§ 117 (81). **Borrowing Money; concerning Implied Power to borrow Money.** — We shall hereafter treat of the *implied power* of municipal corporations *to issue negotiable securities*. But this is a different question from *the power to borrow money*. The power to borrow may be given in express language, in which case the terms and purpose of the grant will, of course, measure its extent. But suppose the power is not expressly conferred, *does it exist by implication?* It is perhaps settled law in this country that private corporations, organized for pecuniary profit, have, in the absence of special limitation or restriction, an implied or incidental authority to borrow money for their legitimate purposes, and to give negotiable obligations for its repayment.[1] The question of the *incidental authority of municipal corporations to borrow money* has not been so thoroughly considered and so often decided as to be entirely closed to controversy. In view of the legislative practice to confer, in terms, all powers so important as this, the dangerous nature of this power, by reason of the temptation it holds out to incur needless debts and to make extravagant expenditures, and the facilities it

511; affirming s. c. 16 Conn. 149; 17 Conn. 80, 96; Chilvers *v.* People, 11 Mich. 43; O'Neill *v.* Police Jury, 21 La. An. 586; Aikin *v.* Railroad Co., 20 N. Y. 370 (1859), relating to the ferry rights of the city of Albany; Benson *v.* Mayor, &c. of New York, 10 Barb. 223; Harris *v.* Nesbit, 24 Ala. 398; United States *v.* Fanning, Morris (Iowa), 348; Conner *v.* New Albany, 1 Blackf. (Ind.) 43; City *v.* Ferry Co., 27 Ind. 100; Shallcross *v.* Jeffersonville, 26 Ind. 193. The right of a city, given by charter, *to license and tax ferries*, is not, unless so expressed, exclusive of a like right in the State or county. Harrison *v.* State, 9 Mo. 526 (1845). "Power to *regulate* ferries," given to municipal corporations in general incorporation act, construed. Duckwall *v.* New Albany, 25 Ind. 283. When equity will annul lease. Phillips *v.* Bloomington, 1 G. Greene (Iowa), 498. A power conferred upon a city to establish ferries and to fix the rates, fees, and rents, authorizes it to *rent* the ferry, but it *cannot surrender its control and supervision* wholly to another. Macdonell *v.* International & G. N. Ry. Co., 60 Tex. 590. See *supra*, secs. 96, 97. In Virginia it was held that a county and a city, being joint grantees of ferry franchises, had no power to lease the ferries to private persons, the franchise being a public trust which they could not, without legislative sanction, dispose of or delegate. Roper *v.* McWhorter, 77 Va. 214. Upon *division of an old town* owning ferry franchise, the *new town* owns no interest therein except so far as conferred by the legislature. Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; *post*, chaps. vii., viii.

[1] Stratton *v.* Allen, 16 N. J. Eq. 229; see *ante*, sec. 50, and chapter on Contracts, *post*, sec. 488. Lucas *v.* Pitney, 3 Dutch. (N. J.) 221; Hackettstown *v.* Swackhamer, 8 Vroom (37 N. J. L.), 191; construction of specific grant, Mayor, &c. *v.* Bailey, 8 Vroom (37 N. J. L.), 519. But see observations of *Byles*, J., in Bateman *v.* Mid-Wales Railway Co., L. R. 1 C. P. 510 (1866), as to powers of common-law corporations in England in respect to drawing, accepting, or indorsing negotiable securities. The court in this case deny (in the absence of express legislative authority conferring the power) that it is competent to a company incorporated in the usual way for the formation and working of a railway to draw, accept, or indorse bills of exchange. *Infra*, sec. 125.

offers for frauds, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants,[1] the author, where the legislative will is wholly silent, is strongly inclined *to deny the existence of a general implied* or *incidental power* to borrow money. But it must be admitted that down to the present time a majority of the express adjudications on the subject favor the contrary opinion.[2]

§ 118 (82). **The Subject considered in Ohio and elsewhere.** — The question arose *in Ohio*, in 1836, and was fully argued and considered. The town of Chillicothe possessed authority to purchase real estate, erect public buildings, repair streets, and the usual municipal powers. The right to borrow money was *not expressly* granted, and the only question in the case (an action upon the bonds of the town given for borrowed money) was, whether it was granted by implication. The case was regarded as of the first impression, no authorities in point being produced. The *court distinctly decided* that in carrying out the express powers, or in effecting any legitimate municipal object, the corporation possessed the *incidental* or *implied* right to borrow money.[3] Subsequently the Supreme Court of Wisconsin affirmed the implied authority of a municipal corporation, as incidental to the execution of the general powers granted by its charter, and in the absence of a special restriction, to borrow money and issue its bonds therefor, it appearing that the proceeds thereof went into the treasury of the city and were expended by it.[4] "The charter," says the court, stating its reasons, "does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would

[1] *Ante*, secs. 90, 91.

[2] Text cited Robertson *v.* Breedlove, 61 Tex. 316; Richmond *v.* McGirr, 78 Ind. 192.

[3] Bank *v.* Chillicothe, 7 Ohio, Part II. p. 31 (1836).

[4] Mills *v.* Gleason, 11 Wis. 470 (1860); s. c. 8 Am. Law Reg. 692; State *v.* Madison, 7 Wis. 688; Clark *v.* Janesville, 10 Wis. 136; Clarke *v.* School District, 3 R. I. 199 (1855), in which it is held that when money is borrowed to pay a lawful debt of a corporation, and it is so applied, the corporation is liable on the notes given for the money borrowed; it is not held that notes so given under the incidental power to provide for the payment of debts have all the qualities of commercial paper. In State, *ex rel. v.* Babcock, 22 Neb. 614 (1888), it was held that a power to make regulations to secure the general health of a city and to construct sewers and to regulate their use, conferred necessarily the power to provide money for the construction of a sewer for the purpose of draining its principal street, by issuing bonds therefor. See *infra*, secs. 120, 125, 126.

pass as an incident to these general powers, according to the well-settled rule that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects than that of borrowing money." In this case, as in the other, the question was not raised until the money had been borrowed and the rights of third persons had attached.[1]

[1] City *v.* Lamson, 9 Wall. 477, 486 (1869), where the Wisconsin cases are referred to by *Nelson*, J.; *ante*, sec. 50, and notes. The right of *private* corporations generally to *borrow money, as incidental to the express powers granted*, is extensively considered upon principle and authority, in the important case of Curtis *v.* Leavitt, 15 N. Y. 9 (1857). See, also, Barry *v.* Merch. Ex. Co., 1 Sandf. Ch. 280; Beers *v.* Phœnix Glass Co., 14 Barb. 358; Stratton *v.* Allen, 16 N. J. Eq. 229; Lucas *v.* Pitney (power of railroad company), 3 Dutch. (N. J.) 221; Fay *v.* Noble (manufacturing corporation), 12 Cush. 1; Davis *v.* Prop. &c. of Meeting-house (religious corporation), 8 Met. 321. Perhaps it is difficult to draw a distinction between private and municipal corporations in respect to the incidental right to borrow money. But we see much more reason for affirming the existence of an incidental power of this kind with respect to trading, banking, manufacturing, and railroad corporations, than in relation to municipal corporations. There is a difference between contracting a debt in the prosecution of an ordinary legitimate corporate purpose and borrowing money for that purpose. In the one case, the application of the credit is necessarily secured to the advancement of the authorized object, while money borrowed is liable to be lost or to be diverted to illegitimate purposes. This difference is insisted on with great force by *Agnew*, C. J., in the dissenting opinion in Williamsport *v.* Commonwealth, 84 Pa. St. 487, 507 (1877). It should be remembered, also, that the express powers can be executed without holding that there is an implied power to borrow money. The *revenue provisions* of charters supply the municipality with the means designed to furnish it with money. And powers are not held to exist merely because they are convenient. *Supra*, secs. 89–91, and notes. As applicable to municipal corporations, there is great and almost convincing force in the argument of *Selden*, J., in Curtis *v.* Leavitt, *supra*, 267, 268. And see Ketchum *v.* City of Buffalo, 14 N. Y. 356, 365 (1856), where the subject is considered by the same judge, and the power of a municipal corporation to contract debts on credit, for legitimate purposes, is admitted to be a question which has "yet to be judicially settled." *Infra*, secs. 125, 126. See, on the general subject, Canal Bank *v.* Supervisors, 5 Denio, 517 (1848); Barker *v.* Loomis, 6 Hill, 463 (1844); People *v.* Brennan, 39 Barb. 522 (1863). In Commonwealth *v.* Pittsburgh, 41 Pa. St. 278, *Strong*, J., says that the power to execute and issue bonds is inseparable from the existence of all corporations, public and private. Douglass *v.* Virginia City, 5 Nev. 147 (1869). In *New York*, see Stat. 1853, 1135, chap. 603. In *Mississippi*, Boards of Police of counties have no implied power to borrow money; and when special power to borrow money is conferred it must be fairly pursued; and it was held that where a warrant properly signed did not (as required by the statute) state on its face the object for which it was issued, nor upon what fund drawn, it could not be enforced. Beamair *v.* Board of Police, 42 Miss. 238; s. c. 15 Wall. 566. There may be ground for a distinction as to the implied power to borrow money, between counties and ordinary city corporations.

English Decisions. — Bond for borrowed money, given after the Municipal Corporations Act, held valid. Pallister *v.* Mayor, &c., 67 Eng. C. L. (9 C. B.) 774; Payne *v.* Mayor, &c., 3 Hurl. & Nor. 572. See Nowell *v.* Mayor, &c., 9 Exch. 457; Kendall *v.* King, 84 Eng. C. L. (17 C. B.) 483. Note for borrowed money held invalid under the act. Attorney-General *v.* Lichfield, 13 Sim. 547; Reg. *v.* Lichfield, 4 Q. B. 893. See Bateman *v.* Mid-Wales Railway Co., L. R. 1 C. P. 510 (1866); *ante*, secs. 117, note, secs. 125, 126.

§ 119. **Same subject.** — In Indiana, the doctrine that corporations, along with the express and substantive powers conferred by their charters take by implication all the reasonable modes of executing such powers which a natural person may adopt,[1] is so applied as to hold that it is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing *their express powers*.[2] In Iowa, school districts have the power to borrow money to discharge debts legitimately created and to pledge the credit of the district for that purpose.[3] In Illinois, the same power exists if authorized *by a vote of the people of the district*.[4] But where a law authorizes the *donation* of money by a municipal corporation to aid in the construction of a railroad, and provides for levying a tax to raise the amounts donated as they become due, neither the corporation nor its officers have the power to borrow money or to and to incur a debt on petition of taxpayers, levy a tax, &c., the board of town trustees has power to purchase such apparatus *on credit*, and direct *a note* therefor to be issued in the name of the town. And this power is not exhausted by the passage, pending the negotiation therefor, of an ordinance for issuance of bonds to realize means to purchase the apparatus, if no bonds are in fact issued thereunder. New Albany Bank *v.* Danville, 60 Ind. 504. So, in Richmond *v.* McGirr, 78 Ind. 192, 198, unrestricted power in the city to purchase real estate for public buildings gives to the council implied power, in its discretion, to purchase on credit, and to issue negotiable bonds for the purchase money; the court refused to enjoin the issue of such bonds. *Infra*, sec. 127, and note. As to power to issue bonds for subscriptions *in aid of railroads*, see *post*, sec. 161.

[1] New England, &c. Co. *v.* Robinson, 25 Ind. 536; Lafayette *v.* Cox, 5 Ind. 38; Board, &c. *v.* Day, 19 Ind. 450; Kyle *v.* Malin, 8 Ind. 34; Haag *v.* Board, &c., 60 Ind. 511; Second, &c. Bank *v.* Danville, 60 Ind. 504; Richmond *v.* McGirr (quoting text), 78 Ind. 192, 198 (1881); Board *v.* Saunders, 17 Ind. 437. See, also, Merrill *v.* Town of Monticello, 22 Fed. Rep. 589.

[2] Board *v.* Day, 19 Ind. 450; Miller *v.* Board, 66 Ind. 162, citing Ketchum *v.* Buffalo, 14 N. Y. 356; Mills *v.* Gleason, 11 Wis. 470; State *v.* Madison, 7 Wis. 688; Bank *v.* Chillicothe, 7 Ohio, 354; Moss *v.* Harpeth Academy, 7 Heisk. 283; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Clark *v.* School Dist., 3 R. I. 199; Hardy *v.* Merriwether, 14 Ind. 203; Sheffield *v.* Andress, 56 Ind. 157. Where a city negotiated its bonds to raise means *to construct water-works*, and the city treasurer misapplied a part of the funds so realized, leaving debts unpaid on account of such works, it was competent for the city council to issue and sell other bonds to make up such deficiency. Daily *v.* Columbus, 49 Ind. 169 (1874). Under Ind. Rev. Stat. (1876), authorizing towns to provide apparatus for *extinguishing fires*,

[3] Austin *v.* Colony, 51 Iowa, 102.

[4] Folsom *v.* School Directors, 91 Ill. 404, where it is held that the power to borrow money carries with it at common law, independent of the statute, the power to give evidence of the loan. The power to give bonds for money borrowed is not a limitation but an enlargement of their powers, and an order given by them on their treasurer is valid and may be enforced against the district. *Ib.* The court limits and distinguishes the case of Clark *v.* School Directors, 78 Ill. 474.

issue bonds in payment of such donation, and bonds issued in payment thereof are void.[1]

§ 120. **Same subject. Doctrine in Pennsylvania.** — The subject of the *incidental or implied power of a municipal corporation to borrow money* to pay pre-existing indebtedness, and also to enable it to grade and pave its streets, and *to issue negotiable paper* for this purpose, is elaborately discussed by the Supreme Court of Pennsylvania.[2] It was admitted that "taken in its broad sense, the power to borrow money and issue bonds therefor cannot be said to be among the implied powers of a municipal corporation." But, nevertheless, the majority of the court, after examining the subject and reviewing the authorities, sums up the result in guarded language, as follows: "The foregoing cases rest upon the principle, which we think a sound one, that where a municipal corporation has lawfully contracted a debt, it has the implied power, unless restricted by its charter or prohibited by statute, to evidence the same by a bill, bond, note, or other instrument; that the power to contract a debt carries with it by necessary implication the right to give an appropriate acknowledgment of such debt, and to agree with the creditor as to the time and mode of payment; that in the absence of statutory provision there is no rule of law limiting the extent of the credit." There was a dissent by three judges on the ground that

[1] Lippincott *v.* Pana, 92 Ill. 24; Middleport *v.* Ætna Life Ins. Co., 82 Ill. 562; Dixon County *v.* Field, 111 U. S. 83. In *Nebraska*, county bonds may be issued to raise money to meet current expenses in case of a deficit in the county revenue, but this must first be authorized by a vote of the electors of the county. Dawson Co. *v.* McNamar, 4 N. W. Rep. 991. As to implied power in *Nebraska* to issue municipal bonds, see State *v.* Babcock, 22 Neb. 614 (1888), cited *supra*, sec. 118 *n.* In *Georgia*, it is held to be within the purpose and scope of a municipal corporation to apply the corporate funds or to create a corporate debt for the purchase of an interest in a building to be used as a *public school or college* for the accommodation of the people of the town; and the fact that superintendence of the school is left in the hands of trustees not elected by the corporation does not render the appropriation of the corporate funds illegal, it appearing that the enterprise is not for any private gain, and that the trustees contract to keep up, in the building, a public school. *Quære.* Danielly *et al. v.* Cabaniss, 52 Ga. 211 (1874). In *Wyoming*, the law prohibiting the trustees of a municipal corporation from incurring any debt or borrowing money for the use of the city, without having the concurrence of five-eighths of the taxable property owners, — to be ascertained by a petition for that purpose, — does not preclude the trustees from *issuing warrants on the treasury*, to be used as evidences of indebtedness, although there is no money in the municipal treasury at the time, nor any special authority therefor in the city charter. Ivinson *v.* Hance, 1 Wy. Ter. 270. Difference between warrants and negotiable paper, *infra*, sec. 487.

[2] Williamsport *v.* Commonwealth, 84 Pa. St. 487 (1877). *Paxson*, J., delivered the opinion of the court, in which *Sharswood*, *Mercur*, and *Gordon*, JJ., concurred; *Agnew*, C. J., delivered the dissenting opinion, in which *Woodward* and *Sterrett*, JJ., concurred.

part of the bonds in question were *issued in advance of any debt incurred* for grading and paving, and as a means of raising money to pay for future improvements; that they were sold at a heavy discount, and the proceeds only thus applied; and while admitting that a municipal corporation may have the implied power to give suitable evidences of an authorized debt actually incurred, they denied any incidental power in such corporations, as a means of raising money to execute its ordinary charter powers or duties, "to issue *commercial* paper, be it bonds or notes, payable to bearer, and negotiable according to the law merchant or general usage, and either to sell them in the market or pass them off to individuals by way of a general loan." The dissenting judges admitted that where *express* power to borrow is given, the municipality has the implied right to issue negotiable evidences of the debt; and they also seemed to concede that if an authorized debt is actually incurred for paving or other proper purposes, the municipality has the right to issue a bond or note or warrant as evidence of it; but it was not said that, even when thus issued, that is, issued by virtue of a merely incidental power, the instrument partook of all the attributes of commercial paper, especially the one which protects such paper in the hands of a holder for value before maturity, from defences of which he has no notice.

§ 121. **Author's comment.** — If *the judgment of the court in this case* is to be taken as holding that a municipal corporation, merely by virtue of its authority to pave streets, may, without any express power to borrow money, issue its negotiable bonds *in advance*, and sell them as a means of raising money to be applied to this purpose; may issue them in any sum it pleases and sell them for any price it can obtain, and that bonds so issued are commercial paper with all the qualities and incidents of such paper, — if such is the doctrine of the court, we feel constrained to say that we are unable, notwithstanding the ability with which it is supported, to regard it as otherwise than unsound and dangerous.

§ 122. **Decisions of the Supreme Court of the United States.** — The *question under consideration* has been considered and discussed by the *Supreme Court of the United States*.[1] Four of the justices as-

[1] Mayor of Nashville *v.* Ray, 19 Wall. 468 (1873); Ottawa *v.* Carey, 108 U. S. 110; Hopper *v.* Covington, 8 Fed. Rep. 777; Merrill *v.* Monticello, 14 Fed. Rep. 628. In Claiborne County *v.* Brooks, 111 U. S. 400, the same court decided that the power to issue commercial paper cannot be conceded to *counties and townships*, which are political divisions, unless it is authorized by express legislation or by

sented to the proposition that a municipal corporation possessed no *inherent or incidental power to raise loans or to borrow money for that purpose;* such a power must in their judgment be conferred by legislation, expressly or by plain implication. Indebtedness may be created, it was conceded, for authorized purposes, to the extent permitted, but the legitimate means of paying such indebtedness was by taxation in the usual mode and not by the issue of commercial paper for sale in the market; and such paper, if issued without the sanction of the legislature, although it may be valid as a voucher, is open, into whosesoever hands it may come, to all defences.

§ 123. **Same subject.** — It was not denied by the Supreme Court of the United States, in the case referred to in the preceding section,[1] *that the power to borrow might be implied from the existence of express*

very strong implication from such legislation.

This subject being under consideration in Hackettstown *v.* Swackhamer, 37 N. J. L. 191, the able and learned judge who delivered the opinion of the court said, "Municipal corporations, in the absence of a specific grant of power, do not in general possess the capacity to borrow money. A note given by such corporation for an unauthorized loan cannot be enforced, even though the money borrowed has been expended for municipal purposes. Seemingly, a promissory note given for legitimate purposes by a municipal corporation will not have the effect, when in the hands of a *bona fide* holder, of cutting off the equities existing between such corporation and the payee. An examination of the books will show that this question has not as yet received much judicial consideration. The courts of Wisconsin and Ohio have had this matter before them, and have arrived at a result the opposite of that which has just been stated. I have carefully weighed the arguments of these learned tribunals, but they have failed to convince my understanding. The cases referred to are those of Mills *v.* Gleason, and Bank *v.* Chillicothe. As a counterpoise to these views stands the weighty opinion of Judge *Dillon* in his treatise on Municipal Corporations, Vol. I, sec. 117. Much emphasis is added to this expression of opinion from the fact that this author had before him, at the time he wrote, the opposing cases just cited. In this state of the authority, it cannot be claimed that the principle is so settled that the judgment of this court cannot be freely exercised with respect to this important subject. My conclusion is that already expressed, that a right to borrow money is not to be inferred from any of the ordinary powers conferred in the charters of municipal corporations, and that, under ordinary circumstances, such a power can proceed only from an express grant to that effect.

"The further question was discussed at the bar, whether a municipal corporation, lacking a special authority to that end, can execute a promissory note. I have examined the subject, but the views already expressed render it unnecessary to pronounce any final conclusion with respect to it; for the purposes of the present case, I may say, however, that my present view is, that *a corporate body of this character has the general and inherent right to execute a note as a voucher of indebtedness*, but that such note will not have the effect, when in the hands of a *bona fide* holder before maturity, of cutting off the equities existing between the maker and payee. In this respect I fully concur in the learned opinion of Mr. Justice *Bradley*, recently read in the Supreme Court of the United States, in the case of The Mayor *v.* Ray, 19 Wall. 468." *Per Beasley*, C. J.

[1] Mayor of Nashville *v.* Ray, 19 Wall. 468.

powers[1] of such a nature as to be *beyond the ordinary range of municipal expenditure*, and which are usually executed by means of borrowing; but it was denied by four of the judges that such a power was incidental to the ordinary grants of municipal authority. To the author, the brief and compact opinion of Mr. Justice Bradley seems to be a careful and accurate exposition of the law on the subject; but the remaining four justices appear to have considered that it unduly restricted the powers of municipal corporations.[2] The court has since decided that *quasi* corporations, such as counties, have no implied power to issue commercial paper unless by virtue of express legislation or by very strong implication therefrom, and

[1] *Infra*, secs. 127, 161, and note; *ante*, sec. 118, note.

[2] The prior case of Lynde *v.* The County of Winnebago, decided by the Supreme Court of the United States, 16 Wall. 6 (1872), when carefully viewed with reference to the legislation of Iowa as to the powers of the county judge in the erection of court-houses, and the *express power* to borrow money for this purpose when the proposition to borrow is sanctioned by a popular vote, will be found to assert or involve no general principle, but to turn upon the special statutory provisions, and on the construction and effect to be given to the particular proposition that was submitted to the people. That proposition, having been adopted by the voters, was held by the majority of the court to imply the power to borrow money to accomplish the object in view; and assuming the construction adopted to be the true one, the result reached logically followed. That this judgment of the Supreme Court in the case just referred to is not authority in favor of the broad proposition that the power to make contracts, — for example, as in that case, the building of a court-house, — carries with it the power to borrow money, and, as incidental to that, the power to issue negotiable bonds for the money borrowed, will clearly appear when the statutory provisions and the facts in that case are considered. Power to build court-houses when payment therefor is to be made out of the ordinary revenue is conferred by statute upon the county judge without the sanction of a popular vote. When, however, money is to be borrowed for this purpose the statute requires the proposition to borrow to be submitted to the vote of the people of the county. No proposition to borrow money and to issue bonds was *in terms* submitted to the people; but there was submitted this question, viz., "Shall the county judge, in 1860, levy a tax of seven mills for constructing a court-house in the county, said tax to be levied from year to year until a sufficient amount is raised for that purpose, not, however, to exceed ten years." The proposition having been carried, a majority of the court (three judges dissenting) held that under the Iowa statute the vote gave the authority to borrow money and issue the bonds. Mr. Justice *Swayne* said, "It was expressed in this formula (of the vote taken), that a court-house was to be built, and we think that it was implied that money was to be borrowed to accomplish that object. Otherwise the vote gave no authority which did not already exist, and was an idle ceremony. The statute authorized an appeal to the voters only that they might give or refuse authority to incur a debt. It could not have been intended that the erection should be delayed till a sum sufficient to pay for the structure had been realized from the tax authorized to be imposed, or that the work should proceed only *pari passu* with the progress of its collection from year to year. What is implied is as effectual as what is expressed."

The dissenting judges said, "We cannot find in this vote any authority in the county judge to issue the bonds of the county."

although the county may have power to erect a court-house and other necessary public buildings, this does not authorize the issue of commercial paper for that purpose.[1]

§ 124. **When Power will be held to exist.** — The *nature and extent of the power to borrow money and issue negotiable paper therefor* was considered at length by the United States Circuit Court for Missouri,[2] in which after a review of the decisions — English and American — the following conclusions were reached: Whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the State applicable to it. It has no *incidental or inherent authority* under the usual grants of municipal powers as a means of discharging its *ordinary municipal functions.* Such authority *may be inferred from special and extraordinary powers,* which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when, upon the whole legislation applicable to the municipality, such appears to have been the legislative intent.[3] These principles were applied; and coupon bonds to borrow money to erect and repair wharves and to open streets, *issued under the general grants of municipal power in the charter,* were held *not* to be binding upon the city, while other bonds *issued under a special act of the legislature, in payment of stock in companies* organized to construct macadamized roads from the city, were held to be valid.

§ 125. **Author's Views and Conclusions summed up.** — Whether there is *power in a municipal corporation to borrow money and to issue negotiable paper* depends, we think, upon the legislative intent, to be collected from statutes, general and special, applicable to the municipality or to the particular case in hand. The American cases are conflicting and cannot be harmonized.

The following summarizes our view of the sound and true doctrines on this subject: —

[1] Claiborne County *v.* Brooks, 111 U. S. 400 (1883); approving Police Jury *v.* Britton, 15 Wall. 566; distinguishing Lynde *v.* County of Winnebago, 16 Wall. 6, where the county had express legislative authority to borrow money for the erection of public buildings when authorized by the voters at an election called for the purpose. *Ante,* sec. 122, and notes.

[2] Gause *v.* Clarksville, 5 Dillon, 165, 183 (1879). Thomas *v.* Port Hudson, 27 Mich. 320 (1873), declares the remedy to be for the money or property received. *Post,* secs. 125, 126, 161 and notes. The remedy where bonds of a city are issued without authority and the money thereon is actually received by the city, is not an action on the bonds, but to recover the money. Gause *v.* Clarksville, *supra.* See also Robertson *v.* Breedlove, 61 Tex. 316. *Infra,* sec. 126 note.

[3] *Infra,* sec. 161, and note; and *post,* chap. xiv. on Contracts.

1. The power to borrow money as a means of raising a fund to make future local improvements, or to carry on the ordinary operations of the municipality, cannot be implied from the *mere* authority to make such improvements or from the usual grants of municipal power. These contemplate that the expense of the execution of the ordinary municipal powers shall be met by the revenues derived year by year from taxation.

2. It does not follow because banking, trading corporations and other private corporations organized for pecuniary profit are held in this country to possess the incidental power to borrow money, and to issue commercial paper having all the qualities attributed to such paper by the law merchant, that a like power is inherently possessed by public and municipal corporations.[1] The analogy is false and

[1] As to the power of corporations to issue commercial paper, the law of England is settled. In *England* no corporation, whether municipal (Reg. *v.* Lichfield, 4 Ad. & El. N. S. 891, 906) or private (Bateman *v.* Mid-Wales Railway Co., L. R. 1 C. P. 499, 1866), has the incidental right to make commercial paper, except the Bank of England, which was incorporated for the very purpose, and trading corporations strictly, such as the East India Company. Accordingly it is laid down by Mr. Justice *Byles,* in his work on bills, that, "without special authority, expressed or implied, a corporation has no power to make, indorse, or accept bills or notes." Byles on Bills (8th Eng. ed.), 62; Grant on Corp. 276. Thus, a water-works company (Broughton *v.* Manchester Water-Works, 3 Barn. & Ald. 1), a gas joint-stock company (Bramah *v.* Roberts, 3 Bing. N. C. 963), or even trading companies, unless such a power is essential to the purposes for which they are formed (Bateman *v.* Railway Co., *supra*), have no general or implied authority to make commercial paper. In Bateman's case, last cited, the question for the first time arose in England, as late as 1866, as to the right of a railway company, with an authorized capital of £170,000, to make or accept bills of exchange, and it was unanimously decided, by judges of great eminence (*Erle,* C. J., *Byles, Keating,* and *Montague Smith,* JJ.), that the company had no such power. The acceptance was under seal, and it is a mistake to suppose that the decision rested on the technical ground that a corporation can only contract under seal. It was placed upon the broad ground that there was no act of parliament, general or special, which conferred the power. It was admitted by all the judges that the railway company might incur debts in the construction or operation of the road; "but it is one thing," says *Keating,* J., "to say that they shall be liable to be sued for goods sold and delivered or for work done, and an entirely different thing to say that they may accept bills in payment." And to the same effect was the opinion of the other judges. The principle of this case was approved in The Peruvian, &c. Railway Co. *v.* Thames, &c. Insurance Co., L. R. 2 Ch. 617, when a general incidental power to issue bills of exchange and negotiable instruments under the Companies Act of 1862 was denied, and the power held to depend upon the proper construction of the memorandum and articles of association. The companies organized under that act may communicate this power to their directors, but it must be given expressly or by fair intendment in the memorandum and articles of association of the company, or it will not exist. In England, as shown by Bateman's case, *supra,* it is held that, inasmuch as the corporation has no power to accept bills, it cannot be made liable on its acceptance, though the bill was drawn for a valid and binding debt. On this point *Erle,* C. J., says: "The bill of exchange is a cause of action, a contract, by itself,