city are small, of the same depth, and similarly situated, an assessment, under the conditions mentioned in a previous section, may be authorized on the basis of *frontage*,[1] which is a convenient substitute for an actual estimate; but this mode cannot be authorized where it must inevitably operate with manifest inequality, as will often be the case with rural or suburban property, or where from the circumstances it is clear that it is legally impossible that an apportionment of the cost on this basis can be just or equal, or approximately so, and where injustice must certainly result from its adoption.[2] The same general principle applies to an assessment upon the basis of *superficial area;* and, therefore, where an assessment in this mode was authorized to be made, and was made equally upon lands remote from the sewer and only slightly benefited, with no provision securing the right to connect with it, and upon lots fronting on the sewer and greatly benefited, — the court considered the mode so arbitrary, so certain to work injustice, so flagrantly opposed to the principle of contribution in proportion to benefits, as to be unconstitutional.[3]

§ 810 (648). **Power to make Contracts for local Improvements.** — Power to a municipal corporation to make local improvements, though the expense be directed in the constituent act to be assessed upon the property benefited, gives the corporation, in the absence of provisions evincing a different legislative intent, the implied power to make *general contracts therefor*.[4] As to agreements made between the corporation and a contractor to do the work, the abutters or property owners on whom the expense falls are not parties, but are brought into direct relation with the proceeding for the local improvement for the first time when the assessment is made. The assessment is a tax levied by the corporation upon property to defray the expense of the improvement, and the suit to collect it (though brought by the contractor under authority given for that purpose) is not the subject of set-off or counter-claim.[1] But although the property owners are not privies or parties to such contracts, yet, to a certain extent and in a substantial sense, the municipality is their agent; and since the burden to pay rests upon them, they have a right to insist on a faithful performance of the contract, and the corporate authorities cannot dispense with such performance.[2]

the taxing power, where the drainage district is not co-extensive with the political or municipal district of which it is a part. It must be made to fall upon the entire political district. A taxing act was held to be fatally defective, if the legislature does not designate the property out of which the tax is to be made, and prescribe a mode for enforcing it. State *v.* Chamberlain, 37 N. J. L. 388. *Ante*, secs. 760 *a*, 760 *b*, 761.

[1] Warren *v.* Grand Haven, 30 Mich. 24; Hoyt *v.* East Saginaw, 19 Mich. 39; s. c. 2 Am. Rep. 76; Seeley *v.* Pittsburgh, *supra;* Lipps *v.* Philadelphia, 38 Pa. St. 503; Washington Av., *In re*, 69 Pa. St. 361. *Contra*, Clapp *v.* Hartford, 35 Conn. 66; State *v.* Newark, *supra; ante*, sec. 760 *a*. It would seem to the author that the frontage rule, whenever admissible, is better adapted to sidewalks and sewers than to paving and grading.

[2] Seeley *v.* Pittsburgh, *supra;* Thomas *v.* Gain, *supra*.

[3] Thomas *v.* Gain, *supra*. An assessment for the construction of sewers made under a statute authorizing the cost to be levied upon *property in a district according to area*, and not upon value, benefits, or improvement, held valid under the police power. Keese *v.* Denver, 10 Col. 112.

[4] Cumming *v.* Brooklyn, &c., 11 Paige, 596 (1845); Mayer *v.* New York, 63 N. Y. 455, 459 (1875); Lates *v.* Briggs, 64 N. Y. 404; Galveston *v.* Heard, 54 Tex. 420.

A power vested in the city authorities to provide by "general ordinance" for the grading and paving of streets, without passing a special ordinance in the particular case, does not empower them to grade and pave any street or part thereof, for the public convenience generally, or for the benefit of the whole city, without any motive or purpose of special benefit to property in the immediate locality, and to assess the cost of the work upon the owners of such property. Burns *v.* Baltimore, 48 Md. 198.

§ 811 (649). **Same subject. Conditions precedent to Abutter's Liability.** — To entitle a *municipal corporation to recover* from the abutter the expense of constructing a sidewalk, or other local improvement, it *must comply with all conditions precedent*, whether prescribed by charter or ordinance.[3] Therefore, if the order of the

[1] Himmelmann *v.* Spanagel, 39 Cal. 389; Same *v.* Cofran, 36 Cal. 411; Meuser *v.* Risdon, *Ib.* 239; Emery *v.* San F. Gas Co., 28 Cal. 345; Burlington *v.* Palmer, 67 Iowa, 681. See Lohrum *v.* Eyermann, 5 Mo. App. 481. But a defence good against the city is good against the contractor. St. Louis *v.* Clemens, 36 Mo. 469 (1856). Coverture is no reason why real estate belonging to a person under such disability should not be assessed for its share of the cost of a street improvement. Ball *v.* Balfe, 41 Ind. 221 (1872); *ante*, secs. 459, 466, 476, 480; *post*, sec. 812. Where a city contracts to pave a street and to pay the contractor by assignment of assessment bills, the abutting owners may make defence upon the character of the work done, although not nominal parties to the contract. Erie City *v.* Butler, 120 Pa. St. 374 (1888).

Under the Constitution of *Illinois* which gives to cities "power to make local improvements . . . by *special taxation of contiguous property* or otherwise," an act authorizing the cost of a sidewalk to be recovered of the adjacent lot-owner *by suit at law*, is void. Craw *v.* Tolono, 96 Ill. 255; Virginia *v.* Hall, 96 Ill. 278.

[2] Bond *v.* Newark, 19 N. J. Eq. 376 (1869); Liebstein *v.* Newark, 24 N. J. Eq. 200; Schumm *v.* Seymour, *Ib.* 143; Lake *v.* Williamsburg, 4 Denio (N. Y.), 523; St. Louis *v.* Clemens, 36 Mo. 467; Saxton *v.* Beach, 50 Mo. 488 (1872); but see Murray *v.* Tucker, 10 Bush (Ky.), 240 (1874). As to the liability of the municipal corporation to the contractor, see chapter on Contracts, *ante*, sec. 480.

[3] Lowell *v.* Wentworth, 6 Cush. 221, involving validity of notice of assessment; Same *v.* French, *Ib.* 223; Finnell *v.* Kates, 19 Ohio St. 405; Dorathy *v.* Chicago, 53 Ill. 79; Wilson *v.* Poole, 33 Ind. 443; Himmelman *v.* Byrne, 41 Cal. 500; Hewes *v.* Reis, 40 Cal. 255 (1870); Harper's Appeal, 109 Pa. St. 9; Sheridan *v.* Fitchburg, 131 Mass. 523. Construction of charter as to "temporary" or "permanent" sidewalks, and as to what constitutes an "acceptance" thereof by the city. Lowell *v.* Wheelock, 11 Cush. 391 (1852). If the charter provides that sidewalks may be constructed by the city "at the expense of the lot-owner," and points out no specific remedy, a civil action lies to recover the amount. Lowell *v.* Wyman, 12 Cush. 273–276 (1853). "The power of

city council requires the sidewalk to be built *on the side* of a certain street, the city cannot recover of the lot-owner an assessment for building a sidewalk several feet from the side of such street.[1] And where the ordinances of the city provide that sidewalks shall be constructed of such materials as the city council may order, the city cannot recover an assessment unless the council has prescribed the kind of material out of which they should be built.[2]

§ 812 (650). **Same subject.** — In Missouri, in actions to *recover the amount charged against a lot for local improvements in front thereof*, the liberal doctrine is adopted, that a *substantial compliance* with the law is sufficient, and it is not necessary for the city to prove a strict compliance with directory ordinances on the subject, but the lot-owner or defendant may show a neglect of duty by the authorities, and if he was injured thereby, it will constitute a defence. If the work has been done in a manner satisfactory to the corporation, and has been accepted by it, a *prima facie* case is made out.[3]

charging the expense of sidewalks on the owners of the adjoining land is a high power, and is not to be extended by construction." *Per Metcalf*, J., in Lowell *v.* French, 6 Cush. 223, 224. N. Y. Prot. E. Public School, *In re*, 47 N. Y. 556.

[1] Lowell *v.* Wheelock, 11 Cush. 391 (1853). The owner of a corner lot, who had applied to the city council for the use of water, and paid for the pipe laid along one front of his property, was held not to be liable for the cost of pipe afterwards laid without his consent along the other front. Baker *v.* Gartside, 86 Pa. St. 498. That no authority exists for the payment, out of the general revenues, of judgments against a city for work performed in the improvement of streets does not release the city from liability therefor. Slusser *v.* Burlington, 42 Iowa, 378 (1876). Under an ordinance authorizing a *plank* sidewalk, a tax assessed for one of *stone* was held void. Sloan *v.* Beebe, 24 Kan. 343.

[2] Lowell *v.* Wheelock, *supra*. The order should appear on the journal of their official proceedings. *Ib.* *Ante*, secs. 96, 779. The provision of a city charter, making the abutting lot-owners liable for a street improvement, being in derogation of the common law, must be construed most strictly against the municipality. The council is the agent of the law in contracting for an improvement so as to make the cost a charge on a lot. No liability attaches until the work to be done is ascertained and prescribed in the ordinance and contract. Henderson *v.* Lambert, 14 Bush (Ky.), 24. Such abutting lot-owners were held not to be liable where only a part of the work contracted for had been completed by the contractor, and accepted and paid for by the city council. *Ib.*

[3] Risley *v.* St. Louis, 34 Mo. 404 (1864); St. Joseph *v.* Anthony, 30 Mo. 537 (1860); St. Louis *v.* De Noue, 44 Mo. 136; St. Louis *v.* Clemens, 36 Mo. 467; Neenan *v.* Smith, 60 Mo. 292 (1875); Adams *v.* Lindell, 5 Mo. App. 197. In an action to recover local assessments, in the absence of proof of fraud, the *acceptance by the corporation* of work it was authorized to contract for is *prima facie* evidence against the defendant, so far as relates to its completion and the manner in which it was done. Municipality No. 2 *v.* Guillotte, 14 La. An. 297 (1859); Murray *v.* Tucker, 10 Bush (Ky.), 240 (1874); *ante*, secs. 464, 465.

§ 813 (651). **Summary Collection may be authorized by the Legislature.** — The legislature may provide for a *summary collection* of taxes and assessments, and declare what shall make a *prima facie* case.[1] For the payment of street improvements, it was provided by statute that the city engineer should make an estimate, which, when the council directed it to be paid, became an assessment upon the particular lot or property to which it was chargeable. It was further provided that if it should appear to the council by affidavit that such assessment was not paid, the council should provide for its collection by precept issued by the mayor and clerk. It was contended that this statute was unconstitutional, because it deprived a party of rights without a judicial hearing, and because it invested the council with judicial power. But the court held that inasmuch as the party had the right by appeal to transfer his cause to a judicial tribunal, the objection to the statute was not well taken, and that the issue of the precept was a ministerial and not a judicial act.[2]

§ 814 (652). **Legislature may authorize Reassessment.** — The original assessment for a local improvement proving insufficient, the legislature may, in the absence of special constitutional restriction, *authorize a reassessment*, and make it operate upon the property benefited, that is, upon all that was originally liable to contribute; and such a law is valid, even against a person purchasing intermediate the assessment and reassessment. Vested rights are not thereby impaired.[3] But where the Constitution of the State contains a special

[1] St. Louis *v.* Coons, 37 Mo. 44 (1865); Riley *v.* St. Joseph, 67 Mo. 491. As to power to validate past assessments. Lennon *v.* New York, 55 N. Y. 361, 365 (1874); Hyde, *In re*, 15 Hun, 477; Mead, *In re*, 74 N. Y. 216. *Ante*, secs. 79, 419, 544. As to what defects will vitiate the warrant to collect assessment, see Butler *v.* Nevin, 88 Ill. 575.

[2] Flournoy *v.* Jeffersonville, 17 Ind. 169 (1861); *Ib.* 175; *ante*, secs. 439, 465.

[3] Butler *v.* Toledo, 5 Ohio St. 225 (1855); People *v.* Rochester, 5 Lans. (N. Y.) 142; Van Antwerp, *In re*, 56 N. Y. 261; Brown *v.* New York, 63 N. Y. 239 (1875); Howell *v.* Buffalo, 37 N. Y. 267; People *v.* McDonald, 69 N. Y. 362 (1877); Whitely *v.* Lansing, 27 Mich. 131 (1873); Breevort *v.* Detroit, 24 Mich. 322 (1872); Dill *v.* Roberts, 30 Wis. 178; Mills *v.* Charleton, 29 Wis. 400 (1872); s. c. 9 Am. Rep. 578; Dean *v.* Borchsenius, 30 Wis. 236, where the extent of the legislative power is discussed. Schenley *v.* Commonwealth, 36 Pa. St. 29 (1859); Meuser *v.* Risdon, 36 Cal. 239; *ante*, secs. 77–79, and notes; sec. 544, and notes. Legislative power affirmed. State *v.* Newark, 34 N. J. L. 236; followed in Righter *v.* Newark, 45 N. J. L. 104, where the first assessment was set aside because the charter provision under which it was made was unconstitutional: Emporia *v.* Bates, 16 Kan. 495 (1876); Howell *v.* Buffalo, 37 N. Y. 267. See State *v.* Plainfield, 38 N. J. L. 95, and Edwards *v.* Jersey City, 40 N. J. L. 176; *In re*, Elizabeth Comm'rs, 49 N. J. L. 488. *Ante*, sec. 760 *a*. Power of legislature to change mode of assessments as to uncompleted local improvements. Hines *v.* Leavenworth, 3 Kan. 186 (1865). It is essential to the validity

provision that "no law *retrospective* in its operation shall be passed," this precludes the legislature from compelling property owners, by force of a subsequent act, to pay for local improvement made under a void ordinance.[1] A reassessment under legislative authority may be made, notwithstanding a final decree of a court enjoining the municipal authorities from collecting the first or original assessment.[2]

§ 815 (653). **Mode of Collection of Taxes and Assessments.** — If the charter gives to a municipal corporation *a specific and complete remedy for the collection of taxes*, as by a distress and sale of property, this will ordinarily be regarded as excluding by implica-

of a reassessment for a local improvement that all the money collected under it shall have been *substantially* expended in the authorized improvement. Butler *v.* Toledo, 5 Ohio St. 225 (1855). Void assessment does not preclude a subsequent valid one. Himmelmann *v.* Cofran, 36 Cal. 411 (1868); Brevoort *v.* Detroit, 24 Mich. 322 (1872). *Further, as to new or reassessment.* Overing *v.* Foote, 65 N. Y. 263 (1875); People *v.* Brooklyn, 71 N. Y. 495 (1877); Chicago *v.* Ward, 36 Ill. 9; Gurner *v.* Chicago, 40 Ill. 165; Beygeh *v.* Chicago, 65 Ill. 189 (1872); 4 Chicago Legal News, 121. See, also, Chicago *v.* People, 56 Ill. 327 (1870); Foss *v.* Chicago, 61 Ill. 354; Union Blg. Asso. *v.* Chicago, 61 Ill. 439. Power of city authorities to validate proceedings invalid in the first instance, denied. Meuser *v.* Risdon, 36 Cal. 239; Municipality No. 2 *v.* Botts, 8 Rob. (La.) 198. Work was begun under a defective ordinance; a curative ordinance was passed, and all the work was done in accordance therewith, and the action of the city was sustained. St. Louis *v.* Schoenemann, 52 Mo. 348 (1873).

[1] St. Louis *v.* Clemens, 52 Mo. 133 (1873); accordingly the court held the act authorizing the city to reassess the property benefited for the sums due to be void, and distinguished the case from Howell *v.* Buffalo and Schenley *v.* Commonwealth, *supra*. The case is perhaps more instructive as showing how an ill-considered constitutional provision becomes in its practical operation the means of producing the very injustice it was designed to prevent. *As to curative acts*, see *ante*, secs. 79, 419, 544.

[2] State *v.* Newark, 34 N. J. L. 236, followed and approved in Emporia *v.* Bates, 16 Kan. 495; Mills *v.* Charlton, 29 Wis. 400 (1872). The *rationale* of the holding is thus expounded in The State *v.* Newark, *supra*: —

"The contention is, that this court having in 1863 set aside the assessment made against the prosecutor for the improvement in question, the judgment then pronounced cannot be nullified or rendered inoperative by act of the legislature. The legal proposition is undoubtedly correct. The judgment of a court of competent jurisdiction cannot be reversed, avoided, or set aside by the legislative power. The question here is, whether the act of 1868 properly considered has the effect ascribed to it. It must be borne in mind that the act does not revive or attempt to render valid the assessment which this court has declared illegal and set aside; it simply orders that a new and independent assessment be made to collect moneys which the city had expended for the benefit of the prosecutor and others. It leaves the judgment of the court upon the first assessment untouched. Its effect is not to nullify the judgment of this court, but to reimburse the city, by means of a subsequent assessment, for moneys expended in improving a street." State *v.* Newark, 34 N. J. L. 236, and see Righter *v.* Newark, 45 N. J. L. 104; *ante*, sec. 760 *a*. An act validating a void assessment for street improvement was held to validate it only from passage of the act. Reis *v.* Graff, 51 Cal. 86; San Francisco *v.* O'Neill, 51 Cal. 91; San Francisco *v.* Kinsman, 51 Cal. 92.

tion the right to resort to any other mode of enforcing the tax; but where the power to levy the tax is plainly given, *the right to collect by suit* should not be taken to be impliedly denied, unless the intention of the legislature that the special mode prescribed should be the *only* mode, appears with reasonable certainty. If the specific remedy is full and adequate, such an intention on the part of the law-maker would be more readily deduced than it would under other circumstances.[1]

[1] Camden *v.* Allen, 26 N. J. L. 398 (1857), citing Pierce *v.* Boston, 3 Met. (Mass.) 520, distinguishing State *v.* Hibbard, 3 Ohio, 63; State *v.* Gazlay, 5 Ohio, 14; and holding that a tax is not a debt or in the nature of a debt, and is not liable to set-off; 26 N. J. L. 398, *per Green*, C. J. To same effect Finnegan *v.* Fernandina, 15 Fla. 379; Gatling *v.* Carteret Co. Comm'rs, 92 N. C. 536. In Charleston *v.* Oliver, 16 S. C. 47, it was decided that a license tax was not a "debt" within the meaning of the constitutional provision that "no person shall be imprisoned for debt except in case of fraud."

In *Pennsylvania* it is held that a property owner has no set-off against the claim of a city for an *assessment*, and, in a suit by the city upon such a claim, equities between the property owner and the contractor cannot be adjusted. Pittsburgh *v.* McKnight, 91 Pa. St. 202. See also Brientnall *v.* Philadelphia, 103 Pa. St. 156. As to *counter-claim*, see Philadelphia *v.* Cloud, 4 W. N. C. 445. Where a city's obligations are receivable for taxes, they and the taxes may be the subject of set-off. Amy *v.* Shelby Co. Tax. Dist., 114 U. S. 387.

Denying that taxes are debts, for which, without statute authority, actions may be maintained, see Pierce *v.* Boston, *supra*; Shaw *v.* Pickett, 26 Vt. 486, cited with approval by *Chase*, C. J., in Lane County *v.* Oregon, 7 Wall. 71, 80 (1868), *arguendo*; Allen *v.* Galveston, 51 Tex. 302; see Butler *v.* Nevin, 88 Ill. 575 (1878); Craycraft *v.* Selvage, 10 Bush (Ky.), 696 (1874); New Orleans *v.* Davidson, 30 La. An. 541; New Orleans *v.* Hill, 30 La. An. 554; Greer *v.* Covington, 83 Ky. 410; Detroit *v.* Jepp, 52 Mich. 458; McCallum *v.* Bethany, 42 Mich. 457; Putnam *v.* Fife Lake, 45 Mich. 125; and Staley *v.* Columbus, 36 Mich. 38. In an important case in the Supreme Court of the United States Justice *Field* states with clearness the distinction between "taxes" and "debts." "*Taxes are not debts.* It was so held by this court in the case of Lane County *v.* Oregon, 7 Wall. 71. Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States . . . an action of debt may be instituted for their recovery. The form of procedure cannot change their character. Augusta *v.* North, 57 Me. 392; Camden *v.* Allen, 26 N. J. L. 398; Perry *v.* Washburn, 20 Cal. 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other." Meriwether *v.* Garrett, 102 U. S. 472, 513. In Dubuque *v.* Ill. Cent. R. R. Co., 39 Iowa, 56, 74, the text, sec. 815 (653), is quoted with approval, and numerous cases are cited by the learned judge, including The Dollar Sav. Bank *v.* United States, 19 Wall. 227. "The cases cited," says *Beck*, J., "it is believed, fully recognize the rule that actions at law may be maintained to recover taxes, though special remedies be provided therefor," unless, it should be added, the special mode appears to have been the *only* mode intended. S. P. Burlington *v.* B. & Mo. R. R. Co., 41 Iowa, 134 (1875), which also holds that an action by a municipality to recover taxes as debts is *within the statute*

§ 816 (654). **Same subject. Specific Mode held exclusive.** — On the principle that *the specific statute mode of collection* must be pur-

of limitations of the State, and is barred by the lapse of the statutory period. To the same effect are, Davenport *v.* C. R. I. R. R. Co., 38 Iowa, 633; Mellinger *v.* Houston, 68 Tex. 37, and cases cited; St. Louis *v.* Newman, 45 Mo. 138; Jefferson *v.* Whipple, 71 Mo. 521. *Statute of limitations* held *not* to be a defence to the enforcement of taxes by a municipal corporation. Elliott *v.* Williamson, 11 Lea, 38. See *ante*, sec. 667 *et seq.*, 675.

Further, as to *personal liability of taxpayer to an action for the taxes*, see Oakland *v.* Whipple, 39 Cal. 112; People *v.* Seymour, 16 Cal. 332; Guerin *v.* Reese, 33 Cal. 292; Litchfield *v.* Vernon, 41 N. Y. 123 (1869); St. Louis *v.* Clemens, 36 Mo. 467; St. Louis *v.* De Noue, 44 Mo. 136. In the case of Neenan *v.* Smith, 50 Mo. 525 (1872), the case of St. Louis *v.* Clemens, 36 Mo. 467, was overruled as to the right under the charter to a judgment and *general* execution, *Bliss*, J., doubting the power of the legislature to make local assessments a personal charge upon the owner. *Voorhies*, J., denied the power, in St. Louis *v.* Allen, 53 Mo. 44 (1873), where the question is fully discussed. Prescribed mode of collection of an assessment must be pursued. Mix *v.* Ross, 57 Ill. 121 (1870). In the case of Taylor *v.* Palmer, 31 Cal. 240 (1866), the majority of the court held, that it was not within the power of the legislature, under the Constitution, to make an assessment for street improvements a personal charge against the owner for whatever sum may remain after a lien on the lot has been enforced. In the learned and strong dissenting opinion of *Sawyer*, J., *Ib.* 666, the legislative practice and the decisions in other States are extensively referred to, and the authority of the legislature to make an assessment a personal charge earnestly and ably maintained. The *statute of limitations* may be pleaded against a city suing for a personal judgment for taxes. Jefferson *v.* Whipple, 71 Mo. 519; see cases in preceding note; *contra*, Elliott *v.* Williamson, *supra*. Contractor not entitled to a personal judgment against the lot-owners. Randolph *v.* Bayne, 44 Cal. 366 (1872); *supra*, sec. 803 *et seq.*; *post*, sec. 821, note.

On the principle that where a statute creates a liability which did not before exist, and gives a special remedy to enforce it, that remedy, and not a common-law action must be pursued, it was held that street assessments must be collected in the manner provided by the charter or constituent act of the corporation. Flournoy *v.* Jeffersonville, 17 Ind. 169 (1861); *Ib.* 318. Precept must be duly signed by the proper officer. Jeffersonville *v.* Patterson, 32 Ind. 140. It was held by a divided court (ten senators to eight) that a county could not maintain a bill in equity, in the nature of a *creditor's bill*, to enforce the payment of county taxes, where the warrant for the taxes was returned no property whereon to levy. Court of Errors, Durant *v.* Albany Co. Sup., 26 Wend. 66 (1841), reversing decree of chancellor and vice-chancellor. *Post*, secs. 906–924; *infra*, sec. 822.

Where, by a constitutional provision, *taxes may be paid in the coupons*, &c., for the payment of which they are levied, the taxpayer can exercise the privilege only before suit is brought for their collection. Bummel *v.* Houston, 68 Tex. 10. The State of *Virginia* agreed to receive coupons on State bonds in payment "after maturity for all taxes due the State." This imposes not only a moral but legal obligation. Hartman *v.* Greenhow, 102 U. S. 672; Antoni *v.* Greenhow, 107 U. S. 769; Virginia Coupon Cases, 114 U. S. 269; Royall *v.* Virginia, 116 U. S. 572; Sands *v.* Edmunds, 116 U. S. 585; Ayers, *In re*, 123 U. S. 443; *contra*, Greenhow *v.* Vashon, 81 Va. 336. This legislation and the decisions reviewed, 23 Am. Law Rev. 924.

Where a county judge, empowered by law to appoint a collector of a tax levied upon a precinct to meet the interest and a reasonable amount of the principal of bonds issued in aid of a railroad, was unable to make the appointment because no person could be found willing to serve, it was held, in an action brought by the bondholders to enforce payment, that the chancellor had no power to appoint a collector or a receiver for the purpose, on the ground that the power to levy and collect taxes is legislative and not inherent in a court; and that if such power were exercised by a court the theory of government and the distribution of powers would be destroyed. McLean Co. Precinct *v.* Deposit Bank, 81 Ky. 254. See *post*, secs. 861, 885, 886.

[1] Cooper *v.* Savannah, 4 Ga. 68 (1848).

[2] Alexander *v.* Helber, 35 Mo. 334 (1864); *ante*, sec. 339.

[3] Dugan *v.* Baltimore, 1 Gill & J. (Md.) 499; Baltimore *v.* Howard, 6 Har. & J. (Md.) 383; Gordon *v.* Baltimore, 5 Gill, 236, 243; Eschbach *v.* Pitts, 6 Md. 71 (1854). In Dugan *v.* Baltimore, *supra*, *Buchanan*, C. J., delivering the opinion of the court, said: "In Baltimore *v.* Howard, 6 Har. & J. 383, it was decided by this court, in relation to the tenth section of the act of incorporation, that the giving a remedy by distress or action of debt was cumulative only, and did not take away the action arising by implication, or the legal obligations to pay a claim created by law. The tax for which this suit is brought was imposed by virtue of that act, the imposition and assessment of which created the legal obligation to pay, on which the law raised an *assumpsit*, independent of the notice required by the fifth section of the ordinance, as a foundation for a summary mode of recovery, and unaffected by the omission of the collector to do his duty, which omission, though it caused the loss of the right to collect the tax by distress and sale of the goods, left the right to recover on the original implied *assumpsit* unimpaired, — an *assumpsit* raised by the law on the imposition and assessment of the tax, and not to arise on the delivery by the collector of an account of the assessment and tax." S. P. State *v.* Southern Steamship Co., 13 La. An. 497 (1858); Dunlap *v.* Gallatin County, 15 Ill. 9; Ryan *v.* Gallatin County, 14 Ill. 83; Geneva *v.* Cole, 61 Ill. 397 (1871); Jonesboro *v.* McKee, 2 Yerg. (Tenn.) 167.

Mode of collection. Bond *v.* Hiestand, 20 La. An. 139; Louisville *v.* Bank of Ky., 3 Met. (Ky.) 148; New Orleans *v.* Graihle, 9 La. An. 561; Baltimore *v.* Chase, 2 Gill & J. (Md.) 376; *supra*, secs.

sued, it was held, in another case, where the legislature had provided that a tax upon free persons of color removing to a city should be collected by hiring them out, that an ordinance which authorized such persons to be imprisoned for the non-payment of the tax was void.[1] So where the organic law of a town gave it power "to levy and collect taxes," and also provided, in another section, that "if any person fail to pay any tax levied on his property, the town collector may recover the same by civil action in the name of the corporation," it was held that the payment of taxes must be enforced by suit, and that it was not competent for the corporation to pass an ordinance providing for their collection, by seizure and sale, before judgment, since the mode of collection specified in the statute excluded all other modes.[2]

§ 817 (655). **Action held sustainable although Summary Mode of Collection is provided.** — The authorities, however, are not uniform, and in some of the States the view is taken that a tax legally levied and assessed by a municipal corporation pursuant to its charter creates a legal obligation to pay such tax, and that the city can *recover it in an action of assumpsit*, and this although there may be a summary mode of recovery provided for in the ordinance.[3] In

Minnesota, where the same statute which granted to a city the power to impose a poll-tax specified a mode for collecting the tax, this express grant of a specific remedy was held to preclude by implication the right to collect by an action, and this although the statutory remedy was admitted to be inadequate and impracticable.[1]

§ 818 (656). **Where the Charter is silent as to Mode of Collection, Suit may be brought.** — If the charter gives the power to impose taxes, but is *silent respecting the method for their recovery*, the corporation may enforce them, or provide by ordinance for their enforcement by due course of judicial proceedings. In such a case, the authority to collect by suit is clearly implied, being necessary in order to make the power to tax available.[2] The well-known rule is, that where a statute creates a right, and gives no remedy, the party may resort to the usual remedy applicable to such a case. But the power to levy and collect a tax, whether general or special, does not carry with it the authority to collect *by distress or sale of property*, or in any way more summary than by resort to legal proceedings. The principle of the common law is clear, as we have already seen,[3] that

811, note, 816, note ; Mix *v.* Ross, 57 Ill. 121 ; Ball *v.* Poor, 81 Ky. 26 ; McLean County Precinct *v.* Deposit Bank, 81 Ky. 254. In *Alabama* a tax levied and assessed is a legal liability upon the taxpayer which may be enforced at common law, unless the statutory remedy is exclusive. Perry County *v.* Selma, M. & M. R. R. Co., 58 Ala. 546 ; Winter *v.* Montgomery Council, 79 Ala. 481. In the latter case it was held also that if the legal remedy is inadequate, as where the owner of the property is a *feme covert*, the lien for taxes may be enforced in equity. It was held in Dollar Savings Bank *v.* United States, 19 Wall. 227 (1873), that by express provision of the Internal Revenue Act taxes due thereunder may be collected in a common-law action of debt. Mr. Justice *Strong* says that such recovery might be had on general principles. He admits that where the statute creates a right and provides a particular remedy for its enforcement such remedy is generally exclusive of all common-law remedies. But he says : "The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. . . . Such principles are not, however, rules of conduct of the State."

In *Iowa*, the liability for a duly authorized tax, lawfully levied, is a debt. Dubuque *v.* Ill. Cen. R. R. Co., 39 Iowa, 56 (1874) ; Davenport *v.* C. R. I. R. R. Co., 38 Iowa, 633. An action at law can be maintained by a city for the recovery of municipal taxes upon the property of a railroad, notwithstanding the legislature may have provided a special remedy therefor. *Ib.* ; Burlington *v.* B. & M. R. R. Co., 41 Iowa, 134 (1875).

[1] Faribault *v.* Misener, 20 Minn. 396 (1874), where the cases are learnedly examined by *Young*, J.

[2] State *v.* Severance, 55 Mo. 378, 389 (1874), *Wagner*, J. ; Amite City *v.* Clementz, 24 La. An. 27 (1872) ; Jefferson *v.* McCarty, 74 Mo. 55. See cases cited *infra*, note 4 to this section.

[3] *Ante*, chapter on Ordinances, secs. 336–353, 408–422.

municipal corporations cannot make a by-law (unless the power be plainly and directly conferred) to enforce the payment of fines by distress, sale, or forfeiture of the goods of the party who may have omitted to discharge his legal dues ; and the same doctrine extends to taxes, when they are treated as debts. Municipal power to collect by distress and sale cannot be implied because the State collects *its* taxes in this manner. It must be given, if not in express terms, yet by the clearest and most indubitable implication.[1] Therefore, the power to sell for the non-payment of taxes, general or special, cannot be inferred from an express provision in the charter to the effect that the collection of the taxes provided for therein shall be enforced in such manner as may be provided by the ordinances of the city.[2]

§ 819 (657). **Same subject. Power to sell for Delinquent Taxes.** — While the power "to levy and collect taxes" will not alone confer the right upon the municipality to collect by a direct sale, yet these words may give such authority in connection with other charter provisions on the same subject, which unequivocally and plainly assume and recognize the existence of a power of sale.[3]

§ 820 (658). **Same subject.** — The principle is a familiar one, that the power to sell, when given, must be strictly pursued, or the

[1] Bergen *v.* Clarkson, 1 Halst. (N. J.) 352 (1796) ; Merriam *v.* Moody, 25 Iowa, 163 (1868) ; Baltimore *v.* Howard, 6 Har. & J. (Md.) 383 ; Dugan *v.* Baltimore, 1 Gill & J. (Md.) 499 ; Annapolis *v.* Harwood, 32 Md. 471 (1870) ; Ham *v.* Miller, 20 Iowa, 450 ; Camden *v.* Allen, 26 N. J. L. 398 (1857) ; Clarke *v.* Tucket, 2 Vent. 182 ; New Orleans *v.* Graihle, 9 La. An. 561 ; Baltimore *v.* Chase, 2 Gill & J. (Md.) 376 ; St. Louis *v.* Russell, 9 Mo. 503 (1845) ; St. Louis *v.* Allen, 13 Mo. 400 (1850) ; McInerny *v.* Reed, 23 Iowa, 410 (1867) ; Haskell *v.* Burlington, 30 Iowa, 232 (1870) ; Dubuque *v.* Harrison, 34 Iowa, 163 (1872) ; Paine *v.* Spratley, 5 Kan. 525 ; Augusta *v.* Dunbar, 50 Ga. 387. The right to impose a fine or penalty for the non-payment of a tax must be plainly conferred, or it cannot be exercised by the corporation. Municipality *v.* Pauce, 6 La. An. 515 (1851).

Municipal corporations, when clothed by charter with the power to impose taxes, may prescribe reasonable penalties in the nature of interest for the non-payment of such taxes when they become due, and such penalties become a part of the debt created by the tax, and are collected in the same manner. The City of Burlington *v.* The B. & Mo. R. R. Co., 41 Iowa, 134 (1875).

[2] Merriam *v.* Moody, 25 Iowa, 163 ; Paine *v.* Spratley, 5 Kan. 525 ; McInerny *v.* Reed, 23 Iowa, 410.

[3] St. Louis *v.* Russell, 9 Mo. 503 (1845) ; St. Louis *v.* Allen, 13 Mo. 400 (1850). In these cases it appeared that in the charter of St. Louis power was given "to levy and collect taxes," &c., and in another portion of the charter it was provided that "the mayor and city council shall have power, by ordinance, to direct the manner in which property advertised for sale, or sold for taxes, by authority of the corporation, may be redeemed," and it was held that the city might sell property for the non-payment of taxes. Compare Merriam *v.* Moody, *supra*.

sale is void; and a party claiming title under a corporation tax sale must, unless the rule is varied by legislative enactment, show that every prerequisite to the exercise of the power has been complied with.[1]

§ 821 (659). **Lien of Taxes.** — It is undoubtedly a sound proposition that taxes, whether general or special, are not liens upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens.[2]

[1] Pope *v.* Headen, 5 Ala. 433 (1843); Allen *v.* Galveston, 51 Tex. 302; Underhill *v.* Smith (publication), Chip. (Vt.) 81 (1791); Bucknall *v.* Story (corporation tax-deeds as evidence of title), 36 Cal. 67; Holroyd *v.* Pumphrey, 18 How. (U. S.) 69; Holbrook *v.* Dickinson, 46 Ill. 285; Ansley *v.* Wilson (publication), 50 Ga. 418; Dowell *v.* Portland, 13 Oreg. 248 (assessment made to a stranger to the title is void); State *v.* Taylor, 59 Md. 338; O'Byrne *v.* Philadelphia, 93 Pa. St. 225 (publication); Allentown *v.* Hower, 93 Pa. St. 332 (defective registration of lien); Pittsburgh *v.* Knowlson, 92 Pa. St. 116 (time of filing lien); McPhee *v.* Venable, 77 Ga. 772.

Effect of municipal tax-deed being made prima facie evidence of title. See cases *supra;* Dubois *v.* Campau, 24 Mich. 360 (1872). The *special mode* of collection of assessments prescribed by law must be pursued. Mix *v.* Ross, 51 Ill. 121 (1870). Blackwell on Tax Titles, chap. xxxi. Compliance with law must appear on the face of the proceedings. Chicago *v.* Wright, 32 Ill. 192; Sharp *v.* Speir, 4 Hill (N. Y.), 76, adjudging that a power to sell for *taxes* did not authorize a sale for a mere *assessment for benefit*; s. p. Sharp *v.* Johnson, 4 Hill (N. Y.), 92. In a proceeding to set aside a sale of land for taxes, on the ground that the full amount had been tendered, the plaintiff must offer to pay the money into court or to the purchaser when relief is obtained. Lancaster *v.* Du Hadway, 97 Ind. 565.

Injunction will lie to prevent a sale of land upon a void precept. Goring *v.* McTaggart, 92 Ind. 200; but see *post*, secs. 737, 738. In Doe *v.* Chunn, 1 Blackf. (Ind.) 336 (1825), it was held that express power to a municipal corporation to levy taxes and sell lands for the non-payment of them (the charter being silent as to conveyance to the purchaser) did not include the power to convey; but this view may, perhaps, be considered too strict to be sound. At all events, this would not be law in any but a tax-title case. See Paine *v.* Spratley, 5 Kan. 525.

"Without express power given to *a municipal corporation*, by statute to *become purchaser* at an authorized sale of lands [by it] for the non-payment of taxes, it possesses no such power, and a sale to it is void." *Dixon*, C. J., in Knox *v.* Peterson, 21 Wis. 247 (1866); Sprague *v.* Cœnen, 30 Wis. 209 (1872); s. p. Champaign *v.* Harmon, 98 Ill. 491; Logansport *v.* Humphrey, 84 Ind. 467. In *Wisconsin* towns are distinguished from municipal corporations proper, and are not authorized to purchase and hold tax certificates. Eaton *v.* Manitowoc Co. Sup., 44 Wis. 489 (1878). *Relief against illegal taxes and assessments. Post*, chap. xxii. *Right to recover back. Post*, chap. xxiii.

[2] Philadelphia *v.* Greble, 38 Pa. St. 339; Howell *v.* Philadelphia, *Ib.* 471; Allegheny City's Appeal (*lien* of assessment), 41 Pa. St. 60; Loffink *v.* Allegheny, 5 Weekly Note Cases 3, (1877); Heine *v.* Levee Comm'rs, 19 Wall. 655; Meriwether *v.* Garrett, 102 U. S. 472; Jefferson *v.* Whipple, 71 Mo. 519; Kansas City *v.* Payne, 71 Mo. 159. Authority to a city "to provide, by ordinance or otherwise, for the *prompt* collection of taxes due to the city, and to that end the city shall have power to sell *real* as well as personal property," authorizes it to pass an ordinance declaring taxes to be a lien on realty. Eschbach *v.* Pitts, 6 Md. 71 (1854), charter of Baltimore. See Dallam *v.* Oliver, 3 Gill (Md.), 445 (1845). Though a personal action may lie against the owner to recover the amount of paving tax, yet this does not affect the specific liability of the property on which the tax is a lien, or which may be sold to pay it. Eschbach *v.* Pitts, 6 Md. 71 (1854). See, as to liens, Mix *v.* Ross, 57 Ill. 121; Higgins *v.* Chicago, 18 Ill. 276; Burlington *v.* Quick, 47 Iowa, 222. A city can create a lien for improving a street only when it has exercised its powers legally, and made the improvement in accordance with the law. Herschberger *v.* Pittsburgh, 115 Pa. St. 78.

The *water rents in favor of a city* owning water-works were by the charter declared "*to be a lien* upon the house and lot in the same way and shall be collected *like other taxes.*" Construing this statute, water rents are not regarded as taxes or an assessment for benefits, and the obligation of the consumer rests upon an implied contract to pay for water used. But though resting on contract it is competent for the legislature to declare that the lien of such water rent shall have priority over mortgages made after such legislative act, although the water was introduced on the mortgaged lot after the giving of the mortgage. Such an act and such effect thereof does not deprive the mortgagee of his property without due process of law. Provident Inst. for Sav. *v.* Jersey City, 113 U. S. 506 (1884).

[1] McInerny *v.* Reed, 23 Iowa, 410; Lima *v.* L. Cem. Assoc., 42 Ohio St. 128. In New York *v.* Colgate, 12 N. Y. 140 (1854), the lien of the city was created by statute, and the cumulative right to enforce it as a *mortgage* given, and the lien, it was held, was not discharged by a defective sale *in pais.* See, also, Norwich *v.* Hubbard, 22 Conn. 587 (1853); Himmelmann *v.* Spanagel, 39 Cal. 389. Though a lien be given, the remedy at law is not necessarily excluded. New Haven *v.* Fair H. & W. R. R. Co., 38 Conn. 422 (1871); s. c. 9 Am. Rep. 399; *supra*, secs. 798, note, 815; Heine *v.* Levee Comm'rs, 19 Wall. 655 (1873). Where the taxes had not been assessed, and where there was no statute declaring them a lien, it was held that a bondholder had no remedy in equity to compel the assessment and collection of the tax. See chapter on *Mandamus, post.* As to enforcement of lien in *California*, see Hancock *v.* Bowman, 49 Cal. 413 (1875).

A contractor, who, as the agent of the city, and by its authority, does paving under a contract with lot-owners, will be *subrogated* to the rights of the city as to liens on the adjoining property, and may prosecute a suit in the name of the city for his use against the delinquent property. Philadelphia *v.* Wistar, 35 Pa. St. 427 (1860). But in Griffing *v.* Pintard, 25 Miss. 173, it was held that the doctrine of subrogation had no application to the rights and remedies of the State or city against delinquent taxpayers.

Suits for local assessments may be brought in the *name* of the corporation, although the charter directs that the board of trustees shall do the work and recover; the trustees are but the agents of the corporation. Palmyra *v.* Morton, 25 Mo. 593 (1857); Northern Liberties *v.* St. John's Church, 13 Pa. St. 104.

§ 822 (660). **Same subject. Mode of enforcing Lien.** — Where the charter of a city conferred upon it the power "to levy and collect" a special tax for local improvements, and declared such tax to be "*a lien*" upon the real estate upon which it should be assessed, and no mode of collection was prescribed, and no power to collect by sale existed, the court was of opinion that the lien might be *enforced in equity*, and the power "to collect" be exercised by the corporation by a suit in its name; but it was held that suit could not be maintained in the name of an assignee of the corporation.[1] The right of the owner to redeem from sales for municipal taxes and