river in the prosecution of their business."[1] Under the facts, as reported, the question is certainly a close one, and had previously been decided the other way by the Supreme Court of Missouri.[2]

§ 789 (628). **Taxation of Street Railway Companies; Gas and Water Companies.** — The property of a street railway company, including its road-bed, situate within the limits of a municipal corporation, is ordinarily subject to its taxing power; and if no different provision be made, it has been held that a street railroad may be taxed as real estate.[3] An exclusive municipal grant to such a railway company to use the streets in the municipality does not exempt it from municipal control, nor deprive the municipal authorities of the right, otherwise existing, to require the company to pay a license or tax.[4] Nor does the payment of a tax or license of a specified sum or amount on each car employed by a city railway company to the city, as required by the contract between the company and the city, in which certain privileges are secured to the company, exonerate

419; Howell *v.* State, 3 Gill (Md.), 14; Perry *v.* Torrence, 8 Ohio, 521. See Mobile *v.* Baldwin, 57 Ala. 61; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, where a license tax upon ferry-boats crossing a river to another State was upheld.

[1] St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423 (1870).

[2] St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580 (1867).

Tax on the basis of tonnage not necessarily in violation of the Constitution of the United States. Lott *v.* Cox, 43 Ala. 697 (1869); N. W. Union Packet Co. *v.* St. Louis, 4 Dillon, 10; Same *v.* Keokuk, 95 U. S. 80 (1877); Same *v.* St. Louis, 100 U. S. 423, affirming 4 Dillon, 10.

[3] No. Beach & M. R. R. Co.'s Appeal, 32 Cal. 499 (1867); People *v.* Cassidy, 2 Lansing (N. Y.), 294; Prov. Gas Co. *v.* Thurber, 2 R. I. 15, 21 (1851), where gas pipes in streets were taxed as real estate. Compare West Chester Gas Co. *v.* Chester County, 30 Pa. St. 232. See, also, Middlesex R. R. Co. *v.* Charlestown, 8 Allen (Mass.), 330; Prov. & Wor. R. R. Co. *v.* Wright, 2 R. I. 459; L. City Ry. *v.* Louisville, 4 Bush, 478; St. Louis *v.* St. L. R. R. Co., 50 Mo. 94, construction of special charter in respect of taxation. Further as to taxation of street railways, see 1 Desty Taxation, 405. A toll-bridge over a navigable river is properly assessed as real estate in the district where located. Hudson River Br. Co. *v.* Patterson, 74 N. Y. 365. The *elevated railways* in the streets of the city of New York are taxable, under the legislation of the State, as "lands" and "real estate." People *v.* N. Y. Tax Comm'rs, 82 N. Y. 462. A township of land was granted to a college, with a provision in the charter exempting the land from "public taxes," and it was held not to exempt the land from local municipal taxes to be expended for the immediate benefit of the particular municipality. Morgan *v.* Cree, 46 Vt. 773 (1871); s. c. 14 Am. Rep. 640; *ante*, chapter on Streets, sec. 720, note.

[4] State *v.* Herod, 29 Iowa, 123 (1870); Los Angeles *v.* So. Pac. R. R. Co., 67 Cal. 433, applying the rule to a steam railroad; Columbus *v.* Street R. R. Co., 45 Ohio St. 98. The grant to a railroad company of the right to lay and maintain its track over a bridge belonging to the city, and to use and operate the same, in an ordinance which contains no reservation respecting tolls or other charges, is within the municipal authority; and the city cannot, by a subsequent ordinance, impose such charges. Des Moines *v.* The Chicago, R. I. & P. R. R. Co., 41 Iowa, 569 (1875); *ante*, sec. 720.

the company from the payment of an *ad valorem* tax on its property, horses, stables, and shops, which are assessable for municipal purposes.[1] So the property of *gas companies* and of *water companies* within the municipality is, ordinarily, taxable by it.[2]

§ 790 (629). **Taxation of Property of Bank; General Law controlled Charter Provisions; Taxation of Railway Property.** — A *general statute of the State* provided that the capital stock of the State bank should be taxable *only for State purposes*, and afterwards a city corporation undertook to levy and collect a municipal tax on certain real estate owned by the bank and forming part of its capital stock; but this, it was adjudged, could not be done, the city and its powers being entirely under the control of the legislature.[3] The

[1] L. City Ry. Co. *v.* Louisville, 4 Bush, 478. As to license fees, see New York *v.* Broadway & S. A. R. R. Co., 17 Hun (N. Y.), 242; Union Pass. Ry. Co. *v.* Philadelphia, 101 U. S. 528.

[2] Commonwealth *v.* Lowell Gasl. Co., 12 Allen (Mass.), 75. Pipes laid in the streets of a city by a gas company, under a grant in their charter, are fixtures, and taxable as real estate. Providence Gas Co. *v.* Thurber, 2 R. I. 15 (1851). But see West Chester Gas Co. *v.* Chester County, 30 Pa. St. 232 (1858). Lessee and proprietor of city water-works for a term of years, whose contract of lease did not stipulate for exemption from city taxation, was held taxable in respect to such works, they being treated as real estate. Stein *v.* Mobile, 24 Ala. 591 (1854); s. p. in Stein *v.* Mobile, 17 Ala. 234. *Contra*, Stein *v.* Mobile, 49 Ala. 362 (1873); s. c. 20 Am. Rep. 283, but *quære; post*, sec. 793, note. 1 Desty Taxation, 364.

The legislature may restrict the tax authorized to be levied for water-works for the supply of water to the inhabitants of cities, and for extinguishing fires, to the district which is benefited and protected by such works. Grant *v.* Davenport, 36 Iowa, 396 (1873). In the case last cited it was also ruled where an ordinance provided that, in consideration of certain covenants by a water company to supply the city with water, its franchise and all property actually required for the management of its water-works shall be exempt from municipal taxation, that such provision was not an exemption from taxes, but was in effect a payment of the taxes by the performance of the covenants on the part of the water company; but *quære*.

It was held, in the absence of special constitutional restriction, to be within the authority of the legislature to empower a city to exempt from taxation for a term of years property belonging to a water company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes. Portland *v.* P. Water Co., 67 Me. 135 (1877). See *ante*, secs. 773, 776, 781.

A *paving assessment* upon the property of a railway company sustained; and it was held that the special remedy by lien and foreclosure was not exclusive, and that an action of debt would lie to recover the assessment. It was also held that the company was estopped by its conduct, in seeing the paving done without objection, to set up that its charter required it to pave the road covered by the track at its own expense. New Haven *v.* Fair Haven & W. R. R. Co., 38 Conn. 422; followed in Columbus *v.* Street R. R. Co., 45 Ohio St. 98; *supra*, sec. 679, note.

[3] Bank of Ind. *v.* Madison, 3 Ind. 43 (1851); Same *v.* Brackenridge, 7 Blackf. 395 (1845). See, also, Gardner, Assessor, *v.* State (holding under a charter that a State tax was in lieu of all local taxes), 21 N. J. L. 557. So, in *Louisiana*, a restriction upon the State in reference to the taxation of banks was held to extend to municipal corporations deriving their au-

extent to which and the manner in which the municipal authorities may *tax railroads* within their limits and *the property of railway companies* depend upon the provisions of the statutes applicable thereto. These are so various that they cannot be usefully referred to. Some of the leading decisions are collected in the notes.[1]

thority from the State. New Orleans *v.* Southern Bank, 11 La. An. 41 ; Municipality No. 1 *v.* La. State Bank, 5 La. An. 394 ; New Orleans *v.* Com. Bank of N. O., 10 La. An. 735 ; New Orleans *v.* Mech. & T. Bank, 15 La. An. 107. A village corporation was authorized "to raise money by a tax to be assessed upon the freeholders and *inhabitants*, according to law," and it was decided that a banking corporation located and doing business in the village was an *inhabitant*, and taxable. Ontario Bank *v.* Burnell, 10 Wend. 186 (1833).

As to taxation of *banks and bank stock* by municipalities in which the banks are located. Madison *v.* Whitney, 21 Ind. 261 ; Evansville *v.* Hall, 14 Ind. 27 ; King *v.* Madison, 17 Ind. 48 ; Connersville *v.* Bank of Ind., 16 Ind. 105 ; Bank of Ind. *v.* Madison, 3 Ind. 43 ; Madison *v.* Whitney, 21 Ind. 261 ; Gordon *v.* Baltimore, 5 Gill (Md.), 231. Compare Gordon *v.* Appeal Tax Court, 3 How. (U. S.) 133 ; Bank of Chester *v.* Chester T. Council, 10 Rich. Law, 104 ; State *v.* Charleston Council, 5 Rich. Law, 561 (dividends) ; State Bank *v.* Charleston Council, 3 Rich. Law, 342 (real property) ; Bulow *v.* Charleston Council, 1 Nott & McC. 527 (shares in United States Bank) ; Cherokee Ins. & B. Co. *v.* Whitfield Jus., 28 Ga. 121 ; Bank of Ga. *v.* Savannah, Dudley, 130 (1832). See Savannah *v.* Hartridge, 8 Ga. 23 ; Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600 (1868) ; O'Donnell *v.* Bailey, 24 Miss. 386 ; Macon *v.* M. Sav. Bank, 60 Ga. 133 ; City Bank of Dallas *v.* Bogel, 51 Tex. 354. Taxation, generally, of the franchises and property of banks and of bank shares. See 1 Desty Taxation, sec. 78, pp. 367–372. *Situs* of corporate shares of stock. *Ib.* 62, 364, 365, 400. 1 Hare Am. Const. Law, 259. In The State *v.* Dowling, 50 Mo. 134 (1872), it was decided that a city had the power to tax the stock of the citizens in a national bank located therein, though the capital of the bank be invested in United States stocks, which are exempt from taxation. And it was further held, in the same case, that the action of the city assessor in assessing such stock, and of the city council sitting in appeal on such assessment, might be reviewed on *certiorari*.

[1] *Municipal taxation of railroads.* Railroad track and property held liable to municipal taxation in the towns or cities where situate. Prov. & Wor. R. R. Co. *v.* Wright, 2 R. I. 459 ; approved, No. Ind. R. R. Co. *v.* Connelly, 10 Ohio St. 159, 164. To same effect, Mohawk & H. R. R. Co. *v.* Clute, 4 Paige, 384 ; Wheeler *v.* Rochester & S. R. R. Co., 12 Barb. 227 ; Railroad Co. *v.* Morgan County, 14 Ill. 163 ; 1 Desty Taxation, chap. xiii., *Taxation of Railroads*. And such property is subject, also, to *special taxes and assessments*. No. Ind. R. R. Co. *v.* Connelly, 10 Ohio St. 159–164 (1859) ; Burl. & Mo. R. R. R. Co. *v.* Spearman, 12 Iowa, 112 ; *supra*, sec. 789, note. Further, as to the liability, under special statute or charter provisions, of *railroads*, their property and stock, to municipal taxation. Davenport *v.* Miss. & Mo. R. R. Co. (rolling stock and real estate), 16 Iowa, 348. The views of *Wright*, C. J., and *Dillon*, J., were subsequently adopted by the court. Of this case the court subsequently says that it should not be regarded as having the force of a precedent, since but two members of the bench concurred in the reasoning by which its conclusions were reached. *Per Beck*, J., *Day*, J., concurring. Dubuque *v.* Ill. Cent. R. R. Co., 39 Iowa, 56 (1874) ; Dunleith & D. Br. Co. *v.* Dubuque, 32 Iowa, 427 (1871) ; Bibb Co. Ord. *v.* Central R. R. & B. Co., 40 Ga. 646 ; Orange & A. R. R. Co. *v.* Alexandria, 17 Gratt. 176 ; distinguished, Richmond *v.* R. & Danville R. R. Co., 21 Gratt. 604 (1872) ; Toledo & W. R. R. Co. *v.* Lafayette, 22 Ind. 262 (1864), as to power and mode of taxing railroads in *Indiana*. Louisville & N. A. R. R. Co. *v.* State (rolling stock), 25 Ind. 177 ; Applegate *v.* Ernst, 3 Bush (Ky.), 648 ; Rome R. R. Co. *v.* Rome, 14 Ga. 275 ; Augusta *v.* Ga. R. R. & B. Co., 26 Ga. 651 (1858) ; Richmond *v.* Daniel, 14 Gratt. 385 (1858) ; Baltimore *v.* B. & O. R. R. Co., 6 Gill, 288 ; North Mo. R. R. Co. *v.* Maguire, 49 Mo. 490 (1872) ; State *v.* Severance, 55 Mo. 378 (1874).

Rolling stock held to be taxable as personal property at the place of the principal office of the company. Phila., W. & B. R. R. Co. *v.* App. Tax Ct. of Balt., 50 Md. 397 ; App. Tax Ct. of Balt. *v.* No. Cent. Ry., 50 Md. 417 ; Dubuque *v.* Ill. Cent. R. R. Co., 39 Iowa, 56 ; Hoyle *v.* P. & M. R. R., 54 N. Y. 314 ; Randall *v.* Elwell, 52 N. Y. 522 ; Hill *v.* La Crosse R. R. Co., 11 Wis. 214 ; Coe *v.* Railroad Co., 10 Ohio St. 372 ; Boston, C. & M. R. R. Co. *v.* Gilmore, 37 N. H. 410 ; Pierce *v.* Emery, 32 N. H. 484 ; Minnesota *v.* St. Paul, 2 Wall. 609 ; Stevens *v.* Buffalo & N. Y. C. R. R. Co., 31 Barb. 590 ; Beardsley *v.* Ontario Bank, 31 Barb. 619 ; Howe *v.* Freeman, 14 Gray, 566 ; Pacific R. R. Co. *v.* Cass County, 53 Mo. 17 ; Meyer *v.* Johnson, 53 Ala. 241 ; Williamson *v.* N. J. So. R. R. Co., 29 N. J. Eq. 311 ; State Treas. *v.* Somerville & E. R. R. Co., 28 N. J. L. 21 ; Bement *v.* Plattsburgh & M. R. R. Co., 47 Barb. 314 ; Chicago & N. W. Ry. *v.* Howard, 21 Wis. 44. See Herman on Mortgages of Real Estate, p. 84 *et seq.*, where the cases are collected. Green's Brice's Ultra Vires, (2d ed.), and 1 Desty Taxation, 399, and cases ; 1 Hare Am. Const. Law, 322.

Taxation of insurance companies. St. Louis *v.* Indep. Ins. Co. of Mass., 47 Mo. 146, 168 ; Tripp, Treas. *v.* Merch. Mut. F. Ins. Co., 12 R. I. 435 ; Dubuque *v.* N. W. L. Ins. Co., 29 Iowa, 9 ; Republic L. Ins. Co. *v.* Pollak, 75 Ill. 292 ; Porter *v.* Rockford, R. I. & St. L. R. R. Co., 76 Ill. 561. 1 Desty Taxation, 228, and cases.

Taxation of corporations. Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556 ; Pac. Hotel Co. *v.* Lieb, 83 Ill. 602 ; Danville Lumber & M. Co. *v.* Parks, 88 Ill. 463 ; St. L., V. & T. H. R. R. Co. *v.* Surrell, *Ib.* 535.

Choses in action, &c. In Johnson *v.* Oregon City, 2 Oreg. 327 (1868), notes and mortgages belonging to a resident inhabitant were held taxable, although deposited outside of the city. But in Johnson *v.* Lexington, 14 B. Mon. 648–661 (1854), authority to a municipality to tax real and personal property was held limited to visible property actually situated within it, and *not to extend to debts and choses in action*. See in same State, Louisville *v.* Henning, 1 Bush, 381, as to taxability of money and things in action. Power to a municipality "to levy and collect a tax upon every species of property, real and personal, within the city, subject to taxation by the laws of the State," was held in *Georgia* to give no authority to levy a tax upon *notes* belonging to a resident, and within the city, where the makers do not reside therein. Bridges *v.* Griffin, 33 Ga. 113 (1861). Compare Augusta *v.* Dunbar, 50 Ga. 387, 392 (1873), as to locality of choses in action. See People *v.* Ogdensburgh, 48 N. Y. 390 (1872). Power to tax *all personal estate* gives authority to tax *money loaned*. Trustees *v.* McConnel, 12 Ill. 138 (1850) ; *supra*, secs. 743 note, 786, and note. For the purposes of taxation, a debt has its *situs* at the residence of the creditor. Kirtland *v.* Hotchkiss, 100 U. S. 491 (1879). 1 Desty Taxation, 65, 66.

[1] Worth *v.* Fayetteville Comm'rs, Winst. Eq. (N. C.), 70 [Repr. 617] (1864). What property may be taxed under such authority. *Ib.* As to right to tax (under special charter provisions) persons residing without, but exercising a trade or calling *within*, the corporation, see, also, State *v.* Charleston Council, 2 Speers L. (S. C.) 623 ; State *v.* Charleston, *Ib.* 719.

§ 791 (630). **Taxation of Avocations.** — The legislature may authorize municipal corporations to impose taxes upon persons whose *ordinary avocations are pursued within the corporate limits*, although residing beyond those limits, the same as upon residents.[1]

§ 792 (631). **Discrimination against Non-Residents illegal.** — The power to tax must be fairly and impartially exercised by the municipal authorities, who cannot *discriminate between residents and non-residents* by taxing the property of the latter within the corporation at a higher rate than the like property of the former, or in a different manner.[1]

§ 793 (632). **Taxes upon Trades and special Professions.** — The usual provisions in the Constitutions of the different States concerning taxation do not prohibit the legislatures from imposing, or authorizing municipal authorities to impose *taxes upon trades, special professions, and occupations.*[2] Authority to tax all persons exercising any profession may be executed by taxing each member of a firm separately.[1]

What may be taxed under authority to tax "income and profits" of non-residents doing business within the corporation, see *Ib.;* Bates *v.* Mobile, 46 Ala. 158 (1870). Taxableness of goods owned elsewhere, but *sold on commission* by residents of the municipality. Cumming *v.* Savannah, R. M. Charlt. (Ga.) 26; Green *v.* Savannah, *Ib.* 368; Padelford *v.* Savannah, 14 Ga. 438, criticising Brown *v.* Maryland, 12 Wheat. 419; Pearce *v.* Augusta, 37 Ga. 597; Shriver *v.* Pittsburgh, 66 Pa. St. 446.

[1] State *v.* Charleston, 2 Speers L. (S. C.) 719 (1844); Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554 (1868). In this last case it was held that there could be no discrimination between merchants selling by sample and those doing business in a different manner. Statutes authorizing the "registration and taxation" of vehicles using the paved streets of a town are strictly construed; and such an act was held not to extend to non-residents. Joyce *v.* Woods, 78 Ky. 386; Bennett *v.* Birmingham Bor., 31 Pa. St. 15 (1850); *ante*, secs. 682, 762. Under the Federal Constitution, a State cannot discriminate in favor of its own citizens and against those of other States by imposing greater burdens, or taxes, or license fees upon the former than upon the latter. 1 Desty Taxation, 219–222, and cases; 1 Hare Am. Const. Law, 251, 252, 318, 467; *supra*, secs. 742–745.

[2] Sacramento *v.* Crocker, 16 Cal. 119; Simmons *v.* State, 12 Mo. 268; Gilkesson *v.* Frederick Jus. (taxation of offices), 13 Gratt. 577 (1856); Baton Rouge Bd. of Sel. *v.* Spalding, 8 La. An. 87. Taxability of "floating palaces," or boats for circus exhibitions, affirmed. *Ib.;* Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554; Mason *v.* Lancaster (tavern keeper), 4 Bush (Ky.), 406; The Germania *v.* State (taxation of amusements), 7 Md. 1; Sears *v.* West (billiard tables), 1 Murph. (N. C.) 291; Concord Comm'rs *v.* Patterson (tax on retailers, &c.), 8 Jones L. (N. C.) 182; Cousins *v.* State, 50 Ala. 113 (1874); s. c. 20 Am. Rep. 290; Mobile *v.* Yuille, 3 Ala. 137 (1841); Morrill *v.* State (tax on peddlers), 38 Wis. 428 (1875); s. c. 20 Am. Rep. 12; Wiley *v.* Owens, 39 Ind. 429; McGrath *v.* Newton, 29 Kan. 364. Occupations cannot be taxed in *California.* San José *v.* San J. & S. C. R. R. Co., 53 Cal. 476; Keller *v.* State (taxation by license on beer manufacturers), 11 Md. 525; 31 Iowa, 493; *Ib.* 102; State *v.* Schlier, 3 Heisk. (Tenn.) 281 (1871); Ould *v.* Richmond (taxation of lawyers by municipal authority), 23 Gratt. 464 (1873); s. c. 14 Am. Rep. 139; Rome *v.* McWilliams, 52 Ga. 251; Goldthwaite *v.* Montgomery Council, 50 Ala. 486 (1874). In Youngblood *v.* Sexton, 32 Mich. 406 (1875); s. c. 20 Am. Rep. 654, a tax levied by State statute on liquor dealers for the benefit of the municipality in which the business was carried on was sustained against various constitutional objections urged against it. The law imposing a smaller license tax on proprietors of bars or drinking saloons kept on steamboats owned and registered in this State, than on the owners of bars kept on land, does not violate the clause of the Constitution prescribing equality and uniformity of taxation. State *v.* Rolle, 30 La. An. Part II. 991 (1878); *Ex parte* Montgomery, 64 Ala. 463. A power to regulate "meat stores" will not warrant a classification which makes the selling of game and fish a separate privilege. Vosse *v.* Memphis, 9 Lea, 294. Under a power to classify businesses, trades, &c., for taxation, persons conducting more than one of the classified occupations may be taxed for each, unless it appears that the custom of conducting them together is so universal as to justify the conclusion that they constitute but one business. Wilder *v.* Savannah, 70 Ga. 760; Keeley *v.* Atlanta, 69 Ga. 583.

"The *power of the State to tax professions* is unquestioned (Simmons *v.* State, 12 Mo. 268; St. Louis *v.* Steinberg, 4 Mo. App. 453 (tax on lawyers in the shape of license sustained); and the State may delegate the authority [to municipal corporations], but it should be done in clear and unambiguous terms." *Per Wagner,* J., St. Louis *v.* Laughlin, 49 Mo. 559 (1872). A provision in the charter of a city giving it power to license, regulate, and tax certain enumerated classes of persons and business, and concluding with the words, "and all other business, trades, avocations, and professions whatever," was held not to confer the power to require a license tax from lawyers, as they were not of the same generic character or class with those specified. *Ib.* Similarly a power to impose a license tax upon certain specified occupations, "and upon any other person or employment, which it (the city) may deem proper, whether such person or employment be herein specially enumerated or not," was held not to confer power to impose such a tax upon a railroad. Lynchburg *v.* Norfolk & N. W. R. R. Co., 80 Va. 237; 1 Desty Taxation, 308, and cases.

Under authority to collect taxes on "auctioneers, transient dealers, and peddlers," a municipal corporation may impose a tax either upon the amount of the sales of such persons, or in the form of a license or tax upon the privilege of selling. Carroll *v.* Tuscaloosa, 12 Ala. 173 (1847); 1 Desty Taxation, 314, 315. In exercising this discretion it is safer for the corporation to adopt the mode, if any, by which such persons are taxed by the State law. Brokers; who may be taxed as such. Portland *v.* O'Neill, 1 Oreg. 218; Little Rock *v.* Barton, 33 Ark. 436, citing text.

The right to impose *specific taxes* is recognized by the Constitution of *Michigan.* Walcott *v.* People (taxation of express companies), 17 Mich. 68; Williams *v.* Detroit (paving tax), 2 Mich. 560; Woodbridge *v.* Detroit, 8 Mich. 274; Youngblood *v.* Sexton (tax on liquor dealers), 32 Mich. 406 (1875); s. c. 20 Am. Rep. 654. In Stein *v.* Mobile, 49 Ala. 362 (1873); s. c. 20 Am. Rep. 283 (followed in Los Angeles *v.* Los Angeles Water Co., 61 Cal. 65, on similar facts), the city was held disabled by its contract to tax the business of carrying on waterworks within the city; but *quære* whether the power to tax could be surrendered, and also whether the contract was not taken subject to the taxing power of the city. *Ante*, sec. 789, note. Detroit *v.* Det. Ry. Co. (Mich.), 43 N. W. Rep. 447.

In *Wisconsin*, see Kneeland *v.* Milwaukee, 15 Wis. 454. In *Pennsylvania*, see Durach's Appeal (power to tax saloon keepers to maintain police force), 62 Pa. St. 491 (1869). It is here said that a special tax levied upon an individual or particular individuals would infringe the implied restrictions on the power of taxation; but in the exercise of this power persons and things may be classified, and it is sufficient if it includes all of a class within the taxing district. *Ib., per Sharswood,* J.; *ante*, sec. 60.

[1] Lanier *v.* Macon, 59 Ga. 187; Wilder *v.* Savannah, 70 Ga. 760.

§ 794 (633). **Municipal Taxation of agricultural Lands.** — The extent of the power of the legislature over municipal corporations gen-

erally,[1] including the power to *fix and change the corporate boundaries*,[2] has been before considered. Where the boundaries have been originally fixed or subsequently changed so as to include within them *rural or agricultural lands* which have never been platted, which are not needed for town lots, and which receive no direct benefit from the municipal government or expenditures, questions have arisen respecting the right to *subject such lands to ordinary municipal taxation*. The power of the legislature to fix or enlarge the corporate boundaries is not disputed, but it is the power to require *such* lands to contribute to the municipal treasury that has been controverted. In Kentucky[3] the principle has been adopted that the "courts will, in such cases, control and limit the taxing power to that point or line where it ceases to operate beneficially to the proprietor in a

[1] *Ante*, chap. iv. sec. 52 *et seq.*

[2] *Ante*, chap. viii. secs. 182, 185, 187.

[3] Cheaney *v.* Hooser, 9 B. Mon. (Ky.) 330; Sharp *v.* Dunoven, 17 B. Mon. (Ky.) 223; Maltus *v.* Shields, 2 Met. (Ky.) 553; Southgate *v.* Covington, 15 B. Mon. (Ky.) 491 (1854). The legislature may tax suburban property within city limits, as such, to support needed local government and the enforcement of police regulations *in and about the property taxed;* but it cannot embrace such property within corporate limits merely for revenue purposes, in order to lessen the burden of others. Arbegust *v.* Louisville, 2 Bush, 271 (1867); Swift *v.* Newport, 7 Bush, 37; Henderson *v.* Lambert, 8 Bush, 607; see United States *v.* Memphis, 97 U. S. 284.

The *Kentucky* view is rejected in *Mississippi*. Martin *v.* Dix, 52 Miss. 53 (1876); s. c. 24 Am. Rep. 661. *Chalmers*, J., says the difficulties in the way of judicial interference seem to be insurmountable. *Ib.* In Kelly *v.* Pittsburgh, 85 Pa. St. 170 (1877), the Supreme Court of *Pennsylvania* held that where farm lands situated within the boundaries of a city are taxed for the support of the city government, the fact that such tax is unfairly burdensome, or that the lands, owing to their distance from the built-up portion of the city, are not within the reach or protection of particular departments of the city government for the support of which they are taxed, does not render the tax unconstitutional. In this case, under authority of an act of the legislature of *Pennsylvania*, the city of Pittsburgh extended its boundaries by the annexation of adjacent territory. In this territory was situated a tract of land used exclusively for farm purposes, and which, on account of its distance from the built-up portion of the city, was not within the reach of the water, fire, police, and other departments of the city government. The city, however, for the support of these departments levied a tax on such farm, the amount of which was largely in excess of the farm's annual productive value. It was held that the tax was not unconstitutional. The court sustained its conclusion by the cases of Weber *v.* Reinhard, 73 Pa. St. 370; Phila. Assoc. for Dis. Firemen *v.* Wood, 39 Pa. St. 73, and Kirby *v.* Shaw, 19 Pa. St. 258, where the principle was held that a tax cannot, in the absence of special constitutional restriction, be pronounced unconstitutional upon the mere grounds of injustice and inequality. The general rule is that a tax must be considered valid unless it be for a purpose in which the community taxed has no palpable interest, and where it is apparent that the burden is imposed for the benefit of others. See, also, Kelly *v.* Pittsburgh, 104 U. S. 78; Sharpless *v.* Philadelphia, 21 Pa. St. 147; Speer *v.* Blairsville Bor., 50 Pa. St. 150, *Agnew*, C. J., and *Sterrett*, J., dissenting; Hewitt's Appeal, 88 Pa. St. 55; Scranton *v.* Pa. Coal Co., 105 Pa. St. 445; noted *supra*, sec. 761, note; Henderson *v.* Jackson County, 2 McCrary C. C. R. 615.

municipal point of view."[1] The general rule in that State is that the right to subject property to real municipal taxation extends only to such as has been surveyed and platted into lots, but the right to tax *may*, under circumstances, extend to property which has never been platted. The Kentucky doctrine has been followed in Iowa.[2]

[1] Langworthy *v.* Dubuque, 16 Iowa, 271, *per Lowe*, J.; approved Fulton *v.* Davenport, 17 Iowa, 407. The more recent cases in the Supreme Court of *Iowa*, Durant *v.* Kauffman, and Davenport *v.* Same, 34 Iowa, 194 (1872), declare an adherence to the rule established by the previous cases, but evince no disposition to extend the exemption from municipal taxation. *Beck*, C. J., in the course of his opinion, remarks: "The mere fact that lands are included within the limits of a municipal corporation does not authorize their taxation for general city purposes. Under certain conditions, they are exempt therefrom. These conditions are such that the property proposed to be taxed derives no benefits from being within the city limits. This is the rule recognized by the various decisions of this court upon this subject. To enable us correctly to apply the rule above stated, we must consider and determine the character of the benefits which will render lands within a city liable to general municipal taxation. These are not such as attach to all lands near a city or large town whereby they are rendered more valuable, but are such as accrue to the lands considered as city property. Lands lying contiguous to or near a city, though incapable of any use except for agricultural purposes, are nevertheless of greater value on account of their location than those more remotely situated. Convenience to a market, &c., adds to their value. Therefore, lands within a city kept and alone used for agriculture, and not capable of being used as city property, and not demanded for that purpose, nor possessing a value based upon adaptation for the purpose of dwellings or business, cannot be considered directly benefited by the fact of their being within the city limits. Such lands cannot be taxed for general municipal purposes. In determining the benefits accruing to such lands, a controlling fact to be considered is the purpose for which they are held. If held as city property, to be brought upon the market as such whenever they reach a value corresponding with the views of the owner, they ought to be taxed as city property. There would neither be reason nor justice in permitting a proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purposes, under the pretence that it is agricultural lands, thus escaping taxation for the general improvement of the city, — the very thing which will bring his lands into market, and thus add greatly to their value, — a direct benefit to the owner. In such a case, the general improvement of the city, the building of streets near or in the direction of the lands so held, the construction of water-works, public buildings, &c., by which the prosperity of the city is advanced, and an invitation to population is held out, all bestow direct benefits upon the owner of such property. The lands being a part of the city, in fact, and held by their owner for the increase in value which he expects because they are city lots, are benefited by the municipal government, and share in the benefits derived by the expenditure of revenue raised by taxation. If property be so held within a city, whether it be subdivided into lots, and streets thereon are dedicated to public use, or be inclosed and cultivated as agricultural lands, it ought to be subject to general municipal taxation. This result is directly deducible from the rule established by the decisions of this court."

[2] In *Iowa*, in order to exempt unplatted land from taxation by a city it must appear that it is used *exclusively* for agricultural purposes. Tubbesing *v.* Burlington, 68 Iowa, 691. In *California* the rule is that land situate within city limits, though used solely for agricultural purposes, is subject to municipal taxation.

§ 795 (634). **Same subject. Rule in Kentucky and Iowa.** — We deduce from the Kentucky and Iowa cases on this subject the following rules or *criteria* to determine the taxability of such lands. So long as the land thus embraced in the corporate limits is used solely for agricultural or horticultural purposes, or lies vacant and is not laid out into town lots, and is not needed or required for streets or houses or other purposes of a town, or benefited by being within the town, the corporation authorities cannot, for strictly corporate purposes, tax the property as town property, without the consent of the owner. But, on the other hand, when the property sought to be taxed is within the corporate limits, in such close proximity to the settled and improved portions of the town or city that the corporate authorities cannot open and improve the streets and alleys and extend its police regulations, &c., without incidentally benefiting the property and enhancing its value, — where, in other words, the property is needed for buildings and houses, or is benefited by the local government, — then the power to tax the same exists, though it may not actually be laid out into lots. Under these rules, each case must be decided upon its special circumstances. If the owners have laid off the same into lots, it is to this extent clearly liable to municipal taxation. And property, though not liable to ordinary *municipal* taxation, may yet be liable for road and school taxes, where the city or town is a road or school district, levying its own taxes for these purposes.[1] It must, however, be

Santa Rosa *v.* Coulter, 58 Cal. 537; followed in Dixon *v.* Mayes, 72 Cal. 166.

[1] See, in addition to the cases from *Kentucky*, the following: Morford *v.* Unger, 8 Iowa, 82 (the first and leading case in Iowa); followed by Butler *v.* Muscatine, 11 Iowa, 433; Linton *v.* Athens, 53 Ga. 588 (1875); Langworthy *v.* Dubuque, 13 Iowa, 86; s. c. more fully, 16 Iowa, 271; Fulton *v.* Davenport, 17 Iowa, 404; Buell *v.* Ball, 20 Iowa, 282 (1866); Burl. & Mo. R. R. R. Co. *v.* Spearman, 12 Iowa, 112; Deeds *v.* Sanborn, 26 Iowa, 419 (1868); s. c. 22 Iowa, 214; Deiman *v.* Fort Madison, 30 Iowa, 542 (1870); Brooks *v.* Polk County, 52 Iowa, 460; Washburn *v.* Oshkosh, 60 Wis. 453; Cary *v.* Pekin, 88 Ill. 154.

The *Kentucky* and the earlier *Iowa* view was first adopted in *Nebraska* (Bradshaw *v.* Omaha, 1 Neb. 16); but the case was subsequently overruled. Turner *v.* Althaus, 6 Neb 54 (1877). The Federal court followed the latest decision of the Supreme Court of the State on the subject. Kountze *v.* Omaha, 5 Dillon C. C. R. 443.

In Buell *v.* Ball, *supra*, *Cole*, J., in delivering the opinion, says: "The ground upon which courts interfere in such cases is, that private property shall not be taken for public use without just compensation. It is the fact of taking without compensation, and not the time or manner, which constitutes the infraction of the constitutional inhibition. The fact may be as effectually accomplished by an original incorporation as by an amendment, and the constitutional guaranty would be of little avail if it could be avoided by mere form." The *Kentucky* cases rest upon the same ground. A similar ground would be that the owner was deprived of his property, — that is, compelled to pay taxes, — without due process of law.

admitted that in the absence of specific constitutional restrictions the difficulties in the way of pronouncing such legislation unconsti-

The practice of embracing within the corporate limits large tracts of land for the sole purpose of taxation is not unusual, and the doctrine adopted by these courts is the only way in which the proprietor can be relieved from a very unjust burden, and it works no wrong to the corporation, because the courts will fix the line of taxability upon an intelligent consideration of the circumstances of each case. In Benoist *v.* St. Louis, 15 Mo. 668; St. Louis *v.* Allen, 13 Mo. 400, and Same *v.* Russell, 9 Mo. 503, the only constitutional question decided was that the legislature had the power to extend the city limits and subject the property in the annexed territory to taxation against the will or without the consent of the inhabitants affected thereby. The legislature may include within the corporate limits adjoining farming lands, if no constitutional provision is thereby violated. Giboney *v.* Cape Girardeau, 58 Mo. 141, and cases cited; State *v.* McReynolds, 61 Mo. 203 (1875). In Barker *v.* State, 18 Ohio, 514 (1849), it was held (the constitutional question not being raised) that, for the improvement of streets, alleys, and sidewalks (the charter discriminating between this and a tax for "*corporation purposes*"), a municipal tax might be levied on *farming land*, not laid out into lots and recorded as such, if within the corporate limits. The method of assessing the cost of grading and other similar municipal improvements by the foot-front rule is inapplicable to lands in a rural district of the city. Kaiser *v.* Weise, 85 Pa. St. 366 (1877); *ante*, sec. 185.

A provision in a charter extending the city limits, that land in the annexed territory, *used exclusively for farming purposes*, or *vacant and unoccupied*, should be taxed not exceeding a specified rate, construed, and it was held not to be an exemption, and therefore to be strictly construed, but an equitable apportionment of burdens with reference to benefits, and the court regarded the *practical and beneficial use* to which the land was put, and not the purpose for which it was held. Gillette *v.* Hartford, 31 Conn. 351 (1863). See Carriger *v.* Morristown, 1 Lea (Tenn.), 116. Taxation of rural property in corporate limits for urban uses. See New Orleans *v.* Michoud, 10 La. An. 763; Municipality No. 3 *v.* Ursuline Nuns, 2 La. An. 611; Same *v.* Michoud, 6 La. An. 605; Serrill *v.* Philadelphia, 38 Pa. St. 355. The injustice of taxing rural property for such urban uses as sewers, lamps, pavements, &c., will justify a legislative classification of the two kinds of property in respect of the taxes which may be levied and assessed upon each kind. 1 Hare Am. Const. Law, 299.

In *Indiana* agricultural lands within city limits are subject to local assessments for street improvements, the statute relating to taxing such lands being held not to apply to such assessments. Taber *v.* Grafmiller, 109 Ind. 206; citing Leeper *v.* South Bend, 106 Ind. 375; and Kalbrier *v.* Leonard, 34 Ind. 497. See also Kelly *v.* Pittsburgh, 85 Pa. St. 170 (1877); s. c. 104 U. S. 78; Cary *v.* Pekin, 88 Ill. 154. In Washington Ave. Case such lands held not liable to grading and macadamizing assessment. 69 Pa. St. 352 (1871); s. c. 8 Am. Rep. 255. The corporate boundaries of *a city were extended so as to embrace farming or agricultural lands.* The council of the city were by the legislative act making the extension required to so discriminate in laying taxes as not to impose on the rural portions those expenses which belong exclusively to the built-up portion of the city, for which purpose the assessors were required by the act to distinguish in their returns what property was agricultural or rural, not having the benefit of lighting, paving, police, water, &c. It was further provided that the lands used for farming and not having any of such urban privileges should be assessed as farm lands and taxed as such. It was held that the decision of the city councils as to what lands were farm lands within the meaning of the above provision is conclusive, if the councils keep within the scope of their jurisdiction and authority. The court, however, adds: "The whole question of discrimination is by the statute committed to the discretion of the

tutional or of affording *judicial* relief in such cases are almost insurmountable.[1]

§ 796 (635). **Power to pave Streets; "Pavement" defined.** — The power *to pave streets* (usually conferred in those words) at the expense, in whole or in part, of the property benefited by the improvement, has given rise to some decisions which may be noticed. In holding that the power to *pave* includes the power to *gravel* streets, the Supreme Court of Illinois thus defines the word *pavement:* "A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but it may be as well formed of pebbles, or gravel, or other hard substances, which will make a compact, even, hard way or floor." [2]

city councils; that discretion is, of course, not absolute; it is not to be exercised according to mere pleasure or caprice, but under the law. If abused, no doubt the power of a court of equity would be adequate to restrain the perpetration of a palpable wrong." Erie *v.* Reed's Ex., 113 Pa. St. 468 (1886). As to sewer and other assessments, Thomas *v.* Gain, 35 Mich. 155 (1876); s. c. 24 Am. Rep. 535; *post*, sec. 808; *ante*, secs. 752, 759 *et seq.*

[1] Santa Rosa *v.* Coulter, 58 Cal. 537, approving the text.

[2] *Per Caton*, C. J., in Burnham *v.* Chicago, 24 Ill. 496 (1860). The word "pave" includes the usual means to cover with stone or brick, so as to make a level or convenient surface for horses, carriages, or foot passengers. It includes macadamizing. Warren *v.* Henly, 31 Iowa, 31. It includes "flagging;" *i. e.*, paving with flat stone. Phillips, *In re*, 60 N. Y. 16 (1875). Authority to *pave* authorizes *sidewalk to be made of plank or other material*, in the discretion of the council. Burl. & Mo. R. R. R. Co. *v.* Spearman, 12 Iowa, 112. Authority to a city to require abutting lot-owners to "pave the street," includes, also, authority to require them to build sidewalks. Warren *v.* Henly, *supra*. In *Louisiana*, it is held that the power to make sidewalks, at the cost of the adjoining lot-owners, includes the *guttering and curbing*. "By common consent," remarks the court, "it is considered that the term 'pavement' embraces the brick sidewalks, of which the curb and gutters form a part." O'Leary *v.* Sloo, 7 La. An. 25 (1852). In Powell *v.* St. Joseph, 31 Mo. 347 (1861), it appeared that the defendant corporation was authorized to assess the cost of paving streets to the owners of adjoining property in proportion to their fronts. This was held to authorize the city authorities to apportion the cost of *paving the street crossings*, as well as of such parts of the street as were in front of lots, among the lot-holders of the adjoining blocks, in proportion to the front feet. Abutters may be assessed for *paving street crossings.* Creighton *v.* Scott, 14 Ohio St. 438; Williams *v.* Detroit, 2 Mich. 560 (1861). Power to pave includes the power to lay *cross walks.* Burke, *In re*, 62 N. Y. 224 (1875); Phillips, *In re*, 60 N. Y. 16 (1875); Lawrence *v.* Killam, 11 Kan. 499 (1873). *Repaving*, *ante*, sec. 859 and note. As to *paving intersections.* State *v.* Elizabeth, 30 N. J. L. 365 (1863); Eager, *In re*, 46 N. Y. 100 (1871); Hines *v.* Lockport, 41 How. Pr. 435. Where the charter makes no provision as to the mode in which the expenses of local improvements are to be ascertained, for the purpose of taxation or assessment of the same, the plaintiff, in an action of this kind, is not precluded from averring and showing, by evidence *dehors* the record, the actual cost thereof. Minn. Linseed Oil Co. *v.* Palmer, 20 Minn. 468 (1874). A resolution of intention to curb and macadamize a "street" held not to include the sidewalk. Dyer *v.* Chase, 52 Cal. 440.

§ 797 (636). **Same subject.** — The power *to pave streets* includes the power to furnish and to do all that is necessary, usual, or fit for paving; [1] and on this ground it has been held that the expense of *grading* a street preparatory to paving is incident to paving, and the expense properly included in the assessment.[2] And in Pennsylvania it is decided that the power to pave includes the power to furnish, or require the party at whose expense it is done to pay for, *curbstones.*[3] And so as to *trimming* and *guttering;* these were held to be included in the power to *macadamize.*[4]

§ 798 (637). **Power to compel Building of Sidewalks.** — Under an authority to make such by-laws as to the common council shall seem "necessary for the good government of the city, and for the regulation and paving of the streets and highways," a city corporation may pass an ordinance requiring the owner of every lot fronting on a designated section of a public street to *fix curbstones* and make a *brick way* or *sidewalk* in front of his lot. Such an ordinance is neither unconstitutional, illegal, nor unreasonable. It would doubtless be otherwise, it is remarked, if this burden was laid without special cause upon one citizen, all others similarly situated being exempted.[5]

[1] Schenley *v.* Commonwealth, 36 Pa. St. 29, 30, 60 (1859); McNamara *v.* Estes, 22 Iowa, 246 (1867); *ante*, sec. 476.

[2] State *v.* Elizabeth, 30 N. J. L. 365 (1863); Williams *v.* Detroit, 2 Mich. 560 (1861); *ante*, sec. 476.

[3] Schenley *v.* Commonwealth, *supra.* In this case the city of Allegheny was authorized "to grade and pave streets, sidewalks," &c., and to levy a special tax upon the lots fronting thereon to defray the expense. The question was made that the cost of *curbstones* was not a legitimate charge upon the lot-owners. But the court held otherwise, observing that "the power to pave includes the power to furnish and do all that is necessary, usual, or fit for paving. How can the court say, as a legal proposition, that curbstones were neither necessary, customary, nor fit for such a work? Common observation shows that it is usual to employ curbstones when streets, sidewalks, or foot-ways are paved, and that they are among the ordinary means used. But whether they are or not was a question for the jury." See, also, Williams *v.* Detroit, 2 Mich. 560 (1861); Steckert *v.* East Saginaw, 22 Mich. 104 (1870); Dean *v.* Borchenius, 30 Wis. 236 (1872).

[4] McNamara *v.* Estes, 22 Iowa, 246 (1867); Williams *v.* Detroit, just cited. The substitution of new curbstones and gutters in a street was held to be "*repairs.*" People *v.* Brooklyn, 21 Barb. 484; *supra*, secs. 753, 780. Construction of special charter provision as to macadamizing. New Haven *v.* Whitney, 36 Conn. 373. "Local improvement" defined, and held to extend to the opening or enlarging of a street. Astor *v.* New York, 62 N. Y. 580 (1875).

[5] Paxson *v.* Sweet, Street Comm'r of Trenton, 1 J. S. Green (N. J.), 196 (1832), cited with approval by *Putnam*, J., in Boston *v.* Shaw, 1 Met. (Mass.) 130–133 (1840). See Downer *v.* Boston, 6 Cush. (Mass.) 277, and observation (*arguendo*) of *Shaw*, C. J., p. 281, as to vacant lots. Assuming that the power was properly construed, the duty enjoined by the ordinance could not be enforced by a sale of the property unless authority to that effect was unequivocally conferred by the legislature. Construing certain acts *in pari materia*, the court held that the