SPECIAL ASSESSMENTS

A STUDY IN MUNICIPAL FINANCE

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TABLE OF CONTENTS.

CHAPTER I.

INTRODUCTORY.

§ 1. *Benefit as a Factor in Finance.* The idea of benefit was at one time the controlling factor in the imposition of all public charges. Only slowly and gradually and driven by force of necessity did the legislator and the financier begin to adopt other bases for taxation. And long after the practice of apportioning the general public expenses according to the advantages or protection conferred by government had been in part, if not wholly, abandoned, it was still the custom of many eminent economists to build their entire theory of public revenue upon the foundation of the benefit derived from its expenditure. To-day this is no longer true. The abstract basis of general taxation is commonly considered to be not the services rendered by the state, but the ability of the contributor to pay. Benefit, if recognized as a factor at all, is admitted only so far as it serves as one of the indices of ability. The position of theory and practice has been reversed: whereas formerly theory lagged behind practice, practice has now been outstripped by theory. Here, as in many other branches of economics and finance, the development seems to have been pushed to the extreme. Benefit still plays an important rôle in the imposition of certain public charges, particularly in local finance. In this country it finds an acknowledged scope of action in those numerous cases where municipal improvements result in distinct and traceable advances in the value of adjacent real property. The impositions laid upon the property-owners in order to defray the expenses of such improvements are with us technically known as special assessments.

The purpose of this monograph, then, is to study the history of special assessments, the methods and extent of their application, their legal aspect before the courts, and their position in the science of finance.

§ 2. *Special Assessments in France.* Although rarely imposed, charges in the nature of special assessments are not altogether unknown in Europe. Records remain of the application of the underlying principle in France as early as 1672. At that time the question arose whether, when dark and narrow streets are widened, the proprietors of those houses which profit by such improvements ought not to contribute to the expense. Already decided several times in the affirmative, the decree of the council now settled it once for all. By its provisions the owners of several houses in *Rue des Arcis* facing the demolished buildings were ordered to bear their shares of the cost in proportion to the advantages which they should receive therefrom. Although issued for the particular case, that decision became the rule. So a few years later,[1] a new decree enjoined it upon the property-owners of *Rue Neuve-Saint-Roche* to pay, according to an assessment roll ordered by the king, the sum of 37,515 livres for distribution among those parties who were "required to withdraw their buildings in order to leave space for the enlargement of the street."[2]

Similar assessments for benefit were again authorized by the legislature of 1807 under the name of *indemnités pour paiement de plus-value*.[3] According to the law then enacted, "when by the opening of new streets, by the creation of new public places, by the construction of quays, or by any other public work, general, departmental, or communal, ordered and approved by the government, private property shall have acquired a marked increase in value, such property may be charged with

[1] May 27th, 1678.

[2] Clément, *La Police sous Louis XIV.*, p. 144.

[3] *Loi relative au desséchement des marais*, 16 Septembre, 1807.

the payment of an indemnity which shall be adjusted according to half the value of the advantages acquired."[1] This enactment still governs such transactions in France. But as we learn from the work of M. Aucoc, the procedure thus authorized has been followed in but very few instances, and he has not been able to cite more than a score of applications.[2] The greater number of these were made at the instigation of cities which were constructing street improvements upon a large scale—Paris, Lyons, Grenoble, Toulouse. Thus an ordinance of March 31st, 1843, declared these clauses of the law of 1807 applicable to the riparian owners upon *Rue de Rambuteau* in Paris. But for the improvements effected upon the streets of Paris, Lyons and Marseilles during the second empire—improvements much more important than those of previous years—the city authorities did not make use of the power vested in them.

The central government has rarely employed the system. In 1855 in the case of a quay erected by it in conjunction with the city of Lyons upon the right bank of the Saône, it was decided to apply the provisions in question to those proprietors whose lands would be increased in value by reason of the execution of the work. Another striking example is found in the measures taken in 1854 and 1855 on occasion of the works on the lower Seine. The embankments then constructed resulted in the artificial reclamation of considerable land, and the government, instead of selling this to adjacent owners, merely subjected them to an assessment for the benefits conferred.

The system enacted by the law of 1807 is in brief this:[3] The liability of the property owners must be declared by a decree of the *Chef de l'État* rendered in the *Conseil d' État*. The assessment is fixed by a commission organized for the pur-

[1] *Law of 1807*, sec. 30.

[2] *Droit Administratif*, ii., p. 732 *et seq.*

[3] Aucoc, *Droit Administratif*, ii., p. 734 *et seq.*

pose, whose duty it is to designate the property-owners who are specially benefited by the work, to determine the amount of the benefit, and to fix the share which each is to pay. As a rule, the decree which authorizes the assessment fixes the district of benefit; in every case it states the portion, not exceeding one-half, of the value of the accruing advantages which may be demanded. To this end the commission are required to secure the advice of experts, and their report may be contested before the *Conseil d' État*. The assessment may be paid, at the choice of the taxpayers, either in ready money, in installments at four per cent. interest, or by a transfer of a part of the property if divisible; or the whole property may be given up at its appraised valuation before the improvement. Upon refusal or neglect to pay, the administration may proceed against the delinquents as with any ordinary debt due to the government.

§ 3. *Special Assessments in Belgium.* At the time of its enactment, the French law of 1807 extended to a portion of the territory now included in Belgium. When the latter country finally became independent, the doctrine of special assessment for benefit not only persisted, but attained a wider application than it had received in France. The Belgian towns are authorized both to determine whether the cost of a particular improvement shall be met from the public treasury or from charges upon abutting property-owners, and also the various details of the system by which such charges are imposed. The procedure, therefore, differs from town to town. The foot-front rule of estimating benefits appears to have been most commonly adopted, although the practice is not uniform as to apportioning the whole or a designated portion of the expense upon the improvement district. Taken altogether, the purposes to which the system is applied in Belgium are more numerous and varied than elsewhere in Europe. The original plan comprehended only the expenses of opening and constructing new streets. The local ordinances of the different towns include,

in addition thereto, the building of foot-ways, the laying of pavements, the construction of sewers, the sweeping and sprinkling of streets, the enlargement and repair of existing streets and public places. Moreover, the central government has similarly assessed the cost of opening canals upon the adjacent proprietors.[1]

§ 4. *Special Assessments in Germany.* There are three classes of public roads in Prussia. First, highways administered by the province authorities. Second, a group of lesser general roads administered by the circle. Third, the city streets under the control of the municipal government. Whether a road belongs to one class or to another depends largely upon its historical development. Of those belonging to the third class, the older ones have usually arisen without any specific legal authorization, the cost being defrayed as local custom might direct. Only since 1875 has a specially ordained procedure been provided by a general law for the construction of new streets. This procedure involves certain charges upon abutting owners very much in the nature of special assessments. They are termed in Prussia *Interessentenzuschüsse* or *Interesssentenchausseebeiträge*.[2]

According to the law of 1875, street improvements may be made at the instance either of the police authorities or of the the municipal executive board, subject to the consent of the municipal council.[3] The approval of the police authorities is necessary in every instance, unless upon appeal the council of the circle over-rules the decision of the police officials. After such approval has been secured, the plan of the proposed improvement must be made public, and opportunity must be given for hearing any objections which may be urged. Only

[1] Leemans, *Des Impositions Communales en Belgique*, chap. 5 to 8.

[2] Leidig, *Preussisches Stadtrecht*, pp. 375, 385.

[3] *Gesetz betreffend die Anlegung und Veränderung von Strassen und Plätzen in Städten und ländlichen Ortschaften, vom 2 Juli, 1875.* See also Leidig, p. 386 *et seq.*

after the decision of the council of the circle upon disputed points, if any, is the plan of the improvement to be formally proclaimed by the municipal council. For defraying the expenses of the improvement, the city is then authorized to levy special assessments upon the property-owners thereby benefited.

Liability to assessment may arise in two ways: First, where, upon the construction of a new street, the property-owner erects a building upon his land after the beginning of the improvement. Second, where, upon the improvement of a street already laid out, but still without abutting buildings, the property-owner erects a building upon his land after the beginning of the improvement. In both cases the extent of the benefit chargeable is the same; that is to say, all parties owning property abutting upon the street who commence the erection of buildings after the designated day are subject to assessment.[1] In the sum assessable upon the parties benefited are included both the cost of the entire street improvement and also the cost of maintenance for a specific period not exceeding five years. And the cost of the street improvement comprises the expenses of purchasing and clearing the land, the original construction, the drainage and the provisions necessary for lighting. The individual assessed is required, as the local ordinance may provide, to pay his share of half the total expenses in the ratio which the frontage of his property bears to the whole street line. If, however, the street exceeds twenty-six metres in width, half the cost is to be computed upon the basis of that width and the remainder charged to the city as a whole.

The ordinance may require a single payment, or one payment toward the cost of construction and a periodical contribution for maintenance. The assessment upon the property-owner becomes due upon that day when the liabil-

[1] The city may prohibit the erection of buildings upon land necessary for a contemplated street until the street is legally laid out.

ity of the city arising out of the improvement in its whole extent becomes legally determined; but if the property-owner does not erect his building until later, it then becomes due immediately.[1] The contribution demanded in Prussia is not strictly a real charge. If the property is alienated by the owner after the assessment is due, the city looks to him and not to his successor for payment. If, on the other hand, he alienates after the time when he became liable to assessment, but before the latter is due,[2] then the owner at the time the assessment becomes due is required to pay the same. On demanding payment, it is incumbent upon the city to show its legal authority, while the remedies of the taxpayer are the same as for other public impositions.

Systems very similar to that just described as in force in Prussia exist in various other German commonwealths.[3] In Bavaria the so-called *Soziallasten* are impositions demanded of those who, within a particular local district, derive special advantages from a certain street, bridge or well. These date from an ordinance of 1831. No permission to build will as a usual thing be granted for new localities until the land needed for street purposes has been put into proper condition; and those who build later must, before they seek to obtain permits, first pay their proportionable share of the cost. In Würtemberg and Hesse, upon the construction of new streets or the extension of existing ones, it may be required by local ordinance that the abutting property-owners who wish to erect buildings thereon, must bear the expense of acquiring the necessary land, clearing it, its first construction, as well as for its maintenance during a designated period. And a Saxon law of

[1] On the arising of his liability thereto by beginning to build.

[2] That is, after erecting a building, but before the liability of the city has been determined by a course of legal proceedings.

[3] Lœning, *Verwaltungsrecht*, p. 580; Neumann, *Die Steuer und das öffentliche Interesse*, p. 331; Ludwig-Wolf, *Sächsische Gesetzgebung über Wegebau*, p. 96.

1870 makes the burden of the original construction of new roads rest upon such persons only who own property in those new building-districts which have made such roads necessary.

§ 5. *Special Assessments in the United Kingdom.* Numerous English statutes have been cited at various times as precedents for the proposed "betterment tax"[1] in the United Kingdom. There are, firstly, a number of sewers and drainage acts dating from 1427 by which commissions were appointed to secure the construction or repair of "walls, ditches, gutters, sewers, bridges, causeys, wears and trenches," which had been damaged by the inundation of the sea, and to apportion the work, or the expenses of the work, upon all whose landed interests received benefits therefrom."[2] These laws, however, sought the prevention of injury by means of common works of protection, rather than the enhancement of the value of the property affected. Rates under the later sewers acts scarcely approximate our special assessments any more nearly. It is an indispensable condition that a person taxed may by possibility receive a benefit from the expenditure, and therefore holders of mountainous or high ground which can not be surrounded are in general exempt. Still the exact measure of the benefit is not the measure of the liability to be taxed.[3] The question of benefit is one of jurisdictional importance only.

Secondly, comes the act passed in 1667 to regulate the rebuilding of the city of London after the great fire of the previous year, as also the several subsequent amendatory acts. By section 20 of the first-named statute,[4] the corporation was

[1] A word said to have been "imported from the United States of America," although it would scarcely be recognized by many Americans.

[2] See statute 6 Henry VI., chap. 5 (1427), and 23 Henry VIII., chap. 5 (1531).

[3] *Report of the Poor Law Commissioners on Local Taxation*, 1843 (published 1844), p. 65.

[4] 19 Chas II., chap. 3. Sec. 20, reads as follows: "And be it further enacted by the authority aforesaid, That the numbers and places for all common sewers, drains and vaults, and the order and manner of paving and pitching the streets and lanes within the said city and liberties thereof, shall be designed and set out by such

empowered to appoint certain persons who were at their meeting to have authority to design and set out "the numbers and places for all common sewers, drains and vaults, and the order and manner of paving and pitching the streets and lanes within the said city or liberties thereof," and also "to impose any reasonable tax upon all houses within the said city or liberties thereof, in proportion to the benefit they shall receive thereby, for and towards the new making, cutting, altering, enlarging, amending, cleansing and scouring all and singular the said vaults, drains, sewers, pavements and pitching aforesaid." And by a subsequent section, the actual charges to be imposed were to be ascertained in case of disagreement through the agency of a jury.[1] This portion of the act, at first operative for seven years only, was three years later made perpetual,[2]

and so many persons as the said mayor, aldermen and commonalty in common council assembled, shall from time to time authorize and appoint under their common seal or the more part of them; which said persons, so authorized and appointed, or any seven or more of them, together with the said surveyors, or some or one of them, within his or their precinct respectively, shall at their meeting have power and authority to order and direct the making of any new vaults, drains or sewers, or to cut into any drain or sewer already made, and for the altering, enlarging, amending, cleansing and scouring of any old vaults, sinks or common sewers:

"For the better effecting whereof, it shall and may be lawful to and for the said persons so authorized and appointed, as aforesaid, or any seven or more of them, at their said meeting, to impose any reasonable tax upon all houses within the said city or liberties thereof, in proportion to the benefit they shall receive thereby, for and towards the new making, cutting, altering, enlarging, amending, cleansing and scouring all and singular the said vaults, drains, sewers, pavements and pitching aforesaid:

"And in default of payment of the said sums to be charged, it shall and may be lawful to and for the said persons so authorized as aforesaid, or any seven or more of them, by order and warrant under their hands and seals, to levy the said sum and sums of money so assessed, by distress and sale of the goods of the party chargeable therewith, and refusing or neglecting to pay the same, rendring the overplus (if any be)." I have been unable to find any record of the actual application of this act."

[1] *Ibid.*, sec. 26.

[2] 22 and 23 Charles II., chap. 17.

with the proviso that all who by May 1st, 1672, had been already charged under the act should not thereafter "be troubled, molested or prosecuted for or in respect thereof." The authority of the persons thus appointed was "inlarged" by a statute enacted in 1708 which gave them the same powers as were vested in commissioners of sewers, and practically brought the whole matter under the general acts respecting sewer rates.[1] The provisions of these acts, as we shall see, in reality contained the germ from which our system of special assessments sprang. Unfortunately, that germ was not developed in England, and the acts, in consequence, can scarcely be regarded as anything more than mere precedent.

Thirdly, the Metropolis Management Act of 1855[2] enables the vestry boards, whenever it appears that an improvement effected is either for the benefit of a particular part of the district, or does not result in equal benefit for the whole district, to exempt any part of such district from the levy, or to require a less rate to be levied thereon, as circumstances may dictate. Another clause of the same act provides for the paving of any new street as a private improvement to be effected by the vestry boards as the agents of the abutting property-owners and at their expense.[3] The question presented by this piece of legislation is that of narrowing the district, not that of apportionment within the district. The clause relating to paving is similar in nature to the provisions of the Public Health Act of 1875,[4] which allows urban authorities, in certain contingencies, to undertake the so-called private street improvements—sewer, level, pave, metal, flag, channel or make good or to provide proper means for lighting the same—and to recover the expenses incurred from the owners in default "according to the frontage of their respective premises."

[1] 7 Anne, chap. 9.

[2] 18 and 19 Victoria, chap. 120.

[3] *Ibid.*, sec. 105.

[4] 38 and 39 Victoria, chap. 55, sec. 150.

And finally, there is that section of the Artizans' Dwellings Act, 1882,[1] reënacted in the Housing of the Working Classes Act, 1890,[2] relating to the compensation to be made for the demolition of obstructive buildings. So much of that amount is to be apportioned by the arbitrator among the owners of the other buildings, respectively, as may be equal to the increase in value of such adjoining buildings. The apportionment rests on the distinct basis of "the increase in value by reason of the demolition of such obstructive buildings." So far, the analogy holds good. It departs from the principle of betterment in that the demolition is ordered on the ground of injury to the adjoining house, and not on the ground of benefit accruing to real property from a public improvement.

An earnest attempt was made to re-introduce the system of special assessment for benefit in the Strand Improvement Bill, 1890, promoted by the London county council.[3] The object of the bill in question was to provide for an important metropolitan improvement in the widening of the Strand between the churches of St. Mary-le-Strand and St. Clement Danes, and to levy contributions—not to exceed one-half the cost—upon a certain area in the neighborhood of the improvement, which it was alleged would be increased in value thereby, in the form of rent charges to be fixed by an arbitrator after the improvements should be carried out.. The committee to which the bill was referred, after refusing to hear any evidence relating to the law of America upon improvement schemes, reported that in the case at issue they were of the opinion "that the principle of betterment could not be applied to the improvement proposed by the bill." The agitation for the measure aroused considerable opposition, and the bill was withdrawn after the adoption of several emasculating amendments.[4] The failure of

[1] 45 and 46 Victoria, chap. 54, sec. 8.

[2] 53 and 54 Victoria, chap. 70, sec. 38–8.

[3] See *Parliamentary Sessional Papers*, 1890, xv., no. 239.

[4] See the discussion running through the Times from Dec., 1889, to March, 1890.

this movement, therefore, makes it impossible to find any system of betterment in present operation in the United Kingdom.

§ 6. *Special Assessments in the United States.* The origin of special assessments in the United States has already been the theme of some theorizing and speculation. One learned jurist thinks that "it had its origin and development in the principle of local self-government, characteristic of free institutions founded by the Anglo-Saxon race—the leaving to each local community the due administration of the affairs in which it had an exceptive, peculiar and local interest, and in the nature of real property, to which it is alone applicable. . . . . Not the creation of a philosophical brain, drafting constitutions and forms of government, but the outgrowth of the necessities and varying exigencies of local communities."[1] According to another theory, the system "most probably rose spontaneously out of natural considerations of equity and convenience."[2] That an historical investigation will not bear out these assumptions, it is almost needless to add.

The facts of the matter are quite different. The underlying principle of special assessment for benefit first appeared in this country in the provisions of a province law of New York in the year 1691. The effective clause of this statute was copied almost literally from the twentieth section of the English act passed 1667, and re-enacted 1670, to regulate the re-building of London after the great fire.[3] The idea was not, as has often been erroneously supposed, indigenous upon American soil. For twenty years the substance of the plan had been enrolled upon the English statute-book. The very words and phrases

[1] George, Ch. J., in Macon *vs.* Patty, 57 Miss., 378, p. 399.

[2] Mr. John Rae, "The Betterment Tax in America," 57 *Contemporary Review*, p. 644. See also the opinion of Justice Agnew in Washington Avenue, 69 Pa. St., 352, 358.

[3] Compare the clause given *ante*, p. 16, with the N. Y. law given *post*, p. 22. Mr. Rae, by an accidental allusion, hints at the possibility of an English source. 57 *Contemporary Review*, 645.

used were borrowed from across the water. The New York law remained unrepealed, though inoperative, until 1787, when it was adapted more closely to the existing necessities. Only in the sense of adaptation can the system be said to have had its origin in the exigency and convenience of the American colonists. This method of raising revenue for local improvements long remained peculiar to New York. No noteworthy headway seems to have been made in gaining a foot-hold in the other commonwealths until after the people began to recover from the effects of the war of 1812. The first development of the system, then, corresponds roughly with the movement for the construction of internal improvements covering the years just before and after 1830, and dying out with the crisis of 1837. Another tendency to spread to the newer commonwealths displayed itself along the later forties and early fifties, coinciding to a great extent with the era of premature railway building. The final movement began immediately upon the close of the late civil war; it is a more general phenomenon than the earlier ones, and has not yet quite ceased its victorious march over the far-western portions of the country. It has even made some headway in crossing the Canadian border.[1] The details of these various phases of development form the subject of the succeeding chapter.

[1] *E. g.*, Toronto.

CHAPTER II.

HISTORY OF SPECIAL ASSESSMENTS IN THE UNITED STATES.

§ 1. *New York before 1813.* Taxation by special assessment for benefit traces its origin in this country back to the period of colonial New York. Other colonies levied local taxes, some of which were, perhaps, apportioned according to estimated benefits, but they were isolated instances of apparently fortuitous impositions. Special assessment first developed as a revenue system in the province of New York, where, from its very inauguration, it has maintained its place upon the statute-book, and has spread its branches, one by one, into nearly all the commonwealths that have been joined under the government of the United States. In New York it has been longest in continuous operation; in New York it has achieved its greatest and most extensive results. This alone will justify a somewhat detailed description of its origin and development in that commonwealth.

In September, 1691, an act was passed by the assembly of the Province of New York entitled "an act for regulating the buildings, streets, lanes, wharffs, docks and allyes of the city of New York."[1] This statute authorized the mayor and aldermen to appoint surveyors and supervisors to see that the streets and other public places be conveniently regulated; to obstruct buildings which might narrow the street; and to exercise the right of eminent domain under certain prescribed conditions. And it continues:

"And forasmuch as the Filth and Soil of the said City, lying in the

[1] Wm. Bradford, *Acts of the Assembly of the Province of New York*, p. 12.

publick Streets thereof, doth prove a common Nusance unto the Inhabitants and Traders to and from the said City, and very prejudicial to their Health: For the removal thereof, *Be it further Enacted by the Authority aforesaid*, That the Numbers and places for all common Shoars, Drains and Vaults, and the Order and manner of Paving and Pitching the Streets, Lanes and Allyes of the said City, shall be designed and set out by the Mayor, Aldermen and Common Council of the said City, together with the said Surveyors & Supervisors appointed in the manner aforesaid; and when they assemble, shall have Power and Authority to order and direct the making of Vaults, Drains and Shoars, or to cut into any Drains or Shoars already made, and for the altering, enlarging, amending, cleansing and scouring of any Vaults, Sinks or common Shoars. And for the better effecting whereof, it shall and may be lawful to and for the said Mayor, Aldermen and Common Council, together with the said Surveyors and Supervisors, at their said Meeting, to impose any reasonable Tax upon all Houses within the said City, in proportion to the benefit they shall receive thereby, for and towards the making, cutting, altering, enlarging, amending, cleansing and scouring all and singular the said Vaults, Drains, Shoars, Pavements and Pitching aforesaid. And in default of payment of the said sum to be charged, it shall and may be lawful to and for the Mayor and Aldermen, *Etc.*, so authorized, as aforesaid, by Order or Warrant under their Hands and Seals, to levy the said sum and sums of Money, so assessed, by distress and sale of the Goods of the Parties chargeable therewith, and refusing and neglecting to pay the same, rendring the Over-plus, if any be."

While it is probable that little actual use was made of this law, yet it remained in force in 1772, when Van Schaack published his collection of public acts, and it was practically reënacted after the revolution by the new commonwealth government in April, 1787.[1] The new statute, however, differed from the old in several points. The latter, it will be noticed, provided that the tax be imposed upon "all houses within said city in proportion to the benefit they shall receive thereby," and left to the mayor and aldermen a wide discretion as to the

[1] *Laws of New York, 1787;* 1 Greenleaf, 441.

method and procedure of fixing the assessment. In these respects, the act of 1787 was much more definite and explicit. The provision reads as follows:

"And for the better effecting thereof, it shall and may be lawful to and for the mayor, aldermen and commonalty of the said city in common council convened, to cause to be made an estimate, or estimates, of the expence of conforming to such regulations aforesaid, and a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby in proportion, as nearly as may be, to the advantage which each may be deemed to acquire respectively. And in order that the same may be safely and impartially performed, the said common council shall, from time to time, appoint five sufficient and disinterested freeholders for every such purpose, who, before they enter into the execution of their trust, shall be duly sworn before the said mayor or recorder, to make the said estimate and assessment fairly and impartially, according to the best of their skill and judgment; and a certificate in writing of such estimate and assessment being returned to said common council and ratified by them, shall be binding and conclusive upon the owners and occupants of such lots so to be assessed respectively; and such owners or occupants respectively, shall thereupon become and be liable and chargeable, and are hereby required to pay such person as shall be authorized by the said common council to receive the same, the sum at which such house or lot shall be so assessed, to be employed and applied for and towards the making, altering, amending, pitching, paving, and scouring such streets, and making, constructing, and repairing such vaults, drains and sewers as aforesaid; and in default of payment thereof, or any part thereof, it shall and may be lawful to and for the mayor, recorder and aldermen of the same city, or any five of them, of whom the mayor or recorder always to be one, by warrant under their hands and seals, to levy the said sum or sums of money so assessed, by distress and sale of the goods and chattels of the owner or occupant of such house or lot so assessed, and refusing or neglecting to pay the same; rendering the overplus, if any there be, after deducting the sum assessed, and the charges of distress and sale, to such owner or occupant respectively, or their legal representatives."

The assessment was no longer to be laid upon all houses within the city, but only upon such of them as were "intended to be benefited." Moreover, since the estimate and assessment were to be made before the contemplated work, the council were authorized to make a further levy in case the sum already collected should prove insufficient.

Notwithstanding the general powers conferred, the mayor and aldermen were reluctant to employ their authority for specific cases. As a consequence, they were constantly asking the legislature to re-affirm the grant, a request with which that body complied by passing various acts applying the same principles to particular municipal improvements. Acts of this character passed in 1793, in 1795, in 1796, in 1801, and in 1807, during which time similar powers were also granted one or two other municipal corporations.[1] The act of 1807 made one important innovation: it appointed three commissioners for a term of four years with exclusive power to lay out streets, squares and public roads north of a designated line, the expense incurred to be assessed upon the property-owners intended to benefited.

§ 2. *New York, 1813 to 1851.* By 1813, the system of taxation by special assessment had progressed so far that the revised laws of that year authorized its application to the four cities of Albany, Hudson, Schenectady, and New York.[2] Of the four, New York had by far the most liberal and carefully drawn charter—an instrument which up to the recent consolidation act persisted as the basis of all its most important corporate powers. The charter made complete provision for supplying the financial needs of the city arising from the expenditures for local improvements. Under it there were two separate procedures for imposing special assessments; one for the opening

[1] *Laws of New York, 1793*, 3 Greenleaf, 52; *ibid., 1795*, 3 Greenleaf, 244; *ibid., 1796*, 3 Greenleaf, 332; *ibid., 1801*, chap. 129, p. 308; *ibid., 1807*, chap. 115, p. 271.

[2] *Laws of New York*, 2 R. L., chapters 51, 72, 76 and 86.

of streets and public places where the power of eminent domain is also involved; the other for the remaining street improvements—pitching and paving the streets, the construction of wharves and slips, sewers and drains, wells and pumps. For the former, action through commissioners of estimate and assessment duly appointed by the supreme court of judicature was necessary, their report to be confirmed by the same tribunal. For the last-named purposes, the council could itself appoint the assessors and confirm the report. In each case, the assessment was to be a lien upon the property benefited, and if the estimate proved too small, a re-assessment of the deficiency was permitted. Exclusive of a few minor changes, these charter provisions governing the exercise of the power of special assessment remained substantially intact until 1839. In that year and the year following, acts were passed by the legislature amending the procedure for making the estimate as previously established.[1] Now, if interested parties objected to the report, the proceedings were to be ordered discontinued, and future estimates were to be made by commissioners selected one from names supplied by the corporation, one from names supplied by the parties interested, and one from the two lists combined. These commissioners were to state, in their report, each item of benefit and of damage separately instead of the resulting balance only, and were required to give notice by publication for hearing objections to the proposed assessment. The costs for the commissioners were to be taxed by the court. The act of 1840 also prohibited the commissioners or assessors from assessing upon any house, lot, improved or unimproved lands, more than one-half the value of such property as valued by the assessors of the ward in which it might be situated.

[1] *Laws of New York, 1839*, chap. 209, p. 182; *ibid., 1840*, chap. 326, p. 272. The minor acts mentioned were: *Laws of New York, 1816*, chap. 81, p. 77; *ibid., 1816*, chap. 160, p. 172; *ibid., 1818*, chap. 210, p. 196. Also *Laws of New York, 1841*, chap. 171, p. 143.

This, in brief, was the status of the system at the time when the convention was called to frame the constitution of 1846. While that body did not take any positive action giving distinct recognition to the power of special assessment, except in Art. VIII, Sec. 9, which made it the duty of the legislature to provide for the organization of cities and incorporated villages, and "to restrict their power of taxation, assessment, borrowing of money," *etc.* yet there was a small element among the delegates hostile to the continuation of the system as it existed. This element, under the lead of Mr. Henry F. Murphy, a New York lawyer representing Kings county, introduced two propositions upon the subject, which were referred to the committee of the whole.[1] They were:

Sec. 2. "No local assessment for any improvement in any city or village shall be laid unless a majority of all the owners of the lands to be assessed shall apply for such improvement, nor unless such improvement shall be ordered by a vote of two-thirds of the common council or board of trustees of such city or village."

Sec. 2. "No assessment for any improvement in any city or village shall be laid otherwise than by general tax upon the taxable property of such city or village, levied and collected with an annual tax for other expenses."

Neither of these propositions was reported back to the convention. Had the one been incorporated into the constitution, the system of special assessment for benefit would have come to an untimely end; had the other been adopted, its usefulness would have been forever restricted. It is interesting in this connection to note the reasons for this opposition as they were set forth at length in a speech by Mr. Murphy.[2] He believed that the practice of assessing in any form for special benefit for any public improvement was unsound in principle, because it substitutes an arbitrary instead of a fixed rule of

[1] *Debates in the Constitutional Convention, 1846*, Argus edition, p. 357.

[2] *Debates*, Argus edition, p. 810.

taxation. It is taxation; and taxation, to be just, should be equal. No public improvement can be made without being of special advantage to some locality; consequently the assumption that there is, in particular instances, a special local benefit, is false. It follows that the improvements which our corporations are continually making, involving the taking of property and taxation for the purpose of advancing the interests of a few individuals, are not public improvements, and should not enter into the consideration of this question. The cases which we are to regard are those in which the public are primarily interested. The sure test of an improvement being public is, that it may be paid for out of the public treasury; that the necessity for it is such that the whole public is willing to bear the expense of it. But the argument of Mr. Murphy was barren of result.

The complaints at that time were much the same as they are to-day. The distinction between assessments and taxes had been formally recognized by the New York courts at least as early as 1813.[1] From 1813 on, taxation by special assessment was constantly involved in numerous cases in which the constitutionality of the exercise of the power was scarcely questioned. The point of constitutionality was first vigorously attacked in Livingston *vs.*. The Mayor, *etc.*, of New York, and n the opinion of the court, it was as vigorously upheld.[2] This decision, however, was made under the old constitution. The question that now arose was this: Had the new constitution of 1846, notwithstanding all omission of direct prohibition, put into force any restrictions upon the legislature which might be expanded so as to cover special assessments? The whole significance of the case of the People *vs.* The Mayor, *etc.*, of Brooklyn, decided in 1851, and reversing a decision of the next inferior tribunal, lies in the fact that it answered this

[1] The Mayor, *etc.*, of New York *vs.* Cashman, 10 Johns., 96.

[2] 8 Wend., 85.

question in the negative, once and for all time, so far as the commonwealth of New York is concerned.[1] The masterly logic of Judge Ruggles permanently disposes of all objection on the score of taking private property without just compensation, and places the system of special assessment firmly and solidly upon the foundation of the taxing power. The courts henceforth had to deal, not with the constitutionality of the legislative power, but with the interpretation of statutory provisions.

§ 3. *New York since 1851.* Subsequent legislation has had to do chiefly with three points in the development of the system in New York City, namely: (1) the limitation of the corporation in levying the assessment; (2) the distribution of the power of special assessment among the various municipal authorities; and (3) a statutory remedy for the taxpayer for fraud or error.

First. An act of 1852 made permanent the existing grades of the streets, and required for further changes the consent of the owners of two-thirds of the abutting land.[2] In 1865, assessment bonds were authorized by which contractors might be paid as certain work progressed, the sum advanced to be later re-imbursed the city from the proceeds of the assessment.[3] A law of the same year permitted only one-half of the expense of regulating, grading and improving the streets in the most northerly portion of the city, to be imposed upon the property-owners benefited;[4] but two years afterwards, the commissioners were again allowed to assess the parties benefited by street openings to the entire extent that they might deem them benefited thereby.[5] A legislative enactment of 1869 limited

[1] 4 N. Y., 419, over-ruling same case, 6 Barb., 209.

[2] *Laws of New York, 1852*, chap. 52, p. 46.

[3] *Laws of New York, 1865*, chap. 381, p. 715.

[4] *Laws of New York, 1865*, chap. 565, p. 1136.

[5] *Laws of New York, 1867*, chap. 697, p. 1748.

the assessment for opening, widening or extending the streets that had been mapped out under the act of 1807, to not more than one-half the total cost of the improvement—if south of Fourteenth street, such part as might be deemed just and reasonable—provided always that such sum did not exceed one-half of the market value of such lands and premises.[1] In 1872, the provisions relating to the issue of assessment bonds, for the purpose of part payment for work in progress, were made general for all local improvements where the expense was to be assessed in whole or in part upon the property-owners benefited, and assessment for repaving any street or public place prohibited upon property upon which an assessment had once been paid for the original paving of the same street or public place.[2] This latter prohibition was limited in 1873, so as to allow such assessment for repaving if petitioned for by the owners of a majority of the front feet of the real property on the line of the improvement.[3] Finally, a series of acts beginning 1876, extended the time for the payment of pending assessments, and permitted payment by installments with interest at a designated rate.[4]

Second. Proceedings for levying special assessments were at first to be instituted uniformly by the common council. In 1853, a "bureau of arrears" was established, with the duties previously performed by the street commissioner and comptroller in relation to advertising, selling and leasing lands for assessments, taxes and regular rents of Croton water and the redemption of the property sold.[5] In 1857, the legislature created the offices of "commissioners of taxes and assessments" to have charge of assessments for local improvements

[1] *Laws of New York, 1869*, chap. 920, p. 2406.

[2] *Laws of New York, 1872*, chap. 580, p. 1412.

[3] *Laws of New York, 1873*, chap. 335, p. 484. See also *ibid., 1875*, chap. 476.

[4] *Laws of New York, 1876*, chap. 103, p. 82; *ibid., 1877*, chap. 159; *ibid., 1878*, chap. 255.

[5] *Laws of New York, 1853*, chap. 579, p. 1065.

directly under control of the council.[1] In 1865, the whole matter of sewerage and drainage was given over to the exclusive direction of the Croton aqueduct board, with power to institute special assessments to defray the expenses incurred, and during the same year, the commissioners of the Central Park secured the sole care, management and control of the streets mapped out in a certain specified district—a jurisdiction repeatedly enlarged by subsequent legislative action until 1870, when the department of public parks succeeded to all the powers and duties of the commissioners of the Central Park.[3] The year 1870, also saw the department of public works receive the powers hitherto belonging to the street commissioner and the Croton aqueduct board,[4] as well as the establishment of a board of street openings.[5] By an enactment of the succeeding legislature, the board of health secured power to institute proceedings for special assessment for the drainage of lands.[6] The act to reorganize the local government of the city of New York, passed 1873, made but minor changes; the most important of these was the stripping of the department of public parks of its authority over certain streets and boulevards and the conferring of that authority upon the department of public works.

Third. A statutory remedy for an unjust assessment was provided by the legislature for the first time in 1858.[8] During the session of that year, following as it did the year of the great

[1] *Laws of New York, 1857*, chap. 677, vol. ii., p. 497.

[2] *Laws of New York, 1865*, chap. 381, p. 715.

[3] *Laws of New York, 1865*, chap. 564, p. 1133; *ibid., 1865*, chap. 565, p. 1136; *ibid., 1866*, chap. 367, p. 818; *ibid., 1867*, chap. 697, p. 1748; *ibid., 1870*, chap. 137, p. 366.

[4] *Laws of New York, 1870*, chap. 137, p. 366.

[5] *Laws of New York, 1870*, chap. 383, p. 881.

[6] *Laws of New York, 1871*, chap. 566, p. 1202.

[7] *Laws of New York, 1873*, chap. 335, p. 484.

[8] *Laws of New York, 1858*, chap. 338, p. 574.

banking crisis, a law was enacted "in relation to frauds in assessments for local improvements in the city of New York," imposing upon the supreme court the duty of hearing petitions for the vacation of any assessment on account of "fraud or legal irregularity," and in case the alleged fraud or legal irregularity was proved, to issue an order annulling the assessment and the lien created thereby. But a judgment of this character was not to discharge the property-owner from liability to a re-assessment according to law for such amount as would otherwise have been justly chargeable. The legal effect of this action was modified in 1870.[1] While hitherto the whole charge was to have been removed whenever the assessment had been unlawfully increased, the judge might now simply reduce the assessment upon the lands of the aggrieved party by deducting the proportionate sum by which it had been so increased; nor was any fraud or irregularity in the proceedings to collect a special assessment by sale of the assessed premises to give grounds for anything more than a mere setting aside of such sale, leaving the respective rights and liabilities of the parties assessed and the municipal corporation as unimpaired as if such sale had not been made. Two years later, a new law prohibited the court from vacating or setting aside an assessment for any omission to advertise or irregularity in advertising any proceeding relative to the improvement, for any omission of any officer to perform a duty imposed upon him, for any defect in the authority of any department acting in connection with the assessment, or for any irregularity or technicality except only in cases in which fraud should be shown, or in which the cost of repaving should be charged against property-owners who had been assessed for the original paving.[2] In 1874, the law of 1858 was amended so as to allow the vacation of assessments for "fraud or sub-

[1] *Laws of New York, 1870*, chap. 383, p. 881.

[2] *Laws of New York, 1872*, chap. 580, p. 1412.

stantial error" instead of for "fraud or legal irregularity."[1] At the same time, the statutory remedy was made the exclusive remedy of the taxpayer, and the act of 1872 made to apply to all improvements whatsoever, already completed or then being made or performed, or which should thereafter be made or performed. Again in 1880, the legislature itself appointed commissioners to act as a board for the revision and correction of all pending assessments—an act intended to relieve the pressure upon the judiciary.[2] It declared, furthermore, that no existing provision of law should be taken to permit any court to vacate or reduce an assessment, in fact or apparent, thereafter confirmed, whether void or voidable, otherwise than to reduce such assessment to the extent that it should be shown to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event should that proportion of such assessment which is equivalent to the fair value of any local improvement, with interest from the date of confirmation, be disturbed for any cause.

Thus far had the system of taxation by special assessment been evolved in its application to New York City at the time of the consolidation act of 1882. That law made no great innovations.[3] Its purpose was to reorganize the municipal government, and to codify the law relating to that city; the details of the system under consideration were not materially altered, and we shall have occasion in another part of our work to examine it as a fully developed whole. In the meantime, the commonwealth of New York had not confined its grants of powers of special assessment to its metropolis alone. One by one, the other local authorities had similar provisions incorporated into their charters, until at present the system of taxation by special assessment for benefit is the foundation

[1] *Laws of New York, 1874*, chap. 312, p. 366.

[2] *Laws of New York, 1880*, chap. 550, p. 798.

[3] *Laws of New York, 1882*, chap. 410.

upon which local improvements are erected in every municipal corporation within its jurisdiction.

§ 4. *Massachusetts.* An attempt has been made to find a precedent for special assessment laws in Massachusetts, in some of the enactments of the old general court during the colonial period.[1] This attempt will not endure the light of criticism. The order of May 19th, 1658,[2] by which a committee, appointed to lay out a way from Roxbury to Boston Farms, were "to judg what is meete satisfaction to the proprietors for the way and that they have power to impose an aequal part upon such of Boston or other tounes, as shall have benefit of such way," presents a question of distributing local burdens among local authorities, and not that of special assessment upon individuals. Similarly the laws of 1692[3] and 1760,[4] respecting the construction of streets in Boston after devastation by fire, according to which certain expenses were to be assessed by a jury "in proportion to the benefit or conveniency any shall have thereby," evidently contemplated charging those only whose property had been increased by strips of land taken from other property-owners. The many sewer and drainage acts beginning 1702, proceeded upon the theory that prevailed in England at that time; the sewers were regarded as the private property of abutting land-owners, who were authorized to enforce a proportionable payment toward their cost from any person who should subsequently cut into them. Not until 1834 did the main sewers become public property, thus furnishing a basis for true special assessments.[5] Of all the

[1] Dorgan *vs.* City of Boston, 12 Allen, 223.

[2] *Massachusetts Colonial Records*, iv., pt. 1, p. 327.

[3] 4 William and Mary, chap. 1, *Massachusetts Charter*, p. 1.

[4] 33 Geo. II., chap. 3, *ibid.*, p. 387.

[5] Wright *vs.* City of Boston, 9 Cush., 233. For the acts themselves see 1 Anne, chap. 4, and 8 Anne, chap. 2, in *Massachusetts Charter*, pp. 142 and 161; also *Province Laws*, 3 Geo. III., chap. 27; *Statutes 1841*, chap. 115; *Statutes 1855*, chap. 105.

early laws of Massachusetts, that which most closely approximates a provision for special assessment was enacted in 1781.[1] This was an act for widening and amending the streets, lanes and squares in that part of the town of Charlestown which had lately been laid waste by fire. It confirms the plan of a committee to lay out the streets in question, and provides that the parties interested join with the committee in the appointment of appraisers, who shall not only consider the advantages resulting to persons part of whose land is taken, but also determine the sum which the owner of any estate benefited by the execution of the plan ought to pay, for which sums the owners would then become liable. But as a system for raising revenue, special assessment was not firmly planted in Massachusetts until 1866, when the constitutionality of a law passed for that purpose the previous year was definitely affirmed.[2]

§ 5. *The Remaining New England Commonwealths.* Of the remaining New England commonwealths, Rhode Island has maintained the constitutionality of special assessments since 1856. In that year its courts upheld a law enacted in 1854 authorizing the city of Providence to lay out, enlarge or straighten streets, no longer according to the old method, but in a manner provided in the act, namely, to assess not to exceed one-half of the expenses incurred upon persons interested in estates adjudged, in the first instance, by a board of commissioners, to be benefited by the improvement to that extent.[3] Similar charges, such as for building sidewalks or for constructing drains, had previously been authorized in Providence, but these were regarded chiefly as sanitary measures.

In Connecticut the power to levy special assessments for street improvements was judicially affirmed in 1854.[4] At that

[1] 1 *Massachusetts Special Laws*, p. 21.

[2] Dorgan *vs.* City of Boston, 12 Allen, 223, affirming act 1865, chap. 159.

[3] Matter of Dorrance Street, 4 R. I., 230.

[4] Nichols *vs.* Bridgeport, 23 Conn., 189; Cone *vs.* City of Hartford, 28 Conn., 363.

time provisions of like character were contained in most, if not all, of the city charters in the commonwealth, either in respect to the laying out or improvement of streets or in respect to public parks, sidewalks, sewers and other municipal purposes.

The highest court of Vermont decided in 1872 that municipal corporations might assess individuals for benefits derived from sewers, sidewalks, aqueducts, *et cetera*,[1] The laws of New Hampshire provided for the collection of similar charges for the construction of sewers in 1870,[2] and for sidewalks and street improvements five years later.[3] In Maine, too, a law of 1872 authorizes the assessment of damages arising from the laying out, widening or altering any new street in any city upon the owners of adjacent lots "in proportion as such lots are benefited or made more valuable by such laying out, widening, alteration or discontinuance."[4]

§ 6. *Pennsylvania.* Pennsylvania had something very similar to a system of special assessment enrolled upon her statute-book at the beginning of last century. By a province law of 1700, commissioners or assessors were to be appointed by the governor with four of his council for regulating the streets and water courses, the pitching, paving and graveling thereof; the clearing of docks and repairing landing places and bridges in the towns; and to defray the charge of pitching, paving, graveling and regulating the said streets, and scouring and cleaning said docks, each inhabitant concerned was to pay towards the same in proportion to the number of feet of his lots or landings adjoining on each or either side of the said streets or docks.[5] A subsequent act of 1769 appointed commissioners for regulating, pitching, paving and cleaning the highways, streets, lanes

[1] Allen *vs.* Drew, 44 Vt., 174.

[2] *New Hampshire General Laws, 1878*, chap. 78, sec. 7.

[3] *Ibid.*, chap. 78, sec. 3.

[4] *Maine Revised Statutes, 1884*, chap. 18, sec. 31.

[5] Quoted by Read, J., dissenting, in Hammett *vs.* Philadelphia, 65 Pa. St., 146, p. 157.

and alleys, and for regulating, making and amending the water courses and common sewers within the inhabited and settled parts of the city of Philadelphia; but the expense was to be defrayed by a special tax on the basis of the general property tax.[1] And in 1790, the cost of street improvements was brought expressly within the general property tax.[2] While the assessment of abutting property-owners for the expense of street improvements thus lapsed in Philadelphia proper, yet the various suburbs, as they become incorporated, retained the old system. Such provisions are found in the acts incorporating Northern Liberties in 1803,[3] Spring Garden in 1813,[4] and Kensington in 1844.[5] Not until the consolidation act of 1854 were special assessments for benefit for street improvements again introduced into Philadelphia,[6] and even then, scarcely as a survival of the ancient colonial practice. For in the meanwhile, the city of Pittsburgh had been authorized by acts passed in 1832 and 1833 to apportion the cost of opening streets upon the lot-owners thereby benefited, and to make them a lien upon the property, and these acts had been declared to be constitutional by a decision handed down the following year.[7] In this decision, moreover, we have the statement of Justice Rogers that the principle of assessment for benefit was at that time a new feature introduced into the Pennsylvania law from New York. The constitutionality of such laws has been repeatedly affirmed by Pennsylvania courts, so that the doctrine is now solidly established in that commonwealth.[8]

[1] Carey and Bioren's *Pennsylvania Laws, 1769*, chap. 594.

[2] Carey and Bioren's *Pennsylvania Laws, 1790*, chap. 1498.

[3] Carey and Bioren's *Pennsylvania Laws, 1803*, chap. 2354.

[4] *Pennsylvania Laws, 1813*, chap. 3703.

[5] *Pennsylvania Laws, 1844*, chap. 215.

[6] *Pennsylvania Laws, 1854*, chap. 16, sec. 40.

[7] McMasters *vs.* The Commonwealth, 3 Watts, 294.

[8] Schenley *vs.* City of Allegheny, 25 Pa. St., 128; City of Philadelphia *vs.* Tryon, 35 Pa. St., 401; Schenley *vs.* City of Allegheny, 36 Pa. St., 29.

§ 7. *The Remaining North Eastern Commonwealths.* The system of special assessment very naturally spread from its first abode in New York to the neighboring commonwealth of New Jersey. The grant to the city council of Newark under the charter of 1836, not long after the validity of such laws was first attacked, was held to be a perfectly proper legislative function and in no way repugnant to the organic law of the commonwealth.[1] This decision was re-affirmed a few years later.[2] The system has been widely developed in New Jersey, although of late years, since the reckless abuse of that power by some of her municipalities, not so much discretionary power has been left to the local authorities.

In Maryland the first judicial recognition of special assessments came in 1847.[3] It was then held that the legislative act of 1838, giving the city of Baltimore authority to impose upon the benefited property-owners the expenses of opening new streets and the ordinances passed to carry that authority into effect, did not offend against the constitutional provision prohibiting the taking of private property for public purposes without just compensation. The court sustained the law not only under the taxing power, but also under the right of eminent domain, and they quote copiously from the New York decisions, from which commonwealth the doctrine had evidently been derived.

Taxation by special assessment has also received the sanction of congress so far as to adopt it for operation in the District of Columbia. By an act of 1865 power was conferred upon the corporation of the city of Washington to charge the expense of making street improvements upon the proprietors of adjacent lots, and this delegation of authority was supported by the supreme court of the United States as inseparable from

[1] The State *vs.* Dean, 23 N. J. L., 335.

[2] The State *vs.* City of Newark, 27 N. J. L., 185.

[3] Alexander and Wilson *vs.* The Mayor, *etc.*, of Baltimore, 5 Gill, 383.

the exclusive legislative power over the district vested in congress by the federal constitution.[1] The same method of raising revenue has since been in constant use at the Capital City.

As early as 1857, the legislature of Delaware granted the city of Wilmington the power to levy special assessments for benefits resulting from certain designated street improvements.[2] A detailed procedure was prescribed at the same time. The point of constitutionality has not yet been raised in the courts.

Special assessments have also been provided for in West Virginia by the code of 1868.[3] The statute was under judicial interpretation in 1876, but its validity was not considered.[4]

§ 8. *The Southern Commonwealths.* When we come to investigate the subject of special assessments in the South, we find the system cropping out about the same time in two widely separated commonwealths—in Kentucky and in Louisiana. The course of legislation and of judicial interpretation in Kentucky has not been altogether harmonious. In 1837, the statute of 1831, amendatory of the charter of incorporation of the city of Louisville, and authorizing such impositions, was declared to be unconstitutional and void.[5] The court argued that such charges, not being general and according to a fixed valuation, were not taxes, and not being taxes, they thus constituted an attempt to take property without adequate compensation. Not until three years later was a similar authority as applied to the city of Lexington upheld by the court, and then only by hypothetical construction of a quasi-municipal corporation out

[1] Willard *vs.* Presbury, 14 Wall., 676.

[2] *Delaware Revised Statutes, 1874*, chap. 73, secs. 63 to 68.

[3] Chap. 47. For sidewalks only.

[4] Douglass *vs.* Harrisville, 9 W. Va., 162.

[5] Sutton's Heirs *vs.* City of Louisville, 5 Dana, 28; quoted with approval in Rice *vs.* Danville, Lancaster and Nicholasville Turnpike Co., 7 Dana, 81.

of each separate square in the city.[1] In the decision of the court, Chief Justice Robertson says that all the streets had been made prior to the incorporation of the city; that most of them had been graded and paved prior to the year 1826, and always in the mode then objected to as unconsitutional; and that he consequently deferred to precedent.[2] However this may be, the course of judicial interpretation was turned so as to permit the continuance and extension of the system previously threatened.[3]

In Louisiana special assessments date from 1832. The legislature of that year thought proper to provide that the costs and expenses of opening new streets in the city of New Orleans which had been formerly, under the act of incorporation of the city, paid out of the public funds in the city treasury, should be thereafter paid by what are called assessments for benefits on the owners of lots adjacent to the newly opened street.[4] This act was sustained in the courts in 1854, while, at the same time, a subsequent act of 1847, which merely repeated the old provisions as to taxation, was held to be unconstitutional under the new constitution of 1845, as lacking equality and uniformity.[5] The power was, however, soon judicially recognized even under the new constitution as to both street improvements and the construction of levees, for which purposes an extensive application of special assessments has been made.[6]

The Mississippi courts in 1853 refused to declare unconsti-

[1] City of Lexington *vs.* McQuillan's Heirs, 9 Dana, 513.

[2] *Ibid.*, p. 523.

[3] See City of Covington *vs.* Boyle, 6 Bush, 204; Bradley *vs.* McAtee, 7 Bush, 667; Caldwell *vs.* Rupert, 10 Bush, 179.

[4] Municipality No. 2 *vs.* White, 9 La. An., 446, p. 450.

[5] *Ibid.*

[6] See Municipality No. 2 *vs.* Dunn, 10 La. An., 57; Yeatman *vs.* Crandall, 11 La. An., 220; Wallace *vs.* Shelton, 14 La. An., 498; Surgi *vs.* Snetchman, 11 La. An., 387; City of New Orleans Praying for Opening of Streets, 20 La. An., 497.

tutional the charter of Aberdeen of 1846, giving power to the city authorities to levy an assessment upon any lot or lots for the purpose of making improvements on the streets in front of such lots.[1] The same principle was later enunciated in connection with the levee taxes[2] and again after the close of the civil war in relation to the provisions of the constitution then adopted.[3] A recent decision of the highest commonwealth tribunal reads: "We believe the power exists: it has been recognized as an existing power in the state by the public, the legislature, and by at least three decisions of this court."[4]

In the charter granted Mobile in 1866, the legislature of Alabama attempted to confer power to make special assessments for street improvements according to the frontage of abutting lots. When issue was taken with this provision before the courts in 1871, it was held that the clause in the constitution of 1868 requiring all taxes to be assessed in exact proportion to the value of the property upon which it is levied, made that portion of the charter void and of no effect.[5] This ruling has just been explicitly reversed. The question arose whether the act of 1885 giving Birmingham the power of special assessment for the construction of sidewalks was in contravention of the constitution adopted in 1875. The court argued that, inasmuch as no such thing as local assessments for commonwealth taxation was known either in 1875 or at any other time, the constitutional limitations attach exclusively to taxation for commonwealth purposes and do not affect assessments levied by municipal authorities.[6]

[1] Smith *vs.* Corporation of Aberdeen, 25 Miss., 458.

[2] Williams *vs.* Cammack, 27 Miss., 209; Alcorn *vs.* Hamer, 38 Miss., 652.

[3] Daily *vs.* Swope, 47 Miss., 367.

[4] Macon *vs.* Patty, 57 Miss., 378.

[5] Mayor, *etc.*, of Mobile *vs.* Dargan, 45 Ala., 310, and Mayor, *etc.*, of Mobile *vs.* Royal Street Railroad Co., 45 Ala., 322.

[6] Mayor, *etc.*, of Birmingham *vs.* Klein, 89 Ala., 461.

Similarly in Texas, the charter of Galveston in 1871 providing for a system of special assessment for benefit was held to be a valid grant by the legislature in a decision handed down in 1875.[1] The same attitude was again taken by the court in respect to the charter given to Houston in 1883, when the latter was resisted as unconstitutional.[2]

The highest appellate court of Virginia, in the middle of the seventies, upheld an assessment for paving levied by the city of Norfolk according to the front foot.[3] That was the first time the point of constitutionality had been raised in that commonwealth, but the conclusion then reached has since been several times affirmed.[4]

So also in Florida an act of 1877 conferring upon any city or town council power to make specified street improvements and "to charge upon those benefited such reasonable assessments as may be agreed upon," or in case of disagreement as ascertained and fixed by five discreet freeholders, has been sustained as entirely within the competency of the legislature.[5]

The courts of Georgia have read the constitutional limitations upon taxation as referring to general taxation only, and have therefore upheld the constitutionality of an act passed in 1881 amending the city charter of Atlanta so as to allow special assessments for benefits resulting from street improvements.[6]

In North Carolina, too, it has been held that the class of taxes imposed only on those owners of property who derive a special benefit from a local improvement "are not within the

[1] Roundtree *vs.* City of Galveston, 42 Tex., 612.

[2] Taylor *vs.* Boyd, 63 Tex., 533.

[3] Norfolk City *vs.* Ellis, 26 Gratt., 224.

[4] Sands *vs.* City of Richmond, 31 Gratt., 571; R. and A. R. R. Co. *vs.* Lynchburg, 81 Va., 473.

[5] Edgerton *vs.* The Mayor, *etc.*, of Green Cove Springs, 19 Fla., 140.

[6] Hayden *vs.* City of Atlanta, 70 Ga., 817; also First M. E. Church *vs.* City of Atlanta, 76 Ga., 181.

[constitutional] restraints put upon general taxation."[1] These decisions, it is true, were occasioned by the act of 1881 providing for the fencing of townships at the expense of those benefited, but the reasoning and language employed by the court are most general in their character.

In South Carolina, on the other hand, an act of the legislature authorizing the assessment of the expense of opening a street upon the lot-owners benefited was declared unconstitutional.[2] Chancellor Dunkin maintained that the charge could not be included under the right of eminent domain, since no land was taken; that, lacking equality and certainty, it could not be a tax; and that the whole proceeding was at variance with the general principles of taxation and without sanction in the usage of the country. He repelled any analogy which might be drawn from an earlier act of 1764 incorporated into the city charter of 1783, since the latter applied to sewers, drains and sidewalks only under the power to abate nuisances, and carefully preserved the cardinal principle of assessing "ratably and proportionably to the value of lands and houses." The act of 1850 introduced a new element by directing the commissioners in making the assessment to "take into consideration the advantages to be derived from the improvement by the proprietors respectively." It is this new element to which the court denied their sanction.

Several of the earlier decisions of the courts of Arkansas seem to imply assent to the doctrine of special assessments,[3] but whatever force these cases may have been thought to bear, has been completely undermined by a subsequent ruling. In 1874 the framers of the new constitution expressly recognized the principle in question,[4] but mis-stated the idea in rather con-

[1] Cain *vs.* Commissioners, 86 N. C., 8; affirmed in Shuford *vs.* Commissioners, 86 N. C., 552.

[2] State *vs.* City Council of Charlestown, 12 Rich., 702.

[3] Washington *vs.* The State, 13 Ark., 752; McGehee *vs.* Mathis, 21 Ark., 40.

[4] "Nothing in this constitution shall be so construed as to prohibit the general

tradictory terms when they required such assessments to be "*ad valorem* and uniform." As a consequence, when a case in point arose in 1877, the court declared an assessment for paving levied according to frontage unconstitutional and in conflict with that article of the constitution which requires taxation to be uniform and according to the true value in money.[1] The clause just cited was thereby construed to mean simply that taxes might be laid upon property in specially designated improvement districts, but within those districts must be equal and uniform according to the value of each tract assessed. In case value should be a just criterion of benefit, this proceeding might approximate a special assessment; in all other instances, the constitution has merely employed a misnomer to represent nothing more than a system of ordinary local taxation.

In Tennessee the course of judicial interpretation has been very like that in Arkansas. As early as 1845, an ordinance imposing upon each owner of a lot the expense of constructing a foot-pavement in front thereof was upheld as valid legislation.[2] In a more recent decision,[3] however, the court has disapproved of all distinction between taxation and local assessment, and has held the latter to be distinctly forbidden by that article of the constitution which inhibits the taxation of property except according to its value. The charter granted Memphis in 1866, then, giving that municipality authority to

assembly from authorizing assessments upon real property for local improvements in towns and cities, under such regulations as may be prescribed by law; to be based upon the consent of the majority in value of the property-holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform." *Constitution of Arkansas, 1874*, art. XIX., sec. 27.

[1] Peay *vs.* City of Little Rock, 32 Ark., 31.

[2] The Mayor and Aldermen *vs.* Maberry. 6 Humph., 368, followed in Washington *vs.* The Mayor, *etc.*, of Nashville, 1 Swan, 177; and Whyte *vs.* The Mayor *etc.*, of Nashville, 2 Swan, 364.

[3] Taylor, McBean & Co. *vs.* Chandler, 9 Heisk., 349.

levy assessments for street improvements according to frontage, was held to be so far unconstitutional and void.

§ 9. *The North Central Commonwealths.* Special assessments for benefits resulting from street improvements were introduced into Michigan with the Detroit city charter of 1827. The constitutionality of that portion of the charter was affirmed in 1853;[1] but in 1860, the method employed, namely, to require each lot-owner to pay the cost of the improvement in front of his lot, was held to be obnoxious to that principle of taxation which demands a regular apportionment of the charges imposed.[2] After this ruling of the court, Detroit went back to the plan of apportionment by front feet without securing an amendment to its charter; this proceeding was legalized by legislative action only toward the end of the sixties.[3]

The city charter of Cleveland, Ohio, which went into effect in 1836, provided for "a discriminating assessment" according to the benefit accruing from local improvements. When questioned in the courts, this authority was sustained as eminently valid.[4] Two years later a similar enactment was again affirmed with special reference to the recent constitution of 1851.[5] As the chief justice then said, "laws of the character of those now drawn in question, are no novelty in this state. Their origin is nearly co-eval with our legislative history, and they have continued to multiply as occasion has required from that time to the present."[6] A series of acts commencing 1846, extended their application to the construction of turnpikes and drains.[7]

[1] Williams *vs.* The Mayor, *etc.*, of Detroit, 2 Mich., 560.

[2] Woodbridge *vs.* City of Detroit, 8 Mich., 274.

[3] Motz *vs.* City of Detroit, 18 Mich., 495.

[4] Scovill *vs.* City of Cleveland, 1 Ohio St., 126.

[5] Hill *vs.* Higdon, 5 Ohio St., 243; affirmed in Ernst *vs.* Kunkle, 5 Ohio St., 520.

[6] 5 Ohio St., p. 244.

[7] Reeves *vs.* Treasurer of Wood County, 8 Ohio St., 333; Foster *vs.* Commissioners of Wood County, 9 Ohio St., 540.

In Illinois, the course of legislation for special assessment has not been uniform. The city of Chicago, from its first incorporation in 1837, has continued to possess authority to charge the expenses of local improvements upon the property-owners benefited. Under the charter of 1837 and 1851, this assessment was to be specifically by benefits, and action thereunder was incidentally recognized by the courts.[1] The charter revision of 1863 changed the rule of estimation from benefits to frontage. Assailed before the courts, this plan of assessment was declared to be unconstitutional; that is to say, it was intimated that the only legal method of levying assessments was by benefits.[2] Accordingly, this latter rule of estimation was re-instated by the charter of 1865 and once more judicially sustained.[3] To obviate all difficulty in the future, the constitution adopted by the commonwealth of Illinois in 1870, expressly recognized the power of special assessment.[4] This clause has been held to have done away with any constitutional restrictions which might previously have existed, and to permit the assessment to be made according to frontage whenever the legislature might deem that a proper criterion of benefit.[5]

In Indiana provisions for special assessments for street improvements have been traced in the early special charters of

[1] Canal Trustees *vs.* The City of Chicago. 12 Ill., 403; Chicago *vs.* Baer, 41 Ill., 306.

[2] City of Chicago *vs.* Larned, 34 Ill., 203; extended to sidewalks in Ottawa *vs.* Spencer, 40 Ill., 211.

[3] Wright *vs.* City of Chicago, 46 Ill., 44.

[4] "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise." *Constitution of Illinois, 1870*, art. IX., sec. 9.

[5] White *vs.* The People *ex rel.*, City of Bloomington, 94 Ill., 604; Falch *vs.* The People *ex rel.*, Johnson, 99 Ill., 137.

various towns: those of Lawrenceburg and Vevay of 1846; that of Peru of 1848.[1] An act of 1857 gave the city of Indianapolis the power to impose such charges upon the abutting property-owners[2] while already in 1852 similar assessments had been authorized by the legislature for benefits resulting from the construction of levees and drains.[3]

The act incorporating the city of Milwaukee, Wisconsin, in 1846, gave the local authorities power to impose a special charge upon lots in the city to defray the expense of opening, grading, improving and paving the streets and building sidewalks and crosswalks in front of such lots. The system was very early extended to include the benefit resulting from the construction of piers along the lake-water, and its validity has been repeatedly judicially affirmed.[4]

Special assessments were authorized in Missouri as early as 1853. From the very first, they have there maintained the support of the judicial tribunals.[5]

In Minnesota special assessment for benefit was at one time forbidden by the constitution. An act passed in 1861 authorizing the cost of a local improvement to be apportioned by commissioners "upon the real estate by them deemed benefited in proportion to the benefits resulting thereto," was held to be beyond the constitutional power of the legislature and consequently void.[6] This was in 1863. But the necessity of some such system of raising revenue in the rapidly growing cities of the West was soon felt to such a degree that,

[1] Palmer *vs.* Stumph, 29 Ind., 329.

[2] City of Indianapolis *vs.* Mansur, 15 Ind., 112.

[3] Anderson *vs.* The Kerns Draining Co., 14 Ind., 199.

[4] Lumsden *vs.* Cross, 10 Wis., 282; Weeks *vs.* City of Milwaukee, 10 Wis., 242; Soens *vs.* City of Racine, 10 Wis., 271; Bond *vs.* City of Kenosha, 17 Wis., 284.

[5] Garrett *vs.* City of St. Louis, 25 Mo., 505.

[6] Stinson *vs.* Smith, 8 Minn., 366.

finally, in 1869, an amendment was secured to the constitution enabling the legislature to delegate such power to the municipal corporations.[1] Under the amended constitution, the system has found judicial support.[2]

In Iowa the doctrine of special assessments appears already in 1855 and 1856, when charters of incorporation were conferred upon the towns of Lyons and Mount Pleasant.[3] Here their constitutionality has been upheld, not on the ground of the specific benefits derived, but upon the broad basis of the taxing power, and as approximating both the equality and the uniformity demanded by the principles of taxation.

§ 10. *The North Western Commonwealths.* Among the northwestern commonwealths, Kansas, as the oldest and first settled, leads in the introduction of special assessments. The city of Leavenworth acquired authority for that purpose with its charter of 1864.[4] When questioned in the light of the constitutional restrictions upon taxation existing in that commonwealth, the legality of that portion of the charter was promptly vindicated, the basis of the argument of the chief justice being "that under the general grant of power the legislature may authorize charges upon adjacent property for improvements of streets and alleys, and is not bound by the first section of the eleventh article of the constitution to require that such charges shall be equal and uniform throughout the whole city."[5]

[1] "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied, shall have a cash valuation, and be equalized and uniform throughout the state. Provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements, upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, or both, without regard to a cash valuation, and in such manner as the legislature may prescribe." *Constitution of Minnesota*, art. IX., sec. 1, as amended November 2nd, 1869.

[2] State *vs.* District Court of Ramsey County, 33 Minn., 295.

[3] The B. & M. R. R. Co., *vs.* Spearman and City of Mount Pleasant, 12 Iowa, 112; Warren *vs.* Henly, 31 Iowa, 31.

[4] Hines *vs.* Leavenworth, 3 Kan., 186.

[5] *Ibid.*, p. 202.

In Nebraska special assessments have been authorized since 1873. In that year an act passed by the legislature gave the city council of Omaha power to assess one-half the expense of grading a street upon the abutting lot-owners. This act was declared to be constitutional under the then existing constitution.[1] When, in 1875, the organic law was revised, largely upon the model of that but recently adopted in Illinois, it, too, was made to include a clause giving distinct approval of the system of special assessment.[2] This clause has been held to be exclusive, in so far as to require assessments for local improvements in cities, towns and villages to be made, if made at all, "in proportion to the benefits received."[3]

But Colorado is another commonwealth in which the principle of taxation by special assessment for benefit has been judicially repudiated. In thus repudiating the principle, the court based their action upon peculiarities of the constitution there in force.[4] According to their construction of that instrument, there is but one mode of taxation provided by the constitution of Colorado, and that is by a uniform levy upon all property according to a just valuation. The right to impose special assessments under the taxing power could not, therefore, be sustained. But while expressing these views upon the general question, the court showed no hesitation in falling back upon the old cover of police power in order to uphold such an assessment for the construction of a sidewalk. In this loop-hole they have left a convenient path for retreat—a path which the local authorities in Colorado have not been averse to utilize.[5]

[1] Hurford *vs.* Omaha, 4 Neb., 336.

[2] "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments or by special taxation of property benefited." *Constitution of Nebraska, 1875*, art. IX., sec. 6.

[3] State *vs.* Dodge County, 8 Neb., 124.

[4] Palmer *vs.* Way, 6 Col., 106.

[5] Special assessments according to benefits from sewers permissible: Keese *vs.*

The remaining northwestern commonwealths have but lately been promoted from the status of territories. The Dakotas, before their separation, enacted in 1887 a general law authorizing the city council of any city to make assessments for local improvements upon property adjoining or benefited thereby.[1] This act was subsequently adopted by both North Dakota and South Dakota respectively. The same year marks the date of the operation of general acts with similar provisions passed by the legislature of Idaho,[2] of Montana,[3] and of Wyoming.[4]

§ 11. *The Coast Commonwealths and Territories.* From the commencement of her career as an American commonwealth, California has adhered to the doctrine of special assessment for benefit. The first charter of San Francisco,[5] as well as the revisions of 1851 and 1855, provided for street improvements at the expense of the property-owners benefited and for imposing the charges in proportion to such benefits. In 1856 the rule of estimation according to frontage was introduced; in 1859 that according to valuation. Two years later recourse was had once more to assessment by the front foot, which method is still retained.[6] These laws have been upheld by a series of judicial decisions, the first one of importance having appeared in 1859 in relation to an act of 1853 which gave the city of Sacramento power to impose special assessments.[7] The system was confessedly borrowed from New York.[8] The constitution of California went so far as to put constitutional restrictions

City of Denver, 10 Colo., 112; and City of Pueblo *vs.* Robinson, 12 Colo., 593; but not for curbing and guttering apart from sidewalks: Wilson *vs.* Chilcott, 12 Colo., 600.

[1] *Compiled Laws of Dakota, 1887*, secs. 959 to 999.

[2] *Idaho Revised Statutes, 1887*, title XIII., sec. 2230, § 23.

[3] *Montana Compiled Statutes, 1888*, division V., chap. 22, sec. 430.

[4] *Wyoming Revised Statutes, 1887*, title IV., chap. 1, sec. 161: for Cheyenne only

[5] 1850.

[6] Emery *vs.* San Francisco Gas Co., 28 Cal., 345.

[7] Burnett *vs.* City of Sacramento, 12 Cal., 76; Blanding *vs.* Burr, 13 Cal., 343.

[8] Taylor *vs.* Palmer, 31 Cal., 240, p. 254.

upon the procedure which might be prescribed by the legislature in cases of special assessment. The clause in question[1] proved to be a greater hindrance to improvement than a protection to the taxpayers, and, as the result thereof, it was repealed in November, 1884.

In Oregon the system of special assessment has long had judicial as well as legislative sanction. In the charter of the city of Portland,[2] the legislature inserted a provision giving the municipal authorities power to apportion the expenses incurred for improving a street upon the owners of adjacent lots, and this act was in 1865 declared by the courts to be a rightful exercise of legislative authority and in complete conformity with the constitution.[3]

The original method of defraying the cost of street improvements in the incorporated villages and towns of Nevada was by a special tax levy upon the regular valuation of the property within a specially created improvement district. In 1881 all restrictions as to the manner of apportionment were abolished, so that the assessment may now be made according to the benefits conferred.[4]

Washington, while yet a territory, was restricted by her organic act from levying impositions, otherwise than according to value.[5] The constitution of 1889, however, expressly

[1] "No public work or improvement of any description whatsoever shall be done or made in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied and collected and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same, authorized or performed." *Constitution of California, 1879*, art. XI., sec. 19.

[2] Incorporated 1851.

[3] King *vs.* City of Portland, 2 Ore., 146.

[4] *Nevada General Statutes, 1885*, sec. 2052; sec. 2024.

[5] City of Seattle *vs.* Yesler, 1 Wash. Terr., 571.

authorizes the legislature to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment of the property benefited.[1] This authority has already been employed in a general municipal corporations act."[2]

Utah, too, has made application of the system of raising revenue under consideration. As early as 1865, Salt Lake City received power to levy special assessments for street improvements to be assessed by commissioners upon the property in prescribed districts "in proportion to the benefit resulting thereto."[3] Similar provisions are contained in the general act governing municipal corporations passed 1888.[4]

§ 12. *Summary.* In summing up we find that out of the forty-four commonwealths which now comprise the Union forty, besides two territories, have given legislative or judicial approval to the doctrine of special assessments. Two[5] of the four dissenting commonwealths allow such impositions for such purposes as may be included within the police power of the state, while one other[6] has made at least an apparent attempt to authorize such action by constitutional provision. Six commonwealth constitutions have given express recognition to the system,[7] only four of which are at present in effective operation. The small number of exceptions to the general rule thus adduced warrants us in maintaining that special assessment for benefit is a distinctive feature of American public finance.

[1] "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments or by special taxation of property benefited." *Constitution of Washington, 1889*, art. VII., sec. 9.

[2] Hill's *Statutes of Washington, 1892*, title IX., chap. 3, sec. 520.

[3] *Utah Compiled Statutes, 1888*, chap. 10, sec. 390.

[4] *Ibid.*, chap. 11.

[5] South Carolina and Colorado.

[6] Arkansas.

[7] Arkansas, California, Illinois, Minnesota, Nebraska, Washington.

CHAPTER III.

SPECIAL ASSESSMENTS IN PRACTICAL OPERATION.

§ 1. *Analysis of Systems of Assessment.* The various systems under which special assessments are actually levied in our American municipalities bear a general resemblance to each other, although they differ widely in many important points. If we seek to analyze them, we shall find that the numerous provisions naturally fall under ten distinct headings. First, we inquire into the purpose of the assessment. Secondly, we ask what conditions must be fulfilled in order to give the assessing body legal jurisdiction. Thirdly, what kinds of notice and hearing are required, and at what stage of the proceedings. Fourthly, the subjects assessed, or rather the property included within the assessment district. Fifthly, the rule of estimating the benefits to the property thus included. Sixthly, the limitations upon the amount of the levy. Seventhly, how and by what action the sums assessed are made final charges against the parties benefited. Eighthly, the legal nature of these charges. Ninthly, the methods of collection. Tenthly, what, if any, statutory changes have been ingrafted upon the taxpayers' ordinary remedies for illegal assessments.

It will aid us materially in our study if we obtain a clear view of some particular system in practical operation before we concern ourselves with the local variations and abuses or defects. This once accomplished, these variations may be the more easily understood. The typical system—if we can call any one system typical—is that of New York City. Some of its provisions trace their origin back to the charter of 1813, and since then have been constantly and repeatedly amended,

adapted and reformed. The New York system, moreover, has long been successfully applied in raising revenue for many vast municipal improvements, and has been moulded especially with reference to its practical working.

§ 2. *Special Assessments in New York City.* There are two distinct and separate administrative systems in force in the city of New York, by which special assessment proceedings may be conducted. These two systems are exclusive, not concurrent. Whether an assessment should be levied by the one method or by the other depends entirely upon the purposes for which it has been authorized. The line of cleavage seems to be the exercise of eminent domain. That is to say, the opening, widening, straightening and closing of streets, involving the taking of private property, must be undertaken in connection with certain legal formalities before the courts, and consequently come within the sphere of the law department and the board of street openings. In the remaining cases for which special assessments are authorized by law—for building wells and cisterns, erecting pumps, pitching, paving, regulating and repairing streets, relaying pavements, constructing sewers, raising, reducing, leveling or fencing vacant lots and public slips—in these cases, the assessment for benefits is under the control of the board of assessors and the board of revision and correction. In one respect the line appears to have been illogically drawn; for where, in changing the grade of a street, the abutters' property rights are injured and an award for damages rendered necessary, the proceeding, although analogous to that for laying out new streets, comes nevertheless within the province of the board of assessors, instead of that of the law department. The various steps required for levying these two classes of assessments have very little in common. We shall do well to consider each method separately.

§ 3. *Assessments for Street Improvements.* First, then, the regular assessments for street improvements and the like. The improvement itself is carried out by the proper municipal de-

partment, either upon its own initiative or that of the common council, as the statutes may provide. Only after the work has been entirely completed does the chief of the department under which it has been done certify the cost of the same to the board of assessors. The board of assessors consists of four disinterested persons, whom the commissioners of taxes and assessments are authorized to appoint from time to time. It is their duty, upon receipt of the certificate of cost of any improvement, to send such certificate to the city comptroller for an indorsement of the interest chargeable upon such advances as the city may have made during the progress of the work. When this certificate has been returned to them with the interest added, they proceed to assess the amount shown upon its face to have been expended, or so much thereof as has been duly ordered, upon those property-owners to whom the special benefits of the improvement are to accrue.[1] The board of assessors determine both the area of the assessment district and the extent of the benefits within the area, unless a permanent area has been previously fixed.[2] For their guidance in determining the area, the law lays down the rule that it should include all lands and premises deemed to be benefited. Property owned by the city forms no exception. Within the assessment district the charge is apportioned according to the individual benefit, subject to two limitations, namely, first, that the charge does not exceed the benefit, and second, that it be no greater than one-half the assessed valuation of the property affected. This is the procedure which the letter of the law seems to prescribe. The board of assessors, however, read the statute more liberally. What they in fact do, is this. Where the district as determined includes only such property as abuts upon the improvement in question, they divide the

[1] If a street has been once paved at the expense of abutting owners, an assessment for repaving can be made only upon petition by the owners of a majority of the front feet on the line of improvement.

[2] *E. g.*, sewer districts.

cost among those chargeable in the ratio of the frontage of the property assessed. Should the district include lands not within this rule, the various parcels are laid off into strips or zones in accordance with their comparative proximity to the work. The board proceed upon the theory that the degree of benefit varies inversely with the distance from the line of the improvement. The abutting property is then assessed at so much per front foot or per square foot, the next nearest zone at a less rate, and the other zones proportionably. Where, however, the change of grade of a street involves damages for which awards must be made, the board of assessors make the assessment separately upon each property-owner, after first giving notice and hearing whatever evidence may be offered.

Upon the completion of the assessment roll, the board are required to give notice by publication for ten days successively, requesting all parties interested to present written objections within a period of thirty days. They may at the expiration of that time alter or modify the assessment list as they may see fit. If objections still remain, they are to be reported with the assessment to the board of revision and correction. This board, made up of the comptroller, recorder and corporation counsel, have power to consider the objections upon their merit, to subpœna and examine witnesses, and either to confirm the assessment or to send it back to the board of assessors for revision. The lapse of thirty days after receiving the report without action is equivalent to confirmation, and confirmation makes the assessment a final charge upon the property, subject, of course, to review by the regular courts upon petition.

§ 4. *Assessments for Street Openings.* Proceedings for the opening of new streets are instituted regularly by the board of street openings and improvements. After the particular work has been duly determined upon, and after notice of the same has been duly given by publication, application is made to the supreme court for the appointment of three commissioners of estimate and assessment, whom the

judges are to select in a manner prescribed by statute from two lists of names submitted by the property-owners and by the city respectively. The commissioners qualify for their duties and are allowed four months for the performance of their work, unless the time is extended upon application to the court which appointed them. The commissioners, after viewing the premises to be taken and listening to such of the interested parties as desire to be heard, make up their report upon the damages and benefits involved. They must necessarily themselves determine the district of benefit if it is to include lands not actually abutting upon the proposed street or public place. The damage inflicted and the benefits accruing are separately determined, and all the expenses of the proceeding are assessed upon the property-owners in the way of benefits, provided the body originally instituting the same have not ordered a specified portion of the cost to be defrayed by the corporation itself. The assessment for benefit, then, is really levied in the ratio of the excess of benefits over damages. All these separate items must be shown in the report, together with diagrams of the proposed improvements and a tabulated abstract of the estimate and assessment. When completed, the abstract is deposited by the commissioners along with any documentary evidence upon which it may be based, with the commissoner of public works, forty days before they intend to report to the court. The commissioners of estimate and assessment give notice by publication for thirty days, stating their intention to present their report for confirmation at a specified time and place, and that they will hear within the ten days just succeeding the thirty days after the first publication of the notice any objections thereto presented in writing. After making any just alteration or correction, the assessment is reported to the court. If, upon the coming in of such report, persons interested therein either by assessment for benefit or by award of damages still object to items aggregating more than one-half the total, then all further proceedings in the

matter must be discontinued, if such persons so desire. Otherwise after listening to any complaints that may be alleged against the report, the court either confirm it or remand it once more to the commissioners for correction, and so on until a report is secured that deserves confirmation.

§ 5. *Collection and Application of Assessments.* From the date of their confirmation, the various assessments for benefit become both liens upon the property benefited and personal liabilities of the owners. Notice of such confirmation must be given by the comptroller by public advertisement for ten days. If unpaid sixty days after entry upon the records, the charges begin to bear interest at the rate of seven per cent. per annum. Assessments for certain designated improvements, however, are payable in yearly installments each of five per cent. of the total amount charged, with seven per cent. interest upon the sums still unpaid. Whenever any assessment remains unpaid for three years, the comptroller is required to direct the clerk of arrears to proceed to collect the same by public sale according to law.

It is to be noted that, except in certain cases of street openings, the assessment is not to be made until after the expenses of the improvement, from which the benefits flow, have been incurred by the corporation. The time elapsing between the completion of the improvement and the confirmation of the assessment, is frequently of considerable duration. These immediate liabilities on the part of the city are met by payments of money realized from the sale of improvement bonds. Bonds of this kind may be issued by the comptroller at not less than par, and for a period not exceeding ten years, upon due authorization. The moneys payable upon these assessments are turned over, as they come into the city treasury, to the commissioners of the sinking fund, and by them applied toward the amortization of the municipal debt.

§ 6. *Remedies of the Taxpayer.* The usual common law remedy open to a taxpayer aggrieved by an irregular or fraudulent

assessment, is to secure a review of the proceedings upon a writ of *certiorari* returnable to the proper court. This method, as applied to assessments laid by the board of assessors, has been entirely supplanted in New York City by the exclusive statutory remedy of a petition for the abatement or reduction of the assessment. Such petition will be entertained by the supreme court only where fraud or substantial error can be proved. The courts are absolutely prohibited from reducing any assessment to a greater extent than it may be shown to have been increased by such fraud or substantial error. In no instance are they allowed to disturb that portion of the assessment which is equivalent to the fair value of the local improvement.

Besides this direct method of contesting an illegal assessment, there are two less direct remedies which may be employed by the taxpayer. First, he may pay under protest and then bring an action to recover the money thus paid. This is a rather dangerous pursuit; for whenever the payment has been voluntarily made with knowledge of all the facts and without the stress of coercion or threats amounting to the same, the courts will scarcely allow a recovery. Secondly, he may refuse payment and suffer the sale of his property for the delinquent assessment to proceed, and afterward dispute the title of the purchaser should the latter seek to enforce his claim to possession. The courts hesitate to give equitable relief so long as justice is attainable by the regular legal proceedings.

§ 7. *Local Variations: Purposes; Acquiring Jurisdiction.* While the New York system may be said to be in a certain way typical, not every American city is supplied with a similar duplicate procedure. It is true that the taking of land by expropriation must everywhere follow a prescribed judicial process, but there is no necessary connection between the assessment for damages and the assessment for benefits. So a number of municipalities—Baltimore, Boston, Cleveland,

Washington[1]—have regularly but one set of assessment officials. The new Massachusetts statute, providing for special assessments in Boston, is extremely careful to separate the two operations of assessing for damages and for benefits.[2] Wherever the duplicate system does exist, the procedure for opening streets approximates as closely as possible the ordinary judicial process required in the exercise of eminent domain. But even where there is really only one method of levying special assessments, there may be several different ways of setting the machinery in motion. The power to initiate such proceedings may be concentrated in the common council or legislative body, as in Chicago, Cleveland, New Orleans, Omaha, Philadelphia, San Francisco, Washington; or it may be delegated to the executive departments, as we have seen to be the case in New York, as also in Boston and Jersey City, usually the department of public works or board of street commissioners. The prevailing tendency seems to be toward a simplification and centralization of this power.

The purposes to which the American municipalities apply their systems of special assessment are in general the construction and improvement of streets. Nearly all of them are authorized to charge the expenses of opening new streets, of laying pavements, of constructing sidewalks, of grading and changing grades, and of building sewers, upon the property-owners thereby benefited. What they are authorized to do, and what they actually do, are, however, not always identical. Baltimore, for example, has power to assess the cost of various street improvements upon the abutting property-owners, but in fact does so only in respect to opening streets and constructing foot-ways. Chicago, Philadelphia and St. Louis are empowered thus to levy the expense of laying water pipes, but St.

[1] But special acts have provided special assessment tribunals, *e. g.*, act of congress, Sept. 27th, 1890.

[2] Act of 1891, chap. 323, as amended by act of 1892, chap. 418.

Louis makes no use of this power. In Chicago the cost of erecting lamp posts is included in the same category. On the other hand, several cities—Cleveland, Minneapolis, Omaha, St. Louis—may impose special assessments for the purpose of street sprinkling. Cincinnati once levied such assessments for street lighting, and Cleveland is authorized so to do. Assessments for street lighting are now almost unknown; they, as also the charges for street sprinkling, seem to fall upon the very border line between the field of assessments and that of fees and tolls.

In many instances, numerous safeguards are thrown about the taxpayer, in order to protect him against hasty action on the part of the body authorized to impose assessments for benefit. Of this nature are the various restrictions upon the acquirement of jurisdiction to act. Of course, the real test of authority is the ultimate power to order an assessment, in spite of the opposition of those who are to be charged. In Boston, Chicago, New Orleans, Philadelphia, Washington, the wishes of the parties immediately interested need not necessarily be consulted. No petition is required for valid action. Other systems offer alternative proceedings; in Jersey City, and for certain purposes in Cleveland, there must be either a petition of the owners of a major portion of the property to be affected, or the improvement must be ordered by an increased vote of the legislative body. In order to give jurisdiction in St. Louis, there must be either a recommendation from the board of public improvements, or a petition from the property-owners; and if the recommendation be accompanied by a remonstrance of any of the interested taxpayers, then the passage of the ordinance requires a two-thirds vote of the assembly. A petition may be absolutely necessary for assessments for all or for particular purposes, as in Baltimore, Cleveland, New Orleans, Omaha, or a remonstrance may utterly oust jurisdiction to act. For example, under the system employed in San Francisco, if, after the passage of an ordinance proclaiming the intention of the council to order a local im-

provement, the owners of a majority of feet frontage remonstrate in writing, jurisdiction for that improvement is ousted for six months, unless such majority petition therefor; but no remonstrance will hold where the assessment does not affect property in more than two blocks.

§ 8. *Notice; .Subjects Assessed; Rule of Estimation.* As regards the notice and the opportunity of a hearing for the taxpayers, the usual method is to give notice of an intention to order a local improvement before any arrangements whatever are made for carrying out the work. This is done in Baltimore, Boston, Chicago, Jersey City, New Orleans, and San Francisco. Its purpose is simply to enable protests to be entered against the whole undertaking. Either with it is coupled a statement of a time and place where the commissioners of assessment will hear evidence as to benefit, or a second notice is given at a later period. In St. Louis this notice and hearing are given by the board of public improvements before they recommend the work to the council. In Cleveland, the objectionable items are referred for equalization to a special board of equalization, while in Omaha, the council themselves act in that capacity. By the Chicago system, the estimate is made by "three members of the council or other competent persons"—in reality, the engineering department—and on approval of their report by the council, the latter file a petition in the county court for proceedings to assess the cost on the property-owners benefited. The court thereupon appoint three competent persons as commissioners to apportion the assessment. These commissioners must then give to the interested parties notice of the assessment and of the term of court at which a final hearing thereon will be had, and if objection be filed, the disputed points are submitted to a jury. As has been before pointed out, wherever the exercise of eminent domain and the assessment for benefit are indissolubly connected, the proceedings follow the regular course of judicial determination.

There are, on the other hand, a number of cities in which no notice need be given the property-owners until after the amount of the assessment has been fixed. This is the case in Omaha when assessments are laid for plank sidewalks, and in New Orleans when the purpose is to defray the cost of drainage. In Washington the taxpayer may not hear of the assessment until he is in fact presented with a tax bill for the same. The same is true with regard to assessments for sewers and water pipes in Philadelphia. The explanation of this situation in Philadelphia is found in the fact that, as the amount of the assessment is fixed by statute, no relief could be obtained by a hearing upon the proportionable benefits accruing. The party assessed, by resisting all attempts to collect the charge, may secure a judicial decision upon the legality or illegality of the assessment, but has no opportunity to attack the relative amount of benefits assessed.

The rule most commonly applied in fixing the assessment district is that of including all contiguous property to which benefits are supposed to accrue from the improvement in question. In Washington, New Orleans and Boston the property assessed must abut upon the line of work whose cost is sought to be thus defrayed. All such property is usually assessed; that is to say, the city pays its share upon whatever municipal property may be comprised within the assessment area. An exception is found in Philadelphia; here only such real property is assessable as is also subject to the general property tax.

The end aimed at in assessing each parcel within the district, is to ascertain the approximate benefits resulting thereto. As an index to this benefit the foot-front rule is employed wherever applicable. The practice of laying the lands off into zones, and subjecting them to different rates, as we have seen to exist in New York City, is frequently met elsewhere. In some cities, as in Philadelphia, a certain deduction is made in favor of corner lots. Assessment according to superficial area,

is practiced now and then in levying upon sewer districts. For street openings and improvements of like nature, the universal rule is to estimate the particular benefit to each parcel.

§ 9. *Limitations on Amount; Confirmation and Legal Nature.* The amount of the levy may be limited by statute in several ways. First, it may be absolutely fixed. This is the case in Philadelphia in respect to assessments for sewers and water pipes. The sum charged must be so much per front foot—no more, no less.[1] Second, the maximum charge may be determined in advance. As examples, we have assessments for sewers in Boston and in Cleveland.[2] Third, the ratio of the assessment to the value of the property may be fixed. Cleveland and St. Louis are authorized to impose the cost of local improvements upon the benefited proprietors, only to the extent of twenty-five per cent. of the fair valuation of the property. The restriction upon the authorities of San Francisco is placed at fifty per cent. of the value. Fourth, the portion of the cost of the improvement chargeable upon the property-owners may be limited. In Washington, one-half the expense is defrayed by special assessment, and the other half by congressional appropriation. In Cleveland, too, at least one-half of the cost of repaving streets, and one-fiftieth of the cost of other public works, must be borne by the city at large. Fifth, the statute may require certain designated items of expenditure to be deducted from the sum otherwise assessable upon private parties. The usual form of this restriction is found in provisions by which the defrayal of the cost of improving street intersections is withdrawn from the system of special assessment. This is the case with Cleveland, New Orleans and Omaha. Similar in scope is the clause in the charter of the last-mentioned city, which specially imposes

[1] Sewers, $1.50; water pipes, $1.00.

[2] $2.00 per foot in each city.

upon street railway companies the cost of paving between their rails. The new Massachusetts statute relating to Boston, prescribes a detailed procedure for ascertaining the proper amount to be assessed upon abutting owners for opening, widening and constructing streets. There the sum is obtained by taking such portion of the expense as fifty feet bears to the width of the entire street, if over fifty feet in width; in widening streets to a greater width than fifty feet, by deducting from the expense such part as the width in excess of fifty feet bears to the total widening. The remainders become a charge upon the whole community. Various combinations of these several restrictions upon the amount assessable, are found in different cities.

The several items on the assessment roll become final charges when confirmed by the body which ordered the assessment or appointed the commissioners. This is in most instances the common council, but in some a specified court or a designated ministerial board. In general the imposition is by statute made a lien upon the property assessed. The charters of Baltimore, Chicago, Cleveland, Omaha and San Francisco expressly constitute it also a personal liability of the owner. According to the law applicable to Cleveland the lien lapses two years after the assessment is payable, unless within that time proper action has been begun to collect the same.

§ 10. *Collection and Remedies.* Greater variations exist in the methods of collecting special assessments than in the provisions already considered. In some municipalities, notably Baltimore, Jersey City and New Orleans, there are no special arrangements for the collection of this revenue other than those provided for covering the general taxes into the treasury. Other cities again have a minute procedure prescribed for this purpose. The charter defines the time when the assessments become delinquent, whether or not they are payable in installments, the rate of interest they are to bear, the penalties which attach to non-payment, to what funds they are to be accredited,

when and in what manner proceedings are to be taken to collect unpaid assessments by sale of the property assessed. As an example we may cite the provisions of the system recently inaugurated in Boston. If the assessment is not paid within a year from the date of the passage of the order therefor by the board of street commissioners with interest, nine per cent. of such sum, including interest, is added to the next and each succeeding annual tax bill issued for the general tax upon that land. For any parcel for which no tax bill would otherwise be issued, the board are to issue a special tax bill. Each such sum is abated, collected and paid into the city treasury in the same manner as city taxes. The owner may at any time elect to pay the balance still due from him, or any part thereof, whereupon the board of street commissioners, with the approval of the mayor, may relieve his property from a corresponding portion of the lien. The amount collected is applied to the sinking fund for extinguishing those bonds upon which money has been raised to defray the expenses of the particular improvement.

The collection of the assessment charges is not always vested in the city officials. In Philadelphia, San Francisco and St. Louis, the assessment bills are turned over to the contractor in payment for his work, and he is deprived of all recourse upon the city in case of failure to collect. In such cities, the certified bills or warrants become delinquent at the expiration of a very short period, after which they bear interest at high rates, and become immediately collectible by sale proceedings. In Philadelphia, moreover, the tenant in possession may pay one of these tax bills, and hand the receipt to his landlord as so much money in liquidation of his rent. In all other respects the contractor is given all the remedies of the city, and may institute legal process for collection in its name.

It is the usual practice to leave the taxpayer who thinks himself aggrieved by any assessment entirely to his ordinary remedies under the common law or code. His rights in this

relation are, however, limited in several cities. Thus, in Jersey City a writ of *certiorari* upon a sewer assessment can not be taken out after the expiration of thirty days from the date of confirmation. In Chicago and Omaha the courts are forbidden to entertain complaints of technical irregularities as grounds for invalidating an assessment or a sale based thereon. And in the charter of St. Louis there exists this peculiar provision, that where a contractor begins legal proceedings for the collection of an assessment warrant, proof on the part of the defendant that the work was not performed according to the contract, and that the real proportionable value of the work had been offered the plaintiff, shall entitle the defendant to a judgment against him only for the amount so tendered, with costs imposed upon the contractor. In no large city outside of the commonwealth of New York has any one statutory remedy been made the exclusive remedy of the taxpayer.

§ 11. *The Rebate Nuisance.* We have learned from our historical study, that the commissioners originally appointed in New York were "commissioners of estimate and assessment." In other words, it was their duty to estimate not only the benefits resulting from the work in hand, but also the probable expense about to be incurred. The reason for this was that, in order to relieve the municipality of all special liability, the sums assessed upon the property-owners were collected in advance of the improvement, and applied to the expenditure as the work progressed. If the cost exceeded the estimate, the deficiency was supplied by a re-assessment; if it fell short of the assessment proceeds, the surplus was to be returned ratably to the contributors. As a matter of fact, the system employed departed from the theory long before it was recognized in the law. We have an instance appearing so early as 1836, where the actual making of the assessment was postponed until after the completion of the work.[1] For

[1] Doughty *vs.* Hope, 3 Denio, 249.

many decades now, it has been the invariable practice to make no assessment upon the parties benefited, until the exact expense of the improvement has been officially ascertained. This phase of development, through which New York passed at an early period, has not yet been reached in several other municipalities. In Minneapolis, in Chicago, in Cleveland, and most probably in numerous smaller cities, the assessment list is to-day made and confirmed before even a contract is entered into for the performance of the contemplated work. In the present experiences of these cities upon this point, we undoubtedly have re-appearances of abuses and defects similar to those which occasioned the change in New York.

§ 12. *Rebates in Minneapolis.* The situation in Minneapolis has recently occasioned serious alarm. The levies for local improvements are made in the light of an approximate estimate of the probable cost, and this estimate is always sufficiently liberal to cover all contingencies. The contractor's figures are as a rule considerably lower than those of the city engineer, and the taxpayer is thus compelled to pay a sum in excess of what is legally due. The excess in certain individual cases has been known to reach up into the thousands of dollars. It is said that there have been at various times upwards of $200,000 of such money in the public treasury, in reality belonging to particular property-owners. During the year 1891, $179,440.60 were collected as special assessments only to be subsequently refunded. Much of the money never reaches its owners, inasmuch as the taxpayers are scarcely less negligent in collecting rebates than in paying the original assessments. The remedy suggested by the authorities in charge of the system in Minneapolis is to delay the assessment until after the improvements have been effected.[1]

§ 13. *Rebates in Chicago.* The state of affairs in Chicago was

[1] The recommendations of the assistant city engineer are published in the Minneapolis Evening Tribune, January 23rd, 1893.

still worse until within the past few months. Here the so-called "guess-work" plan was in active operation, resulting in constant confusion in assessment administration, and in irreparable loss to the contributors. In no city in the country had the system of special assessment for benefit attained such a magnitude as in Chicago, and the extent to which excess payments were collected was upon a scale commensurate with the entire revenue. For many years the amount of rebates annually returned to their owners constituted over twenty per cent. of the total assessment proceeds. As indicated by the comptroller's books, the figures for three years were:

ASSESSMENT REBATES IN CHICAGO.

	Total Assessments.	Abatements.	Assessments Refunded.	Assessments Annulled.	Total Rebates.
1889	$4,220,869.93	$569,569.21	$482,181.77	$7,569.84	$1,059,320.82
1890	6,987,155.48	592,350 73	795,423.07	8,959.50	1,396,733.30
1891	8,790,443.29	436,918.55	1,031,919.47	28,073 37	1,496,911.39

These sums are the actual amounts paid back to the property-owners. The sole cause of the rebate system lay in the inaccurate estimates made by the engineering department. The latter, in their anxiety not to be caught in an under-estimation, were very careful to make the margin of excess wide enough to cover any errors which might have been committed.

The loss devolving upon the taxpayers was fourfold in its nature. Firstly, the contractors found no difficulty in learning how great an amount was authorized to be assessed upon the district benefited by a particular improvement, before they handed in their bids upon the work. In fixing their prices, they would then be influenced by the greatest possible sum attainable, and would thereby secure a greater remuneration than they would otherwise have been able to obtain.[1] Sec-

[1] This was emphatically denied by the contractors.

ondly, the property-owners were deprived of the use of the money paid in excess of the expenditures. They were required to pay six per cent. interest upon every deferred installment, but received no return from their money while lying idle in the city treasury. Calculated upon the same basis, the loss of interest during the year 1891 would amount to a sum in the neighborhood of $100,000. Thirdly, the annoyance and waste of time necessary in order to secure the rebate justly due, often counter-balanced any money value which might have been obtained. "To collect a rebate involves so much labor and bother, so much explanation to this clerk and that official, so many journeyings from bureau to bureau and from department to department, that it wearies soul and body. And when a man is called on to do all this, and then told that his rebate is but eight cents, as sometimes happens, he loses patience."[1] The fourth consequence was, then, that there remained in the city treasury to the credit of the rebate fund several hundred thousand dollars, for the greater portion of which no claimants had presented themselves. In 1890, the city council passed an order transferring $150,000 of this money to the general fund in order that the city might use it. Adding the sum still remaining in the hands of the city treasurer, the total of unclaimed rebates swelled to $385,000. This money belonged to people who failed to get notice of its award, to business men who would not waste their time in collecting it, to speculators whose property had passed through many hands since the assessments were paid. Add to all this the increased expenditures needed to perform the clerical work, and we have a picture of the useless costliness of the pernicious rebate nuisance.

That the rebate system is no necessary concomitant of the system of special assessment for benefit, is a fact that has already been appreciated at Chicago. An application of the

[1] Chicago Evening Post, July 14th, 1892.

simple remedy waited only upon the proper agitation. The agitation and investigation appeared during the summer of 1892. The reform quickly followed. It was effected in this way. The council passed an ordinance changing the time of making the assessment. Instead of being made as formerly upon guess-work estimates, the commissioner of public works now advertises immediately for proposals upon the contemplated improvement. After such proposals are received and bonds filed, the lowest bid of the responsible contractors is sent to the special assessment department, where the work of completing the assessment lists proceeds with this figure as a basis. Then, when the designated proportion of the assessment is covered into the treasury, the commissioner of public works closes the contract. This method of procedure has enabled the authorities to ascertain almost to a cent just what the proposed improvement will cost. The changes have in the main proved satisfactory while the rebate nuisance is rapidly disappearing.

§ 14. *Extravagance and Corruption.* The most frequently met accusation against the whole doctrine of special assessment for benefit is that it fosters extravagance and abets corruption. Whether or not it is true that municipalities are more easily led to make uncalled-for and premature improvements under one system of raising revenue than under another, is a point about which much might be said upon either side. It can not be denied, however, that we have several notable occurrences of such unwise action under the régime of special assessments, which have been followed by most deplorable consequences. Nor would a work upon this subject have a claim to completeness, did it not at least mention the important instances where taxation by special assessment for benefit has proved no bar to lavish expenditure or political corruption.

§ 15. *The New Jersey Insolvent Cities.* The quasi-insolvent condition of a number of New Jersey cities has long been

familiar to students of municipal activity. That their rapid decline under an overwhelming burden of debt was precipitated by a change in the judicial interpretation of the then existing special assessment laws, is a fact less widely known.[1] The method of providing for the expenses of local improvements by assessing the whole or a designated portion thereof upon the abutting property, had been the regular practice in New Jersey for many years. Under this accepted doctrine many cities, particularly Elizabeth, were induced to undertake extravagant and wholly unnecessary public works at the expense of the parties specially interested. The authorities issued assessment bonds in order to secure the funds needed for paying the contractors, and looked to the assessments as they should be collected to liquidate the bonded bebt. Elizabeth, for example, had miles upon miles of streets opened and laid with wooden pavements, through the supposed suburban districts, which as yet comprised nothing more than unbroken meadows or worthless woodland. For these purposes, millions of dollars were borrowed by sale of bonds in anticipation of the revenue from the assessments. The expectation that these improvements would forthwith transform unoccupied tracts of land into desirable residence property was sadly disappointed. In the meantime the property diminished in value; the interest charges and arrears upon deferred installments, mounting gradually higher and higher, soon frequently exceeded many times the value of the property assessed, and made it to the interest of the proprietors to release all title of ownership rather than to pay the charges due. Along with all this, came the change in the New Jersey legal doctrine as to the relation of the amount of the assessment to the actual possible benefits. This change, when applied in 1876 to the charter of Elizabeth, resulted in a decision rendering void all the assessments which had been levied in that

[1] An interesting account is given in the notes to 2 Dillon, *Municipal Corporations*, 928, *et seq.*

city.[1] This left the outstanding assessment bonds a general burden upon the cities which had issued them—a burden which soon reduced several municipalities to practical insolvency. The only path open was to resort to general taxation, in order to defray the charges for interest and the sinking fund. By 1879, it would have required annual taxation at the rate of six per cent. to meet the obligations of the city of Elizabeth. As a result, a series of relief acts passed the legislature, aiming by means of compromise to effect a settlement between the insolvent cities and their creditors, and incidentally to exert a pressure upon such of the latter as refused to compromise. An arrangement was perfected whereby a new series of municipal bonds was authorized as indemnification of the assenting creditors, while the dissenting creditors remained without effectual remedy upon their claims. Elizabeth has now satisfactorily adjusted most of the debt in question. Jersey City, in 1891, still counted over $5,000,000 as her liabilities upon assessment bonds issued for work during this period. In Newark the adjustment commissioners have just completed their task.

§ 16. *Assessment Arrearages in Brooklyn.* The course of affairs in Brooklyn during the decade just preceding the year 1880, was scarcely more re-assuring. On December 1st, 1879, tax certificates to the amount of $3,650,000 were outstanding, of which $1,386,992.37 represented arrears of special assessments which should have been paid in yearly installments.[2] In addition to this sum were $3,164,504.88 of assessments still to be paid but not yet due. The improvement bonds which had been issued to anticipate this revenue were bearing seven per cent. interest; they had never been considered as a city debt proper, the assessments levied upon the property benefited and the prior liens upon such property having been deemed ample

[1] Bogert *vs.* City of Elizabeth, 27 N. J. Eq., 568.

[2] There were at the same time arrearages of $6,243,069.32 for general taxes.

security for the amortization of the bonds. A great portion of the burden of this debt was thus through arrears of payment being shifted over by the delinquents upon the city as a whole. The process by which this result was brought about may be gathered from the following table:

ASSESSMENT ARREARAGES IN BROOKLYN.

Year.	Improvement Bonds Issued.	City's Assets Against the Bonds.		Deficit.	Surplus.
		Assessments in Process of Collection.	Assessments not yet Paid.		
1871	$6,654,405.10	$2,367,938.20	$4,187,270,43	$99,196.47	.....
1872	6,552,055.10	2,502,885.88	3,508,167 83	141,001.39	.....
1873	6,232,104.67	2,661,775.61	3,316,707.02	253,622.04	.....
1874	6,463,000.00	2,514,670.14	3,979,084.95	.....	$30,755.09
1875	5,902,000.00	3,981,159.95	1,991,715.36	.....	70,875.31
1876	6,956,000.00	3,630,947.39	1,447,770.31	1,877,812.30	.....
1877	6,614,000.00	3,701,028.82	699,196.46	2,213,774.72	.....
1878	6,262,000 00	3,113,774.42	681.757.99	2.466,467.69	.....
1879	6,230,000.00	2,955,133.36	629,639.08	2,645,227.56	.....

This deficit of $2,645,227.56 at the commencement of 1880, was to be still further increased by various items: Williamsburgh improvement bonds, $38,000.00; Brooklyn local improvement loan, $213,000.00; assessments uncollected for twenty years and thus lapsing, $86,851.83; an unknown amount of outstanding assessments upon city property; and a large amount of reductions and vacations. The vacations ordered by different bodies—the supreme court, the city court, the common council, the board of assessors, the legislature—summed up a total of $2,353,598.47. Altogether, the burden which had in these ways been cast upon the city made an amount not less than five and a half millions of dollars.

We can have no occasion to wonder, then, that this state of the city's finances was sufficiently alarming to call forth from

the comptroller a special report upon the problem of assessment arrearages.[1] The question propounded at the outset is, What can have been the cause of this condition of the arrears of taxes and assessments? In order to illustrate his view, the comptroller presented a map of the principal districts affected, upon which were shown both the assessed valuation of the property there situated and the amount of the public charges still due. These pieces of property had been considered by their owners as confiscated and as abandoned by them. Among the extreme examples cited, we find lots valued at $200, $400 and $500, subject to special assessments of $884.08, $1072.88 and $3871.25, respectively. The assessors had failed signally to do their duty, and had utterly disregarded the law which prohibited the levying of any special assessment beyond one-half the value of the property benefited. As many as eight separate and distinct levies had been made upon the same lots, when one assessment would have sufficed for practical confiscation. The conclusion of the comptroller was that the property in question "had not been confiscated by taxation, but by fraudulent and unnecessary local improvements forced upon the owners at a time when labor and material brought the highest prices; when the cost per cubic yard of filling was sixty-three cents; when contractors and many city officials became rich while property-owners and the city became poor.[2]" The only solution possible lay in re-adjustment and compromise.

§ 17. *The New York Assessment Commission.* New York City was a contemporary sufferer with Brooklyn, and from similar causes, although upon a larger scale. As we have seen, an assessment commission was specially appointed by the legislature, to the task of untangling the meshes of corruption. The commission began their labors in the autumn

[1] *Special Report of the Comptroller on Arrearages for Assessments for General and Special Improvements*, Brooklyn, 1880.

[2] *Report*, p. 18.

of 1880.[1] Originally created for a period of about fifteen months, they were repeatedly re-appointed by successive laws of 1882, 1884 and 1885, and continued their sessions until December 31st, 1886. The membership, at first consisting of the five chief municipal officers, varied by reason of resignations, deaths, and new appointments; for a considerable time it had sifted down to a little *junta* of two persons who continued to abate assessment charges with marvelous rapidity. The commission conducted their proceedings as a special tribunal, before which petitions for relief might be brought. They were authorized to act according to general equitable principles, and their jurisdiction under the statute extended over (1) all assessments confirmed on or before November 1st, 1880, and (2) all assessments thereafter confirmed for improvements previously completed, if appealed from within two months after confirmation. Upon request of the commission, John Kelly, then city comptroller, made the following statement as to the assessments falling under the first of the two classes:

Total amount of assessments confirmed prior to June 9th, 1880, on which arrears were due		$28,524,761.27
Amount assessed upon the city	$3,239,587.11	
Amount vacated by the courts	2,651,697.85	
Amount paid by property-owners	14,175,428.52	
		20,066,913.48
Amount remaining unpaid April 30th, 1880		$8,457,847.79

In order to give due consideration to this vast amount of business, systematic action was absolutely necessary. The method of procedure was simple. According to the interpretation of the commission, the laws provided that only one-half of the cost of the work should be assessed upon the abutting property-owners, to the extent of one-half of the assessed valuation of the property. This cost, after eliminating

[1] For proceedings, see their *Minutes*.

all elements of fraud which might taint the contracts, was to be charged proportionably upon the property benefited. After hearing the evidence submitted, the commission would decide upon the fair cost of the work at the time executed, and would reduce the assessment by whatever excess might be found to exist.

The grounds of complaint were numerous. The greater part of these charges were for local improvements inaugurated under the corrupt Tweed régime or its immediate successors. The works had been carried on upon a scale of audacious extravagance, and in portions of the city where they were not at the time justified. Great avenues were laid out and improved largely for the purpose of giving fat jobs to favorite contractors, and to provide fine drives for the pleasure and convenience of others than the abutting property-owners. In these cases, the commission estimated the probable expense of constructing an ordinary street adequate to no more than the needs of the neighboring inhabitants, and vacated the excess of the assessment. The reduction ordered in one important decision amounted to forty-two per cent.[1]

Another factor for which allowance had to be made was that of excessive prices paid upon special contracts. The city authorities, in the years gone by, would advertise for bids and accept the lowest, by whomsoever offered. The accepted contractor would perform a little of the work, then claim that his bid was ruinously low and throw over the contract. He and his bondsmen would be immediately released from their obligations to the city, and the remaining portion of the work would be forthwith re-let at fabulous rates, either to the same contractor or to others who stood in collusion. Attempts by the assessment commission to squeeze out this fraudulent element gave wonderful results. The assessments upon the property-owners quickly melted away, forty-three per cent. in one in-

[1] Sixth avenue grading, *Minutes*, p. 167.

stance, sixty-seven per cent. in another, and as much as eighty per cent. in still another.[1] In another case, an assessment was reduced from $670.50 to $106.65, a reduction of eighty-four per cent.[2]

A report to the board of aldermen under date of June 26th, 1885, shows that up to that time the commission had acted favorably to complaints upon 67 assessment lists involving charges to the amount of $2,875,179.65. Under the decisions rendered, this sum was reduced by $984,539.28 so as to stand at $1,890,640.37. Of these 67 assessments, 13 were wholly vacated. The commission during their entire existence vacated 15 assessments and reduced 59, a total of 74; the extent of the reductions was, in all probability, very close upon $1,200,000.

§ 18. *Statistics of Special Assessments.* To endeavor to secure accurate statistics of special assessments is a most difficult task. The eleventh census made an effort to present some figures regarding municipal finance, but the results are on their face incomplete and incorrect. According to census bulletin number 82, the receipts from all sources of "one hundred principal or representative cities of the United States" during the fiscal year 1889, were $359,024,392, of which $139,283,226 were derived from general taxes, and $14,676,092 from special assessments. A great objection to these statistics consists in this, that the cities enumerated are neither the one hundred "principal" nor the one hundred "representative" American municipalities. Moreover, even as to those cities included, the returns are in many cases manifestly incorrect.[3] But while it is thus easy to criticise the census, to give more accurate statistics involves numerous difficulties. Yet the fol-

[1] 120th street grading, *Minutes*, p. 385; 135th street grading, *Ibid.*, p. 553; Ninth avenue grading, *Ibid.*, p. 648.

[2] Fifth avenue grading, *Ibid.*, p. 212.

[3] *E. g.*, Brooklyn, Cleveland, Philadelphia, Minneapolis.

lowing table has been compiled[1] in order to show the receipts from special assessments for the year 1891 in 25 cities containing each over 100,000 inhabitants, as compared with the receipts from all sources and with the receipts from current taxes.

MUNICIPAL REVENUE FOR THE FISCAL YEAR, 1891.

Cities.	Census Population 1890.	Receipts from all Sources.	Receipts from Current Taxes.	Receipts from Special Assessments.
New York . . .	1,515,301	$86,838,343.79	$30,733,818.71	$2,541,856.11
Chicago	1,099,850	30,247,317.17	9,199.796.44	6,407,394.19
Philadelphia . .	1,046,964	23,400,495.79	12,137,058.07	1,063,331.57
Brooklyn	806,343	23,061,698.60	9,405,662.74	284,216.54
St. Louis. . . .	451.770	10,014,606.71	3,405,198.46	339,009.75
Boston[2]	448,477	24,650,173.21	9,653.072.65	38,647.83
Baltimore . . .	434,439	10,273,398.79	3,125,767.79	142,167.12
San Francisco. .	298,997	5,317,098.98	2,517,503.51	[3]1,348,877.00
Cincinnati . . .	296,908	7,082,355 78	2,825,692.34	519,679.17
Cleveland . . .	261,353	4,539,022.92	1,412,850.16	499,363.04
Buffalo[4]	255,664	9,979,661.51	2,845,997.78	2,451.468.85
Pittsburgh . . .	238,617	4,650 876.28	2,711,430.57	[5] 87,803.31
Washington. . .	230,392	6,293,522.96	2,290,536.88	134,064.53
Detroit.	205,876	3,642,130.16	2,481,474.66	223,826.28
Milwaukee. . .	204.468	7,987,286.23	1,963.955.12	45[illegible],086.68
Newark	181,830	5,286,851.49	1,819.376.32	176,338.93
Minneapolis. . .	164,738	4,583.431.98	1,305,800.88	669,168.27
Jersey City . . .	163,003	3.536,656.58	967,694.21	295,694.81
Omaha.	140,452	1,194,478.69	761,195.98	461,794.55
Rochester. . . .	133,896	3,878.975.62	1,676,813.73	461,504.64
St. Paul	133,156	5,598,654.95	1,103,795.04	561,887.08
Providence . . .	132,146	7,473.888.22	2,097,479.40	47,743.71
Denver . . .	106,713	1,566,478.02	731,133.30	191,793.62
Indianapolis . .	105,436	1,181,788.12	525.322.70	306,777.38
Allegheny . . .	105,287	1,630,230.07	617,545.91	75,225.36

A few words of explanation are required. Inconsistencies necessarily arise from the varying methods of accounting in

[1] From the finance reports of the particular cities.

[2] Nine months only.

[3] *Census Bulletin* for year 1889.

[4] Eighteen months.

[5] Collection temporarily suspended in 1891; $1,029,351.50 in 1892.

different cities. In no two municipalities can the same system of book-keeping be found, and this fact alone is sufficient to preclude strictly scientific comparison in matters of finance. The receipts from all sources have but little significance, inasmuch as they may be abnormally swelled by revenue from extraordinary sources, such as gifts, devises, bond sales. Again, the current taxes are not always itemized in the finance reports; so where the actual receipts under this head have not been shown, the general tax levy is here used to supply the place. Finally, the returns of special assessments are defective in several minor respects. First, whenever the work is performed directly at the abutters' expense, the item does not enter the public revenue at all. This is very common in cases of foot-ways. It is also allowed for other improvements in various cities, notably San Francisco and Chicago, where the property-owners have the option of taking upon themselves the construction of the work in question. Secondly, where the contractor is paid by assessment bills to be collected by him, the amounts assessed are frequently entirely omitted from the treasurer's books. Thirdly, where the city receives by dedication new streets in suburban districts, it may have required, as a condition precedent to acceptance, that the cost of constructing the new roadway be defrayed by the property-owners benefited. If so, the sum expended would not enter the municipal budget. It is interesting to note that the system has brought the largest comparative returns in Chicago and Buffalo, nearly equalling in amount the revenue from current taxes in each of those places.

§ 19. *Classification according to Purposes.* The table on the opposite page gives a statistical view of the different purposes to which these assessments have been applied. It will be seen that the sums total in the two tables do not always coincide. This arises from the fact that the amount of assessments collected in one year, is seldom the amount of the assessments levied in that year. Here the latter figure is

ASSESSMENTS LEVIED 1891, CLASSIFIED ACCORDING TO PURPOSES.

CITIES.	Total Assessments.	Street Improvements — Grading, Paving, *etc.*	Street and Alley Openings.	Sewerage and Drainage.	Water Pipes.	Street Sprinkling.	Sidewalks and Foot-ways.	Lamp Posts.
New York. . .	$2,126,880.81	$1,275,233.89	$851,646.92	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
Chicago.	8,790,443.29	4,868,150.78	428,117.76	$2,363,199.74	$479,352.34	. . . . .	$562,761.27	$88,861.40
Philadelphia .	1,063,331.57	553,372.56	10,000.00	259,658.17	217,546.85	. . . . .	22,752.99	. . . . .
Brooklyn. . . .	284,216.54	190,582.86	4,599.53	66,639.02	. . . . .	. . . . .	10,876.57	8,247.89
St. Louis. . . .	339,009.75	. . . . .	177,245.10	. . . . .	. . . . .	$161,764.65	. . . . .	. . . . .
Boston[1].	38,647.83	. . . . .	. . . . .	26,922.39	. . . . .	. . . . .	11,819.45	. . . . .
Baltimore . . .	142,167.12	. . . . .	142,167.12	. . . . .	. . . . .	. . . . .	. . . . .	. . . . .
Cincinnati . . .	519,679.17	464,700.67	. . . . .	55,679.17	. . . . .	. . . . .	. . . . .	. . . . .
Buffalo[2].	3,378,140.85	2,285,648.26	98,646.13	909,656.60	. . . . .	32,832.29	38,439.19	4,945.92
Detroit	223,826.28	164,131.56	14,865.02	42,027.09	. . . . .	. . . . .	2,655.11	. . . . .
Milwaukee . .	455,086.68	212,359.99	32,350.35	96,363.64	88,232.26	18,501.32	5,834.82	. . . . .
Newark	176,333.93	47,122.30	9,847.02	86,898.13	. . . . .	. . . . .	. . . . .	. . . . .
Minneapolis. .	669,168 27	315,595.50	. . . . .	. . . . .	93,368.57	80,393.75	179,820.45	. . . . .
Omaha	461,794.55	360,545.18	. . . . .	57,354.46	. . . . .	. . . . .	43,895.31	. . . . .
St. Paul.	561,887.08	312,146.36	12,463.91	102,780.85	. . . . .	42,052.41	35,055.09	. . . . .
Providence . .	47,743.71	4,439.00	1,581.00	28,971.63	. . . . .	. . . . .	12,447.08	. . . . .
Denver.	191,793.62	79,429.40	. . . . .	181,366.11	. . . . .	. . . . .	2,498.11	. . . . .
Indianapolis. .	388,850.62	365,325.49	1,673 00	13,894.72	. . . . .	. . . . .	10,157.41	. . . . .
Allegheny . . .	98,946.54	72,050.84	2,269.59	24,626.11	. . . . .	. . . . .	. . . . .	. . . . .

[1] Nine months only.

[2] Eighteen months.

given whenever possible. Even these numbers present but an inadequate idea of the extent of the work annually performed by special assessment officials. In Chicago, there were over 2000 separate assessments laid during the year 1891. In New York, during the same year, 100 street opening proceedings were considered by the department of law, and 345 assessment lists were received by the board of assessors—a total of 445. Of these, 17 and 239 respectively reached the final stage of confirmation.

§ 20. *Variations in Receipts from Special Assessments.* While receipts from special assessments constitute a form of extraordinary revenue, yet their variations are on the whole not so great as might be expected. The truth of this statement may be gathered from the figures below, which show the various returns in several cities for a period of eleven years. The omissions are due to lack of data, not to absence of special assessments in those years, and the same reason explains why partial figures for particular classes of improvements only are presented for New York and for Providence.

ANNUAL VARIATIONS IN ASSESSMENTS.

Year.	New York Sinking Fund Assessments.	Chicago Total Assessments Levied.	Philadelphia Total Assessments.	Omaha Total Assessments.	Providence Sewer Assessments.
1881	$651,723.23	$1,227,169.71	.....	.....	$104,811.19
1882	994,578.29	1,395,372.98	.....	.....	7,596.85
1883	993,957.25	2,232,757.04	.....	.....	9,468.46
1884	1,150,550.58	2,857,905.28	.....	.....	18,344.90
1885	876,119.82	2,889,544.80	.....	.....	17,254.43
1886	628,336.08	3,307,567.99	.....	.....	35,437.73
1887	513,238.57	3,160,474.67	$444,500.75	.....	26,675.75
1888	460,726.82	3,655,956.78	1,076,685.00	$1,470,086.54	43,939.96
1889	216,760.40	4,220,869.93	1,085,431.16	892,328.29	32,080.34
1890	304,387.49	6,987,155.48	.....	1,032,345.24	27,484.08
1891	301,226.31	8,790,443.29	1,063,331.57	461,794.55	28,885.35

§ 21. *Statistics of Assessment Arrearages and Sales.* Statistics of arrearages of assessments are not readily obtained.

The general testimony of assessment officials is, that although a greater proportionate number of such impositions become delinquent than of general taxes, still the loss entailed upon the city treasury is not so large. We have seen that in Brooklyn there were assessment arrears to the amount of $1,386,992.37 in 1880, while the arrears of general taxes were $6,243,069.32. In New York City, at the same time, the assessment arrears were $8,457,847.79; this sum has since been materially lessened, but at present the uncollected general taxes of the years 1841 to 1891 are $15,505,526.16. In Newark, the unpaid assessments amounted in 1891, to $555,534.18; in Jersey City they were $2,187,108.66 as against $3,399,290.41 of unpaid general taxes. These unpaid assessments can frequently be collected only by sale of the property affected. We might have expected that New York City would have taken seriously to heart the costly lesson of the assessment commission of 1880, but we find that in November, 1891, a public sale was held at which 4820 tax titles were disposed of for delinquent assessments, dating some of them from as far back as 1852 and 1854, for sums ranging from two cents up to $15,189.63, and adding up over one and a half millions of dollars.[1] There were sold in Chicago in 1891, 9,124 parcels of land to satisfy judgments for arrears of assessments. In Washington, on the other hand, assessment sales during the year amounted to only $401.85.

[1] See the *Notice of Sale*, a huge folio pamphlet of 63 pages.

CHAPTER IV.

THE LAW OF SPECIAL ASSESSMENTS.

§ 1. *The Legal Definition.* In a series of decisions reaching over the past three-quarters of a century, the courts of this country have evolved a body of law touching the subject of special assessment for benefit tolerably complete and comparatively harmonious. While this legal interpretation has rested upon the provisions of multitudinous statutes passed by nearly as many different legislative bodies, yet, considered as a whole, the general principles underlying the main questions involved have, notwithstanding a few still unsettled points, been satisfactorily established. In a broad sense, taxes undoubtedly include assessments, and the right to impose assessments has its foundation in the taxing power of the government; and yet in practice, and as generally understood, the law draws a broad distinction between the two terms. This distinction has been thus defined:

"Taxes . . . are public burdens imposed generally upon the inhabitants of the whole state or upon some civil division thereof, for governmental purposes, without reference to peculiar benefits to particular individuals or property. Assessments have reference to impositions for improvements which are especially beneficial to particular individuals or property, and which are imposed in proportion to the particular benefits supposed to be conferred. They are justified only because the improvements confer special benefits, and are just only when they are divided in proportion to such benefits."[1]

[1] Roosevelt Hospital *vs.* The Mayor of New York, 84 N. Y. 108, p. 112. For other definitions see Matter of Van Antwerp, 56 N. Y., 261; Mayor, *etc.*, of Birmingham *vs.* Klein, 89 Ala., 461; Taylor *vs.* Palmer, 31 Cal., 240; City of Bridgeport *vs.* N. Y. & N. H. R. R. Co., 36 Conn., 255; Alexander & Wilson *vs.* The Mayor of Baltimore, 5 Gill, 383.

Assessments, then, though a species of tax, are understood to mean a special imposition levied in order to defray the expense of a specific improvement, upon those property-owners to whom particular advantages accrue, and in the ratio of those advantages.

§ 2. *Legal Theories.* These impositions are based on the idea of equivalents. As Judge Miller says:

"The principle upon which a corporation tax for the improvement of real estate is founded is quite familiar and well understood. It is based upon the theory that the owner of the property assessed is to receive a benefit corresponding with the amount assessed, and that this is to be paid to meet the cost and expense of the improvement. It is, therefore, of no consequence what the value of the lots may be, provided the enhanced benefit is equal to the assessment."[1]

In the eye of the law the person who pays the assessment has received, or is about to receive, advantages to his property over and above the advantages received by the other members of the community, and equal to or greater than the sum demanded of him. In this particular lies a most important distinction between a tax and an assessment. As stated in a very recent decision:

"A tax, it is said, is a contribution to the general fund; the amount is taken from the individual, and nothing which benefits him individually, as distinguished from the mass of citizens, is given in place of it. He pays, and by the amount he pays is poorer than he was before. Not so with an assessment of the class we are considering. The property-owner pays it, but in legal contemplation, he loses nothing. He receives the value of his money in the betterment of the property, and in addition to this, he is benefited to the same extent that all other citizens are, in that a thoroughfare of the city in which his property is situated and in which he probably lives, is improved. The authorities almost universally take such an imposition, though confessedly laid under the taxing power, out of the category of taxes and taxation as those terms are employed in

[1] Matter of Mead, 74 N. Y., 216, p. 221.

organic limitations on legislative power to levy or authorize the levying of taxes and in general statutes."[1]

The payment of a special assessment for benefit, then, is nothing more than an exchange. The improvement effects an enhancement in the value of the adjacent real property for which the owner pays its market value. But though ostensibly an exchange, it is a forced exchange. It may be required without the owner's consent, and often in the face of his direct opposition. How can such interference with private property be justified? By what authority can the government constitutionally compel a class of citizens to pay for an improvement which, though it may confer perceptible benefits, is neither demanded nor desired by them? A review of the judicial decisions which have attempted to solve this problem will show that the legal theories of special assessment have passed through three stages of development—stages separate and distinct in spite of broad over-lapping and frequent confusion.

§ 3. *Under the Police Power.* First, we have a number of cases in which the levy of special assessments is supported on the ground of the police power of the state. "Police power" is such an elastic formula that the judges would almost involuntarily turn to it for an explanation of every new burden laid upon the citizen. This was all the more natural in this instance, since the earliest objects for which special assessments were levied were analogous to sanitary regulations. The property-owner was required to grade or drain his lot or to lay a side-walk in front of it, and in case of failure to do so, the municipal authorities undertook the work on their own account, and caused the expense to be assessed upon the party benefited. This came clearly under the police power to abate nuisances, and could easily be regarded as a penalty for neglect to carry out the orders of the public officials. But the application of this theory is necessarily very limited in its scope; it must

[1] The Mayor, *etc.*, of Birmingham *vs.* Klein, 89 Ala., 461, p. 466.

permit the property-owner the privilege of effecting the improvement for himself, and can allow the state to interfere only when there is a clear case of default. The principle of special assessment for benefit was soon pushed forward into new directions, and a broader basis than the police power became necessary for its support.

§ 4. *Under the Power of Eminent Domain.* So the second theoretical stage, like the first, was conditioned by the purposes to which the system was applied. It was developed out of the process of opening new streets in the larger cities. From this operation it was seen that every new thoroughfare greatly enhanced the value of the abutting property. Compensation was to be made for the injury inflicted by the exercise of the right of eminent domain, but in this case the owner was not damaged, to say nothing of being positively benefited. Why pay damages to a man who has not been injured? The only way to arrive at a just result, it was said, is to deduct the value of the benefits from that of the property taken and to award the remainder, if any, as compensation. This process was apparently nothing more than the exercise of the power of eminent domain; and by extending its application, that power was invoked to support a compulsory contribution when the benefits conferred exceeded in value the property taken for the new street. This fact must account for and explain the statement frequently met with in the early reports, that a special assessment is not a tax. A tax is a burden imposed by law; here we have no burden, and hence no tax. The eminent domain theory, however, soon encountered insurmountable difficulties. All the ingenuity of the lawyer was needed to make it cover impositions for benefit upon persons from whom no real property was taken, and with the inauguration of special assessments for paving, parking, grading, *etc.*, it broke down entirely. The whole system was on the verge of destruction when the highest appellate court of New York, in the leading case of The People *vs.* The Mayor, *etc.*, of Brooklyn,

reversed the decision of an inferior court, which had held that special assessment, being an exercise of the power of eminent domain without adequate compensation for the property taken, was unconstitutional and void, and placed the system clearly and distinctly upon the foundation of the taxing power.[1]

§ 5. *Under the Taxing Power.* The third stage of legal theory then vindicates the phrase "taxation by special assessment for benefit." In whatever respects assessments may differ from taxes, they are levied under the taxing power; they are not included in the power of eminent domain. The distinction between these two powers is clearly pointed out by Judge Ruggles in the case just cited, contributions in the form of taxation being demanded of the citizen only as his share of a public burden which is to be borne by him in conjunction with all other taxable citizens, while contributions demanded under the power of eminent domain are special exactions in addition to his share of the public burden. That the imposition does not reach all subjects within the political district, does not in itself brand it as a special exaction within the scope of eminent domain, nor does it make it the less a tax. Judge Ruggles says:

"The people have not ordained that taxation shall be general so as to embrace all persons or all taxable persons within the state or within any district or territorial division of the state; nor that it shall or shall not be numerically equal as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax 'must be coextensive with the district or upon all the property in a district which has the character of and is known to the law as a local sovereignty;' nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained."[2]

[1] The People *vs.* The Mayor of Brooklyn, 4 N. Y., 419, reversing case of same title, 6 Barb., 209.

[2] People *vs.* The Mayor of Brooklyn, 4 N. Y., p. 427.

And Chief Justice Ames, of Rhode Island, in an opinion written but a few years later, says with regard to a similar objection:

"It is evident that it gains even a fanciful or formal support for its existence only when the law is to be applied to the case of one, part only of whose land is taken for the street, leaving a part benefited, or to one whose land is taken in one place, he having land benefited in another, in which cases the law provides for a set-off of benefits against damages—the balance either way, only, to be reported by the commissioners or a jury. We say formal or fanciful only, because it must be evident that after all the real question is, Can there be in such case a constitutional assessment for benefits upon estates benefited by the improvement; for if there can be, no reason can be given why a man should be excused from this assessment upon one part of his estate really benefited because another part of it has been taken to make the improvement."[1]

Many, if not all, of the confused utterances concerning the distinction between the powers of eminent domain and of taxation found running through the whole body of law upon this subject, arise from this, that the two operations of assessing damages and of assessing benefits have been hopelessly confounded. Just because, in many instances, the same set of persons act as commissioners to estimate the value both of property taken and of benefits conferred, the courts often assume that the two functions derive their authority from the same source. In only a few cases have they been plainly distinguished. In taking a man's land, he is damaged to the full market value of the property, and should be compensated to that extent. Whether he is benefited by the improvement is a separate inquiry, to be ascertained relatively to the entire benefit conferred.

§ 6. *The Essential Limitations.* A special assessment then is in one sense a tax. It is a compulsory contribution demanded of the taxpayer by the government as his share of

[1] Matter of Dorrance Street, 4 R. I., 230, p. 242.

a common burden. Yet, although special assessments come under the taxing power, the courts have generally concluded that they are not taxes within the technical meaning of that term as it is employed in commonwealth constitutions restricting the legislature in their exercise of the power of taxation.[1] Constitutional limitations requiring uniformity and equality of taxation and assessment upon a true money valuation, are held, with four or five exceptions, to apply to taxation for general purposes only, and consequently to be inapplicable to special assessments.[2] As we have seen, but very few commonwealths have any specific provision whatever upon the subject in their organic laws. Are there, then, no restrictions upon the legislative power of special assessment, or are there limitations inherent in the very conception of the term—limitations sufficiently determinable for interpretation by the courts? This question has been answered in the affirmative, and legal authorities have attempted to define the limits beyond which a legislature may not pass. They give as the essential characteristics of taxation, first, that it must be for a public purpose, and secondly, that it must aim at equality and uniformity by some method of apportionment.[3] To these may be added, as relating exclusively to special assessments, that the imposition must not exceed the benefit. We shall do well to consider these propositions in some detail.

§ 7. *Public Purpose.* First. Special asessments may be authorized for public purposes only. Private benefits may be involved—in fact, must not only be involved but must also be

[1] Cooley, *Taxation*, p. 636; also pp. 626 to 636, where provisions and citations of the separate commonwealths are given. 2 Dillon, p. 907 *et seq.*

[2] Mayor of Birmingham *vs.* Klein, 89 Ala., 461; Emery *vs.* San Francisco Gas Co., 28 Cal., 345; Hayden *vs.* City of Atlanta, 70 Ga., 817; Hines *vs.* Leavenworth, 3 Kan., 186; Yeatman *vs.* Crandall, 11 La. Am., 220, Motz *vs.* City of Detroit, 18 Mich., 495; Daily *vs.* Swope, 47 Miss., 367; Garrett *vs.* City of St. Louis, 25 Mo., 505; Cain *vs.* Commissioners, 86 N. C., 8; Roundtree *vs.* City of Galveston, 42 Tex., 612; Gilkeson *vs.* Frederick Justices, 13 Gratt., 577.

[3] Cooley, *Constitutional Limitations*, chap. 14; also 2 Dillon, sec. 737.

substantial, certain and capable of being realized within a reasonable and convenient time—but their object must be one in which the public is interested.[1] The doctrine that the power of taxation can not be exercised for other than public purposes is most authoritatively set forth in the case of the Loan Association *vs.* Topeka, in which the opinion was written by Justice Miller.[2] It reads:

"To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery, because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation. . . . There can be no lawful tax which is not laid for a public purpose."[3]

However difficult it may be to apply this limitation to cases of ordinary taxation, no such difficulty is found in its relation to special assessments. No one can tell which part of the general tax levy is to be expended for any specific object, and the limitation as to purpose belongs scientifically rather to the power to appropriate than to the power to tax.[4] Not so with special assessment for benefit. Here appropriation and assessment go hand in hand, and every taxpayer would be a party aggrieved should the proceeds be laid out for the ends of private gain. But while it may be easy to bring a definite case before the courts, whether or not a particular purpose is public is a question to be decided in the light of all the surrounding circumstances.

The chief purposes to which the system of special assessment for benefit has been adapted are those connected with the betterment of streets within the bounds of municipal corporations. As Judge Sawyer contends:

[1] Matter of Fourth Avenue, 3 Wend., 452.

[2] 20 Wallace, 655.

[3] *Ibid.*, p. 664.

[4] Burgess, *Political Science and Comparative Constitutional Law*, ii, p. 152.

"The improvement of a public street in a city, to be thereafter used and controlled by the public, is undoubtedly a public work. But it is equally clear, as a general proposition, that the improvement of a street is more beneficial to the local public, or the immediate district in which it is located, than to the whole city. But this fact renders the work no less one of a public character."[1]

Some improvements sustained by the system do not come strictly under this head, but all have distinct elements both of public and of private benefit. A few examples will demonstrate the limits within which the decided cases have permitted these two elements to vary. How far may the public benefit preponderate over the private? The repavement of a street by special assessment, although already paved at the expense of abutting owners, has been repeatedly upheld, even where the pavement replaced has been in fair condition and entirely satisfactory to the parties assessed.[2] A public square is for public use whether intended to be traveled upon or not.[3] A number of commonwealth courts have sanctioned assessments for turnpikes and highways through agricultural lands, on the ground that the property in the vicinity was specifically enhanced in value, but the Pennsylvania tribunals have come to the opposite view that in such cases the private interest is too small to form an adequate basis for special assessment for benefit.[4] In this connection, the case of Thomas *vs.* Leland is something of an anomaly.[5] The legislature of New York passed an act in the spring of 1835, authorizing three designated commissioners to assess the sum of $41,000 "upon the owners of all real estate situated in the said city [of Utica] in proportion to the benefits which each shall be deemed to have acquired by

[1] Emery *vs.* San Francisco Gas Co., 28 Cal., 345, p. 349.

[2] City of Lafayette *vs.* Fowler, 34 Ind., 140.

[3] Owners of Ground *vs.* The Mayor of Albany, 15 Wend , 374.

[4] Washington Avenue, 69 Pa. St., 352.

[5] 24 Wend., 65.

the location of the northern terminus of the Chenango canal in the city of Utica, as nearly as can be estimated." The money, when collected, was to be applied to the relief of certain private citizens who had entered into a bond for that sum as an inducement to procure the terminus of the canal in Utica. When the matter was brought before the court, the latter decided that these facts did not detract from the public purpose of the tax, and upheld the proceedings on the ground that individual personal benefit, aside from the benefit received as a member of the community, was not necessary. This decision carries the doctrine to the extreme. It would scarcely be followed by the courts of to-day.

On the other hand, there are cases which sustain a minimum of public benefit, and a maximum of private benefit. The various acts for the reclamation of swamp lands, for the drainage of overflowed fields, for the erection of levees, have all been held to contain an element of public interest on the side of improved sanitary conditions. The courts, too, have compelled the commissioners to include in their awards, for the payment of which assessments were to be levied, damages to the franchise of a turnpike company claiming to have been injured by the construction of a street which permitted people to avoid the toll-gate.[1] In another instance, the Hon. Samuel B. Ruggles made a report as referee "that if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reinterring the remains," and the money for this indemnification was forthwith assessed "upon the property-owners benefited."[2] The case of Litchfield *vs.* Vernon goes even one step further than this.[3] In April, 1859, an act passed the New

[1] Matter of Flatbush Avenue, 1 Barb., 286; Matter of Hamilton Avenue, 14 Barb., 405; The Seneca Road Co. *vs.* The Auburn & Rochester R. R. Co., 5 Hill, 170.

[2] Matter of Beekman Street, 4 Bradford, N. Y., 503.

[3] 41 N. Y., 123; People *vs.* Lawrence, 36 Barb., 177, affirmed 41 N. Y., 137.

York legislature entitled "an act to provide for the closing of the entrance of the tunnel of the Long Island railroad company, in Atlantic street in the city of Brooklyn, and restoring that street to the proper grade, and for the relinquishment by the railroad company of its right to use steam power within said city." In order to defray the expense of this so-called improvement, the statute subjected the owners of premises within a specified district to special assessments for benefit to that amount. In this suit, prosecuted for the payment of an assessment, the whole proceedings were questioned from the stand-point of constitutional law. The defendant offered to show that the entire scheme was intended for the benefit of the railroad company and not of the land-owners, that the closing of the tunnel and the removal of steam from the street conferred no benefit, but rather inflicted injury upon the property in question, and although opinion in general was divided on the subject whether or not the existence of the tunnel and the use of steam upon the street were beneficial or injurious, yet the offer was refused and all testimony on that point excluded. Upon appeal by the defendant, the constitutionality of the acts was upheld, although a new trial was granted for technical defects. Judge Grover, in his opinion, argued that the assessment was made in the exercise of an unlimited power of taxation by the legislature:

"This local assessment . . . was based upon the ground that the territory subjected thereto, would be benefited by the work and change in question. Whether so benefited or not, and whether the assessment of the expense should, for this or any other reason, be made upon the district, the legislature was the exclusive judge. The constitution has imposed no restriction upon their power in this respect. The counsel for the appellant concedes that this is true so far as closing the tunnel and grading the street are concerned, but insists that compensating the company for abandoning the use of steam and substituting therefor horse-power, does not come within

the like principles. I am unable to see upon what ground the power of the legislature can be limited in this regard."[1]

§ 8. *Apportionment.* Second. Special assessments must be levied according to a definite rule, and within a fixed district. The assessment upon the owner of a lot is not limited to the expense incurred for the improvement in front of his particular lot.[2] If it were so limited, it would be possible to make it cover an arbitrary exaction which could not be constitutionally upheld.[3] The power to apportion belongs to the legislature. So it is said in one case:

"This unlimited power to tax necessarily involves the right to designate the property upon which it is to be levied—in other words, to apportion the tax. And except in cases where the proceeding is merely colorable, and it is really and substantially an exercise of the right of eminent domain, the judicial tribunals can not interfere with the legislative discretion, however erroneous it may be."[4]

The legislature, however, need not exercise the power directly; they may delegate it to the municipal authorities, or they may permit the commissioners who estimate the benefits to fix the district for assessment also. In such cases, the statute indicates the principle on which the limits of the district are to be ascertained, as on all real estate "benefited," on all "in the vicinity," or on "adjoining" or "abutting" property.[5] But while the property to be assessed must in some manner be determinable, the district need not be fixed in advance.[6] It must necessarily depend more or less upon

[1] 41 N. Y., p. 133.

[2] *Ex parte* The Mayor, *etc.*, of Albany, 23 Wend., 277.

[3] Woodbridge *vs.* The City of Detroit, 8 Mich., 274; State *vs.* City of Portage, 12 Wis., 562.

[4] Scovill *vs.* City of Cleveland, 1 Ohio St., 126, p. 138.

[5] Burroughs, *Taxation*, sec. 146.

[6] People *vs.* The Mayor, *etc.*, of Brooklyn, 4 N. Y., 419.

the extent of the benefits.[1] Where, however, it is fixed by the legislative body, a conclusive presumption is raised that no property outside of that district is benefited; and if the commissioners include such property, the assessment is invalid.[2] When it is left to the commissioners to fix the district upon the principle of benefits, no property benefited can legally be omitted.[3] The commissioners can not assess for benefit lands lying outside of the designated district;[4] nor can the municipal authorities prescribe a district, so as to include property situated outside the municipality.[5] The power to fix the district, whether resting in the legislature, or delegated to the municipal authorities, is discretionary and judicial in its nature. "The levying of the assessment," says Judge Currier, "was an exercise of the taxing power. That is conceded. The legislature, therefore, in the exercise of this power, was at liberty in its discretion to impose the whole burden of the cost of the proposed improvement upon the neighboring proprietors to be benefited thereby; and so it might in its discretion limit or extend the district to be taxed, and thus increase or diminish the sum to be paid by any particular proprietor."[6] How small the district may be, is a point undecided. It should probably be determined not *a priori*, but as each case arises. The courts would certainly not interfere unless the action were shown to constitute an arbitrary exaction. How large the district may be made, is also undecided, but this question has been partly answered by our third essential limitation.

§ 9. *Not to Exceed Benefits.* Third. A special assessment

[1] State *vs.* District Court of Ramsey County, 33 Minn., 295.

[2] Alexander and Wilson *vs.* The Mayor, *etc.*, of Baltimore, 5 Gill., 383.

[3] City of Chicago *vs.* Baer, 41 Ill., 306.

[4] Turpin *vs.* The Eagle Creek and Little White Lick Grand Road Co., 46 Ind., 45.

[5] Matter of Lands in the Town of Flatbush, 60 N. Y., 398.

[6] Uhrig *vs.* City of St. Louis, 44 Mo., 458.

must not exceed in amount the estimated value of the advantage accruing from the improvement for which it is levied. A careful writer on constitutional law formulates the principle in these words:

"The conclusion to be drawn from the main current of decisions may therefore be said to be that, notwithstanding some apparent exceptions, local assessments are consititutional only when imposed to pay for local improvements, clearly conferring local benefits on the property so assessed, and to the extent of those benefits. They cannot be imposed when the improvement is for the general good, without an excess of local benefit to justify the charge."[1]

For the same reason that lands outside of the district and not benefited by the improvement, are not to be included in the assessment list, so property to which benefits do accrue ought not to be assessed over and above the value of those benefits. If special assessments are based on equivalents, then nothing more than an equivalent can justly be taken from the taxpayer. Such a sum, it is argued, would, so far as it exceeds actual benefits, be clearly the taking of private property without due compensation; it would be an arbitrary act of confiscation, not taxation. But though this may be said to be the general rule, it can not be termed a universal rule.

The courts of New York, in their early decisions, acted on the principle that unless the benefits accruing to neighboring lot-owners equalled the whole cost of the improvement, the special assessment could not be approved. As far back as 1830, they said that "if the benefit to the owners of property within the range of assessment is less than any contemplated improvement will cost, they can not upon any just construction of the act be made to pay the whole expense."[2] And again four years later, the same tribunal declared that "when property is not and can not be benefited to the extent

[1] Hare, *American Constitutional Law*, vol. i., p. 310.

[2] Matter of Fourth Avenue, 3 Wend., 452, p. 454.

of the amount assessed upon it, it is the duty of this court to send back the report until property can be found sufficiently benefited to defray the expense, or until the proceedings shall be discontinued."[1] Yet there was no intimation that this excess should be defrayed by the public at large, inasmuch as the statute contemplated throwing the whole burden upon the adjacent property-owners. This doctrine has, however, been somewhat modified by the more recent decisions of the New York courts, which now seem reluctant to fix any limitations upon the legislative power as regards the amount of the assessment to be levied. Says Judge Finch (1883):

"There is no force in the objection that after fixing the assessment district the total expense can not be assessed upon the property included, but only so much as is found to be the actual benefit. That is but another form of saying that the legislature can not impose the whole cost upon the area which it decides is benefited to that extent. The case of Stuart *vs.* Palmer expressly holds that the legislature may cause local improvements to be made, and authorize the expense thereof to be assessed upon the land benefited thereby. The resolution of the county board imposes upon each owner his share of the cost in proportion to his benefit accruing."[2]

Similarly an Ohio court has declared that though special assessment rests upon the principle of equivalents, yet it must in its very nature be fallible, and so, if the rule of apportionment be equal and uniform, the fact that the property is not benefited will not invalidate the assessment.[3] And in Vermont, Judge Redfield gave it as his opinion that the benefit need not be actual so long as there is a possibility of the benefit for which the assessment is made.[4]

A change has also taken place in the interpretation of the

[1] Matter of Albany Street, 11 Wend., 149, p. 153. See also Owners of Ground *vs.* The Mayor of Albany, 15 Wend., 374.

[2] Matter of Church, 92 N. Y., 1, p. 6; see also Stuart *vs.* Palmer, 74 N. Y., 183.

[3] Northern Indiana R. R. Co. *vs.* Conelly, 10 Ohio St., 159.

[4] Allen *vs.* Drew, 44 Vt. 174.

law by the New Jersey courts, but in a direction just opposite to the development in New York. Judge Elmer expressed the New Jersey view in an early case thus:

"The expense of opening and improving roads and streets is undoubtedly a governmental burden, and may be defrayed, at the discretion of the legislature, by taxes imposed on the state at large, or upon a particular district, or upon a particular class of persons or property, or upon the particular property benefited by the expenditure in the ratio of the advantage derived. The constitution of this state has imposed no limits on this power, except that it can only be exercised as a legislative power. Taxes to be such and to come within the legislative power, must perhaps operate upon a community or a class of persons or property by some rule of apportionment; but they may be universal or limited, discriminating or general, equal or unequal."[1]

The relation between the extent of the benefits and the amount of the assessment was taken to be a question for the legislative and not for the judicial branch of the government. A series of extravagant and unnecessary local improvements gave the courts occasion to modify their opinions. Already in 1866 in the Tidewater case, involving an assessment for draining agricultural lands, Chief Justice Beasley had said:

"The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act is the public benefit; how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public to be laid in the form of a tax upon certain persons who are designated, not indeed by name, but by their description as owners of certain lands."[2]

In other words, whenever the special benefit accruing to

[1] State *vs.* City of Newark, 27 N. J. L., 185, p. 193.

[2] 18 N. J. Eq., 518, p. 528.

private individuals from any local improvement is less than the cost of such improvement, the excess of cost must be paid from the public treasury. This doctrine gained undeserved notoriety in the celebrated Agens case, and has since been generally applied.[1] But where an act can be considered to permit assessments only to the extent of the benefits, it will be so interpreted;[2] nor is the power to raise money for street improvements by general taxation, inconsistent with the power to levy special assessments for the same purpose, in so far as the latter do not exceed the actual benefits.[3]

As soon as the question arose in Illinois, it was decided in the same way. While the entire cost of an improvement might legally be assessed upon the property-owners there must be a possibility that, in case the cost should exceed the benefits, some part of the expense might be charged upon the municipality. The court, therefore, laid down this rule:

"In these improvements the whole public are interested, and that public should pay the cost on the principle we have suggested; that is, assess to each lot the special benefits it will derive from the improvement, charging such benefits upon the lots, the residue of the cost to be paid by equal and uniform taxation."[4]

And the reasoning of Justice Breese in this case, which declared that an assessment by frontage did not secure an apportionment according to benefits and was therefore unconstitutional, has been largely followed in other commonwealths, although not always leading to the same result. In applying the constitution of 1870, however, the Illinois courts have made use of a specific provision authorizing special taxes for local im-

[1] Matter of Application for Drainage of Lands, 35 N. J. L., 497; State *vs.* Mayor, *etc.*, of Hoboken, 36 N. J. L., 291; State, Agens prosecutor, *vs.* Mayor, *etc.*, of Newark, 37 N. J. L., 415.

[2] Matter of Application for Drainage of Lands, 35 N. J. L., 497.

[3] State *vs.* Township of West Orange, 40 N. J. L., 122.

[4] City of Chicago *vs.* Larned, 34 Ill., 203, p. 282.

provements, as a pretext for practically over-ruling the Larned case. Justice Sheldon says:

"Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement, and if it does not in fact, in the present case, represent the actual benefits, it is enough that the city council have deemed it the proper rule to apply."[1]

In this manner a distinction is drawn between a special tax and a special assessment; a special tax may exceed the benefit conferred, a special assessment must be commensurate with the benefit.

Kentucky, too, has given explicit assent to the doctrine that the assessment necessarily demands an equivalent benefit.

"The power to impose this character of taxation, must to some extent depend upon the fact that the persons taxed are correspondingly benefited by the expenditure thereof. The courts would hesitate to interfere in cases in which it may be a question of doubt as to whether the persons taxed receive commensurate benefits; but where the taxation is so excessive as to render it doubtful whether the property to be benefited will suffice to pay the assessment against it, they can no longer be deemed taxation. To enforce their collection would be the exercise of absolute and arbitrary power over the property of the citizen—a power which, under our form of government, does not exist even in the largest majority."[2]

Similar views have been expressed by the courts of California and Mississippi,[3] and Pennsylvania has reached the same result in a negative manner.[4] In the latter commonwealth it is

[1] White *vs.* the People, 94 Ill., 604, p. 613.

[2] Broadway Baptist Church *vs.* McAtee, 8 Bush, 508, p. 517.

[3] Taylor *vs.* Palmer, 31 Cal., 240; Macon *vs.* Patty, 57 Miss., 378.

[4] Hammett *vs.* Philadelphia, 65 Pa. St., 146; Washington Avenue, 69 Pa. St., 352.

held that the expense of improvements conferring general benefits only, can not be defrayed by special assessment. To use the words of Justice Sharswood:

"Local assessments can only be constitutional when imposed for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They can not be so imposed when the improvement is either expressed or appears to be for the general public benefit."[1]

General benefits—that is, all over and above the special benefits—must be assessed upon the whole community.

§ 10. *Legislative Omnipotence.* Aside from these restrictions inherent in the very conception of special assessment, and in the absence of specific constitutional limitations, the legislative power to authorize such impositions is most absolute and far-reaching in its scope. Over the municipal corporation the legislature is omnipotent. It may, therefore, confer upon the municipal authorities the power to inaugurate a system of special assessments for particular purposes, which power may be limited or unlimited, absolute or only to be exercised upon fulfillment of prescribed conditions;[2] and the exercise of legislative discretion is not reviewable by the courts.[3] But no greater power can be granted than the commonwealth itself possesses.[4] The legislature, then, may sanction an assessment to pay a private claim which in law has no validity;[5] it may authorize an assessment according to the benefits conferred by a completed improvement for the purpose of giving a contractor an addition to the contract price which the corporation by its charter was forbidden to pay.[6] It may compel the municipal

[1] 65 Pa. St., p. 157.

[2] Broadway Baptist Church *vs.* McAtee, 8 Bush, 508.

[3] King *vs.* City of Portland, 2 Ore., 146.

[4] 2 Dillon, sec. 740, p. 899.

[5] Town of Guilford *vs.* Supervisors of Chenango County, 13 N. Y., 143; Sinton *vs.* Ashbury, 41 Cal., 525.

[6] Brewster *vs.* City of Syracuse, 19 N. Y., 116.

authorities to collect the levy before entering upon the construction of the improvement, or it may allow them to pay for the same out of the general fund, and then collect the sum from the taxpayers.[1] If the cost exceed the estimate, the additional amount may be raised by a new assessment.[2] In the matter of re-assessment, the legislature is quite unrestrained.[3] Where an assessment for a local improvement is irregular, the legislature may itself make, instead of authorize, a re-assessment;[4] or it may create a quasi-corporation, such as levee commissioners, for that purpose. The power to levy special assessments for benefit comes under the taxing power, and the exclusive power of taxation rests with the legislature.

§ 11. *Extent of Municipal Powers.* The question how far the municipal authority extends under the statute does not, with us, offer many difficulties. In the United States the municipality has only those powers granted by its charter expressly or by fair implication. No American municipal corporation can impose special assessments for benefit, unless the authority so to do has been distinctly and clearly conferred; and when the power is clearly given, then in its exercise it must be strictly followed.[5] If this power as delegated is to be exercised through certain specified officers, no other municipal officials can legally make such assessment.[6] In

[1] Matter of Roberts, 81 N. Y., 62.

[2] Hastings *vs.* Columbus, 42 Ohio St., 585.

[3] Raymond *vs.* Cleveland, 42 Ohio St., 522; Howell *vs.* City of Buffalo, 37 N. Y., 267; State *vs.* Township of West Orange, 40 N. J. L., 122; Matter of Delaware and Hudson Canal Co., 60 Hun., 204.

[4] Matter of Van Antwerp, 56 N. Y., 261. But in Mayor, *etc.*, of Baltimore *vs.* Horn, 26 Md., 184, the court declared unconstitutional an act of the legislature validating an assessment which had been declared illegal, on the ground that the act was an assumption of judicial power virtually reversing the judgment of the court.

[5] Burroughs, *Taxation*, sec. 148, p. 471.

[6] Matter of Zborowski, 68 N. Y., 88.

case the expense of the improvement may be defrayed by two different means—general taxation or special assessment—the decision as to which means shall be resorted to lies in the discretion of the municipal authorities. So, too, if the public benefit is such as to justify a contribution from the public treasury, it is likewise in their discretion to decide whether a portion of the expense shall be raised by general taxation, and, if any, what portion is so to be raised.[1] But the amount thus paid is to be constantly distinguished from any sum paid by the corporation as an assessment for benefits resulting to public property. Where the assessment is laid upon property owned by the city, whatever sum is paid by the city is as a property-owner, and upon the same principles with reference to amount and benefits as any other property-owner.[2]

The power of a municipal corporation to improve the streets by means of special assessment for benefits is a continuing power and is not extinguished by its initial use.[3] In consequence, where the improvement consists of distinct parts, the assessment for each part may be made separately, and, if desirable, at different times.[4] On the other hand, the costs of different projects, if related in sufficient degree, may be united in one assessment.[5] In every instance the charter must be strictly followed; the courts will not permit any substantial departure from the requirements of the statute.[6]

§ 12. *Purposes of Special Assessments.* The various objects for which special assessments have been authorized give some indication to what extent this system has been, and may be,

[1] Matter of Turfler, 44 Barb. 46; Matter of McReady, 90 N. Y., 652.

[2] Matter of Livingston, 121 N. Y., 94; Alexander and Wilson *vs.* The Mayor, *etc.*, of Baltimore, 5 Gill, 383.

[3] Matter of Furman Street, 17 Wend., 649; Williams *vs.* The Mayor, *etc.*, of Detroit, 2 Mich., 560; Municipality No. 2 *vs.* Dunn, 10 La. An., 57.

[4] Manice *vs.* The Mayor, *etc.*, of New York, 8 N. Y., 120.

[5] The People *vs.* The Village of Yonkers, 39 Barb., 266.

[6] Matter of Flatbush Avenue, 1 Barb., 286.

upheld in law. The greater number of these objects group themselves together in what are known as street improvements. In this group are included the opening of new streets and the widening, extending, and straightening of old ones; also grading, leveling, pitching and draining, providing them with pavements, guttering and sidewalks, beautifying them with shade-trees or parking, sprinkling them by day and lighting them by night. The same principle has also been applied to the betterment of water-ways so far as concerns the removal of obstructions, the construction of embankments and piers.[1] Cities, moreover, have by this means secured and improved public parks and squares.[2] Then there are the various monopolies of service whose cost of construction, when owned by the municipality, has often been defrayed in part by assessment for benefit upon those owners in front of whose lots the pipes or wires have been laid — sewers, water-works, gas-works, electric-lighting plants, wire conduits.[3] Sanitary improvements, such as the building of levees and the drainage of swamps, have been effected under this power of special assessment,[4] with which also the special taxation of a town or county in order to pay for court-houses, public buildings, or fencing townships, has been erroneously classed. This latter exercise of the power is not primarily an assessment in the ratio of individual benefits, but rather local taxation of a local authority for local purposes.

Many commonwealths sanction the construction of turn-

[1] Buffalo Union Iron Works *vs.* The City of Buffalo, 13 Abb. Pr. N. S., 141; Soens *vs.* City of Racine, 10 Wis., 271.

[2] Bouton *vs.* City of Brooklyn, 15 Barb., 375.

[3] Allen *vs.* Drew, 44 Vt., 174; Burroughs, *Taxation*, sec. 151, p. 498. See also an act to enable cities and towns to manufacture and distribute gas and electricity, *Laws of Massachusetts, 1891*, chap. 370, sec. 6, p. 951.

[4] Woodruff *vs.* Fisher, 17 Barb., 224. Welty devotes two chapters in his work on assessment to this subject—one, chap. 24, on drainage assessments, and one, chap. 25, on swamp land districts in California.

pikes by assessment of abutting farm lands, but the courts of Pennsylvania have refused to uphold impositions of this sort, on the ground that agricultural lands cannot possibly reap any definable and specific benefit from such undertakings, and they confine the system of special assessment for benefit to municipal improvements only.[1] Little fault can be found with this application of the rule that improvements for the general benefit must be paid for by general taxation, but the Pennsylvania judiciary, in the far-famed Hammett case, have, by a similar argument, refused to uphold assessments for repaving. In the words of Justice Sharswood:

"The original paving of a street brings the property bounding upon it into the market as building lots. Before that it was a road, not a street. It is therefore a local improvement with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values and fixing the proportion according to these, is a plan open to favoritism or corruption and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments."[2]

And for like reasons, various city charters have been made to read that while the cost of paving may be defrayed by spe-

[1] Washington Avenue, 69 Pa. St., 352; Burroughs, *Taxation*, sec. 151, p. 498; Reeves *vs.* Treasurer of Wood County, 8 Ohio St., 333; Foster *vs.* Commissioners of Wood County, 9 Ohio St., 540.

[2] Hammett *vs.* Philadelphia, 65 Pa. St., 146, p. 155.

cial assessment, repaving must be done at the general expense. Yet such decisions and such charter provisions are exceptions to the rule. Arguments may easily be found in favor of assessments for repavement equally as strong as those of Justice Sharswood. For example, in an opinion of Judge Lindsay:

"It is certainly well settled in this state that the cost of the original construction of the streets of a city may be imposed upon the owners of real estate alone without violating the constitutional limitations upon the legislative power of taxation. We can perceive no sufficient reason why the cost of the reconstruction of such streets may not also be assessed against the owners of the same character of property. In proportion as the trade and population of a city increase, the value of real estate advances. The owners of such estate receive and enjoy very nearly the sole permanent advantages accruing to the city from the construction, repairs, and reconstruction of the streets upon which their property may be situated. The general public certainly receives incidental benefits from such improvements; but the benefits to the owners of real estate are direct, appreciable and permanent. The original improvement enhances the value of lots adjacent to the street improved by making it accessible to the public and attracting trade and population. This enhanced value can be preserved in no other way than by keeping the street in repair and by its reconstruction when too much worn to be longer repaired. Hence, so far as the right to impose this local taxation depends upon the enjoyment by the persons taxed of peculiar local benefits arising therefrom, it seems to us that there is no substantial difference between the reconstruction and the original pavement of the street."[1]

§ 13. *Acquiring Jurisdiction.* In initiating proceedings for special assessments for local improvements, all the steps required for obtaining jurisdiction must be carefully taken. Every condition precedent must be strictly fulfilled. When a statute provides for a resolution by the council decreeing an

[1] Broadway Baptist Church *vs.* McAtee, 8 Bush, 508, p. 511. For a similar criticism of Hammett's case, see Simpson, *Municipal Assessments*, p. 6.

improvement necessary, such declaration is a distinct preliminary act which is indispensable to give the council jurisdiction.[1] Frequently for the purpose of opening, widening or straightening streets, an official map must first be secured, showing a plan of the proposed extension, and in such case the subsequent proceedings must conform with the plan. One very knotty question has arisen in connection with the requirement of a preliminary map, which is not yet entirely untangled. It is whether, in the estimate of damage, the value of buildings erected after the filing of the map, but before the actual opening of the street, should be taken into account. The early laws of New York provided that no compensation be given for improvements made, after the filing of the map, upon lands to be taken for the proposed street; and this provision was at first sustained by the courts.[2] But a few years later, it was held in the case of Seaman *vs.* Hicks that where, after confirming a permanent plan of contemplated streets, the trustees of Brooklyn subsequently laid out and opened a narrower street, and assessed the expense thereof upon the adjoining property, the trustees had by so doing waived the right, if they ever possessed it, to take the lands thus assessed for the opening of the street according to the original plan, without paying for buildings and improvements which had afterwards been erected and made upon the lands thus assessed.[3] And Chancellor Walworth then said, in commenting upon the earlier decision:

"I think, however, the position can not be maintained that where an individual has a single vacant lot in a city or village, which lot is of great value for building purposes and worth little or nothing for any other use, the legislature may authorize the corporation to appropriate such lot prospectively, to be opened and used as a street

[1] Hoyt *vs.* City of East Saginaw, 19 Mich., 39.

[2] Matter of Furman Street, 17 Wend., 649.

[3] 8 Paige, 655.

at its unimproved value, and to be paid for at some future period when the corporation shall think proper to order such street to be opened; thereby depriving the owner of the whole beneficial use of his lot for an indefinite time, without any equivalent whatever for the damage he must sustain in consequence of being deprived of the power of building upon or otherwise improving the lot."[1]

Therefore, when the same controversy arose in the Matter of Widening Wall Street, the court held that damages for opening streets are to be assessed on the property as valued at the time of the estimate, and not at the time the improvement was decided upon or the map filed.[2] To prevent the use of the land for an indefinite period, except at the risk of losing all the capital permanently invested, deprives the owner of rights of property without just compensation. As Judge Mitchell very properly says:

"The public do not bind themselves to adopt an improvement, either by passing a resolution to have it done, or by having commissioners appointed to carry it out; nor by any other act short of confirmation of the commissioners' report by the supreme court. At any time before that confirmation the corporation may discontinue the proceeding. How unjust it would be to require every owner to refrain from building on his own land, or to conform his new building to a plan merely proposed by the corporation, when the proceedings might be delayed for several years, and when the corporation might on its own will then abandon the improvement, after the new building had been made to conform to the proposed plan."[3]

The same line of reasoning has been adopted by the Maryland courts,[4] but a recent New York decision seems to incline to practically the old doctrine as first adopted in that common-

[1] 8 Paige, p. 660.

[2] 17 Barb., 617.

[3] *Ibid.*, p. 642.

[4] Moale *vs.* The Mayor, *etc.*, of Baltimore, 5 Md., 314. See also Angell on *Highways*, sec. 193, p. 233.

wealth. In this case it is decided that a person is not entitled to damages caused by grading a street, to any improvements made after a map showing the change of grade had been duly filed.[1] The judgment is justified by Judge Brady with these remarks:

"There seems to be an imperfection in the law in this respect, namely, that by the filing of the map the new grade is established, but it is not immediately incumbent upon the city to proceed with the alteration. The result is that the owner of the land must wait, or having leveled or built up to the grade, may then proceed with his building."[2]

This part of the subject is thus evidently in an unsettled condition.[3]

The previous consent of a majority of the parties to be affected by a proposed improvement, may constitute a preliminary portion of the proceedings necessary to give jurisdiction. The majority demanded may be a simple majority of the parties affected, it may be the owners of a major portion of the front feet of the abutting lands, it may be the owners of the greater part of the adjoining property estimated at its assessed value, or it may be the taxpayers who are to contribute the major part of the assessment for benefits; whatever the rule of majority, the municipal authorities are to judge in first instance

[1] The People *vs.* Board of Assessors, 58 How. Pr., 327. Also Matter of One Hundred and Twenty-seventh Street, 56 How. Pr., 60.

[2] 58 How. Pr., p. 330.

[3] It is very gratifying to me to note that this statement as to the unsettled condition of the New York law upon this point is no longer true. In Forster *vs.* Scott, the court of appeals (January, 1893), has rendered a decision exactly in line with the view which I have indicated in the text. They there declare unconstitutional and void that section of the New York City consolidation act by which property-owners are denied compensation for buildings upon land taken for a street erected after the filing of a map but before the street is actually laid out. The same issue is likely to again arise in connection with section 9 of the new Massachusetts law, cited on p. 60 of this monograph.

whether the requisite number of names has been presented.[1] And their decision may be made final by statute, although ordinarily a motion will be entertained by the courts to set aside an assessment for the reason that the petition therefor was not signed by a majority of the interested property-owners.[2] But the conclusion of the municipal authorities will not be disturbed merely because one of the opponents of a project "has reason to believe" that they were wrong.[3] Nor will a petitioner be allowed to withdraw his assent after the petition has in any way been acted upon.[4] Yet where a remonstrance signed by a prescribed number of property-owners ousts the jurisdiction of the city to proceed, a subsequent withdrawal of the names will not restore jurisdiction.[5]

§ 14. *Notice and Hearing.* As a rule, the various systems of special assessment for benefit provide for a notification, at some stage of the proceedings, of the parties to be assessed, and if the statute prescribes such notice, the notice must be given in order to create a valid assessment. The notice need not be a personal one, notification by publication being sufficient.[6] Notice of two kinds of work may, if desirable, be joined in one.[7] When the notice is given is not important, so long as it is given before the confirmation of the report of the commissioners of estimate. It need not be before the commissioners act; for its only purpose is to allow opportunity for objections when the report comes up for confirmation.[8]

[1] The People *vs.* The City of Rochester, 21 Barb., 656.

[2] Matter of Sharp, 56 N. Y., 257; Matter of Kiernan, 62 N. Y., 457.

[3] Betts *vs.* City of Williamsburgh, 15 Barb., 255.

[4] The People *vs.* Henshaw, 61 Barb., 409.

[5] Desty, *Taxation*, sec. 183, p. 1300.

[6] Owners of Ground *vs.* The Mayor, *etc.*, of Albany, 15 Wend., 374; Matter of Lowden, 89 N. Y., 548; Chambers *vs.* Satterlee, 40 Cal., 497; Williams *vs.* The Mayor, *etc.*, of Detroit, 2 Mich., 560; Matter of Application for Drainage of Lands, 35 N. J. L., 497; Matter of Union Elevated R. R. Co., 112 N. Y., 61.

[7] Emery *vs.* San Francisco Gas Co., 28 Cal., 345.

[8] Matter of Common Council of Amsterdam, 126 N. Y., 158; Honoré *vs.* City of Chicago, 62 Ill., 305.

According to the doctrine of the New York courts:

"The individual has no constitutional right to be heard upon the question whether the law, either state or municipal, . . . shall be enacted, but he has a right to be heard as to what proportion of the tax or assessment shall be imposed upon him or his property. It is for the government to determine for what public purposes a tax shall be imposed, and upon what districts or persons; but every individual has a right to be heard with reference to the basis of his own contribution to the public burden; if based upon his property, what property; and its proportion by value, frontage, benefits received, or otherwise, to the other like property included within the assessment."[1]

In the case of Stuart *vs.* Palmer, Judge Earl said:

"I am of the opinion that the constitution sanctions no law imposing such an assessment without notice to, and a hearing, or an opportunity of a hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. . . . The legislature may prescribe the kind of notice and the mode in which it shall be given, but can not dispense with all notice."[2]

Thus strictly have the courts of New York and Maryland laid down the limitation. The doctrine of the United States supreme court does not seem to go so far. In Davidson *vs.* New Orleans the court declared that whenever the laws of a commonwealth "provide for a mode of confirming or contesting the charge [which has been imposed as an assessment for benefit] in the ordinary courts of justice, with such notice to the person or such procedure in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his prop-

[1] Matter of Delaware & Hudson Canal Co., 60 Hun., 204, p. 209.

[2] 74 N. Y., p. 188. Also Ulman *vs.* The Mayor, *etc.*, of Baltimore, 72 Md., 587.

erty without due process of law."[1] They here leave unanswered the question what is appropriate to the nature of the case, but in Hagar *vs.* Reclamation District they go on to say that whether notice is at all necessary may depend on the character of the tax and the manner in which its amount is determinable.[2] In that case all they seem to require in satisfaction of due process of law is that the party assessed have an opportunity to take objections to the validity or amount of the assessment when the attempt is made to enforce it. Notwithstanding the fact that the point has been raised on more than one occasion, we have as yet no decision of a federal court which has sought to declare any assessment proceedings to be in contravention of the fourteenth amendment where the local courts have refused to entertain complaints as to the relative amounts of the charges imposed.

§ 15. *The Subjects of Assessment.* After a special assessment for benefit has been ordered, and after the various preliminary acts necessary to its validity have been accomplished, the question presents itself, What property is to be taxed? According to the legal theory of equivalents, the imposition may be charged against such property only as can be benefited by the proposed improvement. But the benefits are estimated benefits; they need not be actual so long as there is a possibility of benefit. "The potentiality of receiving a benefit," is the thing to be charged.[3] So it is very generally conceded that exemption by law from taxation applies only to taxation for general purposes, and does not excuse from the payment of special assessments.[4] Statutes conferring exemptions from taxation

[1] 96 U. S., 97, p. 104.

[2] Hagar *vs.* Reclamation District, No. 108, 111 U. S., 701; Walston *vs.* Nevin, 128 U. S., 578; Spencer *vs.* Merchant, 125 U. S., 345; also Galveston *vs.* Heard, 54 Tex., 420.

[3] Wright *vs.* City of Boston, 63 Mass., 233.

[4] Matter of the Mayor, *etc.*, of New York, 11 Johns., 77; Buffalo City Cemetery *vs.* City of Buffalo, 46 N. Y., 506; Matter of Second Avenue M. E. Church, 66 N. Y., 395; Matter of St. Joseph's Asylum, 69 N. Y., 353; Matter of Hebrew Benevolent Orphan Asylum Society, 70 N. Y., 476; Roosevelt Hospital *vs.*

are to be strictly construed.[1] While Harvard College secured freedom from special assessment by reason of the peculiar wording of the charter, the Massachusetts courts have in other cases refused to relax the strict rule of interpretation.[2] In a similar manner, public property may be made subject to assessment for benefit. "While, then, it may be conceded that property belonging to the state is not the subject of taxation, in the absence of any exemption by statute, it by no means follows that it is not liable to assessment for local improvements."[3] If the property belongs to the public, the people as a whole receive the special benefits, and they should pay for them just as any individual.[4]

§ 16. *The Rule of Estimating Benefits.* When it has been finally decided what property may possibly be benefited by the project in hand, it becomes necessary to determine the quantum of benefit about to accrue to each property-owner. For this purpose, some rule of estimation is required. Apportionment implies an allotment to each taxpayer of his share of the common burden, and this share must not be arbitrarily assigned. The rule as generally stated is to consider the effect of the improvement upon the market value of the property.[5] It was expressed by Justice Bronson in a very early decision as follows:

Mayor, *etc.*, of New York, 84 N. Y., 108; First M. E. Church *vs.* City of Atlanta, 76 Ga., 181; Canal Trustees *vs.* City of Chicago, 12 Ill., 403; City of Paterson *vs.* Society for Establishing Useful Manufactures, 24 N. J. L., 385.

[1] Buffalo City Cemetery Co. *vs.* City of Buffalo, 46 N. Y., 506.

[2] Harvard College *vs.* Aldermen of Boston, 104 Mass., 470; Boston Seamen's Friend Society *vs.* Boston, 116 Mass., 181.

[3] Hassan *vs.* City of Rochester, 67 N. Y., 528.

[4] Matter of Turfler, 44 Barb., 46; Matter of Livingston, 121 N. Y., 94. But McGonigle *vs.* City of Allegheny places the burden on the abutting owner as "the price he pays for the privilege of an open common in his front," 44 Pa. St., 118.

[5] State *vs.* District Court of Ramsey County, 33 Minn., 295.

"The question is not what estimate does the owner put upon it, but what is the real worth in the judgment of honest, competent and disinterested men? . . . In a case like this, the proper mode of adjusting the question of damages is to inquire, What is the present value of the land, and what will it be worth when the contemplated work is completed. In deciding these questions, neither the purpose to which the property is now applied, nor the intention of the owner in regard to its future enjoyment, can be matters of much importance. In both cases the proper inquiry is, What is the value of the property for the most advantageous uses to which it may be applied?"[1]

And in a subsequent opinion the same learned judge says that it is proper to regard all the circumstances which render the proposed improvement more or less beneficial to the owner.[2] In one instance, the commissioners took into account the fact that the opening of the alley would remove an extensive barn building and stable which they said was in dangerous proximity to the property assessed, and the court held that they were justified in so doing.[3] On the other hand, there are several decisions among the New York reports, which hold that the nature of the interest in the land assessed should be considered, and that notwithstanding the possession of a title in fee simple, the character of the limited use to which it is actually applied should be taken into account.[4] This, however, does not seem to be the sound doctrine. Where the owner has unrestricted power of alienation, the present use and purposes as to future enjoyment ought not to be regarded; were it otherwise, the property-owner, after the improvement has been completed, might suddenly change his mind, and by turning his land to new uses reap all the

[1] Matter of Furman Street, 17 Wend., 649, p. 669.

[2] Matter of Degraw Street, 18 Wend., 568.

[3] The People *vs.* The Mayor, *etc.*, of Syracuse, 63 N. Y., 291.

[4] *Ibid.*; Matter of Albany Street, 11 Wend., 149.

benefit of such improvement at the expense of his neighbors.[1] Whether in calculating the enhancement of the value of the owner's interest, a limitation in the title of the estate should be taken into account, has not been uniformly decided in different jurisdictions. So it has been held that an interest in land which will be forfeited if used for other than church purposes can not be enhanced in value so much as if it were held in fee simple.[2] But other courts refuse to take notice of a defeasible title.[3]

In the absence of mandatory provisions in the statute, the commissioners are not confined to any particular mode of estimating the enhancement of value expected to result from the proposed improvement. They may adopt that method which to them seems most suitable, and in this they will be sustained so long as the method adopted is not considered to be capricious or arbitrary. As to what is capricious or arbitrary, the courts have differed widely at different times, but the variance in judicial opinion must be explained by a variance in attending circumstances. If the commissioners decide that the several lots are equally benefited and make an assessment at so much per front foot, there can be no objection; such an assessment is not necessarily an erroneous principle if in the judgment of the commissioners the owners receive benefits in such proportion.[4] The area of adjacent lands may be taken as an index to the benefit, and this is the common method adopted for the construction of highways, levees and drains, although it has also been applied to street improvements.[5]

[1] Matter of William and Anthony Streets, 19 Wend., 678.

[2] Owners of Ground *vs.* The Mayor, *etc.*, of Albany, 15 Wend., 374.

[3] Zion Church *vs.* The Mayor, *etc.*, of Baltimore, 71 Md., 524.

[4] Coles *vs.* Trustees of Williamsburgh, 10 Wend., 659; Matter of Gardner, 41 How. Pr., 255; O'Reilley *vs.* City of Kingston, 114 N. Y., 439; White *vs.* The People, 94 Ill., 604; City of Covington *vs.* Boyle, 6 Bush, 204; Schenley *vs.* City of Allegheny, 36 Pa. St., 29; Norfolk City *vs.* Ellis, 26 Gratt., 224.

[5] Broadway Baptist Church *vs.* McAtee, 8 Bush, 508; Caldwell *vs.* Rupert, 10 Bush, 179; Egyptian Levee Co. *vs.* Hardin, 27 Mo., 495; B. & M. R. R. Co. *vs.* Lancaster County, 4 Neb., 293.

Again, it has been held that commissioners may make their estimate in the ratio of the assessed valuation if there is evidence to warrant the conclusion that property will be benefited in that ratio.[1] To sum up in the words of a southern court:

"The authorities establish the proposition that such assessments may be made on the basis of benefits, and further, that the legislature is not shut up to any one mode of apportionment to grade and pave the streets of a city. The expense may be apportioned among those who own the lots adjacent, either by the running foot or frontage, the square feet of the area, or upon the *ad valorem* basis. It is the legislative discretion to adopt the one mode or the other."[2]

§ 17. *Report and Confirmation.* The report of the commissioners must show distinctly that the assessment was made in proportion to estimated benefits.[3] The owner of the property assessed need not be specifically named, provided the lot be definitely described; and reference by lot number is a sufficient description.[4] No minority report will be recognized. There can be but one report, and that the report of the whole or majority of the commissioners. A concurrence of a majority is all that is required.[5] On the death of one commissioner, power to act remains in those surviving, unless there is a provision at hand for filling the vacancy.[6] But a law conferring authority to supply by appointment a place vacated by death or disability, has been construed to include vacancies by resignation.[7] If, however, two assessors act where only one is

[1] Appeal of Piper, 32 Cal. 530.

[2] Daily *vs.* Swope, 47 Miss., 367, p. 387.

[3] Warren *vs.* City of Grand Haven, 30 Mich., 24.

[4] Matter of John and Cherry Streets, 19 Wend., 659; People *vs.* McGuire, 126 N. Y., 419; City of Covington *vs.* Boyle, 6 Bush., 204.

[5] Matter of Broadway Widening, 63 Barb., 572; Matter of Fourth Avenue, 11 Abb. Pr., 189.

[6] People *vs.* The Mayor, *etc.*, of Syracuse, 63 N. Y., 291.

[7] State *vs.* City of Newark, 27 N. J. L., 185.

required, that will not render the assessment void.[1] While the commissioners must usually be disinterested as regards the improvement proposed, yet being a trustee of lands assessed does not give such an interest as to debar from acting;[2] nor is it any objection that one of the commissioners is a member of the city council when some of the property assessed belongs to the city.[3]

When the report is once made up, the commissioners' power to review is strictly appellate. They have no right to increase any charge for benefit where no objection has been made to the assessment previously filed, and alterations must be confined to those items to which objection has been made.[4] This is because the proceedings in an assessment for benefit are in the nature of a judicial proceeding.[5] Even though the court in reviewing and confirming the report act as quasi-commissioners, they act also as a court in every respect except perhaps in reviewing their own decisions.[6] The courts may, at any time before confirmation of the report, authorize the municipal corporation to discontinue further proceedings in the matter.[7] So, too, the power of appointment implies power of removal, and where a corporation may appoint commissioners, it may remove them before the completion of the proceedings, and appoint others. The report once confirmed, however, then the whole assessment is final and conclusive upon the municipality. Approval by the court gives vested rights which defeat the power of the city authorities to dis-

[1] Matter of Gardner, 41 How. Pr., 255.

[2] People *vs.*, The Mayor, *etc.*, of Syracuse, 63 N. Y., 291.

[3] Matter of Twenty sixth Street, 12 Wend., 203.

[4] Matter of Hamilton Avenue, 14 Barb., 405.

[5] City of Chicago *vs.* Larned, 34 Ill., 203.

[6] Matter of Canal Street, 11 Wend., 154.

[7] The People *vs.* The Corporation of Brooklyn, 1 Wend., 318; Matter of Canal Street, 11 Wend., 154; Matter of Commissioners of Washington Park, 56 N. Y., 144; Matter of Military Parade Ground, 60 N. Y., 319.

continue the proposed improvement; nor can the question of benefit be again reviewed by any other tribunal.[1] Previous to the confirmation of the report, all steps are initiatory; confirmation by a competent body transforms the proceedings into an assessment of record.

§ 18. *The Legal Nature of the Charge.* What now is the nature of the charge made against the property-owner for the benefit accruing to him from the proposed improvement? Is it a personal liability to be collected as other judgments are collected? Is it a lien upon the property only? Or is it, at the option of the municipal authorities, the one or the other, or both? As a matter of fact, we have seen that the legal nature of the assessment varies with the different statutes under which it is prosecuted. As to what sort of a charge such assessment ought to be, we have numerous expressions of the courts which, as a whole, are not altogether harmonious. It is often argued that the legal theory of equivalents necessarily confines the assessment to a lien upon the property benefited. Thus one case holds:

"A local assesment can only be levied on land; it can not, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited."[2]

And again, in another case:

"The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly —the monstrous injustice—of not only absorbing the property supposed to be benefited and rendered more valuable by the improve-

[1] Stafford *vs.* The Mayor, *etc.*, of Albany, 6 Johns, 1; *Ibid.*, 7 Johns, 541; Matter of Third Street, 6 Cowen, 571; Hawkins *vs.* Trustees of Rochester, 1 Wend. 53; Hamersley *vs.* The Mayor, *etc.*, of New York, 56 N. Y., 533; Commonwealth *vs.* Woods, 44 Pa. St., 113.

[2] Macon *vs.* Patty, 57 Miss., 378, p. 386.

ment, but also of entailing upon the owner the loss of his other property."[1]

All this sounds plausible enough, but really seems to have arisen from a confusion of two separate operations, namely, the assessment for benefit and the remedy for enforcing its payment. They are entirely distinct proceedings, and as a rule are conducted by different officials. Justice Sawyer, in his dissenting opinion in Taylor *vs.* Palmer, has stated this most aptly:

"As a matter of convenience, and in a general sense, we speak of the lands benefited. But, strictly speaking, there is no such thing as benefiting the lands. Lands are not objects that can receive benefits. They are but insensate clods, to which it is not a matter of the slightest consequence whether they are what we call improved or enhanced in value, or not. The owner may be benefited by rendering the lands more accessible or useful to him, more subservient to his enjoyment and more valuable. The benefit accrues to the owner alone, and the public charge, by means of which the special assessment accrues, necessarily and properly falls upon him alone. The amount of the debt when ascertained is due from him, and so far as the duty to pay is concerned, the property through which the benefit accrues is only resorted to for the purpose of ascertaining each owner's proper share. When once ascertained, there is no further necessary connection between the debt—the tax or assessment—and the specific piece of property in respect of which each item of the tax was imposed upon the owner,"[2]

In the absence of statutory provision the assessment is nothing more than a personal charge. It is not a lien upon the land unless made so by special legislative authority,[3] and it is at the discretion of the legislature to make it a lien or a

[1] Neenan *vs.* Smith, 50 Mo., 525, p. 529; see also Taylor *vs.* Palmer, 31 Cal., 240. Burroughs seems to incline to this view in his work on taxation.

[2] 31 Cal., p. 669, and cases there cited.

[3] 2 Dillon, sec. 821, p. 1000.

personal liability or both.[1] Upon the point whether a statute which declares an assessment to be a lien, at the same time takes away, by implication its character as a personal liability, the decisions cited seem to conflict. The legal nature of assessment liens must be sought in the charters of cities and the statutes creating them. Like the liens for general taxation, they take precedence of other liens or incumbrances.[2] While distinctions are recognized between tax liens and assessment liens, yet the relation between the two, and which should have priority over the other, have not been generally worked out.[3]

§ 19. *Collection Proceedings.* A special assessment, then, "is enforced by distress and sale of chattels of the owner, if sufficient can be found, and if not, by sale of the land for a term of years or in fee; by personal action of debt or assumpsit, or action on the case, against the owner; or by action to enforce the lien alone, or an action to foreclose and sell as if the charge were a mortgage executed by the owner with judgment and execution for balance in case of deficiency."[4] The warrant issued for the collection of a special assessment should contain all the facts necessary to show that the person upon whose goods it is levied, is liable to pay the sum claimed from him. To this end, it should state when the assessment was confirmed by the proper authority; the names of the persons assessed, both owners and occupiers, who have neglected to make payment; the premises assessed, by some brief but intelligible description; and the amount of the assessment[5] But no warrant can be legally issued to collect an assessment for

[1] Emery *vs.* Bradford, 29 Cal., 75; Walsh *vs.* Mathews, 29 Cal., 123; The Mayor of New York *vs.* Colgate, 12 N. Y., 140; Davidson *vs.* New Orleans, 96 U. S., 97.

[2] Desty, *Taxation*, vol. ii, sec. 189, p. 1358.

[3] Sharp *vs.* Speir, 4 Hill, 76; Welty, *Assessments*, sec. 324, p. 481.

[4] Taylor *vs.* Palmer, 31 Cal., p. 687.

[5] Gilbert *vs.* Havemeyer, 2 Sanf. Supr. Ct., 506.

benefit for work never performed.[1] While the city may transfer to the contractor for public work involving assessment the power to collect the assessment, yet privity of contract exists between him and the municipal authorities only, and not between him and the persons assessed.[2] The liability of the property-owner to the contractor is only as to an agent of the public treasury. So where the city has the power, but neglects or delays to collect the sum due a contractor, it may be compelled by *mandamus* to levy and collect the assessment, or the contractor may sue directly upon his contract. The same is true when, after an assessment has been annulled, the city takes no steps for making a new one.[3]

§ 20. *Remedies of the Taxpayer.* The law does not leave the taxpayer to the unrestricted mercy of the commissioners of estimate and assessment. It provides remedial procedure by which any person aggrieved by the assessment as made, may contest its legality or justice before the courts. Sometimes the legislature provides a special statutory remedy, such as a petition for the vacation of the assessment, but where such is not the case a writ of *certiorari* will issue to review the judicial acts of the municipal corporation.[4] The courts are very reluctant to grant equitable relief in cases of special assessment for benefit, but have done so where it has been clearly shown that no adequate remedy existed at common law. In New York proceedings instituted to vacate an assessment for fraud are applicable only to the lands described in the petition; the vacation of the assessment as to those lands does not operate to render the whole assessment invalid, and the particular charge complained of may be simply reduced by the court to

[1] Dorathy *vs.* City of Chicago, 53 Ill., 79.

[2] Litchfield *vs.* Vernon, 41 N. Y., 123; The People *vs.* Lawrence, 41 N. Y., 137; Emery *vs.* Bradford, 29 Cal., 75.

[3] Reilly *vs.* City of Albany, 112 N. Y., 30; State *vs.* City of Milwaukee, 25 Wis., 122.

[4] The People *vs.* The Mayor, *etc.*, of New York, 5 Barb., 43.

its proper proportions.[1] The presumption is always in favor of the soundness of the report, and the court will not interfere unless there be a plain and decided preponderance of evidence against the judgment of the commissioners.[2] Questions of the policy or expediency, the necessity or propriety of the improvement in hand, rest for decision with the legislative and not with the judicial department of government.[3] Objections on this score will not be received. But the court will interfere if it is plainly shown that no benefit from the projected improvement can possibly be derived, or where the estimate is notoriously extravagant.[4]

In every instance, the party objecting must be interested in the particular item which he claims is irregular; he can not avail himself of any irregularity in assessing property in which he has no immediate interest.[5] Any owner whose property may be taken in default of payment, may be a party aggrieved, and therefore a person who has purchased his land after the work and before the assessment, may properly petition for a vacation of the latter, although he purchased the land subject to the impending assessment, which formed a material part of the consideration furnished by him.[6] The doctrine of equitable estoppel has been invoked to prevent a party, otherwise aggrieved, from objecting to an assessment which he has fur-

[1] Matter of Delancey, 52 N. Y., 80; Matter of Feust, 121 N. Y., 299.

[2] Matter of Furman Street, 17 Wend., 649; Matter of William and Anthony Streets, 19 Wend., 678; Allen *vs.* Drew, 44 Vt., 174.

[3] Matter of Albany Street, 11 Wend., 149; Matter of Furman Street, 17 Wend., 649; Matter of William and Anthony Streets, 19 Wend., 678; Matter of Commissioners of Central Park, 63 Barb., 282; State *vs.* District Court of Ramsey County, 33 Minn., 295; The Tide Water Company *vs.* Coster, 18 N. J. Eq., 518; Scovill *vs.* City of Cleveland, 1 Ohio St., 126; Matter of Dorrance Street, 4 R. I., 230.

[4] The People *vs.* The City of Brooklyn, 23 Barb., 166; Alexander and Wilson *vs.* The Mayor, *etc.*, of Baltimore, 5 Gill., 383.

[5] Coles *vs.* Trustees of Williamsburgh, 10 Wend., 659; Matter of Thirty-ninth Street, 1 Hill, 191.

[6] Matter of Gantz, 85 N. Y., 536; Matter of Pennie, 108 N. Y., 364.

thered. Where a person accepts a benefit under an assessment, he will not be allowed to deny its validity. So a property-owner who stands by and sees an improvement made without offering any protest against it, has been estopped from refusing to pay his assessment after the work was done.[1] Where the owner of an abutting lot assures a contractor doing street improvement work that if he would do the work he would be paid, such owner cannot afterwards, when sued for his share of the cost, show that the petition presented for inaugurating the improvement was defective.[2] If a remedy by appeal is provided by statute, failure to make use of such remedy within the time prescribed, will be considered a waiver of all objections.[3] Appearance before a tribunal acting in the matter cures all irregularity as to notice. These defects may be cured or waived: what is absolutely void can not be made valid except by subsequent legislative action, and then, only in case the constitution does not prohibit retrospective laws.[4]

§ 21. *The Trend of Legal Interpretation.* When we come to review the body of judicial decisions, bearing upon the subject of special assessment for benefit, and seek to discover what attitude, favorable or unfavorable, the courts have taken in dealing with the questions at issue, we find that as a whole the legal profession has been inclined to assist in upholding and extending the system. Not that this system of taxation has been entirely without opponents upon the bench. On the contrary, several judges of high authority have not hesitated to denounce unreservedly the principles upon which it is based. Some of these opinions have been extensively quoted, and deserve still further quotation. For example, Chief Justice Church, of the New York court of appeals, criticizes the system thus:

[1] City of Lafayette *vs.* Fowler, 34 Ind., 140.

[2] Welty, *Assessments*, sec. 318, p. 473.

[3] Chambers *vs.* Satterlee, 40 Cal., 497.

[4] Burroughs, *Taxation*, sec. 149, p. 483.

"The few are powerless against the legislative encroachments of the many. The 'constituents' under this system are attacked in detail, a few only selected at a time, and they have no power to enforce accountability or to punish for a violation of duty on the part of the representative. The majority are never backward in consenting to, and even demanding, improvements which they may enjoy without expense to themselves. The inevitable consequence is, to induce improvements in advance of public necessity, to cause extravagant expenditures, fraudulent practices and ruinous taxation. The system operates unequally and unjustly, and leads to oppression and confiscation. It is difficult to discover in it a single redeeming feature which ought to commend it to public favor. . . . . Among the manifold evils complained of in municipal administration, there is no one, in my judgment, calling more loudly for reform than this arbitrary system of local assessments."[1]

But the number of judges who have commended the principle of special assessment for benefit far exceeds that of those who have denounced it. Says Chief Justice Crozier, of Kansas, "There is a justice in this arrangement which commends itself to the approbation of any right-thinking man, but the injustice of assessing property all over a city for the improvement of a single street must be apparent at a glance."[2] Judge Nevius could see "nothing unfair or unequal, retrospective or unconstitutional" in a law of this kind,[3] and in the case of Municipality *vs.* White, Chief Justice Slidell, of Mississippi, remarks in his dissenting opinion:

"I concede that the system of local assessment is liable to abuse, for which reason courts should scrutinize its application with care, and also see that an equitable share of the burden should be borne

[1] Guest *vs.* The City of Brooklyn, 69 N. Y., 506, p. 517; see also opinions by Atwater, J., in Stinson *vs.* Smith, 8 Minn., 366; by Paine, J., in Weeks *vs.* City of Milwaukee, 10 Wis., 242; by Freeman, J., in Taylor *vs.* Chandler, 9 Heisk, 349.

[2] Hines *vs.* Leavenworth, 3 Kan., 186, p. 202.

[3] State *vs.* Dean, 23 N. J. L., 335.

by the public. But it will be readily foreseen that if the whole charge of local improvements is to be borne by the city treasury, grievous abuses might be practiced upon the inhabitants generally, to subserve the local interests of designing men holding property in a particular neighborhood."[1]

Nor has the good will of the judiciary been shown in words of approval only. A rather fanciful line of distinction has been drawn between the use of the terms "taxation" and "assessment" solely for the purpose of establishing the validity of laws for special assessment. When the constitution demands equal and uniform taxation according to a just property valuation, the imposition for benefit from local improvements is not a tax within the meaning of such provision. If, however, the legislative exercise of the power of special assessment be attacked, then it is sufficiently in the nature of a tax to come under the taxing power. To escape statutory exemptions of charitable institutions from the burdens of taxation, a special assessment is not a tax; but in the levy and collection a special assessment is so far a tax as to come within the essential limitations as to apportionment and public purpose. It is held now to be a tax, now not to be a tax, just as constitutional limitations further or restrict its application. The trend of legal interpretation has been, and still is, favorable to the extension of the system of special assessment for benefit.[2]

[1] 9 La. An., p. 454; for further commendation see Edgerton *vs.* The Mayor, *etc.*, of Green Cove Springs, 19 Fla., 140; Smith *vs.* The Corporation of Aberdeen, 25 Miss., 458; Schenley *vs.* City of Allegheny, 25 Pa. St., 128: Matter of Dorrance Street, 4 R. I., 230.

[2] Instance the recent case of The Mayor, *etc.*, of Birmingham *vs.* Klein, 89 Ala., 461.

CHAPTER V.

THE THEORY OF SPECIAL ASSESSMENTS.

§ 1. *The Place of Special Assessments in Finance.* In order to understand the nature of special assessments, the first requisite is a clear comprehension of their relative place among the various impositions levied by the modern state. In the domain of public finance, classification is by no means an end to be sought in itself, but it is, nevertheless, a most helpful method for arriving at fundamental distinctions. It brings out contrasts and likenesses, and thus assists in fixing the salient features of the topic under discussion.[1] So without pretending to exhaust the details of the subject, we shall find a tentative classification of no little service in our study.

In demanding compulsory contributions from the subjects, the modern state may employ any one of three constitutional powers usually vested in the government. It may, in pursuance of its right of eminent domain, require the use of any particular piece of property in the hands of persons subject to its jurisdiction. Under this head we must place cases of confiscation and expropriation—now rarely items of net revenue, owing to constitutional limitations enjoining compensation by the government. Secondly, we have the police power of the state—an indefinite power, yet capable of enforcing contributions from the individual. The chief financial manifestations of this power are seen in fines, forfeitures and penalties of various kinds. Finally, we have the main reliance of the modern state in matters of public revenue—the taxing power. The latter demands of the individual only his share of a public

[1] Bastable, *Public Finance*, p. 145; Seligman, "The Classification of Public Revenues," *Quarterly Journal of Economics*, April, 1893.

burden. Those impositions comprised under the right of eminent domain constitute so much in addition to his share; those comprised under the police power are looked upon as penalties for defaults. The contributions included within the taxing power require to be still further distinguished.

Of these—the contributions included within the taxing power—a threefold division may be made, according as we view them from the standpoint of the special advantages accruing from their application. At that end of the scale which represents the extreme of specific individual benefit, distinct, traceable, and measurable, we have those impositions treated of in this work under the name of special assessments. At that end of the scale which represents the extreme of general benefit, indistinguishable so far as the individual is concerned and merged in the blessings of government common to all, we must place those contributions known as taxes. The only justifiable foundation for a system of special assessments lies in the special benefits conferred; the only justifiable foundation for a system of general taxation lies in the faculty or ability of the subject to pay. Midway between these two classes of impositions falls the third class of fees and tolls. Here we have contributions levied on the ground of general benefit, but imposed in rough agreement with the special benefits accruing. Fees and tolls approach on the one side the limits of special assessments; on the other, they trench upon the field of taxes proper, into which they may easily be converted. Nowhere is the line of demarcation very sharply drawn, although, for purposes of scientific classification, this threefold division is sufficiently distinct.[1]

[1] Neumann has adopted a threefold classification of this kind, *Die Steuer*, p. 325 *et seq.*; Von Reitzenstein, too, in his *Das kommunale Finanzwesen*, 3 Schönberg, p. 612, speaks of a localized class of fees and tolls corresponding to special assessments. Von Stein, *1 Lehrbuch*, 5th ed., p. 58, distinguishes between impositions based upon general and upon special benefits in questions of local finance, but carries the analysis no further. Cohn gives merely a passing mention of such impositions in his *Finanzwissenschaft*, p. 244.

§ 2. *Special Assessments Compared with General Taxes.* There are some analogies as well as several marked differences to be noted between special assessments and general taxes proper. In one sense of the word special assessments are taxes, that is, in the sense that they are levied for a public purpose under the taxing power of the state. They also resemble taxes in that both are imposed according to some rule of apportionment, and may be finally collected by compulsory process. From this point on the analogy fails. The benefits resulting from special assessments are specific and measurable; those resulting from taxation are general and incapable of precise measurement according to the contribution of the individual taxpayer. In the case of special assessment, the government always performs some positive service, the cost of which it seeks to recoup from the persons benefited. In the case of taxation, the party taxed receives the benefit of no greater governmental service than his fellow-citizens, and the question of the cost of his share of the particular service enters as little into the determination of his tax as does the benefit which he may be supposed to derive. Taxation is resorted to in order to defray the running expenses of government, and to effect in time the amortization of the public debt. The object of special assessments is to provide for the capital account—to increase, as it were, the permanent plant of the community. For taxation the state takes as its test of ability to pay the various criterions of property, income, expenditure, *et cetera*. Special assessments are necessarily apportioned in proportion to the benefits accruing to the owners of real property. The usefulness of a system of special assessment is confined largely to the field of local finance; taxation finds a scope of action throughout the whole realm of public revenue.

§ 3. *Special Assessments Compared with Special Taxes.* What, now, is the precise distinction between a special tax and a special assessment? It may be urged that numerous taxes, commonly excluded from the category of special assess-

ments, are imposed with special reference to the benefits supposed to flow from their expenditure. These special taxes are raised by separate levies, and the proceeds applied to separate funds. They are by no means unknown in municipal finance. Various American municipalities levy special lighting rates, special road rates, special police rates. They re-appear as we have seen in the English local rates—the poor rate and the rates based thereon. The same principle is at the foundation of corresponding taxes in this country—the county road tax, the county poor tax, and others. The revenues derived from all these impositions are expended upon objects which are calculated to be particularly advantageous to the contributors of the tax. Yet there is here this vital difference which marks them off from special assessments. The question of benefit is jurisdictional only; it is regarded in fixing upon the district of taxation or the persons or property subject to taxation, and no further. As between the taxpayers within the district, the special tax is levied not according to individual benefits, but according to evidences of ability to pay. The rich are listed to the poor rate and the blind are taxed for the lighting fund. Where the imposition is levied according to general ability to pay, it constitutes general taxation. Where it thus levied, but upon a district determined with reference to benefits, it constitutes special taxation. Only where it is levied according to the individual benefits accruing to the owners of real property, does it become a special assessment.

§ 4. *Special Assessments Compared with Fees.* We may also profitably compare special assessments with fees and tolls. The points of likeness are these. First, they are both imposed under the taxing power of the state. Secondly, pursuant to the essential nature of the taxing power, both, in order to be constitutionally levied, must include primary elements of public interest. Thirdly, they are both regarded as payments in compensation for some particular service of the government, the cost of which they are intended to cover in whole or in part.

On the other hand, special assessments are applied only to local purposes, while the adaptability of fees and tolls is not restricted to any particular purpose, general or local. Special assessments are apportioned within a territorial district; fees and tolls are collected only as the occasion therefor arises. Special assessments, being so apportioned, are levied upon individuals only as members of a class; fees and tolls are demanded of the individual as such. Special assessments are collected once and for all, or, at the most, by installments bearing interest. Liability to the payment of fees and tolls arises with each recurring instance of the special governmental service. The benefits for which special assessments are asked are derived through the medium of real property; the benefits at the basis of fees and tolls may be either real or personal, and are usually the latter. Neumann has called attention to the resemblance between special assessments and direct taxes existing in the permanent character of the objects or transactions upon which they are apportioned, and the resemblance between fees and tolls and indirect taxes existing in the temporary and transient character of the transactions upon which they are apportioned.[1] These resemblances which Neumann tries to draw are in fact more apparent than real, more confusing than helpful. The distinction indicated is not one between special assessments and all fees; it is rather one between a certain class of fees on the one side, and another class of fees and special assessments on the other side. To be more explicit, if the fee is demanded for some governmental service which is not indispensable, then the individual by doing without the service may altogether escape the payment, nor need any other person make the payment in his stead. But special assessments are apportioned upon the owners of particular pieces of real property; like those fees demanded for indispensable governmental services, if not paid by one person, they

[1] *Die Steuer*, pp. 326 and 327.

will be paid by another. In both instances the principle seems to be, no special benefit without compensation—the charges are in essence equally compulsory, inasmuch as every one who derives a benefit from the service may be forced to pay his share of the expense. Fees and tolls require a permanent collection machinery in order to gather the resulting revenue into the public treasury; while special assessments, being in a sense extraordinary revenue, may be apportioned by a temporary board of assessors, and collected through the existing ordinary administrative channels. The former are usually demanded at a time concurrent with the rendering of the special benefit; the latter most frequently before, though sometimes after, the construction of the improvement in hand. Finally, fees and tolls, by being adjusted so as to bring in more than the cost of the particular service, may be easily and conveniently converted as to the excess into indirect taxes. Special assessments, however, are justifiable only so far as they are levied to cover so much of the cost as results in specific advantages to the property-owner benefited in proportion to these advantages. They do not afford even an approximately just basis upon which such taxation might be founded.

§ 5. *Incidence as between Owner and Occupier.* One of the nice questions to be determined in the discussion of every tax is that of its shifting and incidence. In like manner, we may inquire whether the burden of a special assessment can be thrown off upon others by the parties who originally pay it, and, if so, upon whom it ultimately comes to rest. For the purposes of this inquiry we have to distinguish between two sets of persons, who may be subject to the influence of such special assessment. First, between the owner of the property assessed and the occupier for the time being, provided the latter is distinct from the former. Second, between the owner at the time of the levy and a subsequent purchaser. These are the only two cases that need concern

us; for it is evident at the outset that wherever the owner is himself the occupier, and so long as he refrains from disposing of his property on the market, no opportunity is afforded him to shift the burden to other shoulders than his own.

The question of incidence as between owner and occupier, might appear at first glance as simple in the extreme. It might be argued, for example, that special assessments are imposed only as the equivalent of some distinct and measurable benefit, accruing to the property-owner by reason of the improvement. Furthermore, that no benefit could be said to be distinct and measurable, unless it resulted in an increased rental value of the property. If such were true, then the burden of the special assessment would be immediately transferred to the occupier, the real recipient of the benefit. This line of argument, as has been intimated, is plausible only at the first glance; a closer analysis will show that the problem is much more complicated.

We must remember that the benefit for which the charge in question is imposed, operates only through real property. Its amount is in no way conditioned by the temporary use to which that property is devoted by its present owner. Now the rental value of such property is determined by the relation existing between the supply and the demand. Here the supply is absolutely limited; the demand alone is elastic. It is, then, through some influence upon the demand that the charge must act in order to affect the rental value. Let us approach the problem from this point of view. There are four possible ways in which the benefits resulting from the improvement in hand may influence the demand of those desiring to occupy such premises. First, it may not increase the demand at all. Second, it may increase the demand in the exact ratio of the burden. Third, it may increase the demand to some extent, but not sufficiently to absorb the entire burden imposed. Fourth, it may increase the demand in a greater ratio than the burden.

First. The improvement may not affect the demand at all. This supposition is quite possible where, in a stationary or declining neighborhood, the resulting benefits serve merely to retain the present occupier as tenant, or to counteract, in more or less degree, the inevitable fall in rental value. Here the owner can not raise his rent. If he should attempt to do so, the occupier would relinquish his lease and remove to other quarters. The owner must himself bear the burden of the assessment. To him, in reality, comes the benefit of the improvement; not a positive enhancement of the value of his property, but rather a negative benefit, one which stays the present decline or, at all events, prevents so great a decline as would otherwise have taken place.

Second. The improvement may increase the demand in the precise ratio of the burden. Rather than release his claim to the possession of the property, the occupier is willing to indemnify the owner to the extent of the imposition, but no further. The improvement has made the premises worth exactly so much more to the occupier than they formerly were, so that the entire benefit assessed may be traced to him. The rent will rise in a ratio commensurate with the burden involved, and the owner will be able to shift the entire imposition.

Third. The demand may be increased, but in a ratio not so great as that just assumed. Concurrently the rental value will be raised, though how much it will be raised will depend upon the elasticity of the demand. The lower limit will be the former rental value, the upper limit that value plus a sum representing the burden involved. Between these limits the fixing of the exact rental value will have free play.

Fourth. The demand may be increased in a greater ratio than the burden. This supposition would be untenable if in all cases special assessments were levied up to the full extent of the accruing benefits. It may, however, occur, and often does occur, where only a designated portion of the expenses are to be imposed in proportion to the benefits, or where the

benefits exceed the total expenses incurred. Here the occupier must either give an addition to his former rent in greater ratio than the burden of the special assessment, or he must deliver over the possession to some one who is offering to do so. The owner secures from his tenant more than he has paid out, and is by so much the gainer. The amount shifted over to the occupier is greater than the burden in the first instance imposed.

We have spoken in the preceding paragraphs of the *burden* involved by the special assessment. This burden can never be the amount of the imposition. The latter is a sum paid to the capital account, and the entire capital cannot well be shifted upon the tenant unless so stipulated in the lease. What is thus transferred in every instance is the market value of that capital calculated at the current rate of interest. The special assessment, then, must be looked upon as a permanent investment of capital, which may, according to circumstances, return the current rate of interest, or something less or greater than that rate.

§ 6. *Incidence as between Owner and Subsequent Purchaser.* Suppose now that the original owner who has paid the special assessment decides to dispose of his property. Will he be able to recover in the selling price the amount collected from him for the improvement, or will he be able to recover any indemnity at all? The intimate relation existing between the rental value of the land and the selling price immediately suggests four cases corresponding to those just considered. The selling value of the property is usually a capitalization of the rental value, and consequently would vary with almost the exact movements of the latter. But the burden that may be shifted must here be calculated upon a different basis. The special assessment is a single and extraordinary, although exclusive, payment upon landed property. Unlike the permanent and exclusive land tax, it can never be capitalized by the original contributor to the exemption of the subsequent pur-

chaser. No subsequent payments are to be made.[1] We have, then, something that approximates the very reverse of the so-called capitalization theory of incidence.[2] The burden for the occupier is the interest charge only. The burden for the subsequent purchaser is the whole special assessment. As between the owner and subsequent purchaser, the special assessment as a whole will be shifted, according to the influence of the improvement upon the demand, from the former to the latter, to the extent of the entire imposition, to a lesser extent or to a greater extent, or not at all.

There is one disturbing factor yet to be noticed. The special assessment may not be payable in a lump sum, but may be spread over a considerable period of time by means of installments. The manner of payment, however, so long as it is charged upon the owner, cannot affect the incidence as between owner and occupier. It is the improvement which influences the demand for the premises, and through the demand, the rental value. In respect to the subsequent purchaser, another element is introduced. These installments are liens upon the land, and usually run with the land. Future payments are collectible from the owner, whoever he may be, at the time when due. They might have a tendency to induce the original owner to bear the burden of those payments already made, in consideration that the subsequent purchaser bear those not yet due. Yet this will scarcely happen under the systems of special assessment usually employed. The installments as a rule bear interest, and are regarded merely as an accommodation to the contributor. The liens may be extinguished by immediate payment, as in the nature of a mortgage redeemable at once. In adjusting the selling price of the property, the present value of the installments yet

[1] An exception will be noted in a moment.

[2] Seligman, *Incidence of Taxation*, p. 52; also Bastable, *Public Finance*, p. 393.

to be paid is simply deducted from the market price. It is, therefore, quite evident that the incidence of special assessments, as determined by the other factors, is not appreciably disturbed by the manner of payment. The original contributor must, in every instance, bear the burden during the period between the time of payment and the time when the lease of the occupier expires, or when he effects a sale of the premises on the market.

§ 7. *Double Taxation.* A discussion of the incidence of special assessments would be incomplete without reference to the objection, sometimes urged, of double taxation. There are, of course, no grounds for double taxation in the sense of taxation by more than one overlapping jurisdiction, since a special jurisdiction is created for every levy of the imposition. What has been maintained on this point is that the contributor is charged for the same benefit by two different processes.[1] The line of reasoning proceeds that he is required to pay directly by way of special assessment for the benefit received, and then again in an increased assessment to the general property tax. That this objection is at best specious, is the most its promoters could urge. If the capital taken for the street improvement were invested in a private improvement to the premises, and thus secured an equal rise in rental value, the owner would still be paying directly for the benefit, besides being liable to a greater share of the general taxation. He is not really charged twice for the same benefit. The only reason that his general rate is increased is that, on account of the improvement, his ability to pay has been enhanced. Again the same assertion might as truthfully be made of almost every other tax. The income rated this year, if saved and invested, is chargeable again next year in respect to its increase. The objection to special assessments on the plea of double taxation, has no foundation whatever in fact.

§ 8. *The Justice of Special Assessments.* How does the the-

[1] The Duke of Argyll, "The Betterment Tax," 57 *Contemporary Review*, p. 912.

ory of special assessment for benefit stand when tested by the rules of universality, equality and uniformity, as generally applied to matters of taxation? The justice of public impositions is usually determined by these criterions, and the most frequently met objections to special assessments rest upon accusations of inequality and lack of uniformity.

In the first place it must admitted that from one point of view such charges for benefit are not universal. They do not attach to all subjects within the state, or even to all those within the political jurisdiction imposing them. If they did, they would scarcely differ from the ordinary local taxes. But within the specially created district they do possess the quality of universality. Every one whose circumstances place him within the rules laid down for the determination of liability, becomes subject to the imposition. There are neither exceptions nor exemptions among those who would otherwise be included within this exercise of the taxing power. Within the district of apportionment, the demands of the rule of universality are fully met.

Complaints on the score of inequality and lack of uniformity arise likewise from a similar narrowness of view. Special assessment for benefit appears to operate unequally only to those persons who have in mind some ideal system of taxation by which they seek to judge every public imposition. According to the standard of individual property, according to the standard of individual income, according to the standard of of individual expenditure—according to all these standards, special assessments are certainly defective. But is it proper or scientific to test one system of raising public revenue by the norms applied to a totally different system? The only method by which the equality or inequality of any public contribution can be determined, is by asking whether it operates alike upon one and all who are found in the same relative position. The criterion here, then, consists in inquiring whether one property-owner receiving a certain benefit from the improvement in hand

is subject to a burden equal, to all practical intents and purposes, to that imposed upon every other property-owner who derives a similar benefit. The theory of special assessment makes every one subject to contribute in proportion to the benefits derived. In this, there is nothing unjust by reason of inequality or lack of uniformity.

The very idea of the special assessment, namely, that it is a contribution in return for a specific benefit conferred, precludes the validity of all objections on the ground that the apportionment departs from the ratio of ability to pay, unless it be contended that no public burden, not imposed according to the ability of the contributor to pay, can ever be regarded as just. Whatever be taken as the evidence of ability to pay, special assessments for benefit will be seen to be unpardonable sinners against the rule adopted. They are not levied in the ratio of the value of the property; for in many cases an almost worthless strip of land is increased in value to a greater extent than a most valuable estate. They do not conform to the variations in income; for one owner who derives no revenue at all from his unimproved lot may be subject to as heavy an imposition as his neighbor who collects from his tenant a handsome rent at the expiration of each month. They bear no permanent relation to the expenditures of the contributors; for the present purposes to which the property is devoted are altogether immaterial to the assessor. Wherein, then, lies the justice of a special assessment? If any justification whatever is to be found, it must be in this: Where an expense is to be incurred by a local authority which results in special, distinct and measurable advantages to the property of particular individuals, it is more equitable that those individuals who benefit thereby should contribute to the expense to the extent of those benefits, than that the burden should be placed upon others who have received no such special benefits. The full meaning of this principle will be better appreciated by applying it to one other theoretical objection that has been urged against the system of special assessments.

§ 9. *The "Unearned" Increment.* It has been asserted that imposing upon the property-owner the expenses of any improvement to the extent that he is benefited thereby, is nothing more nor less than an appropriation by the public of the so-called unearned increment in whole or in part, and that, as such, it is open to all the arguments that have been used against the proposal for a single tax on economic rent. Land values are not alone in securing enhancement through the efforts of society as a whole. All values are fixed in some degree by influences not under the control of those who profit by them. Therefore, to compel the land-owner to make compensation for the increment accruing to his property, is unequal and unjust.[1] On the other side, it is said that there is at least a kernel of truth in the single tax theory, and that the legitimate purposes of the single tax upon economic rent are better effected through a system of special assessments for benefit than through the agency of the single tax itself.[2] The last-mentioned view seems to approximate the facts the more nearly of the two. Special assessment undoubtedly transforms a certain part of the enhancement of land values from an unearned increment into an earned increment.[3] It does this at the very time that the benefit arises, thus avoiding every taint of confiscation of vested interests. Through it may be secured the chief advantages of the appropriation of the future unearned increment, without destroying the healthful stimulus arising from the private ownership of landed property. The total

[1] The Duke of Argyll, "The Betterment Tax," 57 *Contemporary Review*, p. 913.

[2] Black, *Municipal Ownership of Land*, p. 78.

[3] It is probably impossible to determine statistically the exact proportion of the increment taken. Some few inquiries made with a view toward the solution of this problem failed to show that the cost of the improvement assessed upon the owner constituted more than a comparatively small fraction of the gradual increase in value accruing to the property. The cases investigated, however, were manifestly abnormal. A complete application of the system would no doubt intercept an appreciable portion of the so-called unearned increment.

increase is seldom appropriated, but only so much as is required to defray that share of the cost of the particular improvement which may represent the special benefit conferred. We have here no uncharitable begrudging of all rise in value due to conditions other than those created by the party who reaps the advantage. All that is demanded is that when a person secures an enrichment to his estate, and the expense, if not borne by him, must be borne by some one—in this instance the taxpaying public—he shall make compensation therefor. This is the true equitable principle. The contributor pays not alone because he obtains a benefit, but because that benefit is joined to an expense the burden of which finds a fitter resting-place upon his shoulders, than upon the shoulders of others not specially benefited.[1] It is a question merely of imposing a burden where in justice it belongs.

From this theory it does not necessarily follow that the logical outcome of the underlying principle would be to allow private individuals to demand similar contributions from their neighbors toward the expenses of private improvements which incidentally benefit the surrounding estates. A special assessment is levied in order to raise that part of the revenue required for a public improvement which is covered by the advantages accruing to the adjacent property-owners. If these advantages do not equal in value the entire cost of the work, the excess of cost is defrayed by the public treasury. In the case of a private structure, the first claim for the necessary outlay rests upon its promoter and builder. The estimated benefit accruing to him can never fall short of the expenditures involved; if it were expected to do so, he would not have undertaken to build it. The advantages anticipated by him outweigh, in his estimation, the cost, and if his expectations are defeated, the risk must be borne by him. There is neither occasion nor reason

[1] See Rae's reply to the Duke of Argyll, 58 *Contemporary Review*, p. 138.

to call upon others to assist him with contributions; they do not benefit to his loss, since he is amply repaid by the structure which he secures.

In respect to the claim that if the individual property-owner is to be charged for the benefits resulting from public improvements, he ought also to be compensated for injury traceable to them, all that need be said is that in the United States this is actually becoming the practice so far as that principle is justifiable. In other words, the constitutions of several commonwealths[1] enjoin that private property shall be neither taken nor damaged for public use without just compensation. The loss for which indemnity is sought must, of course, be the natural and probable result of the improvement in question, and must be proved in positive terms.

§ 10. *Practical Objections and Abuses.* When now we turn to the practical objections usually urged against special assessments, we shall find that they are either based upon abuses or defects of a particular system in vogue, or are not confined in their application to this one method of raising revenue.[2] It is true that the district of benefit is arbitrarily fixed at the discretion of the legislature, the local authorities or the commissioners of assessment, yet in the exercise of that discretion they are guided by well-defined rules. This is the best that has been devised for any system of taxation. The valuation of property, of income, or of expenditure, rests alone upon the discretion of the assessor or the declaration of the contributor. The boundaries of every local jurisdiction that possesses the power of taxation are arbitrarily fixed by legislative enactment.

The difficulties that have arisen in respect to rebates are owing, as we have seen, to inaccuracy in the preliminary esti-

[1] California, Illinois, Nebraska, Washington, and various others.

[2] Some of the supposed "practical objections" are too frivolous to merit serious consideration. *Vide* Schuster, "Betterment" in Palgrave's *Dictionary of Political Economy*, pt. 2, p. 137.

mates of the cost of an improvement. Various remedies have been adopted. A most simple one is to postpone the assessment until the exact expense of the work has first been ascertained. Another lies in securing contingent bids upon the work as a basis for the commissioners' estimates.

Much confusion and complication exist by reason of a duplicate system of special assessments maintained in some cities for two classes of improvements, the one involving the exercise of eminent domain, having a separate administrative machinery. Where, in taking private property, benefit is offset against the damage, injustice is very apt to occur. As has been demonstrated, there is no necessary connection between an assessment of damages and an assessment for benefits. The procedure would be greatly simplified if the two processes were entirely separated, the right of eminent domain exercised without reference to benefits, and the assessment for all benefits for whatsoever purpose placed under the control of a single authority.

The numerous legal obstacles encountered by our cities in the collection of assessments have had less to do with the financial department of the municipal government than with the department controlling the execution of public works. What has rendered so many assessments void and has cast the burden of the improvements upon the whole community instead of upon the benefited property owners, has been not so much defects in making the assessments as irregularities in executing the contract and in carrying out the work. Reform in this direction can be accomplished in only one way. More incorruptible and more painstaking men must be placed in charge of the executive departments of our cities, and public works must be effected less upon the basis of political spoils and more upon the basis of sound business management.

Lastly, we have to meet the objection that the system of special assessment for benefit is a dangerous one in a democratic community. It is said that where the electoral fran-

chise is in the hands of the landless multitude, the masses will enforce the construction of unnecessary public improvements at the expense of the few property-owners. Our study of the incidence of the special assessment has shown that there is a fallacy at the very foundation of this argument. The burden imposed does not rest exclusively upon the party who first pays it into the treasury; it may be, and in most instances is, shifted upon the occupier. All who possess the electoral franchise are, in a more or less degree, occupiers of premises abutting upon streets which may be improved. They have undoubtedly recognized the fact that they cannot secure to themselves the free enjoyment of public works at the sole expense of the property-owners in the community. To this we must ascribe it that, as a matter of fact, the demand for local improvements has come almost universally from the parties immediately interested, and not from the so-called "non-tax-paying" voters. It is, furthermore, one of the inevitable consequences of democracy that the rich must always be in the minority. In the matter of special assessments they run no greater risks than they do with regard to all other public impositions.

§ 11. *Results.* In conclusion, we must repeat that the choice of a community does not lie between the burden of special assessments and no burden at all. There is an expense to be met in the case of every local improvement which, if not defrayed in one way, must be defrayed in another. Several different solutions to this problem have been offered. The first is the plan of levying tolls upon each individual who makes use of the improvement in question. This was at one time a customary proceeding in many countries, but it has now been generally abandoned. The impediment to traffic and freedom of intercourse is under this system intolerable.

Secondly, a scheme of recoupment has obtained with some favor, particularly in England. It is, however, applicable only to the opening of new streets or public places. Here the

municipality buys a considerable tract of land, retains what it requires and disposes of the surplus at its enhanced value on the market. This plan is open to two objections. In the first place, it necessitates a large outlay of capital on the part of the city. With the ideas of the functions of municipal government prevalent in the United States, this system is with us scarcely feasible. Then again, what is fatal to it in this country, it runs counter to the generally existing constitutional provisions respecting the exercise of eminent domain, which forbid the taking of land not required for a public purpose without the consent of the owner.

Thirdly, the system of general taxation. This is employed in many places and often with satisfactory results. Its great weakness consists in this, that it confers distinct and measurable special benefits upon particular individuals at the expense of the community. It thus fails to conform to our sense of equity and fairness.

Finally, the system of special assessment for benefit. This system has been the subject of exposition and discussion in the preceding pages. With few exceptions and abuses, it has operated in the United States to the general satisfaction of all. It rests upon principles of right and justice. It brings quick results at the very time when needed. It discourages the speculative holding of unimproved urban property. Its introduction, like that of every new plan for raising revenue, may, in places where other methods have long prevailed, involve conflicting considerations of expediency. But for young and rapidly growing municipalities, the system of special assessments is undoubtedly the best, the most practicable, the most just.

BIBLIOGRAPHICAL NOTE.

To indicate the authorities from which the materials for a study of this kind have been derived, has become an integral part of a writer's duty toward his readers. Actuated by this thought, I have cited amply as references in the notes those sources which may be available to the ordinary student. On the other hand, I have gained no small portion of the information here presented, especially with regard to the practical operation of special assessments, by personal interviews with the officials in charge of this branch of the municipal administration in quite a number of our larger cities. To these officials, as also to the many others who have kindly responded to my inquiries both with written replies and with copies of their reports, I owe much, although I am unable to express my thanks to them individually by name.

The great mine of information concerning special assessments in this country—hitherto for the most part unworked—is comprised in the countless legal decisions and legislative enactments bearing upon various phases of the subject. In this study I have fortified all inferences of law by proper citations of the reports, and have also collated these citations in the table of cases which follows. The many cases and laws to which I have referred, but which did not yield material precisely in point, have been altogether omitted. I think I may add that this is the first work upon this subject, however superficial it may be found to be, that can even make a pretense of comprehensive treatment. Yet numerous books contain allusions to special assessments or present discussions of particular aspects of the topic. Those dealing with the law of

special assessments are the most satisfactory. I have consulted these works—often with profit—and I append a list of the titles.

It is but just to all concerned to state that this study was entirely completed before I was afforded an opportunity to read the manuscript of Professor Seligman's lucid article upon "The Classification of Public Revenues," which appeared in the Quarterly Journal of Economics for April, 1893. That I, pursuing my investigations as I did under the guidance of my esteemed and learned instructor, should reach similar conclusions upon those points of theory elaborated by us independently, is, therefore, not to be wondered at. To him I am indebted not only for the first suggestion of the study, but also for constant advice, encouragement and assistance.

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