§ 131 (86). **Special Charter Limitations construed.** — Under a charter prohibiting the common council of a city from "*authorizing any expenditure for any purpose*," in the current political year, *ex-*

taxpayer, see *post*, secs. 914–922. Such a limitation was held to forbid *implied* as well as express indebtedness, and to be binding equally upon courts of equity and of law. Litchfield *v.* Ballou, 114 U. S. 190 (where relief in equity was denied to one who had loaned money to a city, in excess of its constitutional limit of indebtedness, which had been used in constructing public works, and who prayed for a return of the money). Where the contract of a town to issue its bonds was illegal because the issue would create a debt in excess of its power under the Constitution to contract, the fact that it afterwards, under the general municipal incorporation law, became a city with power to create a debt in a greater amount, was held not to validate the contract made while it was a town, and that the city could not ratify the contract. Waxahachie *v.* Brown, 67 Tex. 519; Gould *v.* Paris, 68 Tex. 511.

The charter of Atlantic City in New Jersey contained a limitation that its debt "shall at no time exceed $35,000." The city was indebted in this sum when it entered into *a contract with a water company to supply itself with water for public purposes for an indefinite period, making no provision, however, to raise by taxation the amount that the city could be called on to pay under the contract.* On *certiorari*, bringing up the contract for judicial review, it was held that the contract and ordinances were *ultra vires*, and the same were set aside. After reviewing the cases cited *infra*, sec. 136 *et seq.*, from Iowa, Illinois, Indiana, and Pennsylvania, *Magie*, J., said: "It is impossible, perhaps, to entirely reconcile these cases. The true interpretation of such restrictions on municipal indebtedness, in my judgment, lies between the extremes they exhibit. The plain object of such restrictions is to require that all moneys which are to be paid for municipal expenses, after the debt has reached the fixed limit, shall be raised by taxation. In view of this object, it is clear (and all the cases agree in this) that prohibitions against increasing the indebtedness, or the debt, of a municipality are not to be construed as limited to obligations which are debts *eo nomine*, but are to be extended to all contracts for the payment of money or contracts whereon the payment of money may be enforced. But where the money to be paid upon such contracts is provided for, to be raised by taxation upon some fixed and definite scheme, such contracts are not, in my judgment, within such prohibitions. Where, however, the money required to meet such contracts is not provided for, either by being legally ordered to be raised by taxation and appropriated for that purpose, or by some legislative scheme which positively prescribes that it shall be raised by taxation and appropriated for its payment as needed, then such contracts do increase the indebtedness or debt of municipal corporations within the meaning of such prohibitions. Any other construction would deprive these restrictions of the force requisite to reach and cure the evil intended to be prevented thereby." Read *v.* Atlantic City, 49 N. J. L. (20 Vroom) 558.

In *Louisiana* it was held that an act of the legislature prohibiting *counties and cities from thereafter "contracting any debt or pecuniary liability*, without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted," *does not extend to a liability for ordinary street work*, which forms part of the current expenses of the corporation, and which may be paid out of its current revenues. Reynolds *v.* Shreveport, 13 La. An. 426 (1858). A provision in a city charter that the council shall not have power to pledge the credit of the city for more than a specified sum *without submitting the question to the voters of the city* was regarded as a definite restriction on the power; and hence a statute authorizing the city to issue bonds to defray the expenses of building a bridge is subordinate to, and does not override, the restriction in the charter. Cumberland *v.* Magruder, 34 Md. 381 (1871). But see Butz *v.* Muscatine, 8 Wall. 575 (1869); *post*, sec. 162.

ceeding the amount of the annual tax levy, the council cannot authorize any expenditure to be made within the year exceeding the limit; but they are not forbidden to authorize in that year an expenditure to be made in a subsequent year, for services to be performed in such subsequent year.[1] The charter of *Chicago* contained the provision that "*no contract shall be made by the common council, and no expense incurred unless an appropriation shall have been previously made concerning such expense*," and the comptroller is required to submit each year an estimate of the amount necessary to defray the expenses of the city for the current year. With this provision in force the *city made a contract with a gas company* whose works were already complete to take gas for its streets and public buildings at a specified price for the period of ten years. This contract was held invalid on the ground that under the above charter provision there was *no actual or reasonable necessity to make a contract extending over ten years*, no appropriation having been made commensurate with the obligations of the contract; and aside from the special provision of the charter, the court inclined to the same result on the ground that the power was legislative and that the council could not, without any reasonable necessity appearing, bind their successors for ten years or indefinitely. Drummond, J., added, "In all cases of contracts to run for years, the authority to make them should be clear. It is better that all parties should understand there is a limit to the power of municipal bodies in such cases."[2]

§ 132. **Special Charter Limitation construed.** — The city of *Galveston* under a provision of its charter authorizing it to construct sidewalks and make street improvements and to reimburse itself for

[1] Weston *v.* Syracuse, 17 N. Y. 110 (1858). See, also, Cook *v.* City of Buffalo, 1 Clinton's N. Y. Digest, "Buffalo," sec. 2. Limitation on rate of tax to be annually levied construed. State *v.* Mayor, 23 La. An. 358. *Funded debts.* — The charter of a city provided that "no *funded debt* shall be contracted." It was decided, that a city bond, issued on time, for the purchase of market grounds, was not a funded debt. Ketchum *v.* Buffalo, 14 N. Y. 356. Meaning of "funded debt" and "funding" considered by *Selden*, J., *Ib.* p. 367, and by *Wright*, J., p. 378. City may *fund* valid bonds and issue new bonds therefor, without express authority. Galena *v.* Corwith, 48 Ill. 423 (1868); Burr *v.* Carbondale, 76 Ill. 455, 474 (1875). See Smith *v.* Morse, 2 Cal. 524; Police Jury *v.* Britton, 15 Wall. 566; *ante*, secs. 63, 69.

[2] Garrison *v.* Chicago, 7 Biss. 480 (1877), *Drummond*, J.; *ante*, sec. 97. The statute of *California*, which declares that the board of supervisors must not contract debts and liabilities which, added to the salaries of officials, will exceed the revenue of the county for the year, does not mean by "*revenue*" the actual amount of money received into the County Treasury, but the estimate of the board of supervisors of what the revenue will be. Babcock *v.* Goodrich, 47 Cal. 488 (1874).

the expense from abutting lot owners, made a contract for local improvements of this character which created a liability exceeding $50,000. This contract was claimed by the city to be invalid by reason of another provision of the charter, that the *council shall not borrow money for general purposes to an amount greater than* $50,000. The Supreme Court of the United States held the objection to the validity of the contract not to be well taken; and the reasons for its judgment, as stated by Mr. Justice Strong, are given in the note.[1]

§ 133. **Prohibitory Statute construed.** — Under a statute which was passed to *prohibit the making of contracts by unauthorized official agents for supplies* for the use of the city of New York, if a contractor makes a contract without observing the protective requirements of the statute and furnishes supplies thereunder, the city is not bound, although the materials supplied were used by it, and an implied liability cannot be raised in the face of the words and purpose of the statute.[2]

§ 134 (87). **Special Charter Provision construed.** — A municipal charter provided that it *should not be lawful* for the city council to

[1] Hitchcock *v.* Galveston, 96 U. S. 341 (1877). Approved, U. S. *v.* Fort Scott, 99 U. S. 152 (1878). "The limitation," says *Strong*, J., in the case first cited, "is upon the power to borrow money, and to borrow it for *general* purposes. It implies that there may be lawful purposes which are not general in the sense in which that word is used in the charter. An examination of the whole instrument, and of the numerous and large powers conferred upon the council, as well as duties imposed, makes it evident that the provision could not have been intended to prohibit incurring an indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the city. If it is, the grant of power the charter contains was an idle thing, and the duties imposed could not be performed. The council, as we have seen, is empowered to grade and pave the streets, and to construct sidewalks. There is no express limitation of these powers. Their exercise necessarily involves large expenditure. Such expenditure is, therefore, authorized. It is a plain incident of the power, and it is a special expenditure. It is for a new work, unlike the work of keeping in repair. Conceding that it is a purpose of the act incorporating the city, it cannot be regarded as a general purpose, for if it is, all purposes of the charter are general. Grading a street or making a sidewalk, where none had existed before, is a special improvement, not like repairs of constant recurrence. By another article of defendant's charter the city council was authorized to provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created. For these reasons we are of opinion that the limitation upon the power of the council to borrow for general purposes did not make the agreement with the plaintiffs invalid."

[2] McDonald *v.* New York, 68 N. Y. 23 (1876); s. c. 23 Am. Rep. 144, distinguishing Nelson *v.* Mayor, &c., 63 N. Y. 535; and Argenti *v.* San Francisco, 16 Cal. 255, as to implied liability. See Gould *v.* Paris, 68 Tex. 511; *post*, secs. 135, note, 460; *ante*, secs. 124, note, 126, note.

make, or authorize to be made, "*any contract for the payment of money beyond the current fiscal year*," declaring every such prohibited contract "illegal and void." In construing this language the court says: "By this section of the charter, the legislature have, in the most explicit manner, prohibited the city council from contracting any debt beyond the fiscal year. If the city council had, at the time the contract was made in 1845, passed an ordinance that the expense of lighting the streets of the city for that year should be paid in 1848, by a tax *then* assessed for that purpose, it would have come within the letter of the prohibition. It is none the less a violation of its spirit that the council did not pass the ordinance providing for its payment until 1848."[1]

§ 134 *a*. **Constitutional Provisions of California and of Colorado construed.** — The Constitution of California provides that no municipal corporation "*shall incur any indebtedness or liability in any manner or for any purpose, exceeding* in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose," &c.; and this provision is held to mean that, subject to the exception, "each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability in any one year shall be paid out of the income or revenue of any future year."[2] By the Constitution of Colorado "*no county shall contract any debt by loan* in any form except for the purpose of erecting necessary public buildings," &c., and "the aggregate amount of indebtedness of any county for all purposes exclusive of debts contracted before the adoption of this Constitution, shall not exceed at any time" a specified rate. The Supreme Court of that State, ruling upon a contention that the limitation was upon indebtedness "by loan," held that, "while these two propositions are associated they are none the less independent declarations;" that in deter-

[1] *Per Caldwell*, J., Jonas *v.* Cincinnati, 18 Ohio, 318, 322 (1849); distinguished, Richmond *v.* McGirr, 78 Ind. 192, 197 (1881). *Construction of similar provision in other charters.* Goodrich *v.* Detroit, 12 Mich. 279; Philadelphia *v.* Flanigen, 47 Pa. St. 21; Johnson *v.* Philadelphia, *Ib.* 382; Wallace *v.* San Jose, 29 Cal. 180; Bladen *v.* Philadelphia, 60 Pa. St. 464, construing an act applying to the city, to the effect that no debt shall be binding unless authorized by law or ordinance, and a sufficient appropriation therefor be made. Where a charter forbade a city to contract a *debt exceeding in any one year the revenue for that year*, a contract for a *term of thirty years for the use of water* was held to create a liability to the full extent of the term, and that as the aggregate liability was in excess of the revenue of any one year the contract was void. Niles Water Works *v.* Niles, 59 Mich. 311. *Infra*, secs. 135, note, 136, 136 *a*.

[2] San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641.

mining the amount of indebtedness at any time county warrants are to be taken into the account, all those which increase the indebtedness beyond the amount limited being void; that the county authorities as well as the parties dealing with them are bound to take notice of the limit prescribed in the Constitution;[1] and that the limitation includes debts incurred by operation of law as well as those arising upon express contracts, but does not include involuntary liability arising *ex delicto*.[2]

§ 135 (88). **Constitutional Provisions construed.** — The Constitution of Iowa contains the provision that "*no county or other political or municipal corporation, shall be allowed to become indebted in any manner*, or for any purpose, *to an amount exceeding five per cent on the value of the taxable property* within such county or corporation, to be ascertained by the last State and county list, previous to the incurring of such indebtedness." Under this provision, as construed by the Supreme Court of the State, no indebtedness, for whatever purpose created, is exempted from the operation of the prohibition, and it applies to negotiable bonds issued under legislative authority as well as to other debts; and the creditor or bondholder must at his peril take notice that the constitutional limit is not exceeded.[3] Substantially similar provisions in other Constitutions, referred to in the note, have received a like construction.[4] If a municipal corporation *has the means in its treasury to meet its indebtedness*, the issue of warrants to an amount larger than five per cent of its taxable property is not a violation of the section of the State Constitution which provides that "no municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding five per cent of the taxable property within the corporation." In such case it would not become indebted within the meaning of the constitutional clause.[1]

[1] People *v.* May, 9 Col. 81 (1885). The Supreme Court of the United States has recently construed this provision of the *Colorado* Constitution. Lake County *v.* Rollins, 130 U. S. 662 (1889) (county warrants); Lake County *v.* Graham, 130 U. S. 674 (1889) (county bonds). These cases are more fully considered, *post*, ch. xiv.

[2] People *v.* May, 9 Col. 404 (1886). *Infra*, sec. 137.

[3] Bank *v.* School District, 39 Iowa, 490; French *v.* Burlington, 42 Iowa, 614 (1876); Grant *v.* Davenport, 36 Iowa, 396 (1873); McPherson *v.* Foster, 43 Iowa, 48 (1876); Council Bluffs *v.* Stewart, 51 Iowa, 385. The fact that the corporation received the value of its bonds, and that the purchaser acted in good faith, and without notice, does not entitle him to recover the amount paid therefor. Since, in the view of the court, the receipt of value for the bonds does not create a *debt*, whether the identical money received for the bonds could be recovered of the municipality, the court left undecided. *Ib.* See *ante*, secs. 124, note, 126. In Mosher *v.* School District, 44 Iowa, 122 (1876), the doctrine of the preceding cases was adhered to, and the attempt of the legislature to give a remedy was held to be ineffectual. A contract for building a *sewer*, by which the contractor was to receive certificates of assessments upon owners of adjacent property in full payment, held not to create a debt within the meaning of the constitutional limitation. Davis *v.* Des Moines, 71 Iowa, 500.

[4] The courts of *Indiana* have decided that a constitutional provision similar to that of Iowa is *prospective in its operation*, and does not prevent the issue of new bonds bearing interest for the purpose of funding debts and interest in existence when the constitutional amendment was

adopted. Powell *v.* City of Madison, 107 Ind. 106.

Under a constitutional provision in *Pennsylvania*, similar to that in Iowa, *municipal bonds* (as to which see more fully, *post*, chap. xiv. on Contracts) issued in violation of the provision were held void in the hands of *bona fide* holders. Millerstown *v.* Frederick, 114 Pa. St. 435; see also appeal of Wilkes-Barre, 109 Pa. St. 554. The Constitution of *Georgia* contains a like provision. Butts *v.* Little, 68 Ga. 272; Walsh *v.* Augusta, 67 Ga. 293; Hudson *v.* Marietta, 64 Ga. 286; Spann *v.* Webster County, 64 Ga. 498. Construction of like provision of Constitution of *Texas*, Gould *v.* Paris, 68 Tex. 511; Waxahatchie *v.* Brown, 67 Tex. 519.

[1] Dively *v.* Cedar Falls, 27 Iowa, 227 (1869). A contract by the corporation to pay for work when it shall be performed in the future, does not constitute an indebtedness, within the meaning of this provision of the Constitution, until the performance of the work. *Ib.* Valparaiso *v.* Gardner, 97 Ind. 1. But *quære.* See Davenport, &c. Gas Co. *v.* Davenport, 13 Iowa, 229. *Supra*, sec. 134, and note. The meaning and effect of the *Iowa* Constitution quoted above were much discussed before the Supreme Court of *Iowa*, in which the question was, "Is a city corporation liable to a *bona fide holder*, *upon its negotiable bonds issued for value*, when at the time of such issue the city was indebted to the full extent of the constitutional limit?" The cause was settled before being decided, and no opinions were filed; but the judges differed in their judgment. In the Western Jurist (Vol. VI. p. 1, January, 1872) will be found two able and interesting articles upon the question above stated, containing the arguments upon both sides of it, — the one being prepared, as it is understood, by Mr. Justice *Beck*, and the other by Mr. Justice *Cole*, of the Supreme Court of *Iowa*. The proposition upon which they differ is whether the *power* given to a city to issue its bonds absolutely ceases, as to innocent holders, the moment the constitutional limit is reached, the same as if it had never been conferred. Subsequently the Supreme Court of the State decided that bonds issued in excess of the constitutional limit were void in the hands of innocent holders for value; and denies any liability on the part of the municipality, either on the bonds or in respect of the value it received for them. McPherson *v.* Foster, 43 Iowa, 48 (1876). The subject is further discussed in chap. xiv. *post*, on Contracts. *Ante*, secs. 126, note, 130, note.

The provision of the *Iowa* Constitution, above quoted, was expounded in the case of Grant *v.* Davenport, 36 Iowa, 396 (1873), which involved the validity of a *contract by the city to supply itself with water;* and it was held that where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such *special* taxes as it may legally levy, and in good faith intends to levy therefor, such contract does not constitute "the incurring of indebtedness" within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.

An ordinance authorizing a corporation *to construct water-works* within a city upon certain conditions prescribed, and providing that the city may, whenever its financial condition will permit, purchase and control them, is *not an "incurring of indebtedness"* within the constitutional provision; it is only assuming an obligation,

§ 136. **Constitutional Provisions construed.** — Under the constitutional provision in Illinois (quoted in the note[1]) the Supreme Court of the State has established the doctrine that a corporation is *prohibited* from becoming indebted in any manner or for any purpose beyond the limit,[2] even for *necessary current expenses.*[3] It cannot incur corporate *indebtedness* beyond the limit in *anticipation of the collection* of taxes levied; and such indebtedness and the evidences thereof are void.[4] But a corporation may issue a warrant for authorized expenses drawn against taxes actually levied and to be collected for the purpose, which warrant, while not creating a debt or liability against the corporation, may yet operate as an assignment of so much of the particular taxes when collected, and such warrant may be made receivable for taxes.[5]

The Constitution of Indiana contains a provision substantially identical with that of Iowa and Illinois before referred to,[6] under

which, without further action on the part of the city, will not ripen into a debt that is thus forbidden. The city may provide a tax not exceeding five mills for the maintenance of water-works, and a sinking fund to reduce the debt thereon. The fact that, by the levy of the tax, the city may in time become the owner of the works does not render the ordinance liable to the objection that it permits the city to do indirectly what it cannot do directly, because none but legal and constitutional means are employed. Burlington Water Co. *v.* Woodward, 49 Iowa, 58. See *supra*, sec. 134, note.

The charter of the *city of Portland, Oregon*, prohibited the city from contracting an indebtedness exceeding $50,-000; and it was held by Judge *Deady* that an ordinance assuming a liability of $350,000, to be paid in semi-annual instalments extending through twenty years, was in violation of the charter, and this, although the ordinance made provisions for the payment of such instalments as they fell due, by the levy of taxes for that purpose. Coulson *v.* Portland, Deady, 481 (1868).

As to *constitutional* provision requiring the legislature to *restrict the power of municipalities to levy taxes, borrow money*, &c., see *ante*, chap. iii. sec. 50.

[1] "No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness." Const. 1870, art. 9, sec. 12.

[2] Springfield *v.* Edwards, 84 Ill. 626.

[3] Prince *v.* Quincy, 105 Ill. 138; Prince *v.* Quincy, 105 Ill. 215. See Gould *v.* Paris, 68 Tex. 511.

[4] Law *v.* People, 87 Ill. 385; Fuller *v.* Chicago, 89 Ill. 282.

[5] Fuller *v.* Heath, 89 Ill. 296; Law *v.* People, 87, Ill. 385.

A debt *already in existence* at the time of the adoption of such constitutional provision, although in excess of the limit, *may*, of course, *be refunded*, and such refunding is not a violation of the Constitution. Powell *v.* Madison, 107 Ind. 106. "The fact that the property, for which the debt is contracted, is valuable, and a source of profit or revenue, does not remove or change the character of the indebtedness." *Per Miller*, J., in Scott *v.* Davenport, 34 Iowa, 208, 213. The property in question was water-works.

[6] The 13th article of the Constitution of *Indiana*, adopted in 1881, ordains that, "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void." The provisions as to the limit of municipal indebtedness in the Constitutions of Illinois and Indiana were probably copied from the Constitution of Iowa. See Prince *v.* Quincy, 105 Ill. 215; Valparaiso *v.* Gardner, 97 Ind. 1, 9.

which it is held that a city whose indebtedness has reached the limit cannot create a further debt even for necessaries.[1]

The Constitution of Pennsylvania provides that "The debt of any city, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein." The city of Erie made a contract with private persons for the erection of a market-house, by the terms of which the city agreed to pay for twenty-five years a rental of $1500 per annum. A bill in equity was filed by taxpayers stating the above contract, also that the indebtedness of the city was already in excess of the seven per centum limit, and praying for an injunction to restrain the city from paying any money on the said contract. The defendant filed a general demurrer. As it did not appear upon the face of the bill that the annual revenue, after meeting the other municipal liabilities, was sufficient to meet the proposed contract liability, the court held, on the facts before it, that the contract created an indebtedness in violation of the Constitution, and granted the injunction.[2]

§ 136 *a*. **Same subject.** — Under the constitutional provisions in Iowa, Illinois, Indiana and Pennsylvania, referred to, it is held

[1] Sackett *v.* New Albany, 88 Ind. 473. This case was substantially like Prince *v.* Quincy, 105 Ill. 138, and Prince *v.* Quincy, 105 Ill. 215, and the decision was the same. See also Valparaiso *v.* Gardner, 97 Ind. 1.

[2] Appeal of City of Erie, 91 Pa. St. 398. In giving the opinion of the court *Gordon*, J., quotes the following from Grant *v.* Davenport, 36 Iowa, 396: "When a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intends to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts." And adds: "This, we hesitate not to say, is a sound constitutional interpretation, and in a similar case might well be adopted in the construction of our own Constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created." So a contract entered into by a city for the building of a sewer, whereby the contractor agrees to accept, in full satisfaction for the whole work, certificates of assessment made upon the property adjacent to the sewer, *held* not to create a *debt* against the city, and so not to be within the constitutional prohibition. Davis *v.* DesMoines, 71 Iowa, 500.

that a corporation may make a contract (at least for necessaries) covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished; and in such case, *the whole amount* which may ultimately become due *does not constitute a debt* within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition.[1]

§ 136 *b*. **City Stock in Sinking-Fund not a Debt.** — The Constitution of New York (sec. 11, art. 8) was in 1884 amended, *inter alia*, by ordaining that "No county containing a city of over one hundred thousand inhabitants, or any such city, shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten per centum

[1] Grant *v.* Davenport, 36 Iowa, 396 (water supply); E. St. Louis *v.* E. St. Louis, &c. Co., 98 Ill. 415 (gas supply); Valparaiso *v.* Gardner, 97 Ind. 1 (water supply); Appeal of City of Erie, 91 Pa. St. 398, *semble* (city market-house).

Compare Coulson *v.* Portland, Deady, 481, where the debt was for a railroad subsidy, and it seems there would have been an *absolute debt* for the whole amount *immediately*, though payable *in futuro*.

In Jacksonville Ry. Co. *v.* City of Jacksonville, 114 Ill. 562 (1885), an assessment had been made by the municipal authorities, pursuant to statute, against the property of the railway company for its ratable portion of the estimated cost of a pavement, the construction of which was proposed and authorized. The municipal ordinance which authorized the construction and assessment contained a provision that the part of the cost of the pavement that would fall on the city should be raised by general taxation. In a proceeding to review the validity of the assessment, the railway company offered to show that the city was already indebted in excess of the constitutional limit. The court held that as the ordinance did not create a debt it did not violate the constitutional provision. See *supra*, sec. 130, note; Wallace *v.* San Jose, 29 Cal. 180; Niles *v.* Niles, 11 Am. & Eng. Corp. Cases, 299.

A statute in *Nebraska* provided that "it shall not be lawful for any warrants to be issued for any amount exceeding in the aggregate the amount levied by tax for the current year." The county commissioners after the exhaustion of the levy allowed claims against the county, and levied a tax under the name of a "sinking-fund tax" for their payment. The tax was held illegal, because under the legislation of the State a sinking-fund tax is authorized only in the case of *loans*, and an audited claim is not a loan. U. P. R. R. Co. *v.* Buffalo County, 9 Neb. 449.

A city council in *Ohio* was authorized to levy not to exceed fifteen mills on the dollar for all municipal purposes. It first levied for fifteen mills, and later made an additional levy of two mills for the same year. The additional levy of two mills was held void. In 1874 the same city council had authority to make the same levy as in 1871. It first levied ten and five-tenths mills, and later made an additional levy of sixteen mills. The additional levy of sixteen mills was held *void throughout*. Cummings *v.* Fitch, 40 Ohio St. 56.

of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment rolls of the said county or city on the last assessment for State or county taxes prior to the incurring of such indebtedness; and all indebtedness in excess of such limitation, except such as may now exist, shall be absolutely void, except as herein otherwise provided. No such county or such city whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit." Construing this provision, it was held by the Court of Appeals that "*city stock*" *of the city of New York* held by the Commissioners of the Sinking Fund for that city *is not an indebtedness of the city within the meaning of the constitutional provision*, since such city stocks are not debts which the municipality can be called upon to pay, and that the indebtedness referred to in the Constitution is an indebtedness to be met in the future by taxation.[1]

§ 137 (89). **Liabilities ex delicto.** — *A restrictive provision in a city charter*, that the "council shall not create or permit to accrue any debts or liabilities which shall exceed" a specified sum, unless a certain course be pursued by the council and approved by a vote of the people, has been considered to have *no relation to liabilities arising ex delicto*, or to those which the law may cast upon the corporation, and to apply at most only to contracts or liabilities voluntarily created. The court, indeed, seems to consider the provision as directory simply, and not as a limitation on the power of the council to create debts.[2] The provision in the Constitution of Iowa referred to in a preceding section, although it is construed by the Supreme Court of the State to fix an absolute limit to the amount of indebtedness which a municipality has the power to incur,[3] is by

[1] Bank for Savings *v.* Grace, Mayor, &c. of New York, 102 N. Y. 313. After referring to the constitutional amendment and reviewing the legislation respecting the sinking fund of the city of New York, the court said: "This construction cannot lead to a diversion of the sinking fund, but to the accomplishment of its object. It satisfies also the intent of the constitutional prohibition. That is aimed at an actual, not a theoretical indebtedness, — at a substantial liability which can be discharged only by the enforcement of a tax or an assessment which, when levied, will be a charge upon the taxpayer and a burden for him to remove; not a formal obligation which may remain as evidence of a once existing debt, but which can in no way be regarded as a present debt to be enforced, and which, if not before cancelled in the discretion of the commissioners, becomes waste paper by the mere efflux of time."

[2] McCracken *v.* San Francisco, 16 Cal. 591 (1860); *supra*, sec. 134 *a*.

[3] French *v.* Burlington, 42 Iowa, 614 (1876); *supra*, sec. 135.