and within the principle of assessing the costs upon the lots lying upon it, yet where a street was once opened and paved, it was thereby assimilated with the rest of the city and made part of it, and all the particular benefit to the locality derived from the improvements were then received and enjoyed. The learned judge who delivered the prevailing opinion discussed with considerable fulness the principles underlying the power to make assessments for local benefits. The opinion consists mostly of generalizations in regard to established and well admitted principles. It is perfectly true that it would be wholly beyond the scope of legislative power to authorize a municipality to levy a local tax for general purposes. The burdens of the whole community cannot be shifted to the shoulders of one man who has only an interest in common with all the rest. The whole theory of local taxation or assessment is that the improvements for which it is levied afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large would not be an exercise of the taxing power, but an act of confiscation. In effect, it would be transferring the property of one individual to another. These are legal truisms, which have long been entertained and firmly established. The line of separation exists between local and general taxation, and the boundary between them is not always very clear or definite. The case of Hammett *v.* Philadelphia shows that it is difficult to draw the true line of distinction between these respective modes of taxation; and the judge who wrote the opinion of the majority of the court finally placed it upon the fact that the act which he was construing relieved the case of all difficulty, and showed upon its face that the special taxation authorized was avowedly for a general and not a local object. The law was for the uses and purposes of the public, and not especially beneficial to any particular class." See, also, as to local assessments, State *v.* Leffingwell, 54 Mo. 458 (1873); *ante*, sec. 752, note; *supra*, sec. 776, note.

The general doctrine of Hammett's case is adhered to in *Pennsylvania*, and it is held that "power to pave" at the expense of the abutter does not authorize the city to tear up a pavement or curbing which is good and needs no repairs, and which was paid for by the abutter, and at his expense to replace the same with one more costly. Wistar *v.* Philadelphia, 80 Pa. St. 112 (1876); s. c. 21 Am. Rep. 112; Orphan Asylum's Appeal, 111 Pa. St. 135; Wistar *v.* Philadelphia, 111 Pa. St. 604. But does not this view substitute the judicial judgment in the place of that of the city council as to the necessity of a change? Where, in the original plan of paving a street, a strip was left in the middle for trees and shrubbery, a subsequent change by paving the strip was held to be an original improvement, for which the property owners could be assessed. Alcorn *v.* Philadelphia, 112 Pa. St. 494.

In the charter of the city of New York there is a provision that no street once paved, and the expense thereof paid by assessment by the adjoining owners, shall be thereafter paved or an assessment imposed therefor, unless petitioned for by a majority of the owners. Where the city has once determined the character and extent of the work, and assessed and collected the expense from the owners, it has no further jurisdiction over that property until a petition is presented as provided, and an assessment for repavement without such petition is void. Garvey, *In re*, 77 N. Y. 523. Where a city tore up a good pavement for the purpose of constructing a sewer in the street, the court refused to permit the cost of restoring it to be assessed to the owners of abutting property, the cost of restoration being considered a part of the expense of making the sewer. Burlington *v.* Palmer, 67 Iowa, 681.

[1] *Ante*, chapter on Ordinances, sec. 317; Weeks *v.* Milwaukee, 10 Wis. 242; and State *v.* H. & St. J. R. R. Co., 75 Mo. 208, which hold that the city cannot exempt from taxation property which the laws make taxable. City has no inherent power to grant exemption from taxation. Mack *v.* Jones, 21 N. H. 393; 1 Desty Taxation, 466, 467, and cases; *post*, sec. 789, note.

In Moale *v.* Baltimore, 61 Md. 224, the city of Baltimore, being empowered to assess the cost of paving, grading, &c., *pro rata* upon the *property* abutting upon streets, passed an ordinance directing the cost to be collected, when assessed, from "*property owners* as other city taxes are collected," and the court held that by the statute it was only intended to indicate the proportion in which the property owners should be assessed, and that the tax *was a personal debt* of the owners. Citing Dashiell *v.* Baltimore, 45 Md. 615; Gould *v.* Baltimore, 58 Md. 46, and 59 Md. 378, and Handy *v.* Collins, 60 Md. 229.

[2] Thompson *v.* Carroll, 22 How. (U. S.) 422 (1859).

[3] Placerville *v.* Wilcox, 35 Cal. 21 (1868).

[4] Fitch *v.* Pinckard, 5 Ill. 78; approved, Primm *v.* Belleville, 59 Ill. 142 (1872); s. c. 4 Chicago Legal News, 227.

§ 782 (621). **The Objects of Taxation.** — The authority of municipal corporations to levy and collect taxes is usually limited, not only as respects the rate of taxation, but the objects of it.[5] Un-

[5] Power to levy taxes confined to kinds of property mentioned in the charter. Rabassa *v.* New Orleans, 3 Martin (La.),

der grants of this character, the question has arisen, not only as to what property the municipality *may*, but also as to what it *must*, subject to taxation for the purpose of obtaining revenue or discharging liabilities. Thus, the city of New Orleans was authorized by charter "to raise money by taxation, in such manner as to the council shall seem proper, upon *real and personal estate*," &c. It was claimed that the city was bound to tax both species of property at the same time, and that a tax could not legally be imposed upon either alone. This view, however, was not sustained by the court, which said: "It does not appear to us that the power given to tax real and personal estate renders it imperative on the corporation to tax both. By the same section of the law, the city council are empowered to exercise their authority as to them may seem proper." [1]

§ 783 (622). **Same subject. Uniformity of Rule of Taxation.** — But there may be a *constitutional limitation* upon both the legislative and the municipal power to select one class of property for taxation and omit another. In an important case relating to this subject, there was a constitutional provision "that the rule of taxation shall be uniform," &c., which was considered to mean that all kinds of property not absolutely exempt must be taxed alike, by the same standard of valuation, equally with other taxable property, and co-extensively with the territory to which it applies; and therefore a tax to pay a city debt, ordered to be levied *exclusively upon the real property* within the city, is a discrimination in favor of personal property, and violates the uniformity required by the Constitution, and is void.[2]

o. s. 218; Blanc *v.* New Orleans, 1 Martin (La.), o. s. 65; Harper *v.* Elberton, 23 Ga. 566; Municipality No. 3 *v.* Johnson, 6 La. An. 20 (1851); Barret *v.* Henderson, 4 Bush, 255; Dubuque *v.* Northwestern L. Ins. Co. (premiums received by local agent of foreign insurance company), 29 Iowa, 9.

[1] Oakey *v.* New Orleans, 1 La. 1 (1830); s. p. Municipality No. 2 *v.* Duncan, 2 La. An. 182 (1847); Winter *v.* Montgomery, 65 Ala. 404; approved in Winter *v.* Montgomery, 79 Ala. 481. The power of a city corporation to levy a general tax upon one species of property — for example, real estate — and to omit personal property, was, under the construction of special charter provisions, sustained in the case of Frederick *v.* Augusta, 5 Ga. 561 (1848); Primm *v.* Belleville, 59 Ill. 142 (1872); s. c. 4 Chicago Legal News, 227. Power of counties to release lien and reduce amount of taxes must be conferred by statute, or it does not exist. State *v.* Central Pac. R. R. Co., 9 Nev. 79 (1873); State *v.* Central Pac. R. R. Co., 10 Nev. 47 (1875); Lowell *v.* Middlesex Co. Comm'rs, 3 Allen (Mass.), 550; Finch *v.* Temaha Co. Sup. 29 Cal. 453.

[2] Gilman *v.* Sheboygan, 2 Black (U. S.), 510 (1862); approving, on the constitutional point, Knowlton *v.* Rock Co. Sup., 9 Wis. 410; Weeks *v.* Milwaukee, 10 Wis. 242; Lumsden *v.* Cross, *Ib.* 282; Attorney-Gen. *v.* Winnebago L. & F. R. Pl. R. Co., 11 Wis. 42; Zanesville *v.* Richards, Aud., 5 Ohio St. 589; Exchange Bank of Columbus *v.* Hines, 3 Ohio St. 1. See Muscatine *v.* Miss. & Mo. R. R. Co., 1 Dillon C. C. 536; *ante*, sec. 70; *supra*, sec. 748 *et seq.*, 755, note, 778, 781; Hale *v.* Kenosha, 29 Wis. 599; Cape Girardeau Co. Ct. *v.* Hill, 118 U. S. 68; *post*, chap. xx. Uniformity, what is? Livingston *v.* Albany, 41 Ga. 21; Mobile *v.* Dargan, 45 Ala. 310; State *v.* Severance, 55 Mo. 378 (1874); 1 Desty Taxation, secs. 35–38, pp. 173–198, and cases.

§ 784 (623). **Extent of Power to Tax.** — Power to tax real and personal estate within the city corporation does not confer the right to tax *capital employed in merchandise*, distinct from the articles of property in which such capital is invested.[1]

§ 785 (624). **Same subject.** — Authority in the charter of a municipal corporation to tax "all real and personal estate within the corporate limits of the city" was held, in view of the language and history of legislation in the State as to the subject-matter of taxation, not to confer upon the corporation power to tax *income* or *particular occupations*.[2]

§ 786 (625). **What Property is within the Municipality.** — Among the most usual of the express limitations upon the power of municipal taxation is the one confining it to property within the corporation. What property is to be considered *within* the municipality, so as to give the right to tax it, is, in some instances, hard to determine.[3]

[1] Municipality No. 3 *v.* Johnson, 6 La. An. 20 (1851).

[2] Savannah *v.* Hartridge, 8 Ga. 23 (1850); distinguished from cases in *South Carolina*, which hold that the city of Charleston, under the power to levy taxes on "*taxable property*," may tax income. Lining *v.* Charleston Council, 1 McCord, 345; 1 Nott and McCord, 527. Charter of Richmond held to give authority to impose a license tax on lawyers. Ould *v.* Richmond, 23 Gratt. 464 (1873); s. c. 14 Am. Rep. 139. In Rome *v.* McWilliams, 52 Ga. 251 (1874), the principal cases in that State concerning the power to tax professions and to exact license fees are referred to, and the power upheld as one which the legislature may confer. Taxation of *incomes*, 1 Desty Taxation, 202. *Post*, sec. 793.

In *Alabama*, it is held that "when express power to levy and collect particular taxes is conferred, the power to levy and collect other taxes is excluded. Or if particular subjects of taxation are enumerated, the corporation has not capacity to enlarge them." Baldwin *v.* Montgomery Council, 53 Ala. 437; Selma *v.* Selma Press & W. Co., 67 Ala. 430.

[3] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423 (1870). "It is obvious," said Mr. Justice *Swayne*, in this case, "that the purpose of the legislature in conferring authority of this nature was not to tax property through the proprietor, but to tax things themselves, by reason of their being 'within the city.'" *Ib.* 431; Trigg *v.* Glasgow, 2 Bush (Ky.), 594; Loud *v.* Charlestown, 103 Mass. 278.

A power to tax all property within the corporate limits of a city does not authorize the taxation of its own bonds. Macon *v.* Jones, 67 Ga. 489. The taxing power does not extend beyond the geographical limits of a municipal corporation, and where the boundary was the low-water mark in a river, it was held that the city had no power to tax coal under the river beyond that mark. Gilchrist's Appeal, 109 Pa. St. 600. The question of what property is within the city has been passed upon, with opposite conclusions, in discussing the right of *cities to tax bridges over navigable rivers* between two States. In Louisville Br.

With respect to the *situs* of real estate, there can ordinarily be no doubt; but as respects *personal property*, its *situs* is often difficult to settle. If the property is tangible and is actually within the municipality, it is plain that it may be taxed by it, under the authority we are considering, irrespective of the residence or domicile of its owner.[1]

§ 787 (626). **Same subject. Taxation of Vessels.** — In Indiana, where a city had authority by charter to tax all property "*within its limits*," it was holden that the share of the *part owner of a steamboat*, or the boat itself, though in the course of its voyages it necessarily touched at the city, was not subject to taxation by the city, notwithstanding such owner be domiciled or resident therein.[2]

Co. *v.* Louisville, 81 Ky. 189, the Court of Appeals of *Kentucky*, held that the mere fact that a part of a bridge was within the corporate limits of a city, was not sufficient to authorize such a tax, because the corporate limits may be larger than the taxable boundary, and as, at the time the bridge was built, the bed of the river was not subject to taxation by the city, and so remains, they were larger in this case. It also held that a city has no power to tax property which is not benefited by its government; and for these two reasons, it refused to sustain a municipal tax upon a railroad bridge across the Ohio River. In St. Louis Br. Co. *v.* East St. Louis, 121 Ill. 238 (1887), the Supreme Court of *Illinois* decided that the city had the right to tax such part of a similar bridge as was situated within its corporate limits, which limits in this case extended to the middle of the Mississippi River, on the ground that the mere fact that the structure was built upon ground covered by a navigable stream, and therefore was not capable of improvement for streets, &c., furnished no reason for exempting it from city taxes, although it appeared that the bridge company had derived no protection for its property from the city, and had, at its own expense, provided for its lighting, police, fire apparatus, waterworks, cleaning, hospital, &c. A similar result was reached in State, *ex rel.* C. Br. Co. *v.* Columbia, 27 S. C. 137, where the boundary of a city upon a river which was not navigable was held to be in the middle of the stream.

[1] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423, 430, *per Swayne*, J.; Augusta *v.* Dunbar, 50 Ga. 387 (1873); Finley *v.* Philadelphia, 32 Pa. St. 381; Mills *v.* Thornton, 26 Ill. 300; Sangamon & M. R. R. Co. *v.* Morgan County, 14 Ill. 163; Pomeroy Salt Co. *v.* Davis, Treas., 21 Ohio St. 555 (1871); Dunleith *v.* Reynolds, 53 Ill. 45 (1869); People *v.* Ogdensburgh, 48 N. Y. 390 (1872); St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580 (1867); Hoyt *v.* N. Y. Tax Comm'rs, 23 N. Y. 228; New Albany *v.* Meekin, 3 Ind. 481, cited *infra;* People *v.* Niles, 35 Cal. 282. See Bell *v.* Pierce, 51 N. Y. 12 (1872); People *v.* N. Y. Tax Comm'rs, 64 N. Y. 541 (1876). A non-resident creditor of a city, whose debt is evidenced by the certificates of the city, is not a holder of property within its limits. Murray *v.* Charleston Council, 96 U. S. 432 (1877).

As to taxation of personal property where the owner is a corporation, or has his domicile in one town and does business in another, see Gardiner Cotton & W. F. Co. *v.* Gardiner, 5 Me. 133, and cases there cited. Taxation of foreign capital. People *v.* N. Y. Tax Comm'rs, 59 N. Y. 40 (1874); Bates *v.* Mobile, 46 Ala. 158 (1871); Kirtland *v.* Hotchkiss, 100 U. S. 491 (1879); s. c. 42 Conn. 426 (1875). *Territorial restriction* on the power to tax and *situs* for taxation, 1 Desty Taxation, 322, 488.

[2] New Albany *v.* Meekin, 3 Ind. 481 (1852). As to place of taxation. Evansville *v.* Hall (domicile; insurance stock),

So, in Illinois, under power to tax property "within the limits of the city," a *steamboat* belonging to a resident of the city, but registered elsewhere, and only touching at the city during her trips up and down the river, cannot be taxed.[1] In Missouri it is held that where the home port of a steamboat is in a city, and the *nominal* owners reside in it also, it is subject to taxation by the city.[2] The legal *situs* of vessels employed in navigation is, for purposes of taxation, the port where they are registered under the laws of the United States as their home port. The *situs* dependent on registration continues until a new *situs* is acquired, and is not lost by absence or employment elsewhere.[3]

§ 788 (627). **Same subject.** — So a municipality, under the power to tax property "within the city," has been held not to be authorized to tax the *ferry-boats* of a *foreign* private corporation, whose chief relation to the city was regarded as being "merely that of contact there as one of the termini of their transit across the

14 Ind. 27; Rieman *v.* Shepard (domicile, *situs* of personal property), 27 Ind. 288; Madison *v.* Whitney (bank stock), 21 Ind. 261; Powell *v.* Madison (pork owned by non-residents, but slaughtered and stored in city), 21 Ind. 335; 18 Ind. 33. *Perkins*, J., in delivering the opinion of the court in the case first cited, says. "We do not think that, for the purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons which regards its *situs* as following the domicile of the owner. Surely, no one would risk asserting the general proposition that, under the charter of New Albany, all the personal property owned by every resident of the city, no matter where situated, was liable to be taxed by said city; that if a citizen of New Albany was a partner in a steamboat plying on some river in *California*, or in a flock of sheep kept in *Kentucky*, or in some part of Floyd County in this State, out of the corporation of New Albany, he was liable to be taxed for it under its charter. We do not deny that the State might have authorized it to tax such property, but we think that she has not." 3 Ind. 483. Bates *v.* Mobile, 46 Ala. 158 (1870).

[1] Wilkey *v.* Pekin, 19 Ill. 160 (1857). But in *Alabama*, a municipal corporation, with power to lay taxes "on real and personal estate within the city," was held authorized to levy a tax on a steamboat owned by a resident of the city and navigating the waters of a stream on which the city was situate. And the authority to tax was declared to extend even to cases where the owner of the boat was a non-resident of the State, if he resided in the city during the business season. And the power to tax in such cases was held to exist although the boats were registered and enrolled as coasting vessels under the laws of the United States. Battle *v.* Mobile, 9 Ala. 234 (1846). Ferry-boat taxable where owner resides. Mobile *v.* Baldwin, 57 Ala. 61.

See further as to taxation of *boats and vessels*, Oakland *v.* Whipple, 39 Cal. 112; Hays *v.* Pac. Mail Stp. Co., 17 How. (U. S.) 598; Hoyt *v.* N. Y. Tax Comm'rs, 23 N. Y. 224; St. Joseph *v.* Hannibal & St. J. R. R. Co., 39 Mo. 476; Irvin *v.* N. O. St. L. & C. R. R. Co., 94 Ill. 105.

[2] St. Joseph *v.* Saville, 39 Mo. 460.

[3] Hays *v.* Pac. Mail Stp. Co., 17 How. 596; Morgan *v.* Parham, 16 Wall. 471; People *v.* N. Y. Tax Comm'rs, 58 N. Y. 242 (1874); Wheeling P. & C. Transp. Co. *v.* Wheeling, 99 U. S. 273, affirming s. c. 9 W. Va. 170; Irvin *v.* N. O. St. L. & C. R. R. Co., 94 Ill. 112; Johnson *v.* Drummond, 20 Gratt.