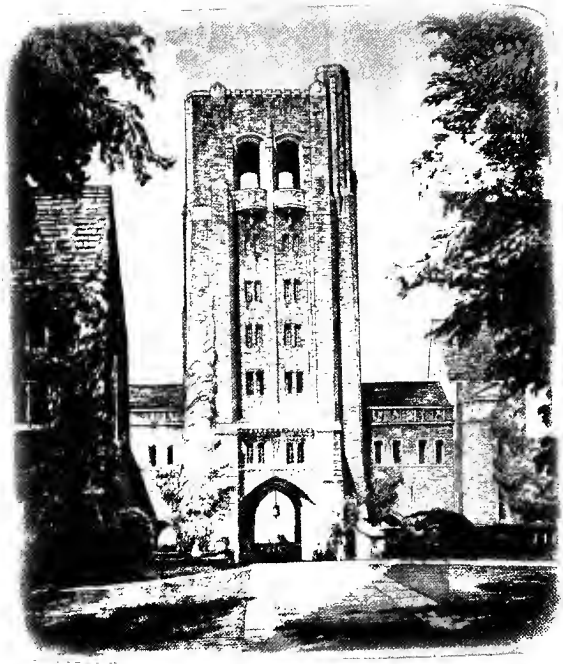

A TREATISE

ON THE LAW OF

PUBLIC SECURITIES

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CHICAGO

CALLAGHAN AND COMPANY

1913

TO MY MOTHER

AS A SLIGHT TRIBUTE TO HER NOBLE EXAMPLE AND HER CONSTANT ENCOURAGEMENT AND INSPIRATION, THIS WORK IS AFFECTIONATELY INSCRIBED BY THE AUTHOR.

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A TREATISE

ON THE

LAW OF PUBLIC SECURITIES

CHAPTER I.

INTRODUCTORY AND DEFINITIONS

§ 1. Introductory.

The importance of the subject of this work justifies its publication at the present time. The debts of the different states and their various civil subdivisions have increased enormously within the past few years. These debts are evidenced by public securities of one form or another which pass into the hands of savings banks, trust estates, and other private investors. In view of the increase, alarming in its extent, in public securities, the investor should observe every precaution in establishing the technical legality of the securities which he buys, for while default and repudiation do not occur as frequently as in former years, yet in substantially all instances the only security behind the obligation is a moral duty to pay coupled with a desire to maintain good credit for the flotation of additional securities in the future. The rapid increase of public debts should tend to make an investor more cautious, for with every increase of liability the point for default and repudiation is more nearly approached.

In the United States the municipal debt, which includes

that of cities, towns, villages and other civil subdivisions, in 1880 was in round figures $1,123,278,000; in 1890, $1,137,200,000, and in 1902, $1,630,000,000. There was added in the period from 1902 to 1909, $1,445,000,000, exclusive of bonds issued for refunding purposes, making a a total net debt, i. e., gross debt less sums or assets held in sinking funds, on the first of January, 1910, of $3,075,000,000, to which was added during the year 1911, approximately $320,000,000. In view of these figures and considering the fact that savings banks and trust estates are the largest purchasers of public securities, the greatest care should be exercised in examining and determining the legality of different issues.

To better understand many of the questions considered by the courts and arising in the cases decided, a brief discussion of the nature and powers of the different public corporations will immediately follow. This will be necessarily brief and reference made to but few authorities. For a full examination of the questions and principles involved the reader is referred to works on public corporations treating in full the questions raised.

§ 2. Definition of a corporation.

The idea that an association or combination of natural persons or things may possess powers and properties distinct from, as well as in common with natural persons, has been a necessary and a favorite one in all systems of jurisprudence. One of the divisions therefore found in the earliest known codified law is that of persons into natural and juridical, the latter including an "artificial person" existing only in contemplation of law, and the logical sequence of existing conditions. Since that time all legal codes have recognized this "artificial person," the corporation. The definition of a corporation most widely known and quoted is that of Chief Justice Marshall in the Dartmouth College case, "A corporation

is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers on it either expressly or as incidental to its very existence."[1]

Austin Abbott in the Century Dictionary defines a corporation as "An artificial person created by law or under authority of law, from a group or succession of natural persons, and having a continual existence irrespective of that of its members and powers and liabilities different from those of its members."

The occasion of the creation of a corporation is chiefly for the resulting convenience, economy, unity and continuity in the transaction of business or the management of property, the exercise of granted powers or the performance of prescribed duties. Certain powers and functions can be better exercised by an artificial body than by natural persons.

Corporations have been classified according to the functions which they may perform, their purpose of creation or the number of members comprising them. The only classification which concerns the present work is that first suggested, viz: the division based upon functions performed. This was broadly suggested in the Dartmouth College case in the opinion of Justice Story: "Public corporations are generally esteemed such as exist for public political purposes only—such as towns, cities, parishes and counties, and in many respects they are so although they involve some private interests. But strictly speaking, public corporations are such only as are founded by the government for public purposes where the whole interests belong also to the government."[2]

1—Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 636.

2—Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 668.

The basis of this classification arises upon a difference in the nature of the duties required and powers exercised and has existed since the first organization of artificial persons by a sovereign state, and the classification is that of public and private. In a California case [3] Chief Justice Sawyer in writing the opinion said in defining a corporation and discussing its nature: "So also there are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a quasi public character, having in view some great public enterprise in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class, there are railroad, turnpike and canal companies. And corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern except the indirect benefits resulting from the promotion of trade and the development of the general resources of the country."

§ 3. Public and private corporations distinguished.

The rights and powers, the duties and obligations of a public corporation as compared with those of a private corporation are marked. This is true because of the entirely different purposes for which they are respectively created. A public corporation is an agency of the state of the sovereign; it is organized to carry out some local political want as auxiliary to the sovereign power; it is a governmental agent created for the benefit of all affected; it is created and exists through the mere will of the Legislature as the delegated agency of the sovereign and the relations existing between itself and the

3—Miners Ditch Co. v. Zellerbach, 37 Cal. 543, 577.

sovereign do not partake of the nature of a contract. On the other hand, a private corporation is organized primarily for the benefit, generally pecuniary, of its members; for the advantage of the few as compared with the many. This distinction is very clearly and concisely stated in an early decision in North Carolina,[4] where the court said: "The purpose in making all corporations is the accomplishment of some public good; hence the division into public and private has a tendency to confuse and lead to error in the investigation; for unless the public are to be benefited it is no more lawful to confer 'exclusive rights and privileges' upon an artificial body than upon a private citizen. The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this body a portion of the power of the legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed or annulled. Other corporations are the result of contract. The legislature is not the only party interested; for although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract. The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side, that of expected remuneration for the outlay is the consideration on the other. It is a contract, and therefore cannot be modified, changed or annulled without the consent of both parties. Counties are an instance of the former, railroad and turnpike companies of the latter, classes of corporations."

4—Mills v. Williams, 33 N. C. (11 Ired. L.) 558.

The most important difference between public and private corporations is that in the one case, as suggested in the North Carolina decision, there is but one party to the transaction; that no contract relation exists as between the inhabitants of the territory organized and the state, and the charter or political organization for this territory may be altered, amended or repealed at the pleasure of the sovereign state. This is not true except within certain well recognized legal limitations in respect to the private corporation. Its charter is a contract subject only to the law of the land governing the construction and enforcement of contracts. In the Dartmouth College case, Chief Justice Marshall uses language often quoted, "The character of civil institutions do not grow out of their incorporation but out of the manner in which they are formed and the objects for which they are created. The right to change them is not founded on their being incorporated but on their being the instruments of government created for its purposes. The same institutions created for the same objects though not incorporated would be public institutions and of course be controlled by the legislature. The incorporating act neither gives nor prevents this control."[5]

§ 4. Classification of public corporations.

There is found upon an examination of the reported cases, a classification of public corporations based upon fundamental characteristics and differences, viz.: municipal and public quasi-corporations. These two classes have been generally recognized, though owing to a confusion of ideas and a failure to comprehend the basic reasons for the division the placing of the same governmental organization in the same class has not been uniform by the courts. This is not altogether their fault

5—Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 638.

for different state constitutions and statutes have placed in different classes governmental organizations possessing the same relative powers. The essential difference between these classes is in the varying power of local action or initiative. This diminishes in passing from municipal to public quasi and accompanying this decrease in power is found a corresponding diminution of duty and of liability.[6]

The distinction between these classes of public corporations is important and the proper placing of a particular corporate organization in its class under constitutional or statutory provisions may be necessary to determine the legality of an issue of public securities in a specific instance. A corporate organization possessing substantially the same powers and exercising substantially the same functions may under constitutional or statutory provisions be termed a "municipal corporation" in one state and a "public quasi" or "public corporation" in another.

To properly place a particular corporate organization is further important in connection with a determination of the powers which it may exercise and the construction of the powers granted to it. The grants of power to a public quasi corporation are subject to greater scrutiny and a stricter rule of construction than similar grants to a municipal corporation; although the courts never in either case depart from what is known as the strict rule of construction.

§ 5. Definition of a public corporation.

The term "public corporation" will be used in this work as a generic one and includes both municipal corporations proper and public quasi corporations. The

6—Abbott Mun. Corp., Sec. 5, et seq.

distinction between the two last named is difficult of detection at times, varying with the idea as it existed in the mind of the court writing a particular opinion. Broadly speaking, the term "public corporation" may include the state. It certainly includes all public governmental agents or political or governmental subdivisions, whatever their powers or obligations, their rights or their duties, may be, though some of them may not have, strictly speaking, all of the powers and capacities of a corporation. The attributes of a corporation attach in a varying degree, and yet they all will be included in the class. Other definitions of public corporations are, "The investing of the people of a place with the local government thereof," and those found in other cases cited in the note.[7]

A recent text book[8] defines a public corporation as "one that is created for a political purpose with political power to be exercised for purposes connected with the public good in the administration of civil government. It is an instrument of the government, subject to the control of the legislature, and its members are officers of the government appointed for the discharge of public

7—Cuddon v. Eastwick, 1 Salk. 143; Society for Propagation of the Gospel v. New Haven, 8 Wheat. (U. S.) 464; Trustees for Vincennes University v. State of Indiana, 14 Howard (U. S.) 268; Bank of Alabama v. Gibson's Administrators, 6 Ala. 814; Dean v. Davis, 51 Calif. 406; Reclamation District No. 542 v. Turner, 104 Calif. 334.

Metcalf v. Merritt, 111 Pac. 505. A reclamation district is a public as distinguished from a private corporation acting as a state agency, but it is not a municipal corporation possessing in any degree general powers of government. Smith v. Biesaida (Ill.), 90 N. E. 1009; People v. Niebruegge, 91 N. E. 115, 244 Ill. 82; Slutts v. Dana (Ia.), 115 N. W. 1115; Inhabitants of Yarmouth v. Inhabitants of North Yarmouth, 34 Maine 411.

Rhodes v. Love (N. C.), 69 S. E. 436. A public corporation is founded for public purposes and generally has for its object the government of a portion of the state and is therefore endowed with a portion of its political powers. Standard Dictionary, "Corporation."

8—Clark & M. Private Corp., Sec. 31.

duties. In other words a public corporation is a corporation created merely for purposes of government, and a private corporation is one that is created for other purposes than those of government."

§ 6. Definition of a municipal corporation.

A municipal corporation has been defined by Judge Dillon as "the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate, specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." [9]

Bouvier defines one as "a public corporation created by government for political purposes and having subordinate and local powers of legislation." [10]

"A corporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government," is still another definition given. A correct one should also convey the idea that organized territory of itself does not constitute a municipal corporation, but that it includes also the people residing within that district.[11]

An excellent descriptive definition is given in a recent work: [12]

9—Dillon, Mun. Corp. (4th Ed.), Sec. 20.

10—Bouvier, Law Dict.

11—Kelly v. City of Pittsburgh, 104 U. S. 78; City of Galesburg v. Hawkinson, 75 Ill. 152; State v. Barker, 116 Iowa 96, 89 N. W. 204; People v. Bennett, 29 Mich. 451; Heller v. Stremmel, 52 Mo. 309; People v. Morris, 13 Wend. (N. Y.) 325; Clarke v. City of Rochester, 24 Barb. (N. Y.) 446; Grennan v. Carson Okla., 107 Pac. 925; City of Philadelphia v. Fox, 64 Pa. 180; East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166; see, also, Abbott Municipal Corporations, Sec. 7, and cases cited.

12—20 Am. & Eng. Enc. Law (2d Ed.), p. 1131, and cases cited; see, also, the following cases defining

"Municipal corporations are of a twofold character, —the one public as regards the state at large in so far as they are its agents in government; the other private in so far as they are to provide local necessities and conveniences for their own communities. And the fact that the legislature has blended the public and private functions of a municipal corporation in one grant of power does not destroy the clear and well settled distinction between them. In its governmental character the corporation is made by the state a local depositary of certain limited and prescribed political powers, to be exercised for the public good of the state. In its proprietary character the theory is that the powers are not conferred chiefly from considerations connected with the

and stating the powers of municipal corporations.

Waller v. Osban (Fla.), 52 So. 970. Municipalities are legal entities established for local governmental purposes.

Penick v. Foster (Ga.), 58 S. E. 773. A municipality is a mere political division of the state having for its object the administration of a portion of the power of government delegated to it for that purpose.

Head v. City of Des Moines, 119 N. W. 276. A municipal corporation has a two-fold character, in the one it may undertake obligations and subject itself to liabilities for which it is answerable as any other corporation; in the other character, it is an arm of a sovereignty of the state and power is conferred upon it to exercise governmental functions.

State v. City of Lawrence (Kan.), 100 Pac. 485. Municipalities are primarily created to perform the functions of local government but they are also created as agencies of the state for governmental purposes. Commonwealth v. City of Covington (Ky.), 107 S. W. 231.

Libby v. City of Portland (Me.), 74 Atl. 805. Municipalities act in a dual capacity, the one corporate, the other governmental. Byars v. State (Okla.), 102 Pac. 804; Ex parte Simmons (Okla.), 112 Pac. 951; Acme Dairy Co. v. City of Astoria (Ore.), 90 Pac. 153.

Anerum v. Camden Water, Light & Ice Co. (S. C.), 64 S. E. 151. A municipal corporation is a legal institution created by charter from sovereign power, erecting a populous community of a prescribed area into a body politic and corporate, with a corporate name and continuous succession and for the purpose and with the authority of subordinate self government and improvement and the legal administration of the affairs of state. Short v. Gouger, 130 S. W. 267; City of Burlington v. Centr. Vt. Ry. Co. (Vt.), 71 Atl. 826.

government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual." [13]

§ 7. Public quasi corporations defined and distinguished from municipal.

Public quasi corporations have been defined as: "It is universally agreed that all those subdivisions of state territory, such as counties, townships, school districts, and like bodies, which are created by the legislature for public purposes and without regard to the wishes of their inhabitants, are to be included in the class known as 'quasi corporations.' They are in essence local branches of the state government, though clothed with a corporate form in order that they may the better perform the duties imposed upon them. Generally they comprise large areas of territory which are but sparsely settled, and the relations of life and business existing within them are extremely simple." [14]

As illustrating the different legal character assigned to municipal or public administrative and political organizations, see the authorities cited in the note. Since the name "public," "municipal," or "public quasi" may be given by constitutional or statutory provisions to organizations of the same relative grades in different

13—City of Winona v. Botzet, 169 Fed. 321; People v. Earl, 94 Pac. (Colo). 294; State v. Denny, 118 Ind. 449; Soper v. Henry County, 26 Iowa 264; Marion County Com'rs v. Riggs, 24 Kan. 257; City of Wellington v. Wellington Tp., 46 Kan. 213; Parker v. Scogin, 11 La. Ann. 629; Small v. Inhabitants of Danville, 51 Me. 359; People v. Common Council of Detroit, 28 Mich. 228; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; Lehigh Water Co.'s Appeal, 102 Pa. 515; Atkins v. Town of Randolph, 31 Vt. 226.

14—Williams, Mun. Liab. Tort., Sec. 2, citing El Paso County Com'rs v. Bish, 18 Colo. 474; see, also, White v. Chowan county Com'rs, 90 N. C. 437; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; Chosen Freeholders of Sussex County v. Strader, 18 N. J. Law (3 Har.) 108; Cooley, Const. Lim. 247.

states, reference must be necessarily had to the authorities in each state for the proper designation of a particular public corporation and no attempt of necessity can be made in this work to make an exhaustive citation of all the cases. [15]

15—Sherman County v. Simmons, 109 U. S. 735. A county is not a corporation within the meaning of the constitution of Nebraska that "the legislature shall not pass any local or special laws * * * granting to any corporation," etc.

Town of Enfield v. Jordan, 119 U. S. 680. A village as used in Sec. 10, Ill. act of Feb. 24, 1869, relative to the granting of railroad aid bonds includes an incorporated town.

Atchison Board of Education v. De Kay, 148 U. S. 591. The Board of Education of the city of Atchison in the State of Kansas is a distinct corporation separate from the city of Atchison.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112. An Irrigation district held to be a public corporation.

Clapp v. Otoe County (Nebr.), 104 Fed. 473. A precinct under the statutes of Nebraska is a mere political subdivision of a county. It is not a municipal or quasi municipal corporation or entity.

Wills v. Bates County, 170 Fed. 812. A drainage district not a quasi corporation under the Missouri Drainage Act. Rev. Stat. 1899, Secs. 82, 83, as amended by Laws 1905, p. 182.

Kumpe v. Bynum, Ala. 48 So. 55. A county is a governmental agency and in a sense a municipal corporation.

Sixth District Agricultural Association v. Wright (Calif.), 97 Pac. 144. An agricultural association duly organized under the laws of the state is a public agency of the state charged with the performance of a part of the functions of the state government.

City of Santa Monica v. Los Angeles County (Calif.), 115 Pac. 945. A county but a branch of the state government.

Hammond v. Clark (Ga.), 71 S. E. 479. The word "county" defined. School, City of Marion v. Forest, 78 N. E. 187 (Ind.). A library board not a corporation.

State v. Board of Com'rs of Marion County (Ind.), 82 N. E. 482, 85 N. E. 573. A county is an involuntary corporation organized as a political subdivision of the state by the legislature solely for governmental purposes.

State v. Gerdink (Ind.), 90 N. E. 70. The word "town" as used in Constitution, Art. 6, Sec. 6, is generic and includes city.

Posey Township, Franklin County v. Senour (Ind.), 86 N. E. 440. Townships are the lowest class of municipal corporations.

Austin Western Company v. Weaver Township (Ia.), 114 N. W. 189. A township is not a legal entity, cannot be sued; see, also as holding the same. Davis v. Laughlin, 124 N. W. 876.

Marion County v. Rives & McChord (Ky.), 118 S. W. 309. A county is a local subdivision of the state, created by the state of its

A corporation possesses certain rights and powers, and there may be imposed upon it by the sovereign certain duties and obligations. Between the two classes of public corporations under discussion a marked difference is found in these respects. This follows from various causes, one of which is the fact that as a rule the government of a public quasi corporation is imposed by the sovereign upon the people residing within certain geographical limits, without consulting their desires or wishes. On the other hand, the government or charter

own will and is not a municipal corporation proper.

State ex rel. Applegate v. Taylor (Mo.), 123 S. W. 892. A drainage district is a public corporation.

Board of Education, etc. v. Board of Education, etc. (N. Y.), 71 N. E. 1128. A school district is a municipal corporation within Constitution, Art. 8, Sec. 1, excepting such corporations from the provision against creating corporations by special act.

Millville Gas Light Co. v. Vineland Light & Power Co. (N. J.), 65 Atl. 504. The word "town" as used in legislative acts in New Jersey has no fixed significance and its use must be applied according to the manifest legislative intention as gathered from the occasion and necessity of the act.

Herman & Grace v. Board, etc. of Essex Co. (N. J.), 64 Atl. 742. A county held to be a municipality within the meaning of act of March 30, 1892, Public Laws, p. 369.

Smith v. Board of Trustees, etc. (N. C.), 53 S. E. 524. School districts are public quasi corporations included in the term "municipal corporation" used in Constitution, Art. 7, Sec. 7.

Wittowsky v. Board of Commissioners of Jackson County (N. C.), 63 S. E. 275. Townships are not corporate bodies but sometimes referred to in legislative acts as quasi municipal corporations.

Burgin v. Smith (N. C.), 66 S. E. 607. Counties are subdivisions of the state created by the legislature for political and civil purposes as agencies of the state government and they are subject to legislative control so that the legislature may compel them to levy taxes to the constitutional limit.

Frantz v. Autry (Okla.), 91 Pac. 193. A county is a mere territorial division of the state, created for public and political purposes connected with the administration of the state government.

Yamhill County v. Foster (Ore.), 99 Pac. 286. A county is not a private corporation, but merely a political agent of the state created for governmental purposes.

Lincoln County v. Brock (Wash.), 79 Pac. 477. A county is a municipal corporation within Constitution, Art. 1, Sec. 16.

See, also, numerous authorities cited in Abbott Munic. Corps. pp. 12-16.

of a municipal corporation proper is usually suggested by the sovereign and adopted or accepted by the people residing within a certain district. The fact that the government or organization is imposed in the one case and adopted or accepted in the other leads to the correlative part of the proposition, namely, the relative duties and obligations of the two classes of corporations, and we find upon an examination of the authorities that the duties and obligations resting upon the public quasi corporations are less in number, and these less burdensome, than those which devolve upon the municipal corporation proper. The people residing within a municipal corporation are given a greater latitude and degree of local self government, in adopting measures looking to their local advantage, than those residing within a public quasi corporation; and as their powers and duties are not thrust upon them, but acquired voluntarily to a large extent, it follows as just and proper that their obligations and duties be in the same measure increased and of a higher character.

§ 8. Hamilton County Commissioners v. Mighels.

One of the early and also a leading case, considering the differences between a municipal corporation and a public quasi corporation is that stated in the title of this section. The principles there stated have been universally followed and the case frequently cited. The court in part in its opinion held that, "As before remarked, municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who will compose them.

"Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented

to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

"A municipal corporation proper is created mainly, for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." [16]

§ 9. Elements of a public corporation.

The fundamental idea in the definition of a public corporation of any grade is the one that it is an organization or an incorporation of the persons residing within a certain prescribed physical territory and the property included within its limits. It is not merely an organization of natural persons into an artificial one The physical elements comprising public corporations consist of the people and the property within certain limits. The name may be changed or the organization of a day abolished and another take its place but the duties and the obligations of that locality remain the same and cannot be changed through the dissolution of the artificial person or a change in the name of the legal person. This principle has repeatedly been the basis of decisions sustaining the character of public securities as valid claims against a new corporation including the

16—Hamilton County Comm'rs v. Mighels, 7 Ohio St. 109.

territory of an old organization dissolved pursuant to an act of the legislature or by order of court. The language used in these decisions recognizes unqualifiedly the principle stated and the same doctrine is the basis of constitutional or legislative provisions providing for the adjustment of debts and liabilities of public corporations upon a change in their boundaries through either division or annexation.[17]

§ 10. Definition and classification of public securities.

The phrase "public securities" as used in its broadest sense and as referred to in this work includes negotiable securities, municipal warrants, school district orders and all other evidences of indebtedness issued by the state and its minor civil subdivisions including cities, towns, villages, counties, townships, road districts, school districts, and other subordinate corporations created under authority of law to aid the sovereign state in executing its governmental functions and performing its public duties. It will be found upon an examination of the authorities that public securities as thus noted are divided into two classes: first, negotiable bonds issued under authority of law, negotiable in their form and character and to which are usually attached coupons containing like promises to pay as found in the body of the bond and representing the several installments of interest as they fall due; second, evidences of indebtedness usually denominated warrants, orders, or certificates, non-negotiable in character. In form, they are

17—See Secs. 179, 212 and 446 post.

State v. Barker, 116 Ia. 96, 89 N. W. 204. The term "public corporation" embraces both the territory and the inhabitants.

Grennan v. Carson (Okla.), 107 Pac. 925. A charter for municipal purposes is an investing of the people of a place with the local government thereof constituting an imperium in imperio, the corporators and the territory are the essential elements, all else being mere incidents or forms.

orders drawn by the proper authorities in the name of a public corporation and directing the payment of the sum therein stated upon presentation to the proper official from either a special fund set aside for their payment or from the general funds of the corporation.[18]

§ 11. Definition of negotiable bonds.

Negotiable bonds are evidences of indebtedness issued under legislative authority by the state or some one of its minor civil subdivisions negotiable in character and form, payable at a future date, transferable by endorsement or delivery, usually under the seal of the corporation issuing them, with coupons attached representing the annual or semi-annual installments of interest as they respectively fall due. Daniel in his work on negotiable instruments refers to them in the following language: "The inventive spirit of modern finance and commerce, stimulated by the prodigious strides of internal improvements, has thrown into circulation a new species of securities for money which has sprung at once to the front rank of negotiable instruments. This security is styled a 'coupon bond.' A vast portion of the wealth of the country is represented in 'coupon bonds.' The reports of all the courts have been filled for the last ten years with decisions respecting their nature and uses. Every banker, merchant, capitalist and business man is deeply interested in the law concerning them."[19] Some

18—Abbott Municipal Corporations, Secs. 170, et seq., 226, et seq. City of Nasbville v. Ray, 19 Wall. 468.

19—Daniel on Negotiable Instruments (5th Ed.), Secs. 1486, 1488. Tally v. Commissioners' Court (Ala.), 39 So. 167. Court house warrants not bonds within Const. Sec. 22.

First National Bank v. City of Elgin, 136 Ill. App. 435. An instrument is not a bond within the meaning of the local improvement act of 1897 notwithstanding it may contain an express promise to pay money when it does not conform to the provisions of the act.

Lane v. Embden, 72 Me. 354. The word "bond" in its ordinary meaning includes instruments not under seal by which the maker binds him-

of the earlier decisions denied to them their true character of negotiable instruments under the law merchant but the universal holding at the present time and for many years has been that when in form they comply with the essentials of a negotiable instrument they are to be received as such, they pass by delivery or endorsement, possess all the attributes of commercial paper and are not subject to equities, where the power to issue exists, in the hands of bona fide holders for value without notice and before maturity. Their nature will be further and fully considered in the sections relating to the negotiability of public securities.

In an early case in the Supreme Court of the United States,[20] Justice Grier discussed and stated clearly and concisely some of the characteristics of negotiable or municipal bonds: "This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper, and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of

self to pay money, as well as instruments for like purposes under seal.

Tucker v. Raleigh, 75 N. C. 267. A bond is an acknowledgment of indebtedness under the corporate seal.

McCully v. Board of Education of Ridgefield Township, 42 Atl. 776. Bonds issued by school districts under authority of Gen. Stat., pp. 3038, 3042, are not mortgages notwithstanding they are a lien by statute on the property of the inhabitants of the district.

State v. Clausen (Wash.), 82 Pac. 187. Under Const. Art. 16, Sec. 5, as amended in 1894, permitting the investment of school funds "in national, state, county, or municipal or school district bonds," bonds issued by a city already indebted to its constitutional limit for the payment of a waterworks plant, payable out of a special fund composed of a fixed per cent of the gross receipts of the plant, are not regarded as municipal bonds.

20—Mercer County v. Hackett, 1 Wall. 83.

the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court but of nearly every State in the Union, is well known and admitted." [21]

§ 12. Warrants, orders, certificates, etc.; their nature and definition.

The essential difference between the evidences of indebtedness stated in the title of this section and negotiable or municipal bonds as the term is variously used, is that the latter are regarded as commercial paper according to the usages of trade while the former are not considered as negotiable instruments. They are universally held to be, although in some instances in the form of commercial paper, mere orders or promises to pay the amount stated therein. The holder, although he may be a bona fide one, does not possess an absolute title free from all equities that may exist as between the

21—See Chap. X post.

original parties. The Supreme Court of the United States[22] defined the instruments included in this section as "vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the use of the city, orders or drafts drawn by one city official upon another, or any other device of the kind used for liquidating the amounts legitimately due the public creditors; and are therefore necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes out of which they must ultimately be paid. But to invest such documents with the character and incidents of commercial paper so as to render them in the hands of a bona fide holder absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose." Such evidences of indebtedness are usually payable out of certain designated funds upon presentation and their payment is dependent upon funds available for that purpose. The subject will be treated fully in the subsequent chapter relating to warrants.

§ 13. Coupons; their nature and definition.

The term "coupon" is derived from the French "couper" to cut; and it is defined by Worcester to signify one of the interest certificates attached to transferable bonds and of which there are usually as many as there are payments to be made, so-called because it is cut off when presented for payment.[23] Coupons are substantially a minute repetition of what is contained in more complete terms in the bond. They are attached to the bond to be separated therefrom at the convenience of

22—Mayor of Nashville v. Ray, 19 Wall. 468.

23—Daniel Negotiable Instruments (5th Ed.), Sec. 1489.

the holder and to be thereafter negotiated as money or the representative of money by simple delivery.[24]

In a decision by the Supreme Court of the United States,[25] Mr. Justice Nelson said, in considering the nature of the coupon: "The coupon is not an independent instrument like a promissory note for a sum of money but is given for interest, thereafter to become due upon the bond which interest is a parcel of the bond and partakes of its nature; * * * These coupons are substantially but copies from the body of the bond in respect to the interest and as is well known are given to the holder of the bond for the purpose: first, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and, second, to enable the holder to realize the interest due or to become due by negotiating the coupons to the bearer in business transactions on whom the duty of collecting them devolves."

Other definitions and a full discussion of the nature and principles of law relating to the collection of coupons will be found in the subsequent chapter upon this subject.[26]

24—Evertsen v. National Bank, 4 Hun., 569, 66 N. Y. 14.

25—City of Kenosha v. Lamson, 9 Wall. 483.

26—Aurora v. West, 7 Wall. 82; Tennessee Bond Cases, 114 U. S. 663; Nesbitt v. Independent District of Riverside, 144 U. S. 610; Howard v. Bates County, 43 Fed. 276; Butterfield v. Town of Ontario, 44 Fed. 171; Williams v. Moody, 95 Georgia 8, 22 S. E. 30; Meyers v. York & C. R. R., 43 Me. 232; Benwell v. City of New York, 55 N. J. Eq. 260, 36 Atl. 668.

CHAPTER II.

THE CREATION AND POWERS OF PUBLIC CORPORATIONS

§ 14. The power to create a public corporation.

From the fact that all corporations are artificial persons it follows that they must be created by a sovereign power or the state. They may be organized or incorporated pursuant to general directions found in the constitution of a state, the provisions of general enabling acts or statutes, or through or by means of a special act or a special charter granted by the legislature of a state when not in contravention of a constitutional provision prohibiting the passage of special legislation.[1]

The organization of municipal corporations whereby their members exercise political rights and duties is a marked feature of American government. It is based on the fundamental idea that the people are the source of all political power and have an inherent right to exercise it at pleasure and controlled only by constitutional provisions. In the United States the power to create public corporations is lodged in the Federal government and in the various state governments as quasi independent sovereigns.[2]

The states being quasi independent sovereigns or gov-

1—See Abbott's Municipal Corporations, Sec. 9, et seq. and cases cited in the notes.

Vernon v. Board of Supervisors of San Bernardino County (Calif.), 76 Pac. 253. In re Sanitary Board of East Fruitvale Sanitary District (Calif.), 111 Pac. 368. Two distinct municipal corporations exercising the same powers, jurisdiction and privileges cannot exist at the same time within the same territory.

2—Madison, The Federalist, Sept. 14, 1787; Jefferson's Memoirs (1829), 523, 526; Act of Congress Feb. 21, 1871, 16 Stats at Large, 419; McCulloch v. Maryland, 4 Wheat. (U. S.) 316; Osborne v.

ernments not of enumerated powers possess the usual attributes of sovereignty, including the creation of artificial persons and except as limited by the constitution of the United States, have the power to create corporations for public purposes with all the means of self government including that of levying taxes for local purposes.[3]

The power to incorporate as possessed by a legislative body, since it is itself one delegated, cannot usually be delegated to subordinate bodies or officers, either legislative, judicial, or ministerial in their character, though the rule does not apply to purely clerical, mechanical or ministerial acts.[4]

§ 15. The charter of public corporations and its legal nature.

The charter of a corporation is its legal authority to exist and exercise its powers as such. It may be a written instrument, or its existence may not be actual but

Bank of U. S., 9 Wheat. (U. S.) 738; Barnes v. Dist. of Col., 91 U. S. 540; State v. Cederaski (Conn.), 69 Atl. 19.

3—See Abbott Municipal Corporations, Sec. 11; Allen v. Board of Trustees of City of Bakersfield (Calif.), 109 Pac. 486; Boise City National Bank v. Boise City (Idaho), 100 Pac. 93; State v. McDonald (Minn.), 112 N. W. 278; State v. Mayo (N. D.), 108 N. W. 36; Smith v. Borough of Hightstown (N. J.), 57 Atl. 901.

Kierpan v. City of Portland (Ore.), 112 Pac. 402. The term "republican" as used in the Federal Constitution, Art. 4, Sec. 4, guaranteeing to every state a republican form of government means a government by the citizens *en masse*, acting directly, though not personally according to the rules established by the majority. Bennett Trust Company v. Sengstacken (Ore.), 113 Pac. 863.

Arey v. Lindsey (Va.), 48 S. E. 889, construing Const. of 1902, Sec. 117, providing for the enactment of general laws for the organization of cities and towns.

State v. Board of County Commissioners of Spokane County (Wash.), 94 Pac. 897, construing Const. Art. 11, Sec. 4, relative to the adoption of township organization.

4—People v. Bancroft, 2 Idaho 1077, 29 Pac. 112; Commonwealth Real Estate Company v. City of South Omaha (Nebr.), 110 N. W. 1007; see to the contrary, State v. Forest County, 74 Wis. 610.

presumed, through either the doctrines of prescription or implication.

One of the fundamental differences, it might be said the essential difference, between a public and a private corporation, is that in the case of a private corporation the charter is regarded as a contract under that clause in the constitution of the United States forbidding the states from passing any law impairing the obligation of a contract. The charter of a public corporation is not considered a contract, nor does it come within the doctrine of the Dartmouth College case.[5]

The reason for this difference of holding may be briefly stated: A public corporation, a municipal corporation considered in its character as a public corporation, and a public quasi corporation, are each and all regarded as agencies of the government. They are involuntary political or civil divisions of the state created by authority of law to aid in the administration of government. Whatever of power they possess, or whatever of duty they are required to perform, originates in the authority

5—Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Prince v. Crocker, 166 Mass. 347; Mills v. Williams, 33 N. C., 11 (Ired. L.) 558; Sharpless v. City of Philadelphia, 21 Pa. 147; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12.

Platt v. City and County of San Francisco (Calif.), 110 Pac. 304. A municipal charter is the constitution of a municipality enumerating and giving to it all the powers it possesses unless other statutes are also applicable to it.

City of St. Petersburg v. English (Fla.), 45 So. 483. The word "charter" as it is called when used in connection with a municipal corporation consists of the creative acts and all laws in force relating to the corporation either defining its powers or regulating their mode of exercise.

Chalstran v. Board of Education of Knox County, 244 Ill. 470; 91 N. E. 713. The charter not a contract. Horton v. City Council of Newport, 27 R. I. 283, 61 Atl. 759; Southwestern Telegraph & Telephone Company v. City of Dallas (Texas), 134 S. W. 321, reversing 131 S. W. 80.

Sargent v. Clark (Vt.), 77 Atl. 337. The action of the state in enlarging, restricting or destroying the corporate existence of a town does not impair contract obligations within the meaning of the Federal Constitution.

creating them. They are organized mainly for the interest, advantage and convenience of the people residing within their territorial boundaries and the better to enable the government, the sovereign, to extend to them the protection to which they are entitled, and the more easily and beneficently to exercise over them its authority. The powers which they exercise in their public capacity are powers of the state, and the duties with which they are charged are duties of the state.[6]

The rights conferred upon the people residing within the limits of these organizations are political in their character, and it has been said that, "It is an unsound and even an absurd proposition that the political power conferred by the legislature can become a vested right as against the government in any individual or body of men." Entirely different conditions exist and principles apply to private corporations so familiar to all that it is unnecessary to repeat them.[7]

Not being a contract, therefore, the state has the power to alter, amend, change or repeal the charter of a public corporation at will. "A municipal corporation (in a broad sense) may be viewed in different aspects; that which it has to the citizen and that which it bears to the state. Seen in the latter relation it is a revocable agency constituted for the purpose of carrying out in detail such objects of the government as may be properly intrusted to a subordinate; having no vested right to any of its forms or franchises, and entirely under the control of the legislature, which may enlarge or circumscribe its territorial limits or functions, may change or modify its various departments, or extinguish it with the breath of arbitrary power."[8]

6—Askew v. Hale County, 54 Ala. 639.

7—People v. Morris, 13 Wend. (N. Y.) 325.

8—1 Hare Const. Law, p. 628; Meriwether v. Garrett, 102 U. S. 472; City of Covington v. Kentucky, 173 U. S. 231.

Hunter v. City of Pittsburgh, 207 U. S. 161. The court in its

"Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the state, but being wholly political, exist only during the will of the general legislature; otherwise there would be numberless petty governments existing within the state and forming part of it, but independent of the control of sovereign power. Such powers may at any time be repealed or abrogated by the legislature, either by a general law operating upon the whole state, or by a special act altering the powers of the corporation."[9]

On the other hand, the grant of authority from the state to a private corporation is considered a contract, within the rule as announced in the Dartmouth College Case, subject only to change or repeal by the sovereign

opinion by Justice Moody uses the following language after citing many cases. "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently, they usually are given the power to acquire, hold and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes or authorizing them to hold or manage such property or exempting them from taxation upon it constitutes a contract with the state within the meaning of the Federal Constitution. The state therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens or even against their protest. In all these respects, the state is supreme, and its legislative body conforming its action to the state Constitution, may do as it will unrestrained by any provision of the Constitution of the United States." Straw v. Harris (Ore.), 103 Pac. 77.

9—Sloan v. State, 8 Blackf. (Ind.) 361.

upon the terms and conditions which may be found within the instrument itself or which exist in the general laws as a part of it. This doctrine is so firmly established in the jurisprudence of the United States that a mere reference to it is sufficient, and authorities will be found in every state in the Union sustaining it.

§ 16. Corporate existence and the doctrine of collateral attack.

A public corporation is created by direct act of the sovereign or indirectly through a delegated body, by the granting of a charter, which is its written authority to act as a governmental agent, and exercise and perform the appurtenant powers and duties. The corporation may be organized under laws subsequently declared unconstitutional or void, or the formal steps in the organization may be imperfectly or irregularly taken, the condition in either case raising a doubt with an adverse decision upon the question being resolved into a certainty. The corporation meanwhile has performed its duties and exercised its powers, it has levied and collected taxes, constructed public improvements, incurred debts and liabilities, and entered into contract relations with third parties who have acted in good faith and upon the assumption that the corporation possessed the necessary powers. The legality of the existence of the corporation or its right to perform these duties and exercise these powers is called in question. What is the effect upon past acts and the relations which exist as their result? And, again, the proposition may present itself,— in what manner, by whom, and at what time can the question of legal right be raised? The rule of law invariably is that the state alone can question the right of the public corporation to exist and perform its duties and exercise its rights, and then in a proceeding brought for that purpose. And also that the question of legal corporate

existence cannot be raised in a case or proceeding as collateral to the main issue or through collateral attack.[10]

This doctrine is adopted to protect the rights of innocent parties [11] and to enable the corporation, however irregularly formed, to compel obedience and enforce its rights.[12]

A public corporation exercises affirmatively certain functions, or it may enter into contract or other obligations. It is with regret the statement is made that too often public corporations endeavor to avoid or defeat an honest debt or a legal obligation by the claim of no authority or power. In such cases the Federal courts have maintained vigorously the doctrine of collateral attack and have repeatedly held, that where there is a

10—Ralls County v. Douglass, 105 U. S. 728; Shapleigh v. San Angelo, 167 U. S. 646; Nat. Life Ins. Company of Montpelier v. City of Huron, 62 Fed. 778; St. Paul Gas Light Co. v. Village of Sandstone, 73, Minn. 225; Coler v. Dwight School Twp. 3 N. D. 249, with many authorities cited and collated; Stuart v. School Dist. of Kalamazoo, 30 Mich. 69; U. S. Bank v. City of Kendall, 179 Fed. 914; Reclamation Dist. No. 765 v. McPhee (Cal.), 109 Pac.. 1106; People v. Pederson, 220 Ill. 554, 77 N. E. 251; People v. Bowman, 247 Ill. 276, 93 N. E. 244; City of Topeka v. Dwyer (Kan.), 78 Pac. 417.

Black v. Early, 106 S. W. 1014 (Mo.). In a suit to restrain the collection of taxes levied by a de facto school district to pay interest upon and to create a sinking fund for the payment of bonds, the validity of its organization cannot be attacked. State v. Several Parcels of Land (Neb.), 113 N. W. 810; Lang v. City of Bayonne, N. J., 68 Atl. 90; Ward v. Grandin (N. D.), 109 N. W. 57; City of Carthage v. Burton (Tex.), 111 S. W. 440; Ex parte Koen (Texas), 125 S. W. 401; Agner v. Commonwealth (Va.), 48 S. E. 493; Board of Education of Flatwood's Dist. v. Berry (W. Va.), 59 S. E. 169; see, also, sec. 266 post.

11—Ashley v. Presque Isle County Sup'rs, 60 Fed. 55; Spear v. Kearney Co. Comm'rs, 88 Fed. 749; Coler v. Dwight School Twp., 3 N. D. 249, 55 N. W. 587; Brown v. Bon Homme County, 1 S. D. 216; but see, Ruohs v. Athens, 91 Tenn. 20, and see, also, cases cited in the notes to Sec. 32, Abbott Municipal Corporations.

12—Presque Isle County Sup'rs v. Thompson, 61 Fed. 914; Keweenaw Association v. School District of Hancock Twp., 98 Mich. 437; Kuhn v. City of Port Townsend, 12 Wash. 605; Hornbrook v. Township of Elm Grove, 40 W. Va. 543.

doubt as to the legality of the creation of the corporation which can only be raised by the state, if the state fails to act until after debts are created and liabilities incurred, those obligations are not impaired or destroyed by a subsequent dissolution of the corporation,[13] or the declaration by a judicial tribunal in a proceeding brought for that purpose that the corporation was originally without legal authority. This doctrine of collateral attack applies also to official acts of officers of public corporations, and it is the rule that in disputes between private parties the validity of a public corporation acting under forms of law cannot be called in question where its corporate existence is unchallenged by the state.[14]

§ 17. Change of corporate boundaries.

A public corporation, using the term in its broad sense, is the organization of a certain geographical district under authority of law for the purpose, if a quasi public corporation, of acting as a governmental agent,—carrying out exclusively some one or more of the functions of government; or, if a municipal corporation, of combining with the above additional powers or privileges and of legislating upon matters more particularly affecting the conditions and convenience of those residing within its limits. The corporation in both instances includes, within its jurisdiction and control, a certain geographical area. The fact that at the time of its organization it includes or is included within certain limits does not prevent the passage of future legislation enlarging boundaries or dividing territory, or preclude annexation or division under existing laws. To state the principle more concisely, a public corporation of whatever class, may have

13—Shapleigh v. City of San Angelo, 167 U. S. 646; see Sec. 266, post.

14—Miller v. Perris Irrigation District, 85 Federal 693; State v. Whitney, 41 Nebr. 613, 59 N. W. 884; State v. Henderson, 145 Mo. 329, 46 S. W. 1076.

its territorial limits under authority of law, arbitrarily or otherwise enlarged or reduced.

The paramount question, if action is taken of this character, is that of legislative authority,[15] and the extent and manner of such annexation is a question solely within the discretion of the legislature except as restrained by constitutional provisions[16] with which the courts cannot interfere.[17]

One of the essential questions involved in a change of corporate boundaries, whether by a division or an enlargement of territory, is the effect of such a change upon existing rights either of the corporation itself, of those residing within its limits or of those who may have had dealings with the corporation. The rule of law is uniform that organized territory cannot avoid or defeat existing rights and oligations by a change in its form of government or a shifting of its boundaries. The legislature cannot authorize nor will the courts permit the destruction of contract rights or the impairment of legal obligations through such proceedings by dishonest public corporations.[18]

§ 18. Effects of annexation or division upon public property and liabilities.

A public corporation, during its existence, acquires property and usually contracts liabilities. This prop-

15—Abbott Municipal Corporations, Sec. 35, et seq.; Gray Limitations of Taxing Power, Sec. 482, et seq., especially Sec. 499, et seq.; United States v. City of Memphis, 97 U. S. 284; People v. City of Oakland, 123 Calif. 598; Town of Cicero v. City of Chicago, 182 Ill. 301; Pence v. City of Frankfort, 101 Ky. 534, 41 S. W. 1011; Stone v. City of Charleston, 114 Mass. 214; Baker County v. Benson, 40 Oregon 207, 66 Pac. 815.

16—Opinion of Justices, 60 Mass. 580.

17—Madrey v. Cox, 73 Texas 538.

18—See Sec. 23 et seq., post; Planters & Savings Bank v. Huiett Twp., 132 Fed. 627, citing many cases; Chalstran v. Board of Education, etc. of Knox County, 244 Ill. 470, 91 N. E. 712; but see, Meriwether v. Garrett, 102 U. S. 472.

erty is partially or wholly paid for through the levy of taxes upon taxable interests within its jurisdiction. In the annexation of territory, the effects of such action are comparatively few and unimportant. When territory is divided, however, other and more serious questions may arise: The obligations or liabilities existing before division; how apportioned, and if wholly assumed by part of the territory thus divided, by what part; and, on the other hand, what part of this district thus divided should retain the property. On these questions many cases will be found fixing or attempting to fix a rule as to the division of both liabilities and property, which shall be just and equitable considered from the standpoint of the corporation itself and private individuals or creditors of the corporation having claims against it.[19]

In many of the states constitutional provisions have been adopted fixing and establishing the rights and obligations of territory affected in cases of change of boundary under legislative or constitutional authority.[20]

19—New Orleans v. Clark, 95 U. S. 144; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Comanche County Com'rs v. Lewis, 133 U. S. 205; Commonwealth of Virginia v. State of West Virginia, 220 U. S. 1, 55 L. Ed. 353; Pepin Township v. Sage, 129 Fed. 657; Towle v. Brown, 110 Ind. 68; Mt. Hope Cemetery v. City of Boston, 158 Mass. 512; City of Winona v. School Dist. No. 82, 40 Minn. 19; School District No. 3 v. Greenfield, 64 N. H. 86; Dare County Com'rs v. Currituck County Com'rs, 95 N. C. 192; De Mattos v. City of New Whatcom, 4 Wash. 130; Board of Education of Barker Dist. v. Board of Education of Valley Dist., 30 W. Va. 430; Schreiber v. Langlade County, 66 Wis. 629; Forest County v. Langlade County, 76 Wis. 610.

In re Hunter (Minn.), 116 N. W. 922. The legislature has the right to change the boundaries of a municipality without apportioning its indebtedness and provide for the enforcement of the liability.

Galloway v. City of Memphis (Tenn.), 94 S. W. 75. Legislative acts annexing territory to the city of Memphis and exempting such property from liability for existing debts of that city do not create a contract which cannot be impaired, but merely grant privileges revokable at any time by the general assembly.

20—Calif. Art. 11, Sec. 3; Colo. Art. 14, Secs. 4, 5; Fla. Art. 8, Sec. 3; Idaho, Art. 18, Sec. 3; Ill. Art. 10, Sec. 3; Ky. Sec. 65; La. Art. 280; Md. Art. 13, Sec. 3; Mo. Art. 9, Secs. 3, 4, 5, 23; Mont.

§ 19. Division or adjustment of debts and liabilities.

Considering first the division or readjustment of indebtedness or liabilities. Sometimes, under laws authorizing division of territory, the liabilities or different portions divided or annexed remain the sole obligation of the original debtor, and taxes are levied by that corporation upon the property within its district to apply on their reduction or payment. The indebtedness generally follows the name; or the indebtedness is assumed proportionately by the reorganized corporations, and taxes to reduce or pay the same are assessed and levied to that same proportion upon all of the property within their limits.[21] Where a new corporation is organized from ter-

Art. 16, Sec. 3; Neb. Art. 10, Sec. 3; S. C. Art. 7, Secs. 6, 7; Tenn. Art. 10, Sec. 4; Tex. Art. 9, Sec 1; Wash. Art. 11, Sec. 3; Wyo. Art. 12, Sec. 2.

21—Laramie County v. Albany County, 92 U. S. 307; Morgan v. Beloit, City and Town, 7 Wall. 613, 617; Burlington Savings Bank v. City of Clinton (Ia.), 105 Fed. 269; Pepin Township v. Sage, 129 Fed. 657; Ex parte Folsom, 131 Fed 496; Planters & Savings Bank v. Huiett Twp., 132 Fed. 627; Columbia County v. King County, 13 Fla. 451; City Council, etc. v. Board of Commissioners of Adams County, Colorado, 77 Pac. 858; Yow v. Sullivan, 58 S. E. 662; White v. City of Atlanta (Ga.), 68 S. E. 103.

Blake v. Jacks (Idaho), 108 Pac. 534. Where a county is enlarged by annexing a portion of another county, the annexed portion is liable for its proportionate share of the debt. Town of Kettle River v. Town of Bruno (Minn.), 118 N. W. 63; Pennsylvania County v. City of Pittsburg (Pa.), 75 Atl. 421; De Mattos v. City of New Whatcom (Wash.), 29 Pac. 933, 4 Wash. State 127; Houston County v. Henry County (Ala.), 47 So. 710; Wheeler v. Herbert (Calif.), 92 Pac. 353.

Pass School District, etc. v. Hollywood City School Dist. (Calif.), 105 Pac. 122. In the absence of a legislative apportionment the common law rule obtains which leaves the property where it is found and the debt on the original debtors. Hayes v. Walker (Fla.), 44 So. 1147.

Maumee School Township v. School town of Shirley City (Ind.), 65 N. E. 285. Creating a corporation is not equivalent to annexation to an existing corporation. Territory v. Board of Commissioners of Santa Fe County (N. M.), 89 Pac. 252.

Cummins v. Gaston (Texas), 109 S. W. 47. An act making a bonded indebtedness created for the erection of a school building a charge upon tax payers in added territory not originally liable for its pay-

ritory formerly comprised within others, a law providing for the assumption of all indebtedness by the new and that all existing rights of action by or against either may be maintained by or against the new corporation, it has been held, does not create a new debt or renew by implication the time of payment so as to affect the running of the statute of limitations against the old,[22] and it has also been held that where a part of a public corporation is separated from it, it is not necessary to provide for a readjustment of the debts or a division of the property in order that the law should be valid.[23]

A public corporation may change its character under lawful authority, passing from a public quasi corporation to a municipal corporation of the highest grade or degree of organization embracing, however, the same territory. The rule is clearly established that such a change does not work a forfeiture of any rights existing as against the old corporation, or defeat any of its liabilities, but that, so far as its obligations and liabilities are concerned, the new corporation is liable for the debts of the old. The transition does not work the dissolution of the civil life of the corporation so as to extinguish its indebtedness. The obligations remain the same and are not impaired or destroyed.[24]

ment, is in excess of legislative power and therefore void. In re Fremont County, 54 Pacific, 1073; see, also cases cited Abbott Municipal Corporations, Sec. 46, especially notes 186 and 187; but see Geo. D. Barnard & Co. v. Board of Commissioners of Polk County (Minn.), 108 N. W. 294.

22—Robertson v. Blaine County, 85 Federal 735; Montgomery County v. Taylor, 142 Ky. 547, 134 S. W. 894; Kahrs v. City of New York, 90 N. Y. S. 793; Huffmire v. City of Brooklyn, 162 N. Y. 584; Town of Spooner v. Town of Minong, 104 Wis. 425.

23—Cullman County v. Blount Co. (Ala.), 49 So. 315; Garland County v. Hot Springs County, 68 Ark. 83; Stuart v. Kirley, 12 S. D. 245, 81 N. W. 147.

24—Manahan v. Adams County (Nebr.), 110 N. W. 860.

East Montpelier v. City of Barre (Vt.), 66 Atl. 100. The liability, however, would not accrue in favor of an illegal claim. Washburn Water Works Company v. City of Washburn (Wis.), 108 N. W. 194;

The same principle also applies where there has been a consolidation of different public corporations. The consolidated corporation succeeds to all the rights and assumes all of the obligations of the constituent organizations.[25] And logically following this rule it is also held that the powers of the new corporation to levy taxes for the payment of such obligations remain the same. They are not or cannot be lessened so as to defeat the rights of creditors of the old corporation.[26]

The act of division and reapportionment of the debts, even upon a failure of the legislature to include a scheme or plan for the reapportionment and readjustment of the debts and property of the territory affected is considered legislative in its character, political action on the part of the sovereign not to be interfered with or changed by the judicial branch.[27]

see, also, Sec. 23 et seq., post, Abbott Municipal Corporations, cases cited Note 192, page 82.

25—Mt. Pleasant v. Beckwith, 100 U. S. 514, Speer v. Board of Commissioners of Kearney County, 88 Fed. 749; D'Esterre v. City of New York, 104 Fed. 605; Taylor v. Pine Grove Township, Saluda County, 132 Federal 565.

White v. City of Atlanta (Ga.), 68 S. E. 103. A statute authorizing the annexation to Atlanta of Oakland City and providing that the city of Atlanta should assume all its debts is not unconstitutional as attempting to loan the credit of Atlanta to Oakland City in violation of Civil Code 1895, Sec. 5891. Wayne County Savings Bank v. School District No. 5, etc. (Mich.), N. W. 378; Carpenter v. Town of Central Covington (Ky.), 81 S. W. 919.

26—Louisiana v. Pilsbury, 105 U. S. 278. The annual tax was the security offered to the creditors; and it could not be afterward severed from the contract without violating its stipulations any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Susong v. Cokesbury Township, Abbeville County, 132 Fed. 567; Boston & C. Smelting Company v. Elder, 77 Pac. 258; Toney v. City of Macon (Ga.), 46 S. E. 80.

Carpenter v. Town of Central Covington (Ky.), 81 S. W. 919. An exemption from taxation follows the property upon its being annexed. White v. City of Atlanta (Ga.), 68 S. E. 103; Shoshone County v. Profit (Idaho), 84 Pac. 712; Milster v. City of Spartanburg (S. C.), 46 S. E. 539.

27—Burleigh County v. Kidder County (N. D.), 125 N. W. 1063; Riverside County v. San Bernardino County, 134 Calif. 517, 66 Pac. 788;

Some of the attempts to formulate a rule applying to the adjustment or reapportionment of debts or property in the case of division of territory have been referred to in the foregoing paragraphs. A favorite expression of the law makers in announcing such a rule is the use of the word "ratable" or "proportionate." The debts and property must be adjusted in a ratable or proportionate manner, the words applying either to the population or the comparative assessed valuation of taxable property of the different portions.[28]

In some cases law makers attempt to arbitrarily decide what is either ratable or a just and equitable division of the debts and property of the territory divided or consolidated without any reference of these questions to local authorities for their determination.[29]

§ 20. The legal authority; where existing.

The legislature having arbitrary power, as has been said, over the organization of all public corporations,

In re Sugar Notch Borough, 192 Pa. 349; Blount County v. Loudon County, 67 Tenn. 74; Richardson v. Boske, 111 Ky. 893, 64 S. W. 919; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328; Town of Ackley v. Town of Vilas, 79 Wis. 157, 48 N. W. 257.

28—Town of Emery v. Town of Worcester, 118 N. W. 807; Wheeler v. Herbert (Calif.), 92 Pac. 353; Shoshone County v. Profit (Idaho), 84 Pac. 712, construing Const. Art 18, Sec. 3; Shoshone County v. Thompson (Idaho), 81 Pac. 73.

Sandoz v. Sanders (La.), 51 So 436. Under Const., Art. 280, which provides that whenever a parish shall be created from contiguous territory, it shall be entitled to a just proportion of the property in assets and be liable for a just proportion of the existing debts or liabilities of the parish or parishes from which said property is taken, an act of the legislature which fails to fix a division of the assets and liabilities or to provide a method by which this can be determined is invalid. Town of Farley v. Town of Boxville (Minn.), 129 N. W. 381; Munhall Borough School Dist. v. Mifflin Twp. School Dist., 207 Pa. 638; 56 Atl. 1125. A legislative act providing for an accounting and an apportionment of indebtedness and property rights gives no authority for the assignment of an undue proportion.

29—Pepin Township v. Sage, 129 Fed. 657. In the absence of constitutional provisions, it is within

to create or dissolve them, increase or diminish their boundaries, legislate as to their debts or liabilities and property, except so far as the rights of third parties may be affected, it follows that upon the division or annexation of territory it has the right and power to determine and apportion, in a fitting manner, the obligations and the property of those corporations. It is for the legislature to determine to what extent the property or the inhabitants of the detached portion shall bear the burdens of the organization to which they formerly belonged.[30] The courts, even under constitutional provisions to the effect that every organization created out of another shall be liable for a just proportion of existing debts, do not have the power to determine such proportion. It is held that this is a legislative question. It is for the legislature to either itself determine what this proportion shall be or to establish a rule or basis for the division, and where an act of division imposes what seems to be a disproportionate part of the liabilities or burdens, the courts have no power to inquire and adjust the obligations upon a different basis.[31]

§ 21. Agency of apportionment.

As already suggested, the basis of division or apportionment of debts and property of a portion of the terri-

the power of the legislature upon the dissolution of a municipal corporation and the transfer of its territory to others to apportion its indebtedness between such others and to determine what proportion shall be borne by each; in the absence of legislative action they will be severally liable in proportion to the value of the taxable property of the dissolved corporation which falls within their boundaries San Diego County v. Riverside County, 125 Calif. 495; In re House Bill No. 231, 9 Colo. 624; Clay County v. Chickasaw County, 76 Miss. 418.

30—Desha County v. State (Ark.), 84 S. W. 625; State v. Browne, 56 Minn. 269; 57 N. W. 659; Town of Rutland v. Town of West Rutland, 68 Vt. 155; 34 Atl. 422.

31—Desha County v. State (Ark.), 84 S. W. 625; County of Tulare v. Kings County, 117 Calif. 195; Sedgewick County v. Bunker, 16 Kan. 498; City of Baltimore v. State, 15 Md.

tory divided or annexed may be fixed by the legislature in the authority given for such action, or it may provide for the appointment of a board, or place upon some existing official body the burden and duty of determining this question. In some instances it is left to an existing judicial body; in others the apportionment is determined by a board ministerial or executive in its character.[32] It is usually held that a duty thus devolving upon these officers or bodies is a continuing one, and their refusal to perform such duty does not defeat or impair the rights of parties intended by the legislature to be established in this way.[33] The authority of boards whose duty it is to ascertain the amount of the debt at a certain time, and apportion it, is limited to what might be termed purely clerical duties. They have no power or authority to pass upon and determine the validity of indebtedness,[34] and in the absence of fraud or mistake their action is final and will not be disturbed, though questions of law may be passed upon after appeal to the courts.[35]

376; Stone v. City of Charleston, 114 Mass. 214; Town of Montpelier v. Town of East Montpelier, 29 Vt. 112.

32—Morgan v. Beloit, City and Town, 7 Wall. 613; Fontenot v. Young (La.), 54 So. 408; Town of Partridge v. Dennie (Minn.), 117 N. W. 234. An adjustment of outstanding indebtedness will be binding upon the corporations consenting though not necessarily upon the holders of the indebtedness thus apportioned. Perkins County v. Keith County (Neb.), 78 N. W. 630; Town of Vaughan v. Town of Montreal (Wis.), 102 N. W. 567; People v. Alameda County, 26 Calif. 641; Shoshone County v. Profit (Idaho), 84 Pac. 712; Munhall Borough v. Mifflin Township, 210 Pa. 527; 60 Atl. 155; Town of Emery v. Town of Worcester, 118 N. W. 807.

33—Elmore, Logan and Bingham Counties v. Alturas County, 4 Idaho 145; 37 Pacific 349; People v. Town of Oran, 121 Ill. 650; 13 N. E. 726.

34—Blaine County v. Lincoln County, 6 Idaho 57; 52 Pac. 165; State v. McNutt, 87 Wis. 277; 58 N. W. 389; In re Fremont and Big Horn Counties, 8 Wyo. 1, 54 Pac. 1073.

35—Vose v. Inhabitants of Frankfort, 64 Maine, 229; Inhabitants of Tisbury v. Inhabitants of West Tisbury, 171 Mass. 201; 50 N. E. 522; Washington Twp. v. Borough of Etna (N. J.), 58 Atl. 1086; In re School Directors of Aliquippa, 172 Pa. 81.

§ 22. Character or form of indebtedness.

The indebtedness or obligations of territory divided often assumes a different legal character or form. It may consist of an issue of valid outstanding negotiable bonds [36] or what can be termed, for want of a better phrase, "floating indebtedness;" [37] or again the obligation may exist as the result of a contract, claim or

36—Hackett v. City of Ottawa, 99 U. S. 86; Morgan v. Beloit, City and Town, 7 Wall. 613; Mt. Pleasant v. Beckwith, 100 U. S. 514; Scipio v. Wright, 101 U. S. 665; Louisiana v. Pilsbury, 105 U. S. 278; Ottawa v. First National Bank, 105 U. S. 342; Carter County v. Sinton, 120 U. S. 517; Comanche County v. Lewis, 133 U. S. 201; Harper County Com'rs v. Rose, 140 U. S. 75; Barnett v. City of Denison, 145 U. S. 135; Morgan v. Town of Waldwick, 17 Fed. 286; Hill v. City of Kahoka, 35 Fed. 32; Ashley v. Presque Isle County, 60 Fed. 55; Pacific Imp. Co. v. City of Clarksdale, 74 Fed. 528; Speer v. Board of County Com'rs, 88 Fed. 729; Taylor v. School District of Garfield, 97 Fed. 753; D'Esterre v. City of New York, 104 Fed. 605; Burlington Savings Bank v. City of Clinton, 106 Fed. 269; Garland County v. Hot Spring County, 68 Ark. 83; Coconino County v. Yavapai County (Ariz.), 52 Pac. 1127; Johnson v. City of San Diego, 109 Cal. 468; County of Tulare v. Kings County, 117 Calif. 195, 49 Pac. 8; Columbia County v. King, 13 Fla. 451; State v. Suwannee County Com'rs, 21 Fla. 1; White v. City of Atlanta (Ga.), 68 S. E. 103; Marion County Com'rs v. Harvey County Com'rs, 26 Kan. 181; State v. Kiowa County Com'rs, 41 Kan. 630; Craft v Lofinck, 34 Kan. 365; Vandriss v. Hill, 58 Kan. 611; Hodgeman County Com'rs v. Garfield County Com'rs, 42 Kan. 409, 22 Pac. 430; Montgomery County v. Menefee County Ct., 93 Ky. 33, 18 S. W. 1021; Rumsey v. Town of Sauk Centre, 59 Minn. 316, 61 N. W. 330; Canosia Tp. v. Grand Lake Tp. 80 Minn. 357, 83 N. W. 346; Holliday v. Sweet Grass County, 19 Mont. 364, 48 Pac. 553; Territory v. Cascade County Com'rs, 8 Mont. 396, 20 Pac. 809; Clother v. Maher, 15 Neb. 1; Inhabitants of Orvil Tp. v. Borough of Woodcliff (N. J.), 38 Atl. 685; Sierra County Com'rs v. Dona Ana County Com'rs, 5 Gild. (N. M.), 190, 21 Pac. 83; People v. Coler, 26 Misc. 327, 56 N. Y. Supp. 1072; Jeff Davis County v. City Nat. Bank, 22 Tex. Civ. App. 157, citing Presidio County v. City Nat. Bank, 20 Tex. Civ. App. 511, 44 S. W. 1069; Washburn Water Works Company v. City of Washburn (Wis.), 108 N. W. 194; Town of Vaughn v. Town of Montreal (Wis.), 102 N. W. 561; see also Sec. 80, et seq. post.

37—Houston County v. Henry Clay (Ala.), 47 So. 710. The term "existing debt" as used in Code 1907, Sec. 124, means anything then owing by the old county regardless of its assets or ability to pay. Colusa County

subscription payable at some future time, or a liability existing as the result of a tort.[38] The cases cited in the notes under these various propositions suggest the different rulings made, but the basic principles of division remain as given in the preceding sections.

In apportioning the floating indebtedness to be paid by respective portions of detached territory, questions may arise as to what constitutes floating indebtedness. Accrued interest upon indebtedness, it is generally held, should be divided or apportioned on the same basis as the principal, though some cases hold to the contrary.[39]

Cash in the treasury of an organization, portions of which have been detached, or credits resulting from taxation or some claim, should not be deducted before determining the amount of the indebtedness to be apportioned.[40] The rule seems to be that the principal of the indebtedness should be adjusted and credit items treated as property to be divided in the same proportion, leaving it to the different organizations to apply these credits as they may elect, either upon the debt assigned to them or in the payment of current expenses. It is further held that an obligation, in order to be considered a "debt," need not be due and payable at the time of the division. The existence of an obligation is the determining question, not its due date.

v. Glen County, 117 Calif. 434; Bradish v. Lucken, 38 Minn. 186; 36 N. W. 454; Lawrence County v. Meade County, 6 S. D. 528; 62 N. W. 131.

38—Hempstead County v. Howard, 51 Ark. 344; Commissioners of Granville v. Com'rs of Vance, 107 N. C. 291, 12 S. E. 39. Indebtedness outstanding at the time of separation must be reduced by the balance of taxes collected before the time this balance was applicable to the payment of indebtedness outstanding. Grant County v. Lake County, 17 Ore. 453; Barber v. City of East Dallas, 83 Tex. 147, 18 S. W. 438.

39—Hempstead County v. Howard County, 51 Ark. 344; but see Garland County v. Hot Springs County, 68 Ark. 83.

40—Cheyenne County Com'rs v. Bent County Com'rs, 15 Colo. 320; Forest County v. Langlade County, 91 Wis. 543, 63 N. W. 760, 65 N. W. 182.

In a Maine case it was held that where the statute dividing the town provided for the assumption of certain indebtedness, a subsequent statute exonerating the new town from its liability was unconstitutional, as it impaired the obligation of the contract created by the original act.[41]

§ 23. Dissolution of corporation.

Public corporations may be dissolved through an act of the legislature;[42] they may voluntarily, under general laws, surrender their charters,[43] again, under general laws, they may change their grade or class, effecting in this manner a dissolution of the old corporation;[44] or the corporation may be dissolved as the result of a judgment of ouster in proceedings brought to determine its rights to corporate existence.[45] The courts have held as negative propositions that a corporation will not be dissolved by its failure to elect officers,[46] for the misuser or nonuser of its charter rights,[47] or the misconduct of

41—Bowdoinham v. Richmond, 6 Me. (6 Greenl.), 112.

42—People v. City of Wilmington (Calif.), 91 Pac. 524; Allen v. Board of Trustees of City of Bakersfield, 109 Pac. 486; McDonald v. Doust (Ida.) 81 Pac. 60. It is not within the power of the legislature to abolish or destroy governmental organizations recognized by the state Constitution at the time of its adoption. State v. Crow Wing County Com'rs, 66 Minn. 519, Board of Township Com'rs v. Buckley (S. C.), 64 S. E. 163; James County v. Hamilton, 89 Tenn. 237; 14 S. W. 601.

43—State v. City of Birmingham (Ala.), 52 So. 461; Ex parte Cross, 71 S. W. 289; State v. Yankee, 98 N. W. 533; Fowler v. Vandal, 84 Minn. 392; Milster v. City of Spartanburg (S. C.), 46 S. E. 539.

44—Mintzer v. Schilling, 117 Calif. 361, 49 Pac. 209; see cases generally cited under Sec. 23, et seq. ante.

45—Dodge v. People, 113 Ill. 491; State v. Shufford (Kans.), 94 Pac. 137; State v. Village of Harris, Chisago County (Minn.), 113 N. W. 887. Sound policy requires that where a de facto village has been permitted to exercise its functions for over twenty years, that the state should be precluded from attacking its franchises.

46—U. S. Bank v. City of Kendall, 179 Fed. 914; People v. Niebruegge, 244 Ill. 82; 91 N. E. 115; Cofield v. Britton (Tex.), 109 S. W. 493.

47—Butler v. Walker, 98 Ala. 358; 13 So. 261; Elliott v. Pardee (Calif.), 86 Pac. 1087; Cain v. Brown, 111 Mich. 657; 70 N. W.

its officers. The debts and legal obligations of a public corporation cannot be impaired or destroyed by a change in the grade or class of a municipal organization, or through its dissolution.[48] The duty of their payment or performance devolves upon the new corporation succeeding the old. Property belonging to the corporation dissolved usually passes to and under the control of the new organization embracing the identical or substantially the same territory.

§ 23a. Effects of dissolution on debts and liabilities.

It will be noted from the preceding sections and as already stated that a corporation may be dissolved under authority of law through absorption by some adjoining or contiguous corporation, by a change of grade or class or through the forfeiture or abolition of the old charter with a subsequent reincorporation of the same territory, property and inhabitants under a new form. The authorities bearing upon a division and adjustment of liabilities where there has been a division or annexation of

337; Largen v. State, 76 Tex. 323; Beale v. Pankey (Va.), 57 S. E. 661; but see Cincinnati, etc. Ry. Co. v. Baughman, 76 S. W. 351 (Ky.), where a city failed for more than seventeen years to exercise any of the governmental functions granted by its charter, the rights and powers thereby granted were held forfeited by non-user.

48—Chalstran v. Board of Education, etc. of Knox County, 244 Ill. 470; 91 N. E. 712; Garfield Township v. Herman (Kans.), 71 Dac. 517; Black v. Fishburne (S. C.), 66 S. E. 681; City of Carthage v. Burton, 111 S. W. 440. Construing Laws 1891, chap. 77, pg. 95, which provide that where a de facto corporation shall cease to exercise its functions, its property shall be turned over to the treasurer of the county and the commissioners' court shall provide for the sale of the same for the settlement of the debts due from the corporation, and holding that property of citizens of a de facto municipal corporation brought into existence by the voluntary action of persons living in the territory sought to be incorporated is still liable for the debts incurred by the incorporation and subject to successive tax levies until the same have been paid; see also the many cases cited in the remaining notes under this section and the cases cited in the notes to Secs. 23, et seq., ante.

territory have been cited in the preceding sections. The common rule further obtains that the people and the property of a particular locality cannot avoid just debts and obligations by a mere change of boundaries, form of government, or a dissolution of a corporate organization. The authorities are numerous and well considered upon this point although some decisions to the contrary will be noted later.[49] It has even been held that where an extinguished municipality owes outstanding debts, it will be presumed that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist should accompany the territory and the property into the jurisdiction to which the territory may be annexed [50] and the Supreme Court of the United States in the case just cited held that the property of an extinguished corporation passes into the hands of its successors and that even if there was no power left to control in its behalf any of its funds or to pay off any of its indebtedness, the rule obtains that when benefits are taken, the burdens are assumed and the successor is thereby estopped to deny a liability for the old debts.

In a leading case in the Supreme Court of the United States [51] where an attempt was made by reincorporation under a new charter to avoid the payment of old liabilities, the court said: "When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a con-

49—Burrough's Public Securities, p. 559; Gray Limitations of Taxing Power, Sec. 449 et seq.; Pacific Improvement Co. v. City of Clarksdale, 74 Fed. 528; City of Uvalde v. Spier, 91 Fed. 594; Meyer v. Brown, 65 Calif. 583; see many cases cited under Secs. 17, et seq. ante.

50—Swain v. Seamens, 9 Wall. 254.

51—Broughton v. Pensacola, 93 U. S. 266.

tinued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. That such was the intention of the State of Florida in the present case, we have no doubt; to suppose otherwise would be to impute to her an insensibility to the claims of morality and justice, which nothing in her history warrants. So a change in the charter of a municipal corporation, in whole or in part, by an amendment of its provisions, or the substitution of a new charter in the place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities."

In another case in the same court,[52] the court followed the principles previously stated and further said: "We are of the opinion, upon this state of the statutes and facts, that the Port of Mobile is the legal successor of the city of Mobile, and liable for its debts. The two corporations were composed of substantially the same community, included within their limits, substantially the same taxable property and were organized for the same general purposes. Where the legislature of a state has given a local community within designated boundaries, a municipal organization and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the

52—Mobile v. Watson, 116 U. S. 289.

new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new."

In a still later case [53] the same rule was followed. The city of San Angelo, Texas, was abolished by a decree of court on account of an irregularity in its corporation. Soon thereafter the city was again incorporated including the principal portions of the territory and property of the former corporation, and the question as to the liability of the new organization for the debts of the old was raised, the court said: "The state's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation whether with extended or restricted territorial limits, such new corporation is treated as in law, the successor of the old one entitled to its property rights and subject to its liabilities."

It was also held that if the act creating the new incorporation should be construed as leaving the assumption of such liability by the corporation to the option of its inhabitants or tax payers, it would follow that in that respect it would have the effect of impairing the obliga-

53—Shapleigh v. San Angelo, 167 U. S. 646.

tions of existing contracts and would be unconstitutional and void.

The same doctrine has been adopted by the state courts. In Kansas [54] where it was held that a township could not divest itself of its liability to pay its warrants by altering its boundaries and changing its name.

In Massachusetts, an act imposing upon towns the debts of abolished school districts was held constitutional [55] the surrender of a special charter by a city and reincorporation under general laws, it has been held does not affect the validity of bonds,[56] and in Texas, it has been held that where a city whose incorporation was adjudged void *ab initio*, upon reincorporation was liable for the legal indebtedness and other obligations incurred by the city during its existence not even as a *de facto* corporation.[57]

§ 24. Meriwether v. Garrett.

In 1879, the city of Memphis, Tennessee, being heavily indebted, the legislature repealed the charter of the city, took possession through state officers of its public property and assumed the levy and collection of taxes and their application to the payment of its debts. The repealing act was a general one and declared that all municipal offices held under various charters were abolished, that the population within the territorial limits were resolved back into the body of the state; that all power of taxation in any form previously granted to their public authorities was withdrawn and reserved to the legislature. The same day with the passage of the repealing act, the legislature passed another act to establish taxing districts in

54—Walnut Twp. v. Jordan, 16 Pac. 812.

55—Whitney v. Stow, 111 Mass. 368; State v. Brock, 66 S. C. 367, 44 S. E. 901.

56—Black v. Fishburne (S. C.), 66 S. E. 681.

57—White v. Quanah (Tex.), 27 S. W. 831.

the state and to provide the means for their local government. It declared that communities embraced in the territorial limits of the repealed corporations were created taxing districts in order to provide the means of local government and that the necessary taxes should be imposed directly by the legislature and not otherwise.

The day previous to the passage of the repealing act, Robert Garrett and others, judgment creditors of the city of Memphis, filed a bill in the United States Circuit Court alleging the insolvency of that city; that a mandamus had been issued to the authorities of the city directing the levy and collection of taxes to discharge the city's indebtedness; that the taxes had not been collected and asking for the appointment of a receiver. After the repealing act was passed, a supplemental bill was filed alleging the invalidity of the act mentioned and asking the same relief. The circuit court, by a decree, appointed a receiver who was directed to take possession of the moneys of the city and certain debts and property belonging to it and its tax books, to collect taxes and debts due it, except the taxes of 1878, and enforce their payment by the usual means, the proceeds to be held subject to the order of the court. It was also decreed that all property within the limits of the city was liable and might be subjected to the payment of the city's debts and that such liabilities would be enforced thereafter from time to time as the court might direct.

This decree was reversed in the Supreme Court of the United States,[58] where Chief Justice Waite announced the conclusions reached by the court in the following propositions: "Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire-engines, hose and hose-car-

58—Meriwether v. Garrett, 102 U. S. 472, 26 Law Ed. 197; see also Lehman v. City of San Diego, 73 Fed. 105; Folsom v. Greenwood Co., 130 Fed. 730; Ex parte Folsom, 131 Fed. 496.

riages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the state, the power once delegated to the city in that behalf having been withdrawn.

"2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the states, that such property can be reached directly on execution against the municipality, has not been generally accepted.

"3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.

"4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the ciy. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief.

"5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the state charged with the duty of their collection, can be compelled by appropriate

judicial orders to proceed with the collection of such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds upon the judgments.''

The principles established by this case are perhaps sufficiently indicated in the quotation above given but a brief resume of them with some suggestions may be pertinent. The first principle established is one which has often been adjudicated and is not denied that the public property, including taxes levied and collected, of a public corporation used for public purposes cannot be reached by legal process; that the private property of the inhabitants is not liable for the debts of municipalities, although some early cases hold to the contrary; that the municipal power to tax is a delegated one and may be revoked at any time by the state and that where this is done a municipality is without power to levy taxes. The only remedy then open to creditors is by appeal to the legislature.

It is difficult to reconcile this decision with others and later ones by the Supreme Court of the United States but it can be said as the best commentary upon it as a ruling case that it stands substantially alone as authority for the principles decided, in respect to the repudiation of debts through the dissolution of corporate organization literally and practically applied.

§ 25. Legislative power over public corporations; in general.

A public corporation is organized primarily to act as an agent of the sovereign in the performance of governmental duties and the administration of public affairs. A private corporation is created under authority of law by a group or association of individuals for the purpose, primarily, of advancing their personal interests. The organization of all corporations, private as well as pub-

lic, is an advantage to the state and results, in the case of a public corporation, directly in a benefit; in the case of a private corporation indirectly. The basis of the continued existence of a public corporation is the will of the sovereign; of the private corporation, the contract between itself and the state. As between the state and the public corporation or the members comprising it, there exists no contract relation. This difference in purpose of organization and authority for corporate life leads, as can be inferred, to a fundamental and far-reaching difference in the power of the sovereign over them.[59]

In considering the question there must also be kept in mind the distinctions already suggested between the different grades of public corporations. We have public corporations as a generic term, including municipal corporations proper and public *quasi* corporations,— ignoring the cases holding that the state itself be considered a corporation.

Referring to definitions already given of municipal corporations proper and public *quasi* corporations, it will be remembered that a public *quasi* corporation is that form of organization used for the exercising of governmental powers over territory less thickly settled than the territory usually included within the limits of a municipal corporation proper. The municipal corporation proper includes cities, towns (not the township organization) and villages, or congested centers of popu-

59—Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; Mt. Pleasant v. Beckwith, 100 U. S. 514. Institutions of the kind, whether called cities, towns or counties, are the auxiliaries of the State in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature of the State, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of a compact. State v. City of Mobile, 24 Ala. 701; Hartford Bridge Co. v. Town of East Hartford, 16 Conn. 172; People v. Draper, 15 N. Y. 532; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12.

lation. The wants and needs of the two classes differ essentially, and as agencies of the government they can each best perform their functions in a different manner. The property of public corporations acquired through the levy and collection of taxes or by grant and devise for public purposes can only be devoted to such uses.

Public corporations of all grades may assume the character of a private corporation and acquire property in that character or as an individual. Their rights in the acquisition, holding and disposal of this property, acquired in their capacity of private corporations, are the same as those pertaining to other private persons. The legislature cannot exercise over these the same degree of control which it ordinarily exercises over the public corporation and its public property.[60]

To state concisely the rule of control: A public corporation in its capacity as a public corporation, is absolutely under the control of the sovereign, subject only to constitutional provisions and the fundamental law that property, contract, and vested rights of third parties dealing with it, cannot be impaired or destroyed.[61] Acting as a private corporation, either in the acquirement of property or the exercise of certain powers, the public corporation, so far as legislative control is concerned, stands on an equal basis with a private corporation or an individual.[62] A municipal corporation proper more frequently acts as and assumes this character of a private corporation.

Without discussing at present the rights of the public as a private corporation, it can be said that public corporations, as governmental agents, so far as the exercise of their governmental powers are concerned, their corporate existence, boundaries, funds, revenues, property and

60—State v. County of Dorsey, 20 Ark. 378; Nichol v. Coster (Calif.), 108 Pac. 302; Davidson v. Hine (Mich.), 115 N. W. 246; but see Keefe v. People (Colo.), 87 Pac. 91, and see also Secs. 36, 37 post.

61—See post, Secs. 36, 37.

62—See post Secs. 36, 37.

contract rights, are subject to the will of the state, which may modify their franchises, increase or diminish their corporate powers, amend their charters, enlarge or reduce their privileges or annul their corporate existence, as in its judgment, the general good requires, and irrespective of consent or objection on the part of the inhabitants of the territory affected, except so far as it is restrained by provisions in the constitution or fundamental law.[63] The limitations usually found in state constitutions are those which prohibit special legislation; laws not having "a uniform operation throughout the state," or those relating to the "business," the "affairs," or "internal affairs" of the corporation.

§ 26. Legislative control over public funds.

The funds of a public corporation, acquired in its capacity as such, are raised by the imposition of taxes on taxable interests within its jurisdiction, and the legis-

63—Bissell v. City of Jeffersonville, 24 Howard, 287; Rogers v. Burlington, 3 Wall. 654; St. Joseph Twp. v. Rogers, 16 Wall. 644; Barnes v. Dist. of Columbia, 91 U. S. 540; Barnard's Twp. v. Morrison, 133 U. S. 523; Folsom v. Ninety-Six, 159 U. S. 611; Dudley v. Board of Com'rs of Lake County (Colo.), 80 Fed. 672; In re Sanitary Board of East Fruitvale Sanitary Dist. (Calif.), 111 Pac. 368; Platt v. City and County of San Francisco (Calif.), 110 Pac. 304; People v. McBride, 234 Ill. 146; 84 N. E. 865; Ward v. Field Museum of Natural History, 241 Ill. 496; 89 N. E. 731; Eckerson v. City of Des Moines (Ia.), 115 N. W. 177; McSurely v. McGrew, Iowa, 118 N. W. 415; Fullerton v. Des Moines, 115 N. W. 607; Graham v. Roberts (Mass.), 85 N. E. 1009; Schigley v. City of Waseca (Minn.), 118 N. W. 259; Booth v. McGuinness (N. J.), 75 Atl. 455; In re Allison (N. Y.), 172 N. Y. 421, 65 N. E. 263, reversing 76 N. Y. S. 1008; People v. Metz, 85 N. E. 1070, reversing 110 N. Y. S. 1141; People v. Prendergast, 128 N. Y. S. 1082; Scott v. Village of Saratoga Springs, 115 N. Y. S. 796; Quilici v. Strosnider (Nev.), 115 Pac. 177; Wharton v. City of Greensboro (N. C.), 59 S. E. 1043; Lutterloh v. City of Fayetteville (N. C.), 62 S. E. 758; Straw v. Harris (Ore.), 103 Pac. 777; Horton v. City Council of Newport, 27 R. I. 283, 61 Atl. 759; Ancrum v. Camden Water, Light & Ice Company (S. C.), 64 S. E. 151; State v. Frear (Wis.), 119 N. W. 894.

lature has the right to regulate and control either the original levy and collection of taxes, or to dispose of funds thus acquired [64] without the consent of the people within its limits, so long as they are applied to public uses and purposes.[65] Another limitation upon the legislative right to dispose of funds other than the one suggested is, that those raised through taxation of taxable interests within a certain district cannot be used for the benefit and advantage of others.[66]

§ 27. Power of the legislature over public revenues.

The legislature, as the law-making part of the sovereign, in the absence of constitutional restrictions, has the power to provide and regulate the manner in and the purposes for which the revenues of a public corporation may be raised and employed. The sovereign has the inherent power of levying taxes for the purpose of raising revenue for its uses, which are presumably public. As it therefore possesses in the first instance the sole power, it has the right to direct the manner in which its mere agencies shall raise funds, either for their special and local public wants or for general purposes,[67] and this

64—Pennie v. Reis, 132 U. S. 464; Rothschild v. Bantel (Calif.), 91 Pac. 803; Gutzweller v. People, 14 Ill. 142; Arnett v. State (Ind.), 80 N. E. 153; McSurely v. McGrew (Ia.), 118 N. W. 415; State v. Lowe (Nebr.), 131 N. W. 196; Horton v. City Council of City of Newport, 27 R. I. 283, 61 Atl. 759; but see Street v. Varney Electrical Supply Co. (Ind.), 66 N. E. 895, which holds that the minimum wage law, Burns' Rev. Stat. 1901, Secs. 7055a, 7055b, is invalid, the power to confiscate property of tax payers by forcing them to pay an arbitrary price for labor on public works is not one of the powers of the legislature over municipal corporations as agencies of the state.

65—Weismer v. Village of Douglass, 64 N. Y. 91; Allen v. Inhabitants of Jay, 60 Me. 124; see Secs. 101 et seq. post.

66—Terrett v. Taylor, 9 Cranch (U. S.), 43; Morgan v. Schusselle, 228 Ill. 106; 81 N. E. 814; State v. Haben, 22 Wis. 660.

67—R. R. Co. v. County of Otoe, 16 Wall. 667; New Orleans v. Clark, 95 U. S. 644. A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumen-

right of the legislature goes not only to the original grant of power, but also to its modification, change or repeal, and the mode of collection.[68]

Further considering this power of the legislature there are cases holding, based upon sound reasons, that a public corporation cannot be compelled to undertake a public improvement purely local, not public or governmental in its character, to be paid for ultimately by compulsory taxation, without the consent of the people paying such taxes.[69] The same principle has also been applied in the granting of aid to railroad or other quasi public corporations, and it has been held in several cases that municipal corporations cannot be compelled against their consent, even by act of the legislature, to give such aid where the only means of meeting the obligation is by levying local taxes.[70]

§ 28. Legislative control over corporate boundaries.

The boundaries of public corporations as agents of the sovereign come within the doctrine of absolute control by the legislature. Originally possessing the right to create these agencies or subagencies, it can exercise the

tality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing therefore a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly. Carter County v. Sinton, 120 U. S. 517; Breckenridge County v. McCracken, et al, 61 Fed. 191, 9 C. C. A. 442; Inge v. Board of Public Works of Mobile (Ala.), 33 So. 678; City of Louisville v. Commonwealth (Ky.), 121 S. W. 411; Township of Stambaugh v. Treasurer of Iron County (Mich.), 116 N. W. 569.

68—County of Calloway v. Foster, 93 U. S. 567; County of Scotland v. Thomas, 94 U. S. 682; Meriwether v. Garrett, 102 U. S. 472.

69—Cooley Taxation, 2nd Ed., pp. 688 et seq.; Park Comm'rs v. Detroit Common Council, 28 Mich. 229; State v. Tappan, 29 Wis. 664.

70—Township of Elmwood v. Marcy, 92 U. S. 289; People v. State Treasurer, 23 Mich. 499; People v. Batchellor, 53 N. Y. 128; see also Sec. 32, post.

lesser power of changing or altering their boundaries.[71] The right of the people within the districts affected to consent to such change or alteration may be given as a matter of favor.

The legislature has also the right to determine the basis for the organization of municipal corporations proper, one of the classes of public corporations, and this can be any determining factor, such as population or geographical area, it may consider a valid and expedient one[72] in the absence of constitutional restrictions. Courts have no power or control to interfere with, in any way, the exercise of this discretionary law-making power by the legislature.[73]

§ 29. Legislative power over public property.

The power of the legislature is full, ample and supreme over the property of the public corporation, acquired and held in its capacity as such and for public purposes. This property is usually acquired through the exercise of the power of taxation, a gift of the sovereign. The legislature has the power to provide means for its acquisition, its control and management, and its final disposition.[74] The only limitations upon this power are

71—City of Ensley v. Cohn (Ala.), 42 So. 827; City of Ensley v. Simpson (Ala.), 52 So. 61; Wheeler v. Herbert (Calif.), 92 Pac. 353; Town of Ormond v. Shaw (Fla.), 39 So. 108; Carruthers v. City of Shelbyville (Ky.), 104 S. W. 744; Chandler v. City of Boston, 112 Mass. 200; Grainger County v. State (Tenn.), 80 S. W. 750; Sargent v. Clark (Vt.), 7 Atl. 337; see also Sec. 17 ante.

72—City of Chicago v. Rumsey, 87 Ill. 348; Williams v. City of Nashville, 89 Tenn. 487; 15 S. W. 364; Commonwealth v. Blackley, 198 Pa. 372, 47 Atl. 1104; see Abbott Munic. Corp., Secs. 13, 14.

73—Lenox Land Company v. City of Oakdale (Ky.), 125 S. W. 1089; Maxey v. Powers (Tenn.), 101 S. W. 181. See also Abbott Munic. Corp., Sec. 86.

74—City of Hartford v. Maslem (Conn.), 57 Atl. 740; East Chicago Company v. City of East Chicago (Ind.), 87 N. E. 17; City of La Harpe v. Elm Township Gaslight, etc. Co. (Kans.), 76 Pac. 448; Codman v. Crocker (Mass.), 89 N. E. 177; Reis v. City of New York, 188 N. Y. 58.

those already stated and well-recognized, viz., the use of public revenues for public purposes, and the retention of local property and revenues for public local uses. If property has been acquired by a public corporation in its capacity as a private corporation, the control of the legislature is limited by the general laws and rules applying to private property.

§ 30. Over corporate contracts and trust property.

Public corporations may, during their existence either as corporations de facto or de jure, enter into contract relations with third parties, and if these, at the time of their inspection, are valid, the legislature cannot, although its powers are broad as to the control of public corporations in all respects, pass laws changing or repealing the powers of the corporation in such a manner as to impair the obligations of these contract rights or relations.[75] Laws in force at the time of the making of such contracts and which were their authority in whole or in part, enter into and form a part of the same.[76] The principle applies to provisions for a sinking fund, particular powers of taxation and also to any property or security which at the time of the legislation authorizing an issue of bonds was devoted to their payment; such sinking funds or means of payment cannot be diverted to other uses, the legislation repealed, or the power to tax lessened or destroyed.[77] It has been held, however,

75—Broughton v. City of Pensacola, 93 U. S. 266; Wolff v. City of New Orleans, 103 U. S. 358; City of Ensley v. Simpson (Ala.), 52 So. 61; Helena Consolidated Water Company v. Steele, 26 Mont. 1; 49 Pac. 382. See Sec. 362 post.

76—Van Hoffman v. City of Quincy, 71 U. S. 535; German Savings Bank v. Franklin County, 128 U. S. 526; City of Detroit v. Detroit Citizens St. R. R. Co., 184 U. S. 368; State of Minnesota v. Duluth & I. R. R. R. Co., 97 Fed. 353; Brunnitt v. Ogden Water Works Co. (Utah), 93 Pac. 828; see Sec. 362, post.

77—State of Louisiana v. Pilsbury, 105 U. S. 278; Town of Mobile v. Watson, 116 U. S. 289; Seibert v. Lewis, 122 U. S. 284; Sawyer v. Parish of Concordia, 12 Fed.

that creditors or those holding contract obligations have no vested right to a particular form of remedy and the legislature may abolish or alter a remedy without impairing the contract obligation, providing it supply one which is equally efficacious and available.[78] Where a remedy is limited or abolished, this will constitute an impairment of a contract obligation for, or as has been said: "Nothing is more important than the means of enforcement." This protection is not afforded, however, to the public corporation in its capacity as such. It is the personal property, contract or vested right of the individual which is protected.[79]

754; Fazende v. City of Houston, 34 Fed. 95; Liquidators of City Debts v. Municipality No. One, 6 La. An. 21; Morris v. State, 62 Texas 728; State v. City of Madison, 15 Wis. 30. See also Secs, 362, 370, 371, 374 post.

78—State of Louisiana v. City of New Orleans, 102 U. S. 203; In National Bank of Western Ark. v. Sebastian County, 5 Dill. 414, Fed. Cas. No. 10,040, Judge Parker held that in reference to the obligation of contracts this provision of the Federal Constitution "embraces those laws alike which affect its validity, construction, discharge and enforcement," and that "an act of a state legislature which provides that counties are no longer corporations—that they cannot be sued—is void as to obligations legally issued by such counties when the law of the state provided they could be sued, when set up against a party seeking a remedy upon the obligations of a county in a federal court, because the state legislature cannot take away the right of a holder of such county obligations to sue in a federal court when such right is given him by the constitution and laws of the United States, and because such a law impairs the obligation of such contracts." See Sec. 433 post. But see Meriwether v. Garrett, 102 U. S. 472, and Thompson v. Wiley, 46 N. J. Law, 476, where the agencies were removed through which the courts could alone act in enforcing the rights of creditors.

79—Edwards v. Kearzey, 96 U. S. 595. The court in its opinion by Justice Swayne in defining the obligation of a contract says: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of these 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are in-

Trust property. The control of the legislature over property or contract rights of the public corporation includes not only property belonging to the corporation in its public capacity, but also the property which it holds as a trustee for the benefit of a cestui que trust. The only limitation upon the power of the legislature in such a case is that the purpose for which the property or its income is to be applied cannot be changed.[80]

separable. 'Want of right and want of remedy' are the same thing.''

State of Louisiana v. City of New Orleans, 102 U. S. 203. The obligation of a contract in the constitutional sense is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of this means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. State of Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716.

Seibert v. Lewis, 122 U. S. 284. Provisions authorizing the levy and collection of a special tax to pay bonds are a part of the contract with the creditor and cannot be repealed unless a remedy equally efficacious is substituted. Fazende v. City of Houston, 34 Fed. 95.

City of Cleveland, Tenn. v. United States, 166 Fed. 677. The rule applies in all cases where a substituted remedy is more difficult, more burdened and more uncertain than the one repealed and which appreciably lessens the value of the contract. Liquidators of City Debts v. Municipality No. 1, 6 La. Ann. 21.

Munday v. Assessors of Rahway, 43 N. J. Law, 338. A statute was passed relating to the issue of writs of mandamus and supplementing certain authority for the issue of bonds by the city of Rahway, the effect of which was to deprive bondholders of their immediate right to such writ. The statute was held unconstitutional and the court said: ''The act would strip him of his priority and attempts what in Martin v. Somerville Water-Power Co., 3 Wall. Jr. 206, Fed. Cas. No. 9,165, was decided to be beyond legislative power. It is as if the legislature enacted that no execution should issue to enforce a pre-existing judgment to the prejudice of the interests of creditors whose claims were not yet due.''

People v. Common Council of Buffalo, 140 N. Y. 300. Any law materially abridging a remedy for the enforcement of a contract existing when it was made is an impairment of its obligation unless it provides a remedy equally adequate. Bassett v. City of El Paso, 88 Tex. 168, 30 S. W. 893; Terry v. Wisconsin M. & F. Ins. Co. Bank, 18 Wis. 87. See Sec. 433 post.

80—Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127; McDonogh's Ex'rs v. Murdoch, 15 How. (U. S.) 367; Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Board of

§ 31. The power of the legislature to compel the payment of debts.

Public corporations, like individuals, have certain characteristics, one of these being, unfortunately, too often possessed, the desire to avoid the satisfaction of a moral or a legal obligation. A corporation may have acquired property directly or indirectly, which it retains and of which it receives the full benefit; it has been or is used by the corporation for its legitimate public purposes; the people of the community in their collective and public capacity enjoy its use. The corporation, however, declines to pay those who have parted with it in good faith, the excuse for non-payment perhaps being inability to pay; an alleged constitutional provision preventing the levy of taxes for such purpose, or in many cases, the dishonest wish on the part of the inhabitants to avoid the assumption of burdens after having enjoyed the benefits of the transaction, the debt being perhaps the result of an improvident contract. Under these conditions it is clearly within the power of the legislature to compel a payment of moral and legal obligations by the public corporation in the manner which it may provide,[81]

Handley Trustees v. Winchester Memorial Hospital (Va.), 70 S. E. 131.

81—Board of Liquidation for United States, 108 Fed. 689, 47 C. C. A. 587; Gray v. State, 72 Ind. 567; Carter v. Cambridge, 104 Mass. 236; City of New York v. Tenth Nat. Bank, 111 N. Y. 446.

City of Guthrie v. Territory, 1 Okla. 188; 31 Pac. 190. Municipal corporations are but subdivisions of the state or territory, created for the convenience and better government of its affairs by local officers. Their rights, powers and duties are the creatures of legislative enactment and they exist and act in subordination to the sovereign power that creates them. The legislature may determine what monies they may raise and expend and what taxes may be imposed and it may compel a municipal corporation to pay a debt which has any moral or meritorious basis to rest upon.

Weister v. Hade, 52 Pa. 474; Jackson County Sup'rs v. La Crosse County Sup'rs, 13 Wis. 490. But see, Fitch v. Bd. of Auditors of Claims v. Manitou County, 94 N. W. 952. The legislature has no power to determine what debts a municipality shall pay and compel

and to enforce obedience to the directions contained in its positive laws through proper process of the judicial branch of the sovereign power. The legislature can provide for the levy and collection of taxes with which to meet this obligation.[82] The power of the sovereign through its law-making branch goes still further, so it has been held, even to the payment under compulsion of a debt or obligation owing by a public corporation which technically can be avoided but for the satisfaction of which there exist the strongest moral reasons.[83] The

their payment under Constitution, Art. 4, Sec. 31, prohibiting it from auditing accounts.

82—State of Louisiana v. United States, 103 U. S. 289; New York Life Ins. Co. v. Cuyahoga County Com'rs, 106 Fed. 123; State v. Parkinson, 5 Nev. 17. See also cases cited in the following note.

83—Sedgwick Stat. & Const. Law, 313, 314; New York Life Ins. Co. v. Cuyahoga County Com'rs, 106 Fed. 123; People v. Burr, 13 Calif. 343.

Creighton v. City and County of San Francisco, 42 Calif. 446, where the rule is announced as follows: "The power of the legislature to appropriate the money of municipal corporations in payment of claims ascertained by it to be equitably due to individuals though such claims be not enforcible in the courts depends largely upon the legislative conscience and will not be interfered with by the judicial department except in exceptional cases." Carter v. Cambridge, 104 Mass. 236; Friend v. Gilbert, 108 Mass. 408; People v. Onondaga Twp. Sup'rs, 16 Mich. 254.

State v. Bruce, 50 Minn. 491. But the distinction between valid and invalid legislation on this subject has been pointed out many times, and it is well settled that, if there rests upon the designated municipality any obligation or duty, moral or equitable (using these words in a large and popular sense) to pay the claim, then a legislative act requiring its payment is supported as valid by the great weight of authority.

Coles v. Washington County, 35 Minn. 124, 27 N. W. 497; State v. Foley, 30 Minn. 350, and cases cited. As the legislature possesses the constitutional power to compel a municipal corporation, out of the funds in its treasury, or by means of taxes imposed for that purpose, to meet and discharge a claim, which in good conscience it ought to pay, although no legal liability has previously existed, it simply remains for us to discover and determine whether there rested at any time upon the county, or upon the state, for that matter, a moral or equitable obligation or duty to refund the amounts paid by the relator.

Merchants National Bank v. City of East Grand Forks (Minn.), 102 N. W. 703. The state can compel any of its political subdivisions to pay obligations not cognizable in any

principle has been well stated in a recent text book:[84] "The power of the legislature to compel a municipality to recognize moral obligations, which have an equitable but not a strictly legal basis, seems to be coincident with its general power to recognize such obligations in matters over which it has direct jurisdiction. That is: The legislature may compel a municipality or local subdivision to recognize a moral obligation resting on such municipality or local subdivision, if that moral obligation is of a class which the legislature may recognize in a claim against the state." As illustrating the basis of the principles inducing the courts to decide as above indicated, a reference is made and quotations taken from two cases decided by the Supreme Court of the United States. In the earlier of the two:[85] "Assuming then, that the bonds were invalid for the omission stated, they still represented an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which its charter authorized. It was therefore, competent for the legislature to interfere and impose the payment of the claim upon the city. The books are full of cases in which claims, just in themselves, but which, from some irregularity or omission in the proceedings by

court of law, but based on considerations so equitable as to receive favorable legislative consideration. Steines v. Franklin County, 48 Mo. 167; O'Neill v. City of Hoboken (N. J.), 60 Atl. 50.

Guilford v. Chenango County Sup'rs, 13 N. Y. 143. The legislature is not confined in its appropriation of the public moneys or the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms. City of New York v. Tenth Nat. Bank, 111 N. Y. 446; O'Hara v. State, 112 N. Y. 146; People v. Board of Education, etc. (N. Y.), 86 N. E. 1130; People v. Miller, 124 N. Y. S. 368; Burns v. Clarion County, 62 Pa. 422; Chatham County Com'rs v. F. M. Stafford & Co. (N. C.), 50 S. E. 862.

84—Gray Limitations of Taxing Power, Sec. 634.

85—City of New Orleans v. Clark, 95 U. S. 644.

which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear. Instances will readily occur to every one, where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal or extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly, the interest on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys, and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply to the means raised to the payment of claims for which no consideration had been received by the city."

And in a later case,[86] the court said: "The term 'debts' includes those debts or claims which rest upon a mere equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the

86—United States v. Realty Co., 163 U. S. 427.

honor of an individual, although the debt could obtain no recognition in a court of law."

In a still later case,[87] the same court followed its earlier decisions and held: "We regard the power of the territorial legislature to pass this act as indisputable. In United States v. Realty Co., 163 U. S. 427, 439, the power of Congress to recognize a moral obligation on the part of the national and to pay claims which, while they are not of a legal character, are nevertheless meritorious and equitable in their nature, was affirmed. The territorial legislature at least had the same authority as that possessed by Congress to recognize the claims of the nature described." The court further says: "It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for the purpose of charity alone. The facts show plain moral grounds for the act, a consideration existing in the benefits received and enjoyed by the city or by its predecessors from whom it took such benefits."

It is also within the power of the legislature, where there has been an alleged assumption of corporate powers under a misapprehension of authority, to compel the payment of debts contracted by a void organization after it has become legally incorporated.[88] Legislative acts authorizing the payment of obligations of the character indicated have been held constitutional though the objection was made that they were retroactive.[89]

87—Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528.

88—Guthrie National Bank v. City of Guthrie, 173 U. S. 528; Cooper v. Springer, 65 N. J. L. 594, 48 Atl. 605; City of Guthrie v. Territory, 1 Okla. 188.

89—New York Life Ins. Co. v. Board of Com'rs of Cuyahoga County (Ohio), 126 Fed. 123. The conclusion that the act was retroactive is based upon the theory that, there having been no vested right at the time it was passed to recover the money loaned, the legislature created a liability upon a transaction which had been already closed and in which no liability had been incurred by the county. But this, we think, is a misconception of the purpose of the act, as well as of the facts upon which it proceeded. It was not

The power of the legislature to apportion the debts and liabilities of subordinate public corporations, the boundaries of which have been increased or diminished, discussed in previous sections,[90] is a further illustration of its arbitrary power over their expenditures.

The rule, however, is unquestionably true that a public corporation cannot be compelled to pay a claim against it where no obligation to pay, either legal or equitable, exists; and in some states under constitutional provisions against the expenditure of public moneys for a private purpose, legislative appropriations or mandatory statutes directed to subordinate public corporations have been held void.[91]

§ 32. Issue of obligations when compelled.

In this connection it might be well to refer to the power of the legislature as the law-making branch of the state to compel the creation of an obligation or the incurring

intended to declare that the past transaction created a contract or imposed any legal liability, but that a moral obligation had arisen, which it was then incumbent upon the legislature to provide the means to discharge by the exercise of its power of taxation. The power of the legislature to raise taxes to meet obligations, whether legal or moral only, is not restricted to such obligations as shall be thereafter incurred. It is not questioned that the legislature of Ohio has, in some circumstances, at least, the power to recognize and provide for the discharge of obligations binding only in conscience and honor. This has always been admitted by the highest court of the State. In the nature of things, the moving facts must have already occurred. Otherwise, there could be no recognition or any estimate of the particular merits of the claim, or the measure of relief which justice would require. A statute of this kind, enacted for the purpose of providing for future transactions, would be anomaly. To deny the power of recognition of a moral obligation because it rests upon past transactions is to deny it altogether. People v. Board of Education, etc. (N. Y.), 86 N. E. 1130.

90—See Secs. 19 et seq. ante; Covington & C. Bridge Co., v. Davidson (Ky.), 102 S. W. 339.

91—See Sec. 101 et seq. post. See also Gray Limitations of Taxing Power, Secs. 390 et seq. and Secs. 635; Hoagland v. Sacramento, 52 Calif. 142; Craft v. Lofinck, 34 Kans. 365; People v. Haws, 37 Barb. 440; Board of Sup'rs v. Cowan, 60 Miss. 876.

of an indebtedness by public corporations. They are created as agencies of the sovereign to exercise on its behalf governmental functions and to administer public affairs to a greater or less degree under its direction. It seems to be within the province and power of the legislature to insist that public corporations, as governmental agents, shall properly perform those duties and functions which ordinarily devolve upon the government and which have for their purpose the protection of life, health, property, the maintenance of civil life. and the administration of public affairs. Non-governmental purposes, not within the proper province of a governmental agent, the legislature cannot compel public corporations to accomplish or to perform.[92] The division

92—Quincy v. Cooke, 107 U. S. 549; Trammell v. Pennington, 45 Ala. 673; Territory v. Vail (Ariz.), 85 Pac. 652; Napa Valley R. R. Co. v. Napa County, 30 Calif. 435; People v. City of Chicago, 51 Ill. 17; State v. Atkin, 64 Kans. 174.

State v. City of Lawrence (Kans.), 100 Pac. 485. Under the Kansas Constitution, Art. 6, the legislature may compel that municipality where the state university is located to issue its bonds in aid of the university and to levy and collect a tax to pay the same. This carries with it the subordinate power of compelling the municipality to furnish aid after a submission of the question to the electors of the city.

State Board of Com'rs of Marion County, 82 N. E. 482, Act of March 7, 1905 (Acts 1905, pp. 493, 496, Chap. 164), providing for the improvement of unimproved highways on the boundary line between two counties and the issue of bonds in connection therewith, is not unconstitutional as a deprivation of the right of local self-government. Grosse Pointe Twp v. Finn (Mich.), 96 N. W. 1078.

Williams v. Duanesburgh, 62 N. Y. 129. Although the legislature cannot compel a municipal corporation to issue bonds in payment of a subscription to railroad stock, yet where under a mandatory act it has issued the bonds, the latter are not invalidated by the compulsory character of the act; it operates as an authority and permission to do the acts; and having been done they will he considered as having been done voluntarily. People v. Board of Supervisors, 74 N. Y. S. 1142; Brockenbrough v. Board of Water Commissioners of City of Charlotte (N. C.), 46 S. E. 28; Jones v. Madison County Com'rs (N. C.), 50 S. E. 291.

Blais v. Franklin (R. I.), 77 Atl. 172. The legislature may not only permit states and towns to incur indebtedness for the construction and maintenance of highways and bridges but may require them to incur such indebtedness.

between the obligations which the legislature can compel a public corporation to assume and those which it cannot, can hardly be characterized by the use of the word "local," although to a certain extent this states the proper basis. To illustrate, the supreme court of the state of Michigan held that the legislature could not compel the people of the city of Detroit to create an indebtedness for the purpose of laying out and improving a public park within the limits of that city, such purpose being one, as it were, of an embellishment of the external appearance of the city. On the other hand it is quite clear that if the city of Detroit failed to provide a proper system of sewage, it could be compelled to do this without the consent of the people, the construction and the maintenance of a system of sewage being highly essential to the proper preservation of the health of the people, a governmental function beyond doubt.[93] The

93—Park Commissioners v. Common Council of Detroit, 28 Mich. 228. In the opinion by Justice Cooley it is said, "The proposition which asserts the amplitude of legislative control over municipal corporations, when confined, as it should be, to such corporations as agencies of the state in its government, is entirely sound. They are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed it would be easy to show that it is not from the standpoint of the state interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears. State duties of a local nature can for the most part be very well performed through the usual township and county organizations. It is because, where an urban population is collected, many things are necessary for their comfort and protection which are not needed in the country, that the state is then called upon to confer larger powers and to make the locality a subordinate commonwealth. It is a fundamental principle in this State, recognized and perpetuated by express provision of the Constitution, that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government. But authority in the legislature to determine what shall be the extent of the capacity in a city to acquire and hold property is not equivalent to, and does not contain within itself authority to deprive the city of property actually

authorities, holding the legislature without power to compel the incurring of an indebtedness for public improvement or for purposes purely local in their character, assert as the reason for their holdings, the principle of local self-government.[94]

Judge Cooley was an able exponent of this doctrine, and in the case of Park Commissioners v. Detroit Common Council, cited above, as well as in other decisions and in his work on taxation, states, with his unusual clearness and force the reasons for his private as well as judicial opinions. The reader is referred to these authorities.[95]

The power of the legislature in respect to the subject of this section is clearly limited by constitutional provisions if they exist, controlling the rate, manner, or purposes of taxation,[96] or the amount

acquired by legislative permission. As to property it thus holds for its own private purposes, a city is to be regarded as a constituent in the State government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the state is a right of regulation, not of appropriation. It cannot be deprived of such property without due process of law. And when a local convenience or need is to be supplied in which the people of the State at large, or in any portion thereof outside the city limits, are not concerned, the State can no more by process of taxation take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to the State use. People v. Flagg, 46 N. Y. 401; Galloway v. Jenkins, 63 N. C. 147.

94—See Gray Limitations of Taxing Power, Chap. 7; Cairo etc. R. R. Co. v. City of Sparta, 77 Ill. 705, and Park Commissioners v. Common Council of Detroit, 28 Mich. 228, cited in the preceding note and from which a lengthy quotation is made.

95—Cooley Taxation, 2nd Ed. pp. 688, et seq.

96—Town of Elmwood v. Marcy, 92 U. S. 289, 23 L. Ed. 710. The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. Ill. Const. 1848, Art. IX, Sec. 5. Held, following the decision of the Supreme Court of Illinois, that an act of the legislature intended to validate the bonds of the township which had been illegally issued, violated this provision on the ground: "That this section having been intended as a limitation

of debt which can be incurred by designated public corporations.[97]

§ 33. Constitutional limitations, affecting legislative power.

Special legislation. During the early legislative history of the states there existed no limitations of this character upon the power of the different state law-making bodies. Nearly all legislation was special in its nature and it will be readily understood that such a system led to great abuses. Many of the states of the Union have now adopted in their constitutions or in amendments thereto, limitations upon the right of legislatures to pass acts special in their nature to meet a special condition or authorize special action.[98] A general law has been defined as "a statute which relates to persons or

upon the law-making power, the legislature could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. Post v. Pulaski County, 49 Fed. 628; Choisser v. People (Ill.), 29 N. E. 546; Dunkirk, etc., R. R. Co. v. Batchellor, 53 N. Y. 128.

97—Russell v. High School Board of Education, etc. 212 Ill. 327, 72 N. E. 441; Village of East Moline v. Pope, 224, Ill. 386, 79 N. E. 587.

In re Opinion of the Justices (Me.), 60 Atl. 85. The legislature cannot authorize a city to increase its debt beyond the constitutional limit nor compel it to become indebted beyond such limit even to meet the cost of a public improvement, the duty of making which is imposed by the legislature on said city. Eaton v. Mimnaugh (Ore.), 73 Pac. 754.

98—Pepin Township v. Sage, 129 Fed. 657 The express authority for the repeal of any existing special or local law conferred by the proviso to the constitutional amendment is a limitation upon the inhibition against the passage of special or local laws. Hettinger v. Good Roads Dist. No. 1, etc. (Ida.), 113 Pac. 721.

Block v. City of Chicago (Ill.), 87 N. E. 1011. The question of whether a general law can be made applicable or whether a special law shall be passed is for the legislature and the courts cannot interfere. Bullock v. Robinson (Ind.), 93 N. E. 998; State v. City of Lawrence (Kans.), 100 Pac. 485; Farwell v. City of Minneapolis (Minn.), 117 N. W. 422; Weston v. Ryan (Nebr.), 97 N. W. 347.

Van Cleve v. Passaic Valley Sewerage Com'rs (N. J.), 58 Atl. 571. A law is special in a constitutional sense when by force of an inherent

things as a class is a general law, while a statute which relates to particular persons or things of a class is special." The mere arbitrary grouping, classing or arranging of certain objects will not of itself make legislation general. There must be a logical basis for the desired effect independent of conditions or circumstances then existing.[99] The existence of a constitutional limitation prohibiting the passage of special legislation may render

limitation it arbitrarily separates two persons, places or things from those on which but for such separation it would operate. People v. State Water Supply Co., 126 N. Y. S. 637; Farwell v. Port of Columbia (Ore.), 91 Pac. 546; Cornman v. Hagginbotham, 227 Pa. 549, 76 Atl. 721.

Bailey v. Town of Clinton (S. C.), 70 S. E. 446; see, as typical of such constitutional provisions, Minn. Const. Art. 4, Sec. 33. In all cases when a general law can be made applicable no special law shall be enacted and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward or school district, or creating the offices, or prescribing the powers and duties of the officers of, or fixing, or relating to the compensation, salary or fees of the same, or the mode of election or appointment thereto; authorizing the laying out, opening, altering, vacating or maintaining roads, highways, streets or alleys; * * * locating or changing county seats; regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes; * * * creating corporations, or amending, renewing, extending or explaining the charters thereof; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose. Provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated. See, also Abbott's Municipal Corp., Sec. 93 with many cases cited, and Secs. 90 and 439, post.

99—Harwood v. Wentworth, 162 U. S. 547; Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528; Pepin Twp. v. Sage, 129 Fed. 657; Board of Education, etc. v. Alliance Assurance Co., 159 Fed. 994; Wheeler v. Herbert (Calif.), 92 Pac. 353; City of Denver v. Iliff (Colo.), 89 Pac. 823; People v. Earl (Colo.), 94 Pac. 294; Rambo v. Larrabee (Kans.), 92 Pac. 913; State v. Cooley, 56 Minn. 540, 549; Richards v. Hammer, 42 N. J. L. 435, 440; Summerton v. City of Elizabeth (N. J.), 73 Atl. 1119; Gubner v.

invalid an issue of securities authorized by law special in in its character, and which would otherwise be valid.

§ 34. Classification laws.

The necessity for legislation classifying public corporations arises from the fact that the density of population varies in different portions of a state, and those localities densely populated require for their proper government and for the proper administration of public and governmental affairs and functions, an organization or form of government more complex in character than that required by sparsely settled regions. The constitutionality of legislation providing for the classification of public corporations is well established so long as it comes within constitutional inhibitions and is based upon some distinction that renders it reasonable and expedient. A classification is inoperative when based upon unsubstantial, arbitrary or illogical differences or characteristics.

That the law has for its basis of classification reasonable and uniform conditions and genuine and substantial distinctions which may apply to the future as well as existing conditions seems to be the test, though some cases hold that where the purpose of the law is temporary only, if it creates a distinctive class based upon existing circumstances it may still be constitutional.[1] The power

McClellan (N. Y.), 115 N. Y. S. 755; Farrell v. Port of Columbia (Ore.), 91 Pac. 546.

McGarvey v. Swan, 96 Pac. 697. A reasonable classification of objects of legislation or localities may be resorted to without rendering a statute objectionable as local or special within the constitutional provision relative to such laws. A classification by population is proper if reasonable and not arbitrary and the fact that only one city is within a class at this time does not necessarily make the act special. State v. Groth (Wis.), 112 N. W. 431; see Sec. 439 post.

1—Ex parte Johnson (Calif.), 93 Pac. 199; Northwestern University v. Village of Wilmette, 230 Ill. 80, 82 N. E. 615; Dawson Soap Co. v. City of Chicago, 234 Ill. 314, 84 N. E. 920; Eckerson v. City of Des Moines (Ia.), 115 N. W. 177; Parker-Washington Co. v. Kansas City (Kans.), 85 Pac. 781; Kirch v. City

of a public corporation to issue securities, it will readily be seen, may depend in specific instances upon: First, the constitutionality of a classification law; and, second, upon the application of that law authorizing the issue to the particular corporation claiming to come within the classification established.

§ 35. Other constitutional objections.

The unconstitutionality of legislation affecting public corporations has been urged, not only upon the grounds noted in the preceding sections, but also upon the ground that a state constitution contains provisions that all laws relating to certain matters "shall be uniform in their operation throughout the state," or there may be provisions which prohibit a legislature from passing any local or special law "regulating the affairs of counties, cities, etc.," or "regulating the internal affairs of towns and counties," and legislative acts or resolves authorizing the incurring of indebtedness or the issue of public securities, may come within the prohibitions contained in these provisions, necessarily depriving the corporation of any power in this respect.[2]

That a bill deals with more than one subject, one only

of Louisville (Ky.), 101 S. W. 373; Specht v. City of Louisville (Ky.), 122 S. W. 846.

Griffin v. Powell, 143 Ky. 276, 136 S. W. 626. The classification of a city by the legislature acting under Const. Sec. 156, is conclusive on the courts.

Hjelm v. Patterson (Minn.), 116 N. W. 610. Population alone furnishes no proper basis of classification for legislation in respect to the appointment of highway superintendents. In re Gould (Minn.), 125 N. W. 273; State ex rel. Major v. Ryan (Mo.), 133 S. W. 8; Allen v. Kennard (Nebr.), 116 N. W. 63; Rapp v. Venable (N. M.), 110 Pac. 834; McCarter v. McKelvey (N. J.), 74 Atl. 316.

Gentsch v. State (Ohio), 72 N. E. 900. A bona fide classification of cities and villages on the basis of real and substantial differences in population and the conditions growing out of the same is valid. Village of Bloomer v. Town of Bloomer (Wis.), 107 N. W. 974; McGarvey v. Swan (Wyo.), 96 Pac. 697.

2—Cole v. Dorr (Kans.), 101 Pac. 1016; Seymour v. City of Or-

being expressed in its title, is another constitutional objection urged against legislation looking to the control of public corporations or grants of power to them. Such a provision is intended to afford a protection to the people and to legislatures against the passage of laws dealing with more than one subject, some of which might not, but for this provision, be included in the title.

The topics suggested in this section will be considered at length later in this work.[3]

§ 36. Control over the corporation in its private capacity.

When acting as a private person, which condition sometimes occurs, a public corporation deals with the legislature or the sovereign state upon the same basis of equality as a private person or corporation. Property of whatever character it may acquire and hold is acquired and held subject to all the rules and limitations of the law affecting private property and interests. A legislature can no more arbitrarily pass laws affecting these interests and property than it can those of private persons. As recently said, "they (the courts) are also more and more recognizing that from the point of view of the inviolable private rights of municipal corporations, these bodies may hold properties as private in character and therefore as inviolable in character by any

ange (N. J.), 65 Atl. 1033; Smith v. Borough of Hightstown (N. J.), 60 Atl. 393; McCarty v. Queen (N. J.), 72 Atl. 1119; State v. Kersten, 95 N. W. 120.

3—Montclair v. Ramsdell, 107 U. S. 147; Otoe County v. Baldwin, 111 U. S. 1; Mahomet v. Quackenbush, 117 U. S. 509; Carter County v. Sinton, 120 U. S. 517; The George W. Elder, 159 Fed. 1005; State v. Miller (Ala.), 48 So. 496; Stokes v. Gallaway (Fla.), 54 So. 799; Vineyard v. City of Grangeville, 98 Pac. 422; Browne v. Town of Providence, 38 So. 478; Armstrong v. George, 84 Kans. 248, 114 Pac. 209; Jackson v. Board of Education of City of Minneapolis (Minn.), 127 N. W. 569; City of St. Louis v. Mortman (Mo.), 112 S. W. 520; Manufacturers Land & Imp. Co v. City of Camden, 79 Atl. 286, affirming 78 N. J. L. 247, 73 Atl. 77; Allen v. Board of Education, etc. (N. J.), 79 Atl. 101.

governmental action as the property of individuals. It is indeed true that this position has not been reached without considerable reluctance." [4]

4—Quoting from Darlington v. City of New York, 31 N. Y. 164; see, also, City of Ensley v. Simpson (Ala.), 52 So. 61. A statute operating to destroy an incorporated city is not invalid as depriving it of its property in violation of U. S. Const. Amend. 14. Carr v. District Ct. of Van Buren Co. (Ia.), 126 N. W. 791.

McSurely v. McGrew (Ia.), 118 N. W. 415. Proprietary or private rights acquired by a municipal corporation and of which they cannot be deprived by the legislature includes only property reduced to possession or held in trust for the inhabitants of that particular locality as distinct from the people as a whole.

In re Municipal Fuel Plants (Mass.), 66 N. E. 25. Municipal coal yards not authorized.

Attorney General v. Common Council of the City of Detroit (Mich.), 113 N. W. 1107. The power to manufacture paving brick is not included in the powers expressly granted to the city of Detroit nor is it fairly implied in nor incident to powers expressly granted; neither is it indispensable or even essential to the declared objects and purposes of the corporation.

Sargent v. Clark (Vt.), 77 Atl. 337. The state has to some extent control of the property of towns held for municipal purposes but not property held for private purposes.

Propr's. of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509. In the opinion Judge Allen said: "The city of Boston is possessed of much other property which, in a certain sense, and to a certain extent, is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of waterworks, its system of parks, its markets, its hospital, and its library. In establishing all of these the city has not acted strictly as an agent of the state government for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control, so that a transfer of it without compensation can be required, it is not easy to see why other properties mentioned are not also; and all the other cities and towns which own cemeteries or other property of the kinds mentioned might be under a similar liability."

Love v. Holmes (Miss.), 44 So. 835. Power to own and operate an electric railway may be conferred by the legislature upon a municipality though that is a business inconsistent with its customary functions.

Sargent v. Clark (Vt.), 77 Atl. 337. The state has to some extent control of the property of towns held for municipal purposes but not property held for private purposes.

Abbott's Mun. Corp. Sec. 97 with cases cited; but see the case of David v. Portland Water Committee,

§ 37. The impairment or destruction of vested rights as a limitation.

The legislature of a state may pass laws creating public corporations, regulating and controlling their affairs, dividing their boundaries, providing for the disposition of their revenues and the manner in which taxes shall be levied and collected, such laws not coming within the constitutional objections noted in a preceding section and therefore not unconstitutional and void, but subject to fundamental principles of law and, if violating them, invalid or subject to other constitutional provisions relating to the impairment of contract obligations and other rights.[5] The control of the sovereign, as has been said, is full, ample and supreme over public corporations, but the existence of this power does not permit even the sovereign state, much less a legislature, its law-making branch, to impair or destroy contract, property or vested rights possessed by aliens or citizens, within the jurisdiction of the state but protected by fundamental law. In short, the cases hold without exception that the legisla-

14 Ore. 98, where the court say: "Public parks, gas, water and sewerage in towns and cities may ordinarily be classed as private affairs but they often become matters of public importance and when the legislature determines that there is a public necessity for their use in a certain locality, I do not think they can be designated as mere private affairs; that is a relative question."

5—Chalstran v. Board of Education, etc. of Knox County, 244 Ill. 470, 91 N. E. 712. If a municipal corporation upon the surrender or extinction in other ways of its charter is possessed of any property, a court of equity will take possession of it for the benefit of municipal creditors and while a municipal charter can be modified or abolished, yet after a municipality has become indebted under that charter, the rights of the creditor based upon the obligation of the contract cannot be impaired by any subsequent legislative enactment. City of Colorado Springs v. Neville, 93 Pac. 1096.

McSurely v. McGrew (Ia.), 118 N. W. 415. A private citizen cannot be deprived by an act of the legislature of any of his rights against a municipal corporation under the guise of legislative control of those bodies.

ture cannot pass a law affecting, either the existence, power or duties of a public corporation which in effect impairs or destroys the right of a creditor of that corporation. Creditors possess vested rights which even the state, controlled by constitutional limitations, cannot take away. Rights of this character may consist of a remedy given by the state to enforce the collection of a valid obligation,[6] or it may be the means for the payment of an indebtedness provided at the time of the grant of the original authority, a corporate power of taxation conferred,[7] or again it may be specific property or revenues placed at the disposal of the creditor under specific circumstances and conditions.[8]

§ 38. The powers of public corporations.

A public corporation is an agency of government created by a sovereign state when such action seems most conducive for the public good for the purpose of aiding it in the exercise and administration of governmental functions. A corporation, either public or private, is an artificial person of limited powers. The powers it possesses are to be found in the charter of its creation which has been held, include not only the act of incorporation whether a special or general law but constitutional provisions and also decisions of the courts of last resort con-

6—State v. Grefe (Ia.), 117 N. W. 13; Milner v. City of Pensacola, 2 Woods 632, Fed. Cas. No. 9619; Rader v. Southeasterly Road Dist. of Union, 36 N. J. L. 273; Upper Darby Twp. v. Borough of Lansdowne, 174 Pa. 203; see, Sec. 37 ante, and Secs. 362, 370, 371, 374, 377, post.

7—People v. Ingersoll, 58 N. Y. 1; City of Covington v. Kentucky, 173 U. S. 231; Devereaux v. City of Brownsville, 29 Fed. 742; Columbia County Com'rs v. King, 13 Fla. 451; Palmer v. City of Danville, 166 Ill. 42; Broadfoot v. City of Fayetteville, 124 N. C. 478; Ladd v. City of Portland, 32 Ore. 271; see, also, Sec. 358, et seq., post.

8—Warner v. Hoaglund, 51 N. J. L. 62, 16 Atl. 166; Weekes v. City of Galveston, 2 Tex. Civ. App. 102, 51 S. W. 544; Smith v. City of Appleton, 19 Wis. 468; see, also, Sec. 366 et seq., post.

struing and applying these acts and provisions. The authorities, both federal and state, holding public corporations artificial persons of especially limited powers, are many.[9]

This rule necessarily follows from the nature of public corporations, the purposes for which they are organized, and the sources from which they derive the funds dispensed by them in the management and conduct of their affairs.

The charter of a public corporation, used in the broad sense above indicated, is the measure of its powers which have been classified as: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to the powers expressly granted; and, (3) those implied as essential to the declared offices and purposes of the corporation, not simply convenient, but absolutely indispensable. The reported cases teem with statements of the principle already stated but which cannot be too strongly emphasized, namely that public corporations can only exercise such powers as are clearly comprehended in the legislative grant or derived therefrom by necessary implication. The incidental powers capable of being exercised by a public corporation must be indispensable to the exercise of powers expressly granted.[10]

9—Barnes v. District of Columbia, 91 U. S. 540; Tippecanoe County Com'rs v. Lucas, 93 U. S. 108; United States v. City of New Orleans, 98 U. S. 381; Ottawa v. Carey, 108 U. S. 110; Stoutenburgh v. Hennick, 129 U. S. 141; Hunter v. City of Pittsburgh, 207 U. S. 161; City of Detroit v. Detroit City Railway Co., 56 Fed. 867; Goldthwaite v. City of Montgomery, 50 Ala. 186; see, also, Sec. 38 et seq., ante.

10—Freeport Water Co. v. City of Freeport, 180 U. S. 87, affirming 186 Ill. 179; United States v. MacFarland, 28 App. D. C. 552; City of Bessemer v. Bessemer Water Works (Ala.), 44 So. 663; In re Munro, 1 Alaska 279; Conradt v. Miller, 2 Alaska 433; Santa Cruz County v. Barnes (Ariz.), 76 Pac. 621; Platt v. City and County of San Francisco (Calif.), 110 Pac. 304; Brunstein v. People (Colo.), 105 Pac. 857; Booth v. Town of Woodbury, 32 Conn. 118; Hardee v. Brown (Fla.), 87 So. 834; Waller v. Osban (Fla.), 52 So. 970; City of Chicago v. Weber (Ill.), 92 N.

In this respect the rule differs from that applied to private corporations. As to such organizations they possess the legal right of exercising incidental powers which are not always indispensable to the carrying out of some express powers or of the purposes for which they were created but which are merely convenient to them.

§ 39. Express and implied powers.

The express powers granted a public corporation are those to be found stated in clear and unmistakable language in its charter. It may possess not only the powers granted in express words as above stated, but also those necessary or fairly incident to powers expressly granted but also those implied because absolutely essential and indispensable to the declared offices and purposes of the corporation. A brief reference to some powers held as coming within the class of implied powers will be made.[11]

To enact ordinances. The power or right of a corporation to adopt such by-laws as it may deem proper for its own local or internal government in harmony with

E. 859; Loeffler v. City of Chicago, 246 Ill. 43, 92 N. E. 586; Brooks v. Incorporated Town of Brooklyn (Ia.), 124 N. W. 868; Frank v. City of Decatur (Ind.), 92 N. E. 173; Leavenworth v. Norton, 1 Kans. 432; Phillips Village Corporation v. Phillips Water Co. (Me.), 71 Atl. 474; Wheeler v. City of S. Ste. Marie (Mich.), 129 N. W. 685; City of Hazlehurst v. Mayes (Miss.), 51 So. 890; Steitenroth v. City of Jackson (Miss.), 54 So. 955; State ex rel. Case v. Wilson (Mo.), 132 S. W. 625; Palmer v. City of Helena (Mont.), 107 Pac. 512; Stern v. City of Fargo (N. D.), 122 N. W. 403; Ex parte Jones (Okl.), 109 Pac. 570; Naylor v. McCulloch (Ore.), 103 Pac. 68; Elliott v. Monongahela City, 229 Pa. 618, 79 Atl. 144; Mannie v. Hatfield (S. D.), 118 N. W. 817; Ball v. Texarkana Water Corp. (Tex.), 127 S. W. 1068; Village of Swanton v. Town of Highgate (Vt.), 69 Atl. 667; Farwell v. City of Seattle (Wash.), 86 Pac. 217; Flannagan v. Buxton (Wis.), 129 N. W. 642.

11—City of Ottawa v. Carey, 108 U. S. 110; Baumgartner v. Hasty, 100 Ind. 575; Ball v. Texarkana Water Corporation (Tex.), 27 N. W. 1068; see, Abbott's Munic. Corp. Sec. 109, and cases cited.

its charter, the laws and constitution of the state and the general law of the land, is not seriously questioned.[12]

Public offices. Another implied power possessed by public corporations is that of instituting certain public offices and officials where such are necessary to the proper performance of the functions or duties imposed or required by law of the corporation.[13]

To acquire and hold property. A public corporation has also the implied power unless restricted by law to acquire and hold such property as may be necessary and convenient to either exercise powers directly granted or perform properly the functions of government for which it was created.[14]

The police power. A public corporation unquestionably has the implied right to exercise the police power and to accomplish this purpose to adopt and enforce such police and sanitary regulations and ordinances as may be necessary and which are consonant with superior law.[15]

Miscellaneous implied powers. Public corporations and especially municipal corporations proper possess in addition to the implied powers suggested above, the right to make and use a common seal and alter it at pleasure; the power to sue and compromise; complain and defend in any court; acquire a name and by that name to have perpetual succession and to exercise such powers as are recognized necessary to the existence of corporate life of the kind and character possessed by public corporations.[16]

12—A Coal-Float v. City of Jeffersonville, 112 Ind. 15; Cross v. Town of Morristown, 33 N. J. L. 57; City of Nashville v. Linck, 80 Tenn. 499.

13—Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109; Boehm v. City of Baltimore, 61 Md. 259.

14—Von Schmidt v. Widber, 105 Calif. 151; In re City of Buffalo, 68 N. Y. 167; see, also, Abbott's Munic. Corp. Chap IX.

15—Rae v. City of Flint, 51 Mich. 526; Sayre Borough v. Phillips, 148 Pa. 482; see, also, Abbott's Munic. Corp. Sec. 115 et seq.

16—Girard v. City of Phil., 7 Wall. (U. S.) 1; Ball v. Texarkana

Express constitutional provisions or action of the state in respect to any of the powers noted will necessarily control the corporation in the exercise of a power, and it will also be remembered that the universal rule obtains, that except as controlled by constitutional provisions, all rights and powers of public corporations, whether express or implied, are held, enforced and exercised only at the will of the sovereign state.[17]

§ 40. Discretionary and imperative powers.

There is found upon examination of the authorities another division of powers not co-ordinate or co-extensive with the one just given but based upon the idea that a public corporation may possess powers granted to it by the sovereign state, the exercise of which is optional. There are also other powers granted to it, the exercise of which is not a matter of choice. We have then imperative powers, or those whose exercise is obligatory upon the public corporation and the performance of which can be compelled by proper process;[18] and discretionary powers or those to be exercised or not within the sound discretion of the officers controlling public affairs and to whom such discretion may be given.[19]

Water Corp. (Tex.), 127 N. W. 1068; Richards v. Town of Clarksburg, 30 W. Va. 491; see, also, Abbott's Munic. Corp. Sec. 109.

17—City of Louisville v. Weikel (Ky.), 127 S. W. 147; Weith v. Wilmington, 68 N. C. 24; Plinkiewisch v. Portland Ry. Light & Power Co. (Ore.), 115 Pac. 151; see, Sec. 25 et seq., ante.

18—Mason v. Fearson, 9 How. (U. S.), 248; City of Ottawa v. People, 48 Ill. 233; Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518; Phelps v. Hawley, 52 N. Y. 28; Cavender v. City of Charlestown (W. Va.), 59 S. E. 732.

19—City of Joliet v. Verley, 35 Ill. 58; St. Joseph Board of Public Schools v. Patten, 62 Mo. 444.

Herford v. City of Omaha, 4 Nebr. 336. The court here say: "It sometimes becomes a very grave question in the construction of the statutes whether particular provisions are to be regarded as mandatory or directory. It is, however, a familiar principle that statutes relating merely to matters of conven-

§ 41. Exercise of imperative powers.

Powers conferred on public corporations to be exercised for the public good involving the performance of governmental duties are imperative in their nature; they become a duty and their performance, an obligation. The language used in conferring the power does not necessarily determine its character. It is the nature of that power which establishes this. The reason for this rule can be briefly stated. Public corporations are political, subordinate divisions of the state, organized as a part of its governmental machinery of administration. Their duties of this character are wholly of a public nature and their creation a matter of public convenience or governmental necessity. In order that they may better carry out the purposes for which they are created, certain powers are conferred upon them, and whether they will assume and exercise these powers or perform the duties imposed are matters with which they have no concern. Necessarily therefore the exercise of public imperative powers is held involuntary.[20] Imperative powers granted to or imposed upon public corporations cannot be abridged, surrendered or destroyed by any act of the corporation itself and the converse of this rule is also true, that a public corporation cannot by any act of itself increase its powers.[21]

ience or to the orderly and prompt conduct of business and not to the essence of the thing to be done, are generally considered as directory only, but this doctrine has been carried so far in some cases that it seems impossible to reconcile all the cases in which the question has been considered and if equal force were given to each case found in the books it would be a fruitless effort to attempt to fix any settled determinate point between a mandatory and directory statute.''

20—Goodrich v. City of Chicago, 20 Ill. 445; Anne Arundel County Com'rs v. Duckett, 20 Md. 468; McGillic v. Corby (Mont.), 95 Pac. 1063; Kennelly v. Jersey City, 57 N. J. L. 293; Phelps v. Hawley, 52 N. Y. 23.

21—Clark v. City of Washington, 12 Wheat. (U. S.) 40; City Council of Montgomery v. Capital City

§ 42. Exercise of discretionary powers.

On the other hand, those duties or powers conferred upon a public corporation, either by the language of the statute conferring the power or by the character or nature of the act to be done may be considered as discretionary and optional so far as the performance or exercise by the corporation is concerned. The exercise of discretionary powers as well as the manner of exercise when not specified by the grant of authority is as indicated by the plain meaning of the words left to the discretion of the corporation and its officials having in charge its management, or the transaction of the specific act.[22]

Public corporations generally possess a wide discretion, both in regard to the opening of public streets or highways and their improvement, including the construction and maintenance of drains, sewers, side-walks and pavements.[23]

Courts are not permitted, nor do they assume the right to exercise any restraining or other influence in regard to the performance or non-performance of discretionary powers unless questions are involved of bad faith, fraud, corruption, or the invasion of private rights.[24]

Water Co., 92 Ala. 361; New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann. 188; Gale v. Village of Kalamazoo, 23 Mich. 444; City of New York v. Second Ave. R. R. Co., 32 N. Y. 261; see, also, Abbott's Munic. Corp. note 34, page 195.

22—United States v. City of New Orleans, 31 Fed. 537; Thompson v. Board of Trustees of City of Alameda (Calif.), 77 Pac. 951; State v. Tampa Water Works Co. (Fla.), 47 So. 358; Edwards Hotel, etc. Co. v. City of Jackson (Miss.), 51 So. 802; State v. City of St. Louis, 158 Mo. 505; Spears v. City of New York, 72 N. Y. 442; Carr v. Northern Liberties, 35 Pa. State 324; Grant v. City of Erie, 69 Pa. 420; Kelley v. City of Milwaukee, 18 Wis. 83.

23—Fulton v. Cummings, 132 Ind. 453; Hovey v. Mayo, 43 Me. 322; City of Biddeford v. Yates (Me.), 72 Atl. 335; People v. Queens County Sup'rs, 131 N. Y. 468; City of Tacoma v. Titlow (Wash.), 101 Pac. 827

24—City of East St. Louis v. Zebley, 110 U. S. 321; Goytino v. City of Waynesboro (Ga.), 50 S. E. 122;

The corrective and restraining power of the courts can be invoked where public corporations transcend or abuse their power or threaten to do so, but public corporations are ordinarily free to transact their police, administrative and local discretionary duties without restraint or hindrance by the judicial or other branches of the state government.[25]

§ 43. Corporate powers; their delegation or surrender.

The powers possessed by public corporations are usually governmental in their nature and when granted by the legislature cannot be delegated by the corporation to others for their discharge or performance. It must exercise the functions imposed upon it by its charter. The character of these duties and the manner of their performance is usually specified in the original grant of power. The manner of the exercise of discretionary powers, as already stated, is usually confided to the discretion and good judgment of public officials.[26] This rule does not prevent, however, a delegation of the performance of ministerial duties or acts. The law recog-

People v. Grand Trunk West. Ry. Co., 232 Ill. 292, 83 N. E. 839; Lincoln School Twp. of Hendricks County v. Union Trust Co., 73 N. E. 623; Swan v. City of Indianola (Ia.), 121 N. W. 547; Hibbard v. Barker, 84 Kans. 848, 115 Pac. 561; State ex rel. Gentry v. Village of Dodson (La.), 49 So. 635; Carling v. Jersey City (N. J.), 59 Atl. 395; So. Ry. Co. v. Board of Com'rs, etc. (N. C.), 61 S. E. 690; Jones v. Town of North Wilkesboro (N. C.), 64 S. E. 866; Seitzinger v. Borough of Tamaqua, 187 Pa. 539; Brummitt v. Ogden Water Works Co. (Utah), 93 Pac. 828.

25—City of Chicago v. Schmidinger, 243 Ill. 167, 90 N. E. 369; Le Feber v. Northwestern, etc. Co. (Wis.), 97 N. W. 206; see cases cited in the preceding note.

26—Crittenden v. Town of Booneville (Miss.), 45 So. 723; Thompson v. Board of Trustees of City of Alameda (Calif.), 77 Pac. 951; Galindo v. Walker (Calif.), 96 Pac. 505; Lowery v. City of Lexington, 75 S. W. 202; City of Bowling Green v. Gaines (Ky.), 96 S. W. 852; City of Baltimore v. Gahan (Md.), 64 Atl. 716; Edwards v. City of Kirkwood (Mo.), 127 S. W. 378; see, also, Abbott's Munic. Corp., Sec. 112 and Sec. 40 et seq., ante.

nizes the clear distinction between duties or powers involving the exercise of judgment and discretion and those purely mechanical, clerical, or ministerial in their character.[27]

Closely related to the principle stated in the preceding paragraph is the rule that a public corporation cannot surrender nor divest itself, of the law-making powers granted to it, without legislative authority, either express or clearly implied. Subordinate public corporations have no power to make contracts or do those acts which in effect are a surrender of their governmental powers or which tend to limit or embarrass them in the performance or discharge of their governmental and public duties.[28]

§ 44. Rules of construction.

It is seldom that a rule other than that of strict construction is applied or should be applied to powers of whatever nature granted to and exercised by a public corporation. The reason for this salutary principle is that a public corporation is organized not for the personal, pecuniary gain or profit of its members but as an agency of the government for the exercise of governmental powers and for the better performance of the duties which every good government owes to those within its jurisdiction. The charter of the corporation contains

27—City of Biddeford v. Yates (Me.), 72 Atl. 335; Edison Electric Light & Power Co. v. Bloomquist (Minn.), 124 N. W. 969; People v. Grand Trunk W. Ry. Co., 232 Ill. 292, 83 N. E. 839; Jewell Belting Co. v. Village of Bertha (Minn.), 97 N. W. 424; City of Carthage v. Garner (Mo.), 108 S. W. 521; Schwartze v. City of Camden (N. J.), 75 Atl. 647.

28—Higgins v. City of San Diego, 118 Calif. 524; People v. Clean Street Company, 225 Ill. 470, 80 N. E. 298; Flynn v. Little Falls Water Power Co. (Minn.), 74 N. W. 180; State v. Board of Park Com'rs of City of Minneapolis (Minn.), 110 N. W. 1121; Columbus Gas Light & Coke Co. v. City of Columbus, 50 Ohio St. 65; City of Marshall v. Allen (Texas), 115 N. W. 841.

the grant of its powers and powers, rights, or privileges, cannot be read into this charter by judicial construction or interpretation.[29]

Any ambiguity or doubt, if such exists, must be construed or resolved in favor of the public and as against the exercise of the power by the public corporation. The action of a public corporation is to be held strictly to the limits imposed by its charter.[30] If a public corporation,

29—Minturn v. Larue, 23 How. (U. S.) 435. Where Justice Nelson said: "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

Curtis v. The County of Butler, 24 How. (U. S.) 435. Now we freely subscribe to the rule that neither privileges, powers nor authority can pass by the law of incorporation unless they be given in unambigous words and that an act giving special privileges must be construed strictly.

Thompson v. Lee Co., 3 Wall. (U. S.) 327. A municipal corporation "can exercise no power which is not in express terms or by a fair implication conferred upon it." Omaha Electric Light & Power Co. v. City of Omaha, 179 Fed. 445, affirming 172 Fed. 494; Boise City v. Boise City Artesian, etc. Co., 186 Fed. 705; Howard v. Town of Eastlake (Ala.), 46 So. 754; State v. Smith, 67 Conn. 541.

Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71. In this case, Chief Justice Shaw speaking for the court, said: "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of, their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. The principle is fairly derived from the nature of the corporations, and the mode in which they are organized and in which their affairs must be conducted." Leonard v. City of Canton, 35 Miss. 189; Heaney v. Sprague, 11 R. I. 456.

30—Ottawa v. Carey, 108 U. S. 110; City of Fort Scott v. Eads Brokerage Co. 117 Fed. 51.

Omaha Electric Light & Power Co. v. City of Omaha, 179 Fed. 455, affirming 172 Fed. 494. Legislative grants of power to municipal corporations must be strictly construed and cannot operate except so far as expressly delegated or indispensably necessary to the exercise of some other power which has been expressly delegated.

English v. Chicot Co., 25 Ark. 454. A county is a political corporation created for specific purposes and its powers like those of any other corporation must be strictly construed. A statute authorizing a county to subscribe to the capital stock of a railroad company does not authorize it to issue county bonds in payment of such stock. State v. Tampa Water Works Co. (Fla.), 47 So. 358; City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035; City

through irresponsible, dishonest or extravagant agents, exercises an ambiguous or a doubtful power resulting in an oppressive debt, an injury or loss to public property or an increase in taxation, it is the community at large, the taxable interests that must sustain and bear the loss and the burden. The principle, therefore, of strict construction is universally applied and every doubt as to the existence of a power is construed as against its exercise, and in favor of the tax paying public.[31]

§ 45. Rule of strict construction; how modified.

The rule of strict construction as stated above, is occasionally modified. The courts hold that it should not be carried to such an extent as to defeat the very purpose for which the power was granted, if proper to be exercised, and that where it is necessary to adopt a more liberal rule of construction of a corporate power to accomplish the result sought by the legislature, it should be done. The rule of strict construction also is not so frequently applied to grants of ordinary powers to munici-

of Chicago v. Weber, 92 N. E. 859; Chicago v. M. & M. Hotel Co., 248 Ill. 264, 93 N. E. 753; Bear v. City of Cedar Rapids (Ia.), 126 N. W. 324; City of Somerville v. Dickerman, 127 Mass. 272.

Leonard v. City of Canton, 35 Miss. 272. The power of a corporation is merely something added as to the particular locality to the general powers of government; or, in other words, it is a special jurisdiction, created for specified purposes and like all such jurisdictions, must be confined to the subjects expressly enumerated. City of Hazelhurst v. Mayes (Miss.), 51 So. 890; State v. Butler (Mo.), 77 S. W. 560; State ex rel. etc. v. Clifford (Mo.), 128 S. W. 625; State ex. rel. Case v. Wilson (Mo.), 132 S. W. 625; State v. Edwards (Mont.), 106 Pac. 695; Meday v. Borough Rutherford, 65 N. J. L. 645; In re Village of Kenmore, 110 N. Y. S. 1008; State v. Webber, 107 N. C. 962; Stern v. City of Fargo (N. D.), 122 N. W. 403; Leslie v. Kite, 192 Pac. 268; Blankenship v. City of Sherman (Tex.), 76 S. W. 805; Mantel v. State (Tex.), 117 S. W. 855; City of Winchester v. Redmond, 93 Va. 711; Quint v. City of Merrill, 105 Wis. 406.

31—Lachman v. Walker (Fla.), 42 So. 461; see also cases cited in preceding notes.

pal corporations proper, but even as to these corporations, the principle is equally applicable to unusual or extraordinary powers or those which when exercised result in a public burden.[32]

The customary rule in respect to the construction of statutes is also followed by the courts, viz: That it is the duty of the court to give effect, if possible to every clause and word of a statute and that when taken together if the purpose of the different provisions of a statute is not ambiguous or doubtful that construction should be given, if possible, as will give effect to all its provisions.[33]

The rule of strict construction is also modified where the corporation is endeavoring to extend its power to the injury of others and where it states by way of de-

32—Allen v. Louisiana, 103 U. S. 80; County of Moultrie v. Fairfield, 105 U. S. 370; Carey v. Blodgett (Calif.), 102 Pac. 668; Porter v. Vinzant (Fla.), 38 So. 607.

Smith v. City of Madison, 7 Ind. 86. The strictness then to be observed in giving construction to municipal charters should be such as to carry into effect every power clearly intended to be conferred upon the municipality and every power necessarily implied in order to the complete exercise of the powers granted.

In City of Port Huron v. McCall, 46 Mich. 565, it is held that the reason for the rule of strict construction does not apply where the power granted relates merely to a change in the form of municipal indebtedness. The court in its opinion by Justice Cooley said: "There is a principle of law that municipal powers are to be strictly interpreted and it is a just and wise rule. Municipalities are to take nothing from the general sovereignity except what is expressly granted. But when a power is conferred which in its exercise concerns only the municipality and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view of narrowing its construction. If the parties concerned have adopted a particular construction not manifestly erroneous and which wrongs no one, and the state is in no manner concerned, that construction ought to stand. That is good sense, and it is the application of correct principles in municipal affairs. State v. Walbridge, 119 Mo. 383; Gregory v. City of New York, 40 N. Y. 273.

33—Allen v. Louisiana, 103 U. S. 80; County of Moultrie v. Fairfield, 105 U. S. 370; Montclair v. Ramsdell, 107 U. S. 147; Grenada County Sup'rs v. Brogden, 112 U. S. 261.

fense to an action brought against it that it has itself been guilty of usurpation of power.[34]

§ 46. The power to contract.

A public corporation, it must be remembered, is: (1) An artificial person, and, (2) a governmental agent; so that as compared with private corporations its powers are still further restricted and limited. It is organized for the benefit and advantage of the community at large without special reference to any individual, family or class and for the further purpose of exercising governmental functions. The right to contract is one of the powers usually conferred upon it through some charter provision. The tendency of the court is to confine the exercise of corporate powers granted to public corporations strictly to such as are clearly given and following this rule, the power to contract of a particular public corporation whether municipal or public quasi, will be determined not by the application of general rules or principles of laws but by the specific right given to it by some grant of legal authority.[35]

Public corporations have only such rights and powers as are especially granted or absolutely necessary to carry into effect the powers and rights so granted. This rule applies in its full force to the making of contracts,[36]

34—Bank of Chillicothe v. Town of Chillicothe, 7 Ohio Pt. 2, 31.

35—City of Memphis v. Brown, 20 Wall. (U. S.), 289; Berry v. Mitchell, 42 Ark. 243; Hone v. Presque Isle Water Co, (Me.), 71 Atl. 769; Swift v. Inhabitants of Falmouth, 167 Mass. 115; City of Lexington v. Lafayette County Bank, 165 Mo. 161; Chamberlain v. City of Hoboken, 38 N. J. L. 110; Hubbard v. Norton, 28 Ohio State 116; Abbott Munic. Corp. Sec. 246; see also Commonwealth of Virginia v. State of West Virginia, 220 U. S. 1, 55 L. Ed. 353, construing a contract between these two states relative to an adjustment of the debt of Virginia.

36—City of Mobile v. Moag, 53 Ala. 561; City of New London v. Brainerd, 22 Conn. 552; Roberts v. City of Cambridge, 164 Mass. 176; Mayo v. Ins. Co., 96 Me. 539; In re Board of Water Com'rs, 176 N. Y. 239; Fawcett v. Town of Mt. Airy, 134 N. C. 125, 45 S. E. 1029.

and the legality of a particular contract will depend, therefore, not upon the general principles of law relating to the execution of contracts but upon the special construction of some legal grant from which the right to contract is claimed.[37]

The purpose of the contract may be one also in furtherance of an act which the corporation is prohibited by general principles or specific restrictions of the law from doing as not coming within the scope of the object or purpose for which the public corporation was incorporated. Aid, donations or assistance rendered private individuals in the advancement of private enterprises are invariably prohibited by law.[38]

§ 47. The implied power to contract.

The implied power to contract on the part of a public corporation does not exist except so far as may be indispensably necessary to carry into effect those powers and rights which have been by law expressly granted. This rule precludes, save in exceptional cases, the existence of an implied or discretionary power to contract.[39]

The principle that there does not exist the implied power to contract must be distinguished, however from the one that where the authority exists, in the absence

37—Staten Island Water Supply Co. v. City of New York, 128 N. Y. S. 128.

38—Parsons v. Inhabitants of Goshen, 28 Mass. (11 Pick) 396; Brick Pres. Church v. City of New York, 5 Cow. (N. Y.), 538; City of La Crosse v. La Crosse Gas & Electric Co. (Wis.), 130 N. W. 530. See Sec. 101 et seq., post.

39—City of Litchfield v. Ballou, 114 U. S. 190; Gillette-Herzog Mfg. Co. v. Canyon Co. 85 Fed. 396; City of Newport News v. Potter, 122 Fed. 321; City of Hartford v. Hartford Electric Light Co., 65 Conn. 324; Moss v. Sugar Ridge Twp. (Ind.), 67 N. E. 460; McDonald's Admr. v. Franklin County (Ky.), 100 S. W. 861; Dolloff v. Inhabitants of Ayer, 162 Mass. 569; Clark v. West Bloomfield Twp. (Mich.), 117 N. W. 638; City of Wellston v. Morgan, 65 Ohio State 219; McCormick v. City of Niles (Ohio), 90 N. E. 803; see Abbott Munic. Corp. Sec. 247, with many cases cited.

of an express contract, when a public corporation has received services or property of value and which it could legally use or acquire, an implied contract will be held to exist sufficient to enable the party rendering the services or transferring the property to recover their reasonable value.[40]

§ 48. Ultra vires contracts.

A corporation, either public or private, may do an act in excess of or beyond its lawful authority as found in its charter; such an act is termed ultra vires. A public corporation is an artificial person of a special character and as such is legally capable of only doing such acts and exercising such powers as may be conferred upon it by the charter of its creation directly or as indispensable and necessarily implied to carry into effect the powers directly granted. The legal authority to make a contract therefore lies at the foundation of its validity. This is found in the charter, using the term in its broad sense, and the absence of authority acts as a limitation upon the right of the public corporation to contract. Contracts entered into without such authority are beyond the power of the corporation to make and are necessarily void.[41]

40—Vilas v. City of Manilla, 31 Sup. Ct. Rep. 416; Steele County v. Erskine, 98 Fed. 215, affirming 87 Fed. 630; Fernald v. Town of Gilman, 123 Fed. 797; Butts County v. Jackson Bank Co. (Ga.), 60 S. E. 149; Darling v. Box Butte Co. (Nebr.), 111 N. W. 470; Robbins v. Hoover, 115 Pac. 526; Balch v. Beach (Wis.), 95 N. W. 132.

41—Hitchcock v. City of Galveston, 96 U. S. 341. A contract partly lawful and partly unlawful, if separable, can be enforced to the extent that it is lawful; Manhattan Trust Company v. City of Dayton, 59 Fed. 327; City of Fort Scott v. W. G. Eads Brokerage Co., 117 Fed. 51.

City of Mobile v. Moog, 53 Ala. 561. The doctrine of invalidity of contracts because ultra vires is more strictly maintained in respect to public corporations than private.

Coker v. Atlanta etc. Ry. Co. (Ga.), 51 S. E. 481. The fact that great benefits will result to a city from the carrying out of an ultra vires contract is no reason for denying equitable relief to a citizen who attacks it as illegal. City Council of Dawson v. Dawson Water Works

Persons dealing with a public corporation are charged with notice of its right to contract upon the subject-matter and in the manner contemplated or of the legal authority of public officials to act on behalf of their principal.[42]

§ 49. Other classes of ultra vires contracts.

Contracts made by public corporations may be also ultra vires and therefore void because of their purpose or result,[43] because through or by the making of them the obligation of some previous contract is impaired;[44] because the effect of the contract as made will be in violation of some statutory or constitutional provision in respect to the amount of indebtedness which can legally be incurred or some other express provision

Co., 106 Ga. 696; Blades v. Hawkins (Mo.), 112 S. W. 979; Fox v. Jones (N. D.), 102 N. W. 161; City of Paris v. Sturgeon (Tex.), 110 S. W. 459; Schneider v. City of Menasha (Wis.), 95 N. W. 94; see Abbott Munic. Corp. Sec. 249.

42—Sheridan v. City of New York, 145 Fed. 835; May v. City of Chicago, 222 Ill. 595, 78 N. E. 12, affirming 124 Ill. App. 527; Martindale v. Incorporated Town of Rochester (Ind.), 86 N. E. 321; Citizens Bank v. City of Spencer, 101 N. W. 643; Perry County v. Engle (Ky.), 76 S. E. 382; Commercial Wharf Corp. v. City of Boston (Mass.), 94 N. E. 805; McCurdy v. Shiawassee County (Mich.), 118 N. W. 625; Burns v. City of New York, 105 N. Y. S. 605; McAleer v. Angell, 19 R. I. 688, 36 Atl. 588; Schneider v. City of Menasha, 118 Wis. 298; see, also Sec. 52 post.

43—Sutherland-Innes Company v. Village of Evart, 86 Fed. 597.

Brooks v. Incorporated town of Brooklyn (Ia.), 124 N. W. 868. See especially in respect to contracts effecting the incurring of indebtedness and involving the subject of purpose or result; Secs. 101 et seq. post.

44—Houston & Texas Central R. R. Co. v. State of Texas, 177 U. S. 66; Board of Liquidation of New Orleans v. State of Louisiana, 179 U. S. 622; see, also Secs. 37 ante and Secs. 362, 373 et seq. post.

But see Cox v. Jones (N. H.), 63 Atl. 178, where it is held that a later contract is not illegal even where a refusal to perform an earlier contract would make the public corporation liable in damages thereon. Wormser-Goodman Construction Co. v. Borough of Belmar (N. J.), 77 Atl. 466.

relative to the powers of the corporation;[45] because the contract as made may infringe upon, affect or regulate some exclusive right, privilege or power given by the Federal Constitution exclusively to the Federal Government to enjoy or possess; because the contract may result in a beneficial interest to the public officials executing it on behalf of the public corporation;[46] or finally,

45—Citizens Bank v. City of Spencer, 101 N. W. 643; Higgins v. City of San Diego (Calif.), 45 Pac. 824; Baltimore etc. R. R. Co. v. People, 200 Ill. 541, 66 N. E. 148; Wabash R. R. Co. v. People, 202 Ill. 9, 66 N. E. 824; Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462; Lund v. Board of Com'rs of Newton County (Ind.), 93 N. E. 179.

Johnson v. Board of Com'rs of Norman County (Minn.), 101 N. W. 180. A contract for the erection of a court house at a price exceeding the debt limit of the county payment for which is to be made by issuing county warrants on the annual income of the county is a mere evasion of the statutory limit and will be enjoined.

Davenport v. Kleinschmidt, 6 Mont. 502. A county prohibited from incurring an indebtedness of more than $20,000 cannot when its bonded debt is $19,000, and its floating debt $15,000, contract to take water at an annual rental of $15,000.

Painter v. City of Norfolk (Nebr.), 87 N. W. 31. A contract for the purchase of waterworks assuming an outstanding bonded indebtedness of the company is void unless authorized by popular vote as provided by statute. Raton Water Works Co. v. Town of Raton, 9 New Mexico 70.

Berlin Iron Bridge Company v. City of San Antonio, 50 S. W. 408. Contract will be valid, however, if it involves an expenditure included within a debt already incurred.

State v. City of Pullman (Wash.), 63 Pac. 205; Secs. 696, 697 of Hill's Code prohibits a city from contracting for an extension of its water system without the approval of its citizens, in case an indebtedness is to be incurred, it requires the assent of three-fifths of the voters. A contract for the part purchase of a water system not made in compliance with the above provisions is void; but see Simons v. City of Eugene, 159 Fed. 307; Swan v. City of Indianola (Iowa), 121 N. W. 547; City of Winona v. Jackson (Minn.), 100 N. W. 368.

46—The authorities are numerous and a few only of the latest cases will be cited. Lainhart v. Burr (Fla.), 38 So. 711; Bullock v. Robison (Ind.), 93 N. E. 998; Bay v. Davidson (Iowa), 111 N. W. 25; Commonwealth v. Lane (Ky.), 102 S. W. 313; Clark v. Logan County (Ky.), 128 S. W. 1079; State ex rel. Board of Liquidation v. Brede (La.), 41 So. 487; O'Neil v. Flannagan, 98 Me. 426, 57 Atl. 591; Consolidated Coal Co. v. Trustees etc. (Mich.), 129 N. W. 193; Stone v. Bevans (Minn.), 92 N. W. 520; Wilson v. Otoe County (Nebr.), 98 N. W. 1020; Harrison v. City of

because of illegal or fraudulent means used, either in its inception or its actual execution.[47]

The subject of executory contracts as bearing upon the creation of debt in excess of a constitutional or statutory limitation will be considered in a later section.[48]

§ 50. Ultra vires contracts; their enforcement.

An unauthorized or an illegal contract executed by a public corporation is incapable of enforcement. It is absolutely void and neither the doctrine of estoppel nor ratification can be invoked to maintain it. The strict rule of law applying to ultra vires contracts of private corporations as followed by the English courts and the Federal decisions in this country is strictly applied to the contracts of public corporations.[49]

Where an application of the strict rule relative to the ultra vires contracts of private corporations results in injustice, many courts hold that a more liberal one should be applied and that where equities exist between the par-

Elizabeth (N. J.), 57 Atl. 132; State v. Williams (N. C.), 68 S. E. 900; Poling v. Board of Education (W. Va.), 49 S. E. 148; Antigo Water Company v. City of Antigo (Wis.), 128 N. W. 888; see also Abbott's Munic. Corps. Sec. 225, citing many cases.

47—Rice v. Trustees of Hayward, 107 Calif. 398; Nelson v. Harrison County (Iowa), 102 N. W. 197; State v. Kern, 51 N. J. L. 259; City of Wichita v. Skeen, 18 Texas Civ. App. 632; Herman v. City of Oconto, 100 Wis. 391.

48—See post, Sec. 77.

49—Manhattan Trust Co. v. City of Dayton, 59 Fed. 327; City of Detroit v. Grummond, 121 Fed. 963; Edison Electric Co. v. City of Pasadena, 178 Fed. 425; Berka v. Woodward, 125 Calif. 119, 57 Pac. 777; City Council of Dawson v. Dawson Water Works Co., 106 Ga. 696; City of Indianapolis v. Wann, 144 Ind. 175, 42 N. E. 901; Root v. City of Topeka, 63 Kans. 129, 65 Pac. 233; Village of Reed City v. Reed City etc. Works (Mich.), 131 N. W. 385; Grannis v. Blue Earth County Com'rs, 81 Minn. 55; Peck-Williamson etc. Co. v. Board of Education etc. (Okla.), 50 Pac. 236; Smith v. City of Philadelphia (Pa.), 76 Atl. 221; State v. True (Tenn.), 95 S. W. 1028; Baldwin v. Travis County (Texas) 88 S. W. 480; Chippewa Bridge Co. v. City of Durand (Wis.), 99 N. W. 603; Hoeppner v. City of Rhinelander (Wis.), 125 N. W. 454; Abbott Munic. Corp. Secs. 258 and 259.

ties they should be established and enforced. The courts, however, quite uniformly agree that this principle can not be applied under the same conditions or circumstances to the contracts of public corporations.[50] There are some decisions to the contrary and still other decisions hold that where, under an ultra vires contract the public corporation has received and retained goods or property or services of value, there is an implied obligation on its part independent of the contract to return full value for benefits actually received.[51]

There is a broad distinction to be made between the irregular or informal exercise of a granted power and the doing of an act entirely beyond or in excess of the legal powers of the corporation. The application of the doctrine of estoppel may depend upon this distinction;

50—Hitchcock v. Galveston, 96 U. S. 341; City of Detroit v. Detroit City Ry. Co. 56 Fed. 867; Fort Madison Water Co. v. City of Fort Madison, 110 Fed. 901; Slaughter v. Mobile, 73 Ala. 134; State v. City of Helena, 24 Mont. 521; Parker v. City of Philadelphia, 92 Pa. 401; see Abbott Munic. Corps. Sec. 279 and cases cited.

51—See Sec. 31, ante; Warner v. City of New Orleans, 87 Fed. 829; City Council of Montgomery v. Montgomery Water Works, 79 Ala. 233; Argenti v. City of San Francisco, 16 Calif. 255; Higgins v. City of San Diego, 131 Calif. 294, 45 Pac. 824, 63 Pac. 470.

Brown v. City of Atchison, 39 Kan. 37. Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it, * * * but the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part by and on the part of one of the parties and the other party received benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received, for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit. London etc. Land Co. v. City of Jellico, 103 Tenn. 320; Monroe Water Works Co. v. City of Monroe, 110 Wis. 11, 85 N. W. 685; but see Edison Electric Co. v. City of Pasadena, 178 Fed. 425.

the courts holding the corporation estopped in the former case while denying the application of the doctrine where the act is ultra vires in the proper and technical sense. This distinction is the basis of many decisions although it may not directly appear as a reason.[52]

§ 51. Contracts; their formal execution.

A public corporation necessarily acts through its official representatives; and every possible safeguard, therefore is thrown around its property and interests likely to be affected or wasted by a misuse or abuse of the powers vested in public officials. Nowhere is this object of the law more apparent than in the establishment and maintenance of rules controlling and regulating the formal execution of contracts by public corporations. As already stated the authority of public officials is special, not general; they have the right to exercise only such powers and perform such duties as are expressly given and their principal is only held under such conditions and circumstances. A public corporation is not bound by acts coming within the apparent scope of the agent's power and authority. In this respect the rule differs widely from that applying to an agent of a private corporation or individual.[53] One may find in charter or

52—Rogers v. City of Burlington, 3 Wall. (U. S.) 654; Lake County v. Graham, 130 U. S. 674; Scott's Exc'rs v. Shreveport, 20 Fed. 714; Higgins v. City of San Diego, 118 Calif. 524; Black v. Common Council of Detroit, 119 Mich. 571; Wormstead v. City of Lynn, 184 Mass. 425; Union Bank of Richmond v. Oxford County Com'rs, 119 N. C. 214; McTwiggan v. Hunter, 19 R. I. 265; Abbott's Munic. Corp. Sec. 133.

53—The Floyd Acceptances, 7 Wall. (U. S.), 666.

Story on Agency, Sec. 307a. "In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relations to mere private agents, as to the latter, the persons are in many cases bound where they have not authorized the declarations and representations to be made. But in cases of public agents, the government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or

statutory provisions, minute details as to the manner and formalities attending the making and execution of a contract. These are held mandatory, not directory merely.[54] Charter or statutory provisions may further require the execution or approval of contracts on behalf of public corporations by certain designated officials with countersignatures, and contracts executed by others, or

he is held out as having authority to do the act or is employed in his capacity as a public agent to make the declaration or representation for the government. Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or rashness and indiscretion of their agent.''

Clark v. City of Des Moines, 19 Iowa 199. The general principle of law is well known and definitely settled that the agents, officers or even a city council of a municipal corporation cannot bind the corporation when they transcend their lawful and legitimate powers. This doctrine rests upon this reasonable ground: The body corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule, that the corporation is bound only when its agents, by whom from the very necessities of its being it must act if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of ultra vires; that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority.

City of Baltimore v. Eschbach, 18 Md. 282. For this reason the law makes a distinction between the effects of the acts of an officer of a public corporation and those of an agent for a principal in common cases. In the latter the extent of the authority is necessarily known only to the principal or the agent, while in the former it is a matter of record in the books of the corporation or of public law. City of Nashville v. Hagan, 68 Tenn. 495.

54—Los Angeles Gas Co. v. Toberman, 61 Calif. 199; Ness v. Board of Com'rs of Marshall County (Ind.), 91 N. E. 618, 93 N. E. 283; City of Baltimore v. Eschbach, 18 Md. 276; Butler v. City of Charlestown, 73 Mass. 12; Smart v. City of Philadelphia, 205 Pa. 329, 54 Atl. 1025; Carpenter v. Yeadon Borough, 208 Pa. 396, 57 Atl. 837; Beyer v. Town of Crandon, 98 Wis. 306; Chippewa Bridge Co. v. City of Durand (Wis.), 99 N. W. 603; but see Larkin v. City of Alleghany, 162 Fed. 611.

not in the manner required by law, will be invalid.[55] The law does not countenance dishonesty or a wilful avoidance of an obligation entered into in good faith and following substantially the conditions required, but it does require a strict observance of those provisions intended to protect public property from private plunder. Such charter or statutory provisions may require as preliminary to the execution of a contract involving the expenditure of moneys or the incurring of a debt, the certification of the cost of or necessity for a proposed work of public improvement; a resolution or ordinance of the council or legislative body authorizing the execution of the contract with its attendant expenditures; an appropriation by the council of moneys for the purpose required; the letting of the contract only upon public advertisement for a designated time, or other provisions concerning the time of its execution; the making of the contract in duplicate; a petition by a required number of residents or property owners who are to be affected by the proposed contract, or the approval of the contract by the electors.[56]

55—City of Superior v. Norton, 63 Fed. 357; Times Publishing Co. v. Weatherby (Calif.), 73 Pac. 465; City of Chicago v. Peck, 196 Ill. 260; Bowditch v. Supt. of Streets Boston, 168 Mass. 239; City of Philadelphia v. Gorgas, 180 Pa. 296; but see Griffin v. City of Tacoma (Wash.), 95 Pac. 1107.

56—Continental Construction Co. v. City of Altoona, 92 Fed. 822; Seward v. Town of Liberty, 142 Ind. 551, 42 N. E. 39; Town of Gosport v. Pritchard, 156 Ind. 400.

Goddard v. City of Lowell, 179 Mass. 496. Many charter provisions are to be found which provide for the letting of contracts only after competitive bidding. City of Newport News v. Potter, 122 Fed. 321; Kansas City etc. Brick Co. v. National Surety Co. 167 Fed. 620; U. S. Wood Preserving Co. v. Sundmaker, 186 Fed. 678; Tousey v. City of Indianapolis (Ind.), 94 N. E. 225; Kenyon v. Board of Sup'rs (Mich.), 101 N. W. 851; Attorney General v. Public Lighting Com. City of Detroit (Mich.), 118 N. W. 135; Woodruff v. Welton (Nebr.), 97 N. W. 1037; Case v. Inhabitants of Clinton (N. J.), 74 Atl. 672; Hart v. City of New York, 201 N. Y. 45, 94 N. E. 219; Hannan v. Board of Education of Lawton (Okla.), 107 Pac. 646.

§ 52. Authority of officers and agents to bind the corporation.

In preceding sections, the invalidity of a contract made by a public corporation the result of want of authority or legal power has been discussed, but granting this, the further principle is suggested that a public corporation being an artificial person can only act through its agents specially authorized. The principles creating and regulating the relations existing between principal and agent differ in their application to officers or agents of a public corporation as distinguished from such representatives either of private corporations or natural persons. A public corporation being merely a governmental agent and not organized for the pecuniary advantage of its members is restricted and limited in the exercise of its powers in every way. The legal principle cannot be too often repeated that a public corporation is not bound by acts of its agents coming within the apparent scope of their power and authority. Their authority to act must be explicit and direct that the corporation be bound.[57] Many contracts therefore made or attempted to be made by public officials are held invalid which, if executed on behalf of a private corporation or a natural person, would be enforced. The power of public officials to bind a corporation, in the making of a contract or of the corporation itself to contract, is closely scrutinized, and unless the same clearly appears, its existence will not be presumed.[58]

57—Coleman v. Township of Hartford (Ala.), 47 So. 594; Whitney v. City of New Haven, 58 Conn. 450; Woodward v. City of Grangeville (Idaho), 92 Pac. 840; Krause v. Lehman, 80 N. E. 550; Hunneman v. Inhabitants of Grafton, 51 Mass. 454; Attorney General v. Murphy (Mich.), 22 N. W. 260; Holroyd v. Town of Indian Lake, 83 N. Y. S. 533; In re Niland (N. Y.), 85 N. E. 1012; People v. Board of Audit, 175 N. Y. 394, 67 N. E. 620; Mahon v. Luzerne County, 197 Pa. 17; see also authorities cited under Sec. 65, post.

58—Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433.

A public corporation is an organization of a greater or less degree of complexity; each of the different branches or departments having for its purpose the exercise, control and management of certain governmental powers or duties. As exercising such powers on behalf of the corporation will be found certain designated officials to whom by law, is given the right to perform certain prescribed duties. Contracts made by officials concerning matters which do not come within the scope of duties thus specified or for which authority does not exist cannot be enforced. This doctrine is most emphatically applied in connection with those acts involving the expenditure of public moneys.[59]

The authority of public agents or officials being thus special and limited, all persons dealing with them are charged with notice of such limitations and are bound at their peril to ascertain the nature and extent of their authority and especially is this true of acts or duties conferred specifically by statute. The authority granted by charter or statutory provision must be exercised in the manner, at the time and in the place designated, and contracts not executed agreeably to such provisions will be held void and therefore, incapable of enforcement.[60]

59—Neosha County Com'rs v. Stoddard, 13 Kans. 207; Butler v. City of Charlestown, 73 Mass. 12; for full citation of authorities see Secs. 65 et seq. post.

60—A. H. Andrews Co. v. Delight Special School Dist. (Ark.), 128 S. W. 361; Robbins v. Hoover (Colo.), 115 Pac. 526; Kelly v. Town of Torrington (Conn.), 71 Atl. 939; Hord v. State (Ind.), 79 N. E. 916; Bennett v. Incorporated Town of Mt. Vernon (Ia.), 100 N. W. 341; Owen County v. Walker (Ky.), 133 S. W. 236; Whitney v. Parish of Vernon (La.), 52 So. 176; Baldwin v. Inhabitants of Prentiss (Me.), 74 Atl. 1038; Moore v. City of Detroit (Mich.), 129 N. W. 715; Jewell Belting Co. v. Village of Bertha (Minn.), 97 N. W. 434; W. W. Cook & Son v. City of Cameron (Mo.), 128 S. W. 269; Wakefield v. Brophy, 122 N. Y. S. 632; Hart v. Village of Wyndmere (N. D.), 131 N. W. 271; Stronger v. Franklin Co. (Texas), 123 S. W. 1168.

§ 53. Ratification of an invalid or ultra vires contract.

A contract may, because of some irregularity or informality in the manner or time of its execution be technically incapable of enforcement. Such a contract, the authorities hold, may be ratified either by an acceptance of the benefits of a contract by the public corporation, by the subsequent performance of those acts and conditions required by law for the execution of a valid contract, by acquiescence in existing conditions, by silence or conduct other than that already suggested.[61] The rule stated in the preceding sentence does not apply to an ultra vires contract. If there is no legal authority for it, that authority cannot be created through the application of any doctrine or principle of estoppel, acceptance or ratification. The contract cannot be enforced.[62]

The courts recognize and apply the clear distinction

61—Slaughter v. Mallett Land & Cattle Co., 141 Fed. 280; Audit County of New York v. City of Louisville, 185 Fed. 349; Randolph County v. Post, 93 U. S. 502; Daviess County v. Dickinson, 117 U. S. 657; Town of Bloomfield v. Charter Oak Bank, 121 U. S. 121; San Diego Water Co. v. City of San Diego, 59 Calif. 517; Sacramento County v. Southern Pac. R. R. Co., 127 Calif. 217; City of Chicago v. Morton Mill Co., 196 Ill. 580; Roberts v. City of Cambridge, 164 Mass. 176; Darling v. City of Manistee (Mich.), 131 N. W. 450; Aurora Water Co. v. City of Aurora, 129 Mo. 540; Gutta Percha & Rubber Mfg. Co. v. Ogalalla, 40 Nebr. 775; Albany City National Bank v. City of Albany, 92 N. Y. 363; Silsby Mfg. Co. v. City of Allentown, 153 Pa. 319; Aspinwall-Delafield Co. v. Borough of Aspinwall, 229 Pa. 1, 77 Atl. 1098; Norton v. City of Roslyn, 10 Wash. 44; Abbott Munic. Corp. Sec. 279; see also Secs. 274 et seq. post, relating to the doctrine of estoppel as applied to an issue of negotiable securities.

62—Edison Electric Co. v. City of Pasadena, 178 Fed. 425, 431; Sioux City v. Ware, 59 Iowa 95; Root v. City of Topeka, 63 Kans. 129, 65 Pac. 233; Hilton v. Common Council of Grand Rapids, 112 Mich. 500; Village of Reed City v. Reed City etc. Works (Mich.), 131 N. W. 385; Berlin Iron Bridge Co. v. Wilkes County Com'rs, 111 N. C. 317; Smith v. City of Philadelphia, (Pa.), 76 Atl. 221; Huron Water Wks. Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975; State v. True (Tenn.), 95 S. W. 1028; see also 48 et seq. ante.

between an irregular or informal exercise of an express or implied power and the total lack or absence of power.[63]

The rule also obtains that if the legislature possesses the power to authorize the making of specific contracts by a public corporation, it can authorize such a corporation to ratify a contract previously executed by it without authority; the ratification is then equal in legal force to the grant of original authority and relating back to the inception of the transaction validates all acts in connection therewith.[64]

§ 54. Contracts of suretyship and guaranty.

The power of a public corporation to enter into contracts of guaranty and suretyship must be expressly given. Such acts do not come within its implied powers as construed and defined by the courts.[65]

The rule applies to contracts involving the guaranty by a public corporation of negotiable instruments issued by private persons or corporations.

The authority to aid a railway company by subscribing for its stock does not empower it to endorse the bonds of the company and such endorsement is void.[66]

63—Lake County v. Graham, 130 U. S. 674; National Life Ins. Co. v. Board of Education, 62 Fed. 778; see sections 330 et seq. post for a discussion of the doctrine as applied to an issue of negotiable bonds.

64—Daviess County v. Dickinson, 117 U. S. 657; Hill v. City of Indianapolis, 92 Fed. 467; Cranor v. Board of Com'rs of Volusia County (Fla.), 45 So. 455; State of Wisconsin v. Torinus, 26 Minn. 1.

Wittmer v. City of Jamestown, 109 N. Y. S. 269. It was competant, however, for the state as principal to make it good by a legislative enactment adopting it as its own, for it could have authorized it in the first instance. Whatever it can do or direct to be done originally, it can subsequently and when done lawfully, ratify and adopt with the same effect as though it had been properly done under a previous authority.

65—Blake v. Mayor of Macon, 53 Ga. 172; Clark v. Des Moines, 19 Iowa 199; Carter v. Dubuque, 35 Iowa 416; Louisiana State Bank v. Orleans Nav. Co. 3 La. Ann. 294.

66—Blake v. Mayor, etc. of Macon, 53 Ga. 172; but see City of Savannah v. Kelly (Ga.), 108 U. S. 184.

CHAPTER III.

THE POWER TO INCUR INDEBTEDNESS AND ISSUE NEGOTIABLE INSTRUMENTS

§55. Distinction between private and public corporations.

The essential differences and distinctions existing between a public and private corporation are well understood, but since these control so materially the powers of the public corporation in respect to the incurring of indebtedness under whatever form, it may be pertinent to re-state them here.

(1) A public corporation is created solely as a governmental agent and for the purpose of local government; "It is a representative not only of the state but is a portion of its governmental power; it is one of its creatures made for a specific purpose to exercise within a limited sphere the powers of the state."[1] It is organized for the common benefit and advantage of those within its territorial limits, who have no individual interest in its property. A private corporation, on the other hand, is organized solely and exclusively for the individual and particular benefit, gain or advantage of its members or stockholders.

(2) No contract relation exists as between the public corporation or any of its members and the state which as has been noted in preceding sections[2] has full, ample and complete control over it in every respect. On the contrary, a contract relation is the basis of all of the

1—United States v. Baltimore & Ohio R. R. Co., 17 Wall. (U. S.) 322.

2—See Secs. 15, 25 et seq. ante.

rights and powers of a private corporation not only as among the members but also as between the corporation and its members, the corporation and the state, and its members and the state.[3]

§ 56. Corporate powers.

A corporation, the authorities universally hold, may exercise powers either express or implied in their nature, all of which must be derived from its charter which is the true and sole test and measure of its legal capacities. No question arises in either the case of a public or private corporation in respect to its right to exercise powers directly and expressly granted.

There is also a division found in the authorities of implied powers into those which a corporation, either public or private, may exercise because absolutely necessary and essential to the execution of an express power. A further division is made of implied powers capable of being legally exercised by a private corporation into those which are not necessarily essential or indispensable to the existence of the corporation or the execution of an express power but merely convenient for the corporation to exercise in furtherance of its legal objects and purposes. The last division of implied powers as thus broadly construed and as liberally interpreted by the overwhelming weight of authority cannot be exercised by public corporations.[4]

§ 57. The power to incur indebtedness.

Since a corporation, either public or private, is an artificial person it necessarily follows as a legal proposi-

3—Abbott Municipal Corp. Sec. 22; Clark & Marshall Private Corp. Secs. 268 et seq.; Thompson Corp. 2nd. Ed. Sec. 313 et seq.

4—See Secs. 38 et seq. ante; Abbott Munic. Corp. Secs. 108, et seq.; McQuillen Munic. Corp. Secs. ——.

tion that its acts must have as a basis for their validity the existence of a grant of power either express or implied, from the authority creating it.

This principle applies in all its virility to the incurring of indebtedness. When the power to incur indebtedness is expressly given and under proper constitutional authority, the only questions arising in connection with its exercise are those relating to the manner in which it may have been carried out. In the earlier cases there will be found, however, a serious conflict of authority in respect to the existence of an implied power on the part of public corporations to incur indebtedness.[5]

To simplify the subject, a division of the manner in which the debt may be created will be suggested since this may determine the right of the public corporation in the first instance to incur that debt. Subordinate governmental bodies may incur an indebtedness (excluding a liability for torts) in one or more of three ways: (1) by the issue of negotiable instruments or securities; (2) through the borrowing of money with or without issuing in return therefor evidences of indebtedness merely assignable or quasi negotiable in character and form; and (3) the incurring of a liability for supplies, labor, services or materials used in carrying on the ordinary business of the public corporation, or in furtherance of some power expressly granted or included within the first class of implied powers.[6]

5—Brenham v. German American Bank, 144 U. S. 173; Watson v. City of Huron, 97 Fed. 449; Lindsay v. Rottaken, 32 Ark. 619; Ex parte Sims, 40 Fla. 432; Law v. People, 87 Ill. 385; Meyers v. City of Jeffersonville, 145 Ind. 439; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367; Frost v. Inhabitants of Belmont, 88 Mass. 152; State v. City of Great Falls, 19 Mont. 518; Town of Hackettstown v. Swackhamer, 37 N. J. L. 191; Wells v. Town of Salina, 119 N. Y. 280; see also Secs. 88 et seq. post, and the cases cited in the notes under this and the immediately following sections.

6—Abbott Munic. Corp. Secs. 141, 143; Gray Limitations of Taxing Power, Secs. 21-23, et seq.; Burroughs Public Securities, Sec. 24; Daniel on Negotiable Instruments,

The modern authorities all agree upon the principle that the power to incur indebtedness through the issue of negotiable instruments must be expressly given. This question and the reasons for the doctrine will be considered at length and the authorities cited in subsequent sections.

Some of the earlier cases held that an implied power existed to incur indebtedness through the borrowing of money,[7] but the later authorities deny almost universally this doctrine.[8]

5th Ed. Secs. 1527 et seq.; Reid on Corporate Finance, Secs. 1 et seq.

7—Gelpcke v. Dubuque, 1 Wall. (U. S.), 221; Desmond v. Jefferson, 19 Fed. 483; State v. Babcock, 22 Nebr. 614; Bank of Chillicothe v. Town of Chillicothe, 7 Ohio, Pt. 2, page 31; Mills v. Gleason, 11 Wis. 470; see also Glucose Suger Refining Co. v. City of Marshalltown, 153 Fed. 620; Peed v. McCrary, 94 Ga. 487, 21 S. E. 282.

Pennick v. Foster (Ga.), 58 S. E. 773. A municipal corporation may borrow money for the purposes of government when the power to borrow is delegated in the charter. Smith v. City of Madison, 7 Ind. 81; New England Co. v. Robinson, 25 Ind. 536; Richmond v. McGirr, 78 Ind. 192; Bicknell v. Widner School Twp. 73 Ind. 501; Lovejoy v. Inhabitants of Foxcroft (Me.), 40 Atl. 141.

8—Police Jury v. Britton, 15 Wall. (U. S.), 566; Dudley v. Board of Com'rs of Lake Co. (Colo.), 80 Fed. 672; Ex parte Sims (Fla.), 25 So. 280; National Bank of Jacksonville v. Duval County (Fla.), 34 So. 894; Boise City Nat. Bank v. Boise City (Idaho), 100 Pac. 93; Law v. People, 87 Ill. 385; Hewitt v. Normal School Dist. 94 Ill. 528; Indiana Trust Co. v. Jefferson Twp., Boone County (Ind.), 77 N. E. 63.

Butts County v. Jackson Bank (Ga.), 60 S. E. 149. County Commissioners have no authority to borrow money to be used in defraying current expenses though the loan be payable within the current year and the general design be to discharge the same from the anticipated revenues of that year. McCord v. City of Jackson (Ga.), 69 S. E. 23; Tate v. City of Elberton (Ga.), 71 S. E. 420.

Costello v. Inhabitants of North Easton (Mass.), 91 N. E. 219. A watch district established under Revised Laws, Chap. 31, Sec. 8, has no power to borrow money even in anticipation of taxes though it may raise and appropriate money for purposes for which it was organized. McCurdy v. Shiawassee County (Mich.), 118 N. W. 625.

Town of Hackettstown v. Swackhamer, 37 N. J. L. 191. Municipal corporations in the absence of a specific grant of power do not in general possess the capacity to borrow money and a note given by such a corporation for an unauthorized loan cannot be enforced even though the

In Mayor of Nashville v. Ray, the court said: "The power to borrow money does not belong to a municipal corporation as an incident to its creation. To be possessed, it must be conferred by legislation, either express or implied. There are cases, undoubtedly, in which it is proper and desirable that a limited power of this kind should be conferred, as where some extensive public work is to be performed, the expense of which is beyond the immediate resources of reasonable taxation, and capable of being fairly and justly spread over an extended period of time. Such cases, however, belong to the exercise of legislative discretion, and are to be governed and regulated thereby."[9]

The subject of the power of the legislature to compel the payment of debts has been considered in a previous section[10] and it will be found upon an examination of the authorities that an implied power to incur indebtedness or the existence of an implied obligation on the part of a public corporation was and is based upon claims arising, under the circumstances or conditions noted in the third subdivision above noted.[11]

money borrowed has been expended for municipal purposes. Ford v. Washington Township, Bergen County (N. J.), 58 Atl. 79; Knapp v. Mayor of Hoboken, 39 N. J. L. 394; Ketchum v. Buffalo, 14 N. Y. 356.

Wells v. Town of Salina, 119 N. Y. 280, 23 N. E. 870. Under statutes authorizing municipal corporations to raise money for prosecuting and defending suits and for all municipal purposes, it is intended that the money is to be raised by taxation and not by borrowing. Good Roads Machinery Co. v. Old Lycoming Twp. (Pa.), 25 Pa. Super. Ct. 156; Montpelier Savings Bank & Trust Co. v. School Dist. No. 5 of Town of Ludington (Wis.), 92 N. W. 439.

9—Mayor of Nashville v. Ray, 19 Wall. 468.

10—See Sec. 31 ante.

11—Clairborne County v. Brooks, 111 U. S. 400; Desmond v. Jefferson, 19 Fed. 483; Holmes v. City of Shreveport, 31 Fed. 113; Daily v. Columbus, 49 Ind. 169; Miller v. Com'rs, 66 Ind. 162; State v. Babcock, 22 Nebr. 614; Bank of Chillicothe v. Town of Chillicothe, 7 Ohio, Pt. 2, pg. 31; Williamsport v. Commonwealth, 84 Pa. State 487; Richmond etc. County v. Town of West Point, 94 Va. 688.

§ 58. Necessity for express authority; basis of the rule.

Another reason for the principle, that the authority to incur indebtedness must be expressly given, growing out of the distinctions, already noted, between public and private corporations, fundamental in its character and of controlling influence in doubtful cases involving the incurring of an indebtedness or the creation of an obligation, is the source of funds available for the payment of these obligations. A private corporation is a private enterprise designed usually for the direct personal pecuniary advantage of the members. The funds for its promotion and the transaction of the corporate business are derived through contributions from or assessments upon their private means. If by mismanagement, the dishonesty or extravagance of its agents, or the creation of ill-advised or imprudent obligations, a loss is sustained by the corporation, such loss is met by and falls upon the members personally. Entirely different are the conditions and results with public corporations. They are organized as governmental agents and as such share in the administration of governmental affairs and the exercise of public duties resting upon the sovereign. All the expenditures of these corporations in their public capacity are paid by moneys raised through the imposition and collection of taxes upon taxable interests of the community. Those in charge of the expenditures of public money may be irresponsible agents elected by some misguided, temporary, popular feeling. Irresponsible, however, or otherwise, there is ever an irresistible tendency on the part of public officials, prudent though they may be in the management of their private finances, to expend public moneys lavishly and extravagantly or unnecessarily to incur debts or contract obligations intended to advance their personal interests or to perpetuate themselves in power. The expenditures of public moneys must be met by the levy and collection of taxes, or by the in-

curring of indebtedness or the creation of obligations, which ultimately must be paid from the public purse. Foolish, unwise or extravagant expenditures and losses resulting from fraudulent or improvident contracts do not fall except in the most indirect manner, and then only to a limited extent, upon the private means of these irresponsible official agents. It is chiefly this difference in the manner of raising revenue which leads the courts to adopt the strict rule of construction in allowing and recognizing the right to incur indebtedness by public corporations.

§ 59. To what extent discretionary when expressly given.

The courts usually hold that if the power to incur indebtedness or create an obligation is expressly given in the charter, statutes or constitution, it is to be considered as to the issue of bonds not as a continuing power but exhausted through their issue to the amount and for the purpose specified.[12] The power to incur indebtedness for governmental work or usual municipal purposes, if granted, has a different character and is generally considered a continuing power, to be exercised however for the purpose and in the manner as provided by law and subject to constitutional restrictions respecting indebtedness incurrable by public corporations. The courts further hold in construing this last power, whether expressly given or found in the first class of implied powers, that unless the specific purpose is designated by the authority, the time and place or the expediency of its exercise rests within the sound discretion of the public authorities, so long as the purpose is a "public one," and the amount within constitutional limitations.[13]

12—Millsaps v. City of Terrell, 60 Fed. 193; Wilson v. City Council of Florence, 40 S. C. 290.

13—Brenham v. German American Bank, 144 U. S. 173; City of Huron v. Second Ward Savings Bank, 86

§ 60. Implied power of courts to compel the payment of debts.

To protect the tax-paying public the courts have adopted and enforced almost universally the strict rule of construction of a corporate right to incur a valid indebtedness. The practical effect of the working of this rule is to deny to public corporations the legal authority to incur an indebtedness if the question may arise or if there exists any doubt or ambiguity. There will be found, however, on an examination of the authorities,

Fed. 272; Town of Greenburg v. International Trust Co., 94 Fed 755.

White v. City of Decatur (Ala.), 23 So. 999. Courts have no power to determine what municipal expenditures are necessary. These matters are within the sound discretion of the municipal authorities. City of Redlands v. Brook (Calif.), 91 Pac. 150; Staples v. City of Bridgeport (Conn.), 54 Atl. 194; Anderson v. Newton (Ga.), 51 S. E. 508; Platt v. City of Payette (Idaho), 114 Pac. 25; Advisory Board of Washington Twp. v. State (Ind.), 73 N. E. 700.

Johnson v. Wilson County Com'rs, 34 Kans. 670. While under the statute the question of authority to borrow money must be submitted to a popular vote, the question of erecting the buildings for which the money is to be borrowed need not, however, be so submitted.

Gray v. Bourgeois (La.), 32 So. 42. Where authority has been granted by the taxpayers to the municipal authorities to incur a debt and to issue bonds and to secure these by a special tax, the officials of the town may, if they deem it more advantageous and advisable, create the debt and levy a special tax to pay it without issuing the bonds. Boston Water Power Co. v. City of Boston (Mass.), 10 N. E. 318; Matter of Saline County, 45 Mo. 52.

State ex rel. Witmer v. Conrad (Mo.), 49 S. W. 857. The fact that the time of holding a special county bond election is within the discretion of the county court does not authorize it to refuse absolutely to call such an election when duly petitioned for as required by law. Decker v. Deimer (Mo.), 129 S. W 936; Carlson v. City of Helena (Mont.), 102 Pac. 39; Jones v. Madison County Com'rs (N. C.), 47 S. E. 753; Com'rs of Town of Hendersonville v. C. A. Webb & Co. (N. C.), 61 S. E. 670; Ackerman v. Buchman, 109 Pa. State 254; Mayor v. Aldan Borough, 209 Pac. 247, 58 Atl. 490; Carrigon v. Kershaw County, 83 S. C. 88, 64 S. E. 1018.

Clark & Courts v. San Jacinto County (Texas). County Com'rs cannot be compelled by mandamus to fund the indebtedness of the county since this is within their discretion; but see Schonweiler v. Allen (N. D.), 117 N. W. 866.

cases holding that defect of power may be no defense. For the purpose of enforcing just obligations, courts have adopted what might be termed the implied power of a public corporation to incur indebtedness other than by ordinance, charter, or statutory provision,[14] either considered as withholding the power or regulating the manner in which it shall be exercised. The late Justice Field when upon the supreme bench of the state of California held in an early case that[15] "The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law, which always intends justice, implies one; and her liability thus arising is said to be a liability on an implied contract,

14—Dodge v. City of Memphis, 51 Fed. 165, 167. The authorities show that if negotiable paper is uttered by a municipal corporation without authority of law it is void, and a suit cannot be maintained thereon for any purpose.

City of Logansport v. Dykeman, 16 Ind. 15, Art. 13, Ind. Const., limiting municipal indebtedness affords no defense to an action upon a contract made by a city for services rendered in effecting a compromise of municipal indebtedness. Backman v. Town of Charlestown, 42 N. H. 125; Bigelow v. Inhabitants of Perth Amboy, 25 N. J. L. 297; Oklahoma City v. T. M. Richardson Lmbr. Co., 3 Okla. 5; Town of Topsham v. Rogers, 42 Vt. 189; Richmond etc. Co. v. Town of West Point, 94 Va. 688; see also Secs. 48 et seq. ante, and 380 post.

15—San Francisco Gas Co. v. City of San Francisco, 9 Calif. 453; Argenti v. City of San Francisco, 16 Calif. 25.

and it is no answer to a claim resting upon a contract of this nature to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of $50,000 prescribed by the charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance and the restraining clauses of the charter. It would be indeed a reproach to the law, if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness. In reference to money or other property, it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her; and when it is property other than money, it must have been used by her, or be under her control. But with reference to services rendered, the case is different. Their acceptance must be evidenced by ordinance to that effect. Their acceptance by the city with the consequent obligation to pay for them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting." [16] The consideration that one of the parties to the transaction is a public corporation should not permit it to defraud others or to play fast and loose with contract obligations. And the fact cannot be ignored that the contract or other obligation is entered into on behalf of the corporate body by agents elected by the people to represent them and bind the corporation during official life. If these agents dishonestly or imprudently, or perhaps illegally, so far as the manner of the act is concerned, place burdens upon their principal, this of itself should

16—See also Secs. 48 et seq. ante and 380 post.

be no excuse for the failure to compensate the other party to the transaction for that of value with which he has parted, or to enforce specific contracts.

In applying this doctrine of implied power on the part of a public corporation to incur indebtedness it may not be necessary for the courts to openly and arbitrarily override charter or constitutional provisions or to hold contrary to the strict rule of construction. In considering the powers exercised by corporations either public or private we have the classes already enumerated. An ultra vires act of a corporation is one beyond or in excess of its legal authority or power. In considering the character of an act whether ultra or intra vires those cases where the power is absolutely lacking or wanting must be distinguished from those cases in which the power may exist for designated purposes, or acts done may be valid if done in a certain manner, but otherwise not.

A corporation may be authorized to exercise certain powers or to do certain acts to carry out certain designated purposes. If these are exercised or done for a different purpose or in excess of the designated power, the act is not questionable because of a lack of power but on account of the distinction between a want of power and a misuse or abuse of power. Or again a corporation may be authorized to exercise certain powers or do certain acts which are valid if done in a specific manner, but otherwise not. Here we have a distinction and a difference between a want of power and a want of necessary formality in executing a granted power.

In applying the principle of the implied power of a public corporation to incur indebtedness, advantage is taken by the courts of the distinctions suggested in the preceding paragraph, and a legal reason, in addition to the moral one, will sustain a just decision.

§ 61. Basis of implied authority.

The basis of the doctrine of the existence of an implied power to incur indebtedness when the evidences of that indebtedness do not consist of negotiable instruments is partly suggested in the preceding section, viz: the power as residing in the legislature or the courts to enforce a just claim. Another and the principal reason is that where power is given directly to a public corporation to be exercised, it has the legal right as an incident of that power to borrow money or incur indebtedness. It is argued in this class of cases that the power to borrow or incur indebtedness is necessary to the proper exercise of the express power granted.[17]

Two of the earlier cases illustrate well this line of argument and decision. The town of Chillicothe, Ohio, had power, under its charter, to purchase real estate, erect public buildings and repair streets; the town borrowed money for these purposes and a certificate was issued signed by the mayor acknowledging the debt and promising to repay the money borrowed at a certain time. The court held the town liable on the certificate on the principle that it in carrying out an express power granted for any legitimate municipal purpose had the implied power to borrow money to accomplish such object.[18]

In another case, a city, by its charter had power to establish a market and it was held that in order to accomplish this purpose, it could borrow money and issue its bonds in payment for the sums borrowed. The court said: "The charter does confer the power to purchase

17—Smith v. City of Madison, 7 Ind. 81; Board of Com'rs v. Day, 19 Ind. 450; Miller v. Board of Com'rs, 66 Ind. 162; Rushville Gas Co. v. City of Rushville, 121 Ind. 206; State v. Windle, 156 Ind. 648, 59 N. E. 276; State v. Babcock, 22 Nebr. 614, 35 N. W. 941; Ketchum v. City of Buffalo, 14 N. Y. 356; City of Williamsport v. Commonwealth, 84 Pa. State 487; Clark v. Janesville, 10 Wis. 136; Mills v. Gleason, 11 Wis. 470.

18—Bank of Chillicothe v. Town of Chillicothe, 7 Ohio Pt. 2, 31.

fire apparatus, cemetery grounds, to establish markets and 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 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."[19]

§ 62. Soundness of implied power doctrine.

There is nothing in the nature of public corporations which favors the doctrine of implied powers of the second class and there is nothing to favor the implied power to borrow money and issue as evidences of that indebtedness commercial paper or instruments even of an assignable character. To carry on the ordinary functions of public corporations, they have been given by the state the power of taxation through which to raise the means for the exercise of the governmental powers with which they are endowed and which have been delegated to them. The possession of the power of taxation on principle, it would seem, should exclude any implied power to borrow money.[20] Public corporations, further, are subordinate civil divisions of the state and even the state itself cannot borrow money except in pursuance of an express power stated in its constitution and conferred by the legislative department acting under that authority. A local and subordinate governmental agency of the state of which it is an involuntary part clearly cannot possess powers not enjoyed by its creator.

19—Mills v. Gleason, 11 Wis. 470. 20—See Sec. 141 et seq. post.

§ 63. Mayor of Nashville v. Ray.

The presumption exists that for the purposes indicated, the power of taxation is sufficient and the more modern cases as well as the weight of authority hold that this presumption is ordinarily conclusive against any implied power to borrow money. This question was discussed at length in a case in the United States Supreme Court.[21] One of the questions considered was, has a municipal corporation the power without express legislative authority to borrow money for any of the purposes of its incorporation. Justice Bradley said: "A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt until afterwards. Such a power does not belong to a

21—Mayor of Nashville v. Ray, 19 Wall. (U. S.) 468, 475.

municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."

And in a recent case,[22] it was held that "It is the policy of the laws that town charges shall be met by annual recurring taxation, and thus extravagance and improvidence are in some degree checked, as those who create town charges or are the taxpayers when they arise must bear the burden of taxation to meet them. It is quite easy for the taxpayers of to-day to create a debt which they are not to feel and which the taxpayers of the future are to discharge. The system of laws relating to towns requires that all bills for moneys expended, or materials furnished, or services rendered to the town shall be verified and presented to the board of town auditors and audited by them, and then enforced by warrants of the board of supervisors against the taxpayers of the town. This whole system would be subverted if towns could borrow money upon credit to meet town charges. Then the money would have to be repaid whether the town had had the benefit thereof or not, and the wise provisions of the statutes to secure economy and safety by the audit of accounts would be entirely frustrated."

22—Wells v. Town of Salina, 119 N. Y. 280, 23 N. E. 870.

§ 64. Distinction between borrowing money and incurring indebtedness by contract.

A clear distinction exists between the power to make a contract for a particular purpose and to execute an obligation in payment of the contract price and borrowing the money for that purpose and executing an obligation for the borrowed money. The distinction is well-drawn in a New York case, [23] where Mr. Justice Selden, delivering the opinion of the court, used the following language: "A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created cannot be diverted to any illegitimate purpose. The contract not only creates the fund but secures its just appropriation. On the contrary, if the money may be borrowed, the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It may be borrowed to build a market, and appropriated to build a theater, and yet the corporation would be responsible for the debt. The lender is in no way accountable for the use of the money. It is plain, therefore, that if the policy of limiting the powers and expenditures of corporations to the objects contemplated by their charters is carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. If they procure the requisite funds by the indirect mode of borrowing, they may resort to any other indirect mode of obtaining them, such as establishing some profitable branch of trade, entering into commercial enterprises, etc., the avowed object being to ob-

23—Ketchum v. City of Buffalo, 14 N. Y. 356.

tain the means necessary to accomplish some authorized purpose. No one can fail to see that to concede to corporations the power to borrow money for any purpose would be entirely subversive of the principle which would limit their operations to legitimate objects. Hence the distinction between such a power and that of stipulating for a credit in a contract made for the direct advancement of some authorized corporate object." [24]

§ 65. Authority of public officials and agents in respect to the incurring of indebtedness.

In Section 52 ante, has been noted somewhat at length the question of the general authority, of officials and agents of public corporations to bind their principal. In this section will be considered the cases and principles applying more particularly to their acts in incurring indebtedness.

The authority for the administration of governmental affairs in this country rests in the people of the different states and of the United States by whom it has been delegated to public officers and employes through constitutional or statutory provisions. The source of official power as possessed by these must therefore be found in some act or expression of the sovereign people and without which the exercise of governmental and administrative powers by an individual is clearly regarded as a usurpation and an unwarranted and illegal assumption of power.[25] Since the authority of public officials can

24—See also Schaeffer v. Bonham, 95 Ill. 368.

25—Hussey v. Smith, 99 U. S. 20.

County of Mobile v. Kimball, 102 U. S. 691. It is not necessary to constitute an agency of a political subdivision of a state that its officials should be elected by its people or be appointed with their assent. It is enough to give them that character that however appointed they are authorized by law to act for the county, district or other political subdivision. Hungerford v. Moore, 65 Ala. 232; Opinion of Justices, 3 Maine 481.

Ames v. Port Huron, etc. Co., 11

only be created by law and is therefore a matter of public record, all persons dealing with them are bound to take notice of the existence of that authority and must ascertain that it is sufficient in an assumed use. Persons dealing with a public official must take notice of the extent of his powers at their peril and they cannot rely upon a mere presumption of official authority. The power and authority of public officials and agent is special and limited, not general; and the right to act in a specific instance must be ascertained and determined by an inspection of the law interpreted strictly.[26]

The division of public corporations into municipal corporations proper, and public quasi corporations will be remembered and also the rule that public quasi corporations are artificial persons of especially restricted and limited powers. The rule above stated as to official authority is necessarily applied, and therefore with a still greater degree of strictness in considering the extent of

Mich. 139. It is difficult to perceive by what proceeding a public office can be obtained or exercised without either election or appointment. It is absurd to suppose that any official power can exist in any person by his own assumption or by the employment of some other private person.

26—The Floyd Acceptances, 7 Wall. (U. S.) 666.

Marsh v. Fulton Co., 77 U. S. 676. An unauthorized act cannot create an estoppel or prevent the public corporation going behind recitals in a bond to show the true facts. Bissell v. Spring Valley, 110 U. S. 162; City of Louisville v. Bank of Louisville, 19 Sup. Ct. Rep. 753; Coler v. Cleburne Co., 131 U. S. 162.

Bernards Twp. v. Morrison, 133 U. S. 523. Officers designated by the Legislature may issue bonds and bind the township though they are not the regular township officers. Travelers Ins. Co. v. Oswego, 55 Fed. 361.

Blair v. City of Waco, 75 Fed. 800. When the charter of the city commits to the city council the exclusive control of the municipal finance, authority cannot be delegated by the council to the mayor to sell bonds of the city in his discretion as to the price and thereby bind the city. Citizens Savings Bank v. City of Newburyport, 169 Fed. 766.

Courtner v. Etheredge (Ala.), 43 So. 368. Ultra vires acts of school commissioners in making a loan may be subsequently ratified by the legislature. Waldo v. Portland, 33 Conn. 363; Dent v. Cook, 45 Ga. 323; State v. Anderson, 39 Iowa 274; State v. Peele, 124 Ind. 515, 24 N. E. 440; Troy v. Donipban

the power of the officials and agents of public quasi corporations.[27]

The presumption of law, however, is in favor of the proper performance of official duties but the application of this rule did not include a vital jurisdictional fact nor an act done in furtherance of an extraordinary or unusual power and one which results in a public burden.[28]

Co. Com'rs 32 Kans. 507; Breaux v. Iberville Parish, 23 La. Am. 232; Washburn v. Commonwealth, 137 Mass. 139; Rogers v. Board of Com'rs Le Sueur County (Minn.), 59 N. W. 488; Young v. Board of Education, etc. 54 Minn. 385, 55 N. W. 1112; Sandeen v. Ramsey County (Minn.), 124 N. W. 243; Edwards Hotel & City R. R. Co. v. City of Jackson (Miss.), 51 So. 802; City of Hazlehurst v. Mayes (Miss.), 51 So. 890; Smith v. Town of Epping (N. H.), 45 Atl. 415.

Coler v. Board of County Com'rs of Santa Fe (N. Mex.), 27 Pac. 619. An official signature, however, may be mere surplusage and therefore not affect the validity of an issue of bonds. Horgan & Slattery v. City of New York, 100 N. Y. S. 68; Brown v. Bon Homme County, 46 N. W. 173; City of Seattle v. Stirrat (Wash.), 104 Pac. 834.

Veeder v. Lima, 19 Wis. 298. In the issuance of bonds the officers of the municipality are mere special agents the acts of whom must be strictly within the powers and conditions imposed by the statute in order to give validity to the bonds. Lawson v. Schnellen, 33 Wis. 288; see also Daniel Neg. Ins. Secs. 420, 427, 1550.

27—Police Jury v. Britton, 15 Wall. (U. S.) 566; State ex rel. City of Centralia v. Wilder (Mo.), 109 S. W. 574.

28—Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64. By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium.* Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer, etc. Mandeville v. Reynolds, 68 N. Y. 528; In re City of Buffalo, 78 N. Y. 262; City of Albany v. McNamara, 117 N. Y. 1688, 6 L. R. A. 212.

It is evident, therefore, that a legal indebtedness can be incurred by a public corporation only when contracted by the corporation in the manner especially provided by law and further by that official body or agent of the corporation specifically designated by law to act in the particular instance and to bind the corporation by that action. Indebtedness to be valid, if the authority to incur it exists, must be contracted by the particular official body or agent representing the public corporation in the exercise of certain of its powers.[29]

To illustrate, a municipal corporation may have as one of its subordinate departments a school and park board, a police and a fire department. In matters of public education, the school board represents and is authorized by law to engage in contracts or incur debts binding upon its principal. In respect to the acquirement or maintenance of a park system, the same is true of the park board or park commissioners. It would be clearly without the province or the authority of the school board or the park board to incur indebtedness binding upon the municipality in the support of or for the benefit of the fire or the police departments.

Specific illustrations of acts of corporate officers and

29—Sheboygan County v. Parker, 3 Wall. (U. S.) 93; McClure v. Township of Oxford, 94 U. S. 429; Wilson v. Salamanca, 99 U. S. 499; Walnut v. Wade, 103 U. S. 683; Kankakee County v. Aetna Life Ins. Co., 106 U. S. 668.

Norton v. Shelby County, 118 U. S. 425. To give validity to the acts of county courts or other tribunals or boards, the presence and participation of a legal quorum is necessary. Rich v. Mentz Township, 134 U. S. 632; Hancock v. Chicot County, 32 Ark. 575; State v. Johns (Ind.), 84 N. E. 1; Harrison County Court v. Smith, 15 B. Mon. 155; Howard v. Trustees of School District No. 27 (Ky.), 102 S. W. 318.

State v. Babcock, 25 Nebr. 709, 41 N. W. 654. A city created by act of March 1, 1879, out of a village having a president and board of trustees may until the election of a mayor and council exercise the ordinary powers of a city of the second-class including the issuing of bonds through the agency of the president and trustees. Musgrove v. Kennell, 23 N. J. Eq. 75; Prairie School Township v. Haseleu (N. D.), 55 N. W. 938; City of Oklahoma v.

agents held binding upon public corporations will be noted in the subsequent chapter relating to the formalities required in the execution and issuance of negotiable securities.[30]

§ 66. Authority of de facto officers.

A public official who has acted on behalf of a public corporation in the incurring of indebtedness may subsequently be deprived of that office in a proper proceeding and the questions will then arise of the validity of his acts and whether they are binding upon the corporation. A de facto officer has been defined as one "who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law." [31]

He is one who exercises the duties of an office under color of right by virtue of an appointment or election to that office being distinguished on the one hand from an officer de jure and on the other hand from a mere usurper.[32] A de jure officer is one whose regular title to an office is clear while a usurper is one who has intruded upon an office and assumes to exercise its functions without either color of right or the lawful title to it. It is the color of right which distinguishes an officer de facto from a mere usurper.[33]

T. M. Richardson Lumber Co. (Okla.), 39 Pac. 386; Town of Klamath Falls v. Sachs (Ore.), 57 Pac. 329; City of Philadelphia v. Flannagan, 47 Pa. St. 221.

30—See Secs. 140, 167 et seq., 185 et seq. and 254 post.

31—Rex. v. Bedford Level, 6 East 356, definition by Lord Ellenborough; Ralls County v. Douglas, 105 U. S. 728; Norton v. Shelby County, 118 U. S. 425; Wright v. United States, 158 U. S. 232; Lavin v. Board of Com'rs of Cook County, 245 Ill. 496, 92 N. E. 291; Howard v. Burke, 248 Ill. 224, 93 N. E. 775.

32—Chandler v. Starling (N. D.), 121 N. W. 198; Bennett Trust Co. v. Sengstacken (Ore.), 113 Pac. 863; In re Krickbaum's Contested Election, 221 Pa. 521.

33—State v. Carroll, 38 Conn. 449; Commonwealth v. Bush (Ky.), 115 S. W. 249; People v. Stanton, 73 N. C. 546; McCraw v. Williams (Va.), 33 Grat. 510; see also Abbott Munic. Corp. Sec. 656, subdivisions (a), (b) with many cases cited.

In order that one be considered an officer de facto, it is necessary that there should exist a legal office for which there can be an officer de jure. If this office does not exist, it is clear that no person by assuming the duties of an imaginary one can establish even the relations which flow from the existence of a de facto office and the pretended officer is merely a usurper to whose acts no validity can be attached. Where the legal existence of office depends upon the validity of corporate organization until an irregular or illegally formed corporation is so declared, its officers are considered de facto and their acts binding upon the people residing within its limits.[34]

Officers acting under an irregular municipal organization are de facto officers and bonds issued by them on its behalf are not void. In one of the leading cases on this point[35] the court said: "In the case at bar the legal charter under the special act was laid aside. One illegal, but having all the appearances of legality, was formed. It named the necessary officers, elected them, and performed all the functions of a municipal corporation for a period of nearly seven years. The state, during this period, did not challenge its exercise of power. It issues $40,000 of bonds, and obtains the benefit of their sale. Then, by judgment of the court, the officers are removed as officers of the new organization, and others elected under the first charter. Can it be held that the city, composed of the same people, including the same resources for revenue, is now absolved of all liability upon the bonds? Can a city, under an illegal and irregular change of limits, preserving the same name, obtain credit for public improvements, and when the irregular charter is vacated, return to the use of the first, which

34—Norton v. Shelby County, 118 U. S. 425; Carlton v. People, 10 Mich. 259; Leach v. People, 122 Ill. 420, 12 N. E. 726; Attorney General v. Town of Dover, 62 N. J. L. 138, 41 Atl. 98; Kirker v. City of Cincinnati, 48 Ohio State 507, 27 N. E. 898; see also Sec. 266 post.

35—City of Lampasas v. Talcott, C. C. A. 94 Fed. 457.

has all along been in force, and then stand freed of the debt? The people and property now sought to be charged were all, or nearly all, included and represented in the irregular corporation which issued the bonds. They get the benefits of the bonds. The facts show that the city and citizens were acting in good faith. The bonds were issued with public approval, and without objection. The improvements were accepted, and it was intended that the bonds should be paid. * * * The officers representing the city in the issuance of the bonds believed that they were clothed with authority by the procedure of 1883. In this they were mistaken. The charter of 1873 was still in existence. It authorized the election of officers of the city. The officers had been elected. Although they believed that they held office under the new organization, they were officers de facto of the city, actually filling places created by the special act of 1873. The special act of incorporation authorized the issuance of the bonds for public improvement. An ordinance was passed to issue them. The bonds, we hold, were not made invalid by reason of the illegal effort at incorporation made in 1883."

One of the leading cases upon the necessity for the existence of a legal office as well as the validity of the acts of de facto officers was decided by the Supreme Court of the United States in 1886.[36] The court said in its opinion by Mr. Justice Field, relative to the two questions above noted: "But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county. This contention is met by the fact that there can be no officer, either de jure or de facto, if there be no office to fill. As the act attempting

36—Norton v. Shelby County, 118 U. S. 425.

to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers.

"The doctrine which gives validity to acts of officers de facto whatever defects there may be in the legality of their appointment or election is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is

difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it has never been passed."

§ 67. Validity of the acts of de facto officers.

The rule obtains that all reasonable presumptions must be made in favor of the legality and validity of the acts of public officers. This principle is applied to the acts of de facto officers and the decisions are uniformly to the effect that the acts of an officer de facto within the scope of his actual authority are valid so far as the public and third persons are concerned.[37] This doctrine and rule has been well-stated by a text-book writer [38] and applies

37—Ralls County v. Douglas, 105 U. S. 728. County bonds issued by a de facto county court, sealed with the seal of the court and signed by the de facto president, cannot be impeached in the hands of an innocent holder by showing that the president was not a de jure justice of the court. In no state is it more authoritively settled than Missouri that the acts of an officer de facto, although his title may be bad, are valid so far as they concern the public or the rights of third persons who have an interest in things done. Norton v. Shelby County, 118 U. S. 425; Waite v. City of Santa Cruz, 184 U. S. 302; Waite v. City of Santa Cruz, 89 Fed. 619; Cardoza v. Baird (D. C.), 30 App. D. C. 86; Pack v. United States, 41 Ct. Cl. 414; Monahan v. Lynch, 2 Alaska 132; Kyle v. Abernathy, 102 Pac. 746; Gregory v. Woodbury (Fla.), 43 So. 504; Briggs v. Voss (Kans.), 85 Pac. 571.

State v. Poulin (Me.), 74 Atl. 119. The de facto doctrine is exotic and was engrafted by the law as a matter of policy and necessity to protect the interests of the public and individuals where involving the official acts of persons performing the duty of an office without being lawful officers. Stuart v. Inhabitants of Ellsworth (Me.), 75 Atl. 59; Commonwealth v. Wotton (Mass.), 87 N. E. 202; Harrison v. Borough of Madison (N. J.), 78 Atl. 665; Knight v. Western Union, 45 W. Va. 194; see Abbott's Munic. Corp. Sec. 659 citing many cases.

38—Mechem Pub. Off. Sec. 328. "Third persons who have occasion to deal with a public officer and to rely upon his acts, finding a person in apparent possession of the office and ostensibly exercising its functions lawfully and with the acquiescence of the public, can neither be expected to know, nor to investigate in every instance, his title to the

both in respect to the creation of rights or relations between third parties and also between the corporation they represent and others. This rule includes the acts of a de facto council or other representative body of a public corporation and an indebtedness incurred by them is valid.[39]

§ 68. Fraud and misconduct of public officers.

The principle obtains that officers and agents of a public corporation having special and limited power and authority, their principal is not bound by their acts when not coming within its actual and specific scope. In this as will be remembered, the rule is different from that which is applied to an agent of a private corporation or a natural person but the same rule applies to the fraud, misconduct, or irregular acts of public officers and agents that controls such acts or conduct of the officers and agents of private persons or corporations. The public corporation is bound; it is estopped to set up as a defense irregularities, misconduct or fraud of its agents when acting within the scope of the authority specifically granted to them.[40]

office or his eligibility to election to it. As to them, he must be held to be, what he appears to be, the lawful occupant of the office. This rule is demanded by public policy as the only one affording protection to the public.''

39—National Life Ins. Co. v. Board of Education, 62 Fed. 778; Decorah v. Bullis, 25 Iowa 12; State v. Douglas, 50 Mo. 593.

People v. Bartlett (N. Y.), 6 Wend. 422. The doctrines stated in this section are so well settled that a further citation of authorities is unnecessary.

40—Town of East Lincoln v. Davenport, 94 U. S. 801. The case shows that the plaintiff below was bona fide owner of the coupon sued on, questions of form merely or irregularity or fraud or misconduct on the part of the agents of the town cannot therefore be considered, whether the supervisor of the board signed the bond during the midnight hours, whether he delivered it about daylight on the morning of April 2, 1873, and whether he immediately left the town to avoid the service of an injunction, are matters not chargeable to the owner of the bond. The supervisor was not his agent but the agent of the

It is sufficient to show that the agency existed and that the act was done within the general scope of the agent's authority. The public corporation is bound by the representations of its duly constituted agents, the truth or falsity of which the third person had no means of ascertaining from public records, with the examination of which he might be legally charged.[41]

A public corportion, however, is not bound by the ultra vires acts of its agents.

§ 69. Definition of the word "indebtedness" or "debt" as used in laws of limitation.

The word "debt" or "indebtedness" is the one ordinarily used in constitutional or statutory provisions limiting the obligations legally to be incurred by public corporations. What charges or obligations can be included properly within the meaning of these words may be material and important in determining the amount of indebtedness incurrable and the courts from time to time have defined these words and included or excluded certain obligations. [42]

town and if there has been a misconduct on his part, the town rather than a stranger must bear the consequences. Perkins County v. Graff, 114 Fed. 441; Columbia v. Dennison, 16 C. C. A. 125; Meyer v. Brown, 65 Calif. 583; Black v. Cohen, 52 Ga. 621; Copper v. Jersey City, 44 N. J. L. 634; Coler v. Board of County Com'rs of Santa Fe (New Mex.), 27 Pac. 619; Town of Ontario v. Union Bank of Rochester, 47 N. Y. S. 927.

But, see, Pugh v. Moore (La.), 10 So. 710. Where it was held that a state bond in negotiable form even though in the hands of innocent holders after having been fraudulently re-issued from the State Treasurer's office is subject to defense. And see, also, State v. Hart, 14 So. 507, 46 La. Ann. 40.

41—Mercer County v. Hackett, 1 Wall. (U. S.) 83; Lynde v. Winnebago County, 16 Wall. (U. S.) 6; Barnard v. Sangamon County, 190 Ill. 116, 60 N. E. 109; Gould v. Starling, 23 N. Y. 458; Brownell v. Town of Greenwich, 114 N. Y. 518; City of Seattle v. Stirrot (Wash.), 104 Pac. 134; see, authorities fully cited in Secs. 52 and 65, ante.

42—City of Conyers v. Kirk, 78 Ga. 480, 3 S. E. 442. A debt arising from a breach of contract to pay cash not within the constitu-

As to the purpose of these limitations, a decision upon the meaning of the Iowa constitutional provision is instructive.[43]

The Iowa Constitution, Art. 11, Sec. 3, reads as follows: "No county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness." In the decision referred to, Judge Lochren said: "The language of this section is plain and simple, and its meaning is unmis-

tional limitation. Law v. People, 87 Ill. 385.

Town of Kankakee v. McGrew, 178 Ill. 74. The term does not apply to current indebtedness or to an obligation of the town not bearing intereest and not deferred for payment to some future date.

Stone v. City of Chicago, 207 Ill. 492, 69 N. E. 970. The amount which a city has been assessed for public benefits in assessment cases and which remains unpaid is not a debt in the sense of the constitutional limitation,—"the water fund debt" of a city held included.

Lobdell v. City of Chicago, 227 Ill. 218, 81 N. E. 354. The street railway certificates issued under Hurd's Rev. Stats., page 438, Chap. 34, known as the "Mueller Law" create an increase of the city's debt within the meaning of the Constitution 1870, Art. 9, Sec. 12.

City of Richmond v. McGirr, 78 Ind. 192. The word "loan" as used in Ind. Rev. Stat. 1881, Sec. 3159, does not include the issue of negotiable bonds, payable in the future and bearing interest. Quill v. City of Indianapolis, 124 Ind. 292; City of La Porte v. Gamewell Fire Alarm & Tel. Co., 146 Ind. 466, 45 N. E. 588; Allen v. City of Davenport, 107 Iowa 90, 77 N. W. 532; Bonnell v. Nuckolls Co., 28 Nebr. 90, 43 N. W. 1145; State v. Fayette County Comm're, 37 Ohio State 526; Fowler v. City of Superior, 85 Wis. 411.

Connor v. City of Marshfield (Wis.), 107 N. W. 639. Bonds on a water and lighting plant and assumed by a city are not to be included within the constitutional inhibition against cities incurring debts in view of the provisions of Rev. Stat. 1898, Sec. 959; see cases cited generally in sections immediately following this, see, also, meaning of the word "indebtedness." Notes 44, Am. St. Reps. 230, 232; L. R. A. Vols. 23, p. 402, and 33, p. 474; Abbott Munic. Corp. Sec. 152, et seq.; Gray's Limitations on Taxing Power, Secs. 2056, et seq.

43—City of Ottumwa v. City Water Supply Co. (C. C. A.), 119 Fed. 315.

takable. The incurring of indebtedness beyond the amount limited is absolutely and unqualifiedly prohibited; no matter what the pretext or circumstances, or the form which the indebtedness is made to assume. It curbs equally the power of the legislature, the officials and the people themselves, and was designed to protect the taxpayers from the folly and improvidence of either, or of all combined."

Ingenious attempts have been made to incur obligations which by a "jugglery of phrases" it is claimed are not "debts" or "indebtedness" within the meaning of constitutional or other provisions, notably through the making of executory contracts for designated supplies or providing for the payment of the obligation from special sources or funds. These will be considered in later sections of this chapter.[44]

The fair construction of the words uninfluenced by ulterior motives includes the aggregate[45] of all liabilities of whatever nature and contracted for whatever purpose and in whatever manner, that are or may become a legal

44—See Secs. 77 and 78, post.

45—Hagan v. Comm'rs Court of Limestone County (Ala.), 49 So. 417. The aggregate amount of the principal sums to be levied yearly to meet contract payments under a contract for the erection of a courthouse and which provided for the levy of a certain tax each year for a successive number of years is to be included in applying the limitation fixed by Const. 1901, Sec. 224. People v. Hanford Union High School District (Calif.), 84 Pac. 193; Epping v. City of Columbus (Ga.), 43 S. E. 805.

Frost v. Central City (Ky.), 120 S. W. 367. The aggregate indebtedness at the time of the issuance and sale of bonds determine an excess of indebtedness under Const. Sec. 158.

State ex rel. City of Columbia v. Wilder (Mo.), 94 S. W. 495. A bonded indebtedness of $110,000 issued for water works and electric light plant owned by the city should be included in ascertaining the total indebtedness under Constitution 1875, Art. 10, Sec. 12.

State v. Common Council of City of Tomahawk (Wis.), 71 N. W. 86. A liability on railroad aid bonds is not incurred until the delivery of the bonds and the question of whether the indebtedness of the city including such bonds exceeds the constitutional limit is to be determined as of such date.

obligation due from and to be met by the public corporation from the proceeds of public taxes levied and collected upon taxable property within its limits [46] together

46—Hitchcock v. City of Galveston, 96 U. S. 341; Coulson v. City of Portland, Deady 481, Fed. Cas. No. 3,275; Murphy v. Town of East Portland, 42 Fed. 208.

Springfield v. Edwards, 84 Ill. 626. The court here say: "A debt payable in the future, is obviously no less a debt than if payable presently and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt and, therefore, within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute—the debt exists—and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred and since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else."

Law v. People, 87 Ill. 385. The word "indebtedness" as used in the Constitution includes debts incurred to be paid in the future as well as those payable at once.

City of Logansport v. Jordan (Ind.), 85 N. E. 959. The obligation of a city for its portion of the cost of a sewer arises when the sewer is completed and accepted by the city within Const., Art. 13, forbidding a city to become indebted in excess of 2 per cent of its taxable property, and is not postponed until the final estimate of benefits resulting to the city is made and an assessment therefore levied against the city; see, also, on this point, Jordan v. City of Logansport (Ind.), 86 N. E. 47.

Windsor v. City of Des Moines, 110 Ia. 175, 81 N. W. 476; Louisville & Nashville R. R. Co. v. Commonwealth, 106 Ky. 633.

State v. Graham, 23 La. Ann. 402. In this case the court defines the word "debt" as including an appropriation whereby the liabilities of the state are increased. Christie v. City of Duluth, 82 Minn. 202; State ex rel. Dickason v. Marion County Court (Mo.), 30 S. W. 103, 31 S. W. 23; Barnard v. Knox County, 105 Mo. 382 overruling Potter v. Douglass, 87 Mo. 240.

Levy v. McClellan (N. Y.), 89 N. E. 569 But bonds issued to be redeemed within a year are not to be computed. Municipal Securities v. Baker County, 33 Oregon 338, 54 Pac. 174; Brooke v. City of Philadelphia, 162 Pa. 123.

In re State Bonds, 7 S. D. 42, 63 N. W. 223. Losses sustained by the school fund by defalcation or mismanagement under Const. Art. 8, Secs. 2, 13, constitute a permanent funded debt against the state which is not included in the "indebtedness" to which the state is limited by Art. 13, Sec. 2.

City of Cleburne v. Gutta Percha & Rubber Mfg. Co. (Tex.), 127 S. W. 1072. A note given by a city, payable within the year of its ex-

with the accrued interest upon such obligation at the time of making the debt computation.[47]

It was stated in a New York case that the purpose of New York Constitution, Article VIII, Sec. 10, limiting the indebtedness of municipalities to a specified per cent. of the assessed valuation of the real estate was to prevent them from improvidently contracting debts for other than ordinary current expenses of administration and to restrict their borrowing capacity; and that therefore the provision should be construed in the broadest sense which would give effect to it and that the word "indebtedness" as found in the constitution should be defined as "a state of being in debt," and a "debt" as that which is due by express agreement unaffected by the manner or condition on which it is to be paid.[48]

There is no well established rule of construction which has been adopted in construing and applying the words. The desire on the part of the courts not to limit the indebtedness of a public corporation or to compel on the

ecution does not create a debt within the Const., Art. 11, Sec. 5, since it matures concurrently with the city's revenues for that year and if paid according to promise, it cannot be a debt on the revenue for future years. "Within the meaning of the constitutional provision, the true test of whether an obligation is a debt is, does it impose a burden on the revenues of the city for future years?" Fritsch v. Salt Lake City Comm'rs, 15 Utah 83, 47 Pac. 1026; Stanley v. McGeorge, 17 Wash. 8, 48 Pac. 738; Neale v. Wood County Court, 43 W. Va. 90, 27 S. E. 370.

Earles v. Wells, 94 Wis. 285. But the moment an indebtedness is involuntarily created in any manner or for any purpose with no money or assets in the treasury or current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness. Rice v. City of Milwaukee, 100 Wis. 516, 76 N. W. 341.

State v. Laramie County Comm'rs, 8 Wyo. 104, 55 Pac. 451. Uncollected taxes due the state from a county should not be considered a debt within the Const., Art. 16, Sec. 4, limiting the power of counties to create debts.

47—Epping v. City of Columbus (Ga.), 43 S. E. 805; Kelly v. Cole (Kans.), 65 Pac. 672.

48—Levy v. McClellan (N. Y.), 89 N. E. 569.

other hand the payment of a just obligation not technically binding rather than any fixed rule of construction has at times influenced their decisions.[49]

§ 70. Miscellaneous exceptions.

Refunding bonds. The usual construction of the word "indebtedness" or "debt" excludes securities, negotiable or otherwise, issued under authority of law for the purpose of funding or refunding, as the phrase is used, outstanding corporate indebtedness, the courts holding that the issue of such securities or obligations does not increase or add to the debts of the corporation but merely changes their form. The authorities on this point will be cited and discussed in the chapter relating to refunding securities.[50]

Liability for torts. Whether the liability of the public corporation for a tort should be included in any computation made for the purpose of ascertaining the extent of its indebtedness and whether a constitutional or statutory limitation is applicable will depend upon the form which that liability has assumed at the time of the computation.[51]

The usual rule is that judgments for torts must be included in calculating the total debts of the corporation;[53] and the principle also applies equally well that unliqui-

49—Blood v. Beal (Me.), 60 Atl. 427. The Supreme Judicial Court has authority to prevent a city from creating a debt in excess of the constitutional limit whether created for a legal or an illegal purpose.

50—See Chapter IX, post.

51—Stone v. City of Chicago, 207 Ill. 492, 69 N. E. 970. The amount which a city has been assessed for public benefits in assessment cases and which remains unpaid is not a debt in the sense of the constitutional limitation.

Levy v. McClellan, 89 N. E. 569 (N. Y.). Liability to owners for property taken for a public use must be included in outstanding public debt. Fritsch v. Salt Lake City Comm'rs, 15 Utah 83, 47 Pac. 1026.

53—City of Chicago v. McDonald, 176 Ill. 404.

Stone v. City of Chicago, 207 Ill. 492, 69 N. E. 970. Judgments against a city unprovided for should

dated claims for damages and those in which a final judgment establishing a liability has not yet been rendered should not be included. Their contingent and uncertain character requires the application of the rule as thus stated.[54]

Limitation on power of state when not applied to a municipality. In some states where an express limitation is found in the Constitution on the power of the state to incur indebtedness, the courts have held that the provision applies equally to all subordinate public corporations on the theory that what the state itself is prohibited from doing, it legally cannot authorize that to be done by any one of the subordinate civil subdivisions created by it.[55]

On the other hand, in some states, it is expressly stated in the constitutional limitation that subordinate corporations are excepted from the operation of its prohibitions.[56]

And in still other jurisdictions, acting upon the theory

be included in determining its indebtedness with reference to the constitutional limitation; see, also, Conner v. City of Nevada (Nev.), 86 S. W. 256.

But see Keller v. Scranton, 200 Pa. St. 130, 49 Atl. 781, where the court said: "It is true that the Constitution does not exempt municipalities, how great soever their indebtedness, from liability for wrongful and tortious acts, but it does not authorize the voluntary assumption of an obligation to pay money by a scheme of tort."

54—Cook v. City of Ansonia, 76 Conn. 413, 34 Atl. 183; Thomas v. City of Burlington, 69 Ia. 140, 28 N. W. 480; Ft. Dodge, etc. v. City of Fort Dodge, 115 Iowa 568, 89 N. W. 7.

City of Chicago v. Pittsburgh, etc. Ry. Co., 91 N. E. 422. The passage of a compromise ordinance in the nature of an agreement with a railroad company relative to track elevation through which there was an adjustment and assumption of certain claims for damages by the city held not an incurring of indebtedness. Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344.

Levy v. McClellan (N. Y.), 89 N. E. 569. Unliquidated claims pending against a city the liability for which is denied, are not debts within Const., Art. 8, Sec. 10. Baker v. City of Seattle, 2 Wash. 576.

55—Anderson v. Hill, 54 Mich. 477; Oren v. Pingree, 120 Mich. 550, 79 N. W. 814.

56—See Chapter XVIII, post, containing abstracts from state constitutions.

that indentity of territory does not constitute corporate identity, the courts hold that constitutional restrictions limiting the state as to the amount, form or the purpose of a debt do not necessarily apply to subordinate civil subdivisions.[57]

Unearned interest not considered a debt. In determining the total amount of corporate liability for the purpose of determining whether its constitutional limit has been reached unearned interest coupons attached to valid and outstanding negotiable securities are not considered a part of its indebtedness and should not be included in any computation of that amount.[58]

§ 71. Compulsory and voluntary debts.

It may become necessary for a public corporation to incur certain indebtedness in the exercise of imperative powers placed upon it by the state; and the question of whether debts thus made compulsory are to be included in computing the amount of outstanding indebtedness, is one which has arisen in a number of cases. The compulsory obligations referred to including fees of witnesses, jurors, constables or sheriffs in criminal cases,[59]

57—Pine Grove Township v. Talcott, 19 Wall. 666; Patterson v. Yuba, 13 Calif. 175; Marshall v. Silliman, 61 Ill. 218; Quincey, etc. Ry. Co. v. Morris, 84 Ill. 410; Chicago, etc. Ry. Co. v. Shea, 67 Iowa 728, 21 N. W. 901; Van Cleve v. Passaic Valley Sewerage Com'rs (N. J.), 58 Atl. 571; Riley v. Carrico (Okla.), 110 Pac. 738; State ex rel. Jones v. Froelich, 115 Wis. 92, 91 N. W. 115.

58—Epping v. City of Columbus (Ga.), 43 S. E. 803; Blanchard v. Village of Benton, 109 Ill. App. 569; Finlayson v. Vaughan, 54 Minn. 331, 56 N. W. 49; Carlson v. City of Helena (Mont.), 102 Pac. 39.

59—Board of County Comm'rs of Lake County v. Rollins, 130 U. S. 662, reversing Rollins v. Lake County, 34 Fed. 845; Hamilton County Comm'rs v. Cottingham, 56 Ind. 559.

Jenkins v. Newman (Mont.), 101 Pac. 625. The necessary services of county officers as such in carrying out for the county a public work contracted for are a part of their duties and must not be considered in arriving at the cost of the work within Const., Art. 13, Sec. 5, but moneys expended for the em-

the expense attendant upon holding of a session of the legislature or others of a similar character. A bill of rights, perhaps providing for a speedy trial by jury for those accused of crime and a legislative session considered necessary to the maintenance of organized government a reason sometimes of doubtful applicability.

The Federal courts have held uniformly that there is no distinction between compulsory and voluntary indebtedness within the meaning of that word as used in constitutional provisions and that the word "debt" or "indebtedness" uninfluenced by ulterior motives should include all liabilities of whatever nature and contracted for whatever purpose or in whatever manner.

The leading case upon this question in the Supreme Court of the United States is one decided in 1888,[60] where the validity was raised of a large number of county warrants issued by the County of Lake, Colorado, for ordinary county expenses such as witness and juror's fees, election costs, charges for the board of prisoners, etc. It was claimed in this case that the warrants were void since Sec. 6, Art. II of the state constitution fixed a maximum limit beyond which no county could contract any indebtedness and that the warrants sued on were all issued after that limit had been reached and even exceeded. The court held the contention good and the warrants therefore void. The argument in favor of their validity was based upon the distinction made in this section between a compulsory and a voluntary obligation. The court said on this point: "Neither can we assent to the

ployment of inspectors other than county officers should be included.

Gubner v. McClellan, 115 N. Y. S. 755. The provision of the public service commissions law for the payment of salaries and expense of the commission does not involve the creation of indebtedness and therefore is not within the Const., Art. 8, Sec. 10, preventing municipalities from incurring indebtedness for other than municipal purposes. City of San Antonio v. Beck (Tex.), 101 S. W. 263.

60—Board of County Com'rs of Lake County v. Rollins, 130 U. S. 662.

position of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated "compulsory obligations." The compulsion was imposed by the Legislature of the State, even if it can be said correctly that the compulsion was to incur debt; and the Legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the Constitution provided for certain county officers, and authorized the Legislature to fix their compensation and that of other officials, affect the question. There is no necessary inability to give both of the provisions their exact and literal fulfillment."

This rule has been followed in a number of jurisdictions [61] and by the later cases in Oregon.[62]

In Washington, the contrary rule is held. In one of the cases,[63] the court in its decision after referring to

61—Pacific Underwriters v. Widber, 113 Calif. 201. The claim here arose upon a contract and although it was one made by the city in the performance of duties imposed upon it by law yet the court held that the obligation came within the constitutional prohibition. Goldsmith v. San Francisco, 115 Calif. 36, 46 Pac. 816; People v. May, 9 Colo. 80, 404, 10 Pac. 641; Prince v. Quincy, 128 Ill. 443, 21 N. E. 768; Sackett v. New Albany, 88 Ind. 473; Barnard x. Knox County, 105 Mo. 382, 16 S. W. 917, over-ruling Potter v. Douglass County, 87 Mo. 239; Municipal Securities Co. v. Baker County, 33 Oregon 338, 54 Pac. 174.

Fritsch v. Salt Lake County Comm'rc, 15 Utah 83, 47 Pac. 1026. The limitation includes debts created by operation of law, salaries of officers, debts arising from express contracts and liabilities based upon the negligence of county officials. Spillman v. Parkersburgh, 35 W. Va. 605, 14 S. E. 279; Hebbard v. Ashland Co., 55 Wis. 145, 12 N. W. 437; Grand Island, etc. Ry. Co. v. Baker, 6 Wyo. 369, 45 Pac. 494.

62—Eaton v. Mimnaugh, 43 Ore. 465, 73 Pac. 754, modifying Grant County v. Lake County, 17 Oregon 453, 21 Pac. 447; Burnett v. Markley, 23 Oregon 436, 31 Pac. 1050. But see Cunningham v. Saling (Ore.), 112 Pac. 437.

63—State v. Board of Liquidation of City Dedt, 51 La. Ann. 1849; 26 So. 679; Underwood v. Town of Asheboro (N. C.), 68 S. E. 147; City of Oak Cliff v. Etheridge (Tex.), 76 S. W. 602; City of San Antonio v. Beck (Tex.), 101

those provisions of the constitution of the state of Washington, providing for the organization and maintenance of county government and for a speedy trial in criminal cases, said: "All these provisions of organic law are alike declared to be mandatory. It would make these various provisions of the constitution contradictory and render some of them nugatory if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the constitution to carry out the organized and essential powers of government. * * * We are constrained to rule that the limitation of county indebtedness does not include those necessary expenditures made mandatory in the constitution and provided for by the legislature of the state and imposed upon the county, that the payment of these is a prior obligation and other liabilities incurred by the county are subject and inferior to these primary obligations which must always continue."

The decisions in this state, however, are to the effect that when the total indebtedness of a public corporation, including its compulsory obligations exceed or equal the constitutional debt limit, it cannot thereafter create voluntary obligations.[64]

S. W. 263; Duryee v. Friars, 18 Wash. 55, 50 Pac. 583; Hull v. Ames, 26 Wash. 272; Overall v. City of Madisonville (Ky.), 102 S. W. 278; Rauch v. Chapman, 16 Wash. 568, 48 Pac. 253; see, also, Ferris v. Widber, 99 Calif., 413, 99 Pac. 412.

Gladwin v. Ames (Wash.), 71 Pac. 189. Where the court held that municipal warrants issued for labor and material furnished in the building of the city jail, publishing notices and printing ballots of election, insurance on city buildings, services in making assessment rules, city printing, etc., were valid though the city had exceeded the limit of its indebtedness, that such were necessary expenses incurred in maintaining its existence.

Wolfe v. School Dist. No. 2 (Wash.), 108 Pac. 442. The maintenance of a school throughout a school year is not such a necessity as to warrant incurring indebtedness in excess of the legal limit.

64—Duryee v. Friars, 18 Wash. 55, 50 Pac. 583.

§ 72. Current and necessary expenses.

By constitutional provision in some of the states, certain necessary expenditures are excluded from any computation made to ascertain the total debt of the public corporation in order to determine whether it has reached or exceeded the maximum constitutional limit.[65] The construction of the word "necessary" is in all cases arising upon these constitutional provisions the only question considered and the decisions in some states hold to a narrow interpretation of the word,[66] and in others to a more liberal rule.[67] It would seem that the word should only include those expenditures connected with the discharge of the usual and ordinary powers and functions of public corporations. The conduct of their every day affairs, to use a simple and homely phrase.

Where no express exception is made, necessary expenses are usually included within a computation to ascertain the total debt.[68]

§ 73. The indebtedness must be a legal demand.

Constitutional or other limitations usually restrict the debt legally incurrable by public corporations to a cer-

65—Idaho, Art. 8, Sec. 3; Ky., Sec. 158; Md., Art. 9, Sec. 7; Mont., Art. 13, Sec. 6; N. C., Art. 7, Sec. 7.

66—Underwood v. Town of Asheboro (N. C.), 68 S. E. 147. The constitutional limitation does not apply to an indebtedness of a town incurred for necessary expenses. People v. City of Geneva, 92 N. Y. S. 91.

Camden, Clay County, v. Town of New Martinsville (W. Va.), 68 S. E. 118. The expenditure of current revenue and accrued funds is not a contraction of debts within the constitutional inhibition.

Helena Waterworks Co. v. City of Helena (Mont.), 78 Pac. 220. The question of what is a current expense is ultimately for the courts. Expenditures to install a water system held in this case not a current expense.

67—Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029; Davis v. Town of Fremont, 135 N. C. 538, 47 S. E. 671; Highway Commission v. C. A. Webb & Co. (N. C.), 68 S. E. 211.

68—City of Springfield v. Edwards, 84 Ill. 626; La Porte v. Gamewell Fire Alarm Tel. Co., 146

tain definite amount or to a certain percentage upon the taxable property within the corporate jurisdiction. In determining whether an obligation is to be included for the purpose of ascertaining whether the legal limit has been reached, it is generally held that it must be a legal claim or demand against the corporation and of such a character that it can be enforced through the use of the available and proper remedies given by the laws of the state for the enforcement of such demands. Under this rule an unliquidated claim or demand or one unapproved by the proper officials would not be considered a "debt" or an "indebtedness" and in computing the total debt of the corporation should be excluded.[69]

Ind. 466, 45 N. E. 588; City of Council Bluffs v. Stewart, 51 Iowa 385; Windsor v. City of Des Moines, 110 Iowa 175; Beard v. City of Hopkinsville, 95 Ky. 239, 24 S. W. 872; State ex rel. Helena Water Works Co v. Helena, 24 Mont. 521, 63 Pac. 99.

Municipal Securities Co. v. Baker County, 33 Ore. 338, 54 Pac. 174. A necessary county expense should not be included within the word "indebtedness" as used in the constitutional limitation since it is an involuntary obligation. See, also, Sec. 71, ante.

69—Ashuelot v. Lyon County, 81 Fed. 127. Bonds in excess of the constitutional limit and therefore void are not to be included as a part of the municipal indebtedness in determining the total outstanding indebtedness with reference to an issue of bonds. The court say: "The constitutional limitation which is relied on as a defense in this case was intended to prevent the overburdening of property within the municipalities of the state by debts created by corporate authorities, and the prohibition of the constitution extends to all forms of indebtedness and the true inquiry in each case is whether at the given date there exists indebtedness in any form up to the limit for which the municipality can be held liable at law or in equity. Whatever the form of the indebtedness may be if it can be enforced by a court of law or equity, it certainly comes within the constitutional provision; but on the other hand, claims which cannot be thus enforced and which are not binding on the municipality, do not come within the meaning of the term 'indebtedness' as used in the constitution of the state." German Insurance Co. v. City of Manning, 95 Fed. 597; Keene Five-Cent Savings Bank v. Lyon County, 100 Fed. 337, affirming 90 Fed. 523; Bickerdike v. State (Calif.), 78 Pac 270; Trowbridge v. Schmidt (Miss.), 34 So. 84; Graham v. City of Spokane (Wash.), 53 Pac. 714.

§ 74. Indebtedness further defined; warrants issued in anticipation of taxes levied.

A public corporation may incur a liability for the payment of which there are no funds in the treasury, although the taxes when collected will be sufficient to pay such demand. Or again municipal warrants may be drawn anticipating the payment of taxes not then delinquent but levied and due. The courts hold that such warrants or other evidence of indebtedness should not be considered a debt within the meaning of constitutional provisions, for, as said in one case, the "warrants" are drawn against existing values.[70]

In some states by constitutional provision an issue of securities or the incurring of debts, in anticipation of current revenues is permitted although these may exceed the maximum debt allowed by law.[71]

70—Hockaday v. Chaffee County Comm'rs, 1 Colo. 362, 29 Pac. 287; Stein v. Morrison (Idaho), 75 Pac. 246; City of Blanchard v. Village of Benton, 109 Ill. App. 569; Stone v. City of Chicago, 207 Ill. 492, 69 N. E. 970; Corliss v. Village of Highland Park (Mich.), 93 N. W. 610; Merchants National Bank v. City of East Grand Forks (Minn.), 102 N. W. 703.

In re State Warrants, 6 So. Dak. 518, 62 N. W. 101. At first thought it may seem difficult to maintain that the issuing of an obligation to pay, is not the incurring of an indebtedness. Critically considered, it may constitute the incurring of an indebtedness, * * * but it is not an indebtedness repugnant to the constitution because its payment is legally provided for by funds constructively in the treasury. If the drawing of the warrant upon the state treasury is the incurring of an indebtedness by the state, then the drawing of such warrant would violate the constitution even if there was money in the state treasury to pay it, if the constitutional limit of indebtedness had been reached, for there must always be some time intervening between the drawing of the warrant and its payment and during such time the indebtedness of the state would be increased beyond the constitutional limit. Such an interpretation of the constitutional limitation would obviously be too hypercritical to be practicable or reasonable. Fenton v. Blair, 11 Utah 78, 39 Pac. 485. But see Balch v. Beach (Wis.), 95 N. W. 132.

71—Ala., Sec. 225; Ga., Art. 7, Sec. 7, par. 1; Md., Art. 12, Sec. 7; Mo., Art. 9, Sec. 19; N. Y., Art. 8, Sec. 10; S. C., Art. 8, Sec. 7; Va., Art. 8, Sec. 127.

§ 75. Debts of territorially co-existing public corporations.

The same territory may be and often is organized into and included within two or more separate and distinct civil bodies or public corporations, with a limit placed upon each of the amount of indebtedness it can legally incur. In determining the limit of such indebtedness the total debt of each of the civil bodies or corporations is to be separately considered and not the aggregate of all the corporate organizations which may be wholly or partially co-extensive territorially. The courts usually consider each of the civic corporations as bodies corporate, separate, independent and distinct from each other.[72]

The rule stated above is the one based upon the weight of authority. Sound reasoning is in favor of the exception to the rule or of the exception as the general rule. There is no doubt but that the principle given has led to very great abuses and the placing of almost intolerable burdens of taxation upon taxable property and interests

72—Atchison Board of Education v. De Kay, 148 U. S. 591; Chilton v. Town of Gratton, 82 Fed. 873; Board of Education of City of Huron v. National Life Insurance Co., 94 Fed. 324; Robertson v. Library Trustees of Alameda, 136 Calif. 403, 69 Pac. 88; Broad v. City of Moscow (Ida.), 99 Pac. 101; Stone v. City of Chicago, 207 Ill. 492, 69 N. E. 970; Kucera v. West Chicago Park Comm'rs, 221 Ill. 488, 77 N. E. 912; Wilcoxon v. City of Bluffton, 153 Ind. 267, 54 N. E. 110; Heinl v. City of Terre Haute, 66 N. E. 450, 161 Ind. 44; City of Iola v. Merriman (Kans.), 26 Pac. 485; Ex parte City of Newport (Ky.), 132 S. W. 580; Vicksburg, etc. Ry. Co. v. Goodenough, 108 La. 442, 32 So. 404; Kenebec Water District v. Waterville, 96 Me. 234, 52 Atl. 774; Du Toit v. Village of Belview (Minn.), 102 N. W. 216; State v. Lancaster County, 6 Nebr. 214; Board of Education of Eddy v. Bitting, 9 New Mexico 588; Vallelly v. Board of Park Comm'rs of Grand Forks (N. D.), 111 N. W. 615; Riley v. Carrico (Okla.), 110 Pac. 738; Straw v. Harris (Ore.), 103 Pac. 777; Saltsman v. Olds, 215 Pa. 336, 64 Atl. 552; Wilson v. Board of Education of Huron, 12 S. D. 535; State v. Common Council of Tomahawk, 96 Wis. 73, 71 N. W. 86. But see Pettibone v. West Chicago Park Comm'rs, 250 Ill. 304, 74 N. E. 387; and West Chicago Park Comm'rs v. City of Chicago, 216 Ill. 54, 74 N. E. 771.

within certain localities. Identical territory is permitted, under legislative authority to be organized into separate corporations for the purpose of the carrying on by each one of its distinct functions of government and each of these organizations can legally incur the full amount of indebtedness permitted by the constitution or statutory authority; as a result the amount of indebtedness which can be placed upon the inhabitants and taxable property of this territory or district is unlimited. A constitutional limitation may prohibit the incurring of debts in excess of a certain per cent or amount. Under the prevailing rule it is possible to organize separate subordinate civil divisions under authority of law for performing the separate functions of government, each one of these can incur indebtedness to the full limit of the law,—a park board, police board, board of education and so on ad infinitum.[73]

The soundness of the reasoning above has been recognized in some of the states, notably New York, where counties altogether comprised within city limits are expressly forbidden to contract any debts,[74] and South Carolina where a limit is placed upon the indebtedness

73—See as sustaining the views of this paragraph, City of Ottumwa v. City Water Supply Co., 119 Fed. 315 C. C. A.

Orvis v. City of Des Moines Park Comm'rs, 88 Iowa 674, 56 N. W. 294. Where the court held that even though a board of park commissioners was authorized under the special authority of an act of the legislature, yet its bonds were to be considered a charge of the city within the meaning of Const. Art. 11, Sec. 3, limiting the amount of municipal indebtedness to five per cent of the value of the taxable property. Reynolds v. City of Waterville, 92 Maine 292; Territory v. Board of Trustees for High School of Logan County (Okla.), 76 Pac. 165, which holds the indebtedness of a high school board of trustees is to be computed in connection with the county debt in ascertaining whether the federal limitation of four per cent has been exceeded.

Neale v. County Court of Wood County (W. Va.), 27 S. E. 370, where it is held that a subscription by a magisterial district to an internal improvement being a county debt is to be regarded in determining the limits of the county indebtedness fixed by Const. Art. 10, Sec. 8.

74—N. Y. Const., Art. 8, Sec. 10; Levy v. McClellan, 89 N. E. 569.

which can be incurred by any given territory for all purposes, including all political subdivisions in which the territory is situated.[75]

§ 76. Basis of indebtedness; assessment or valuation.

The percentage limit of indebtedness is based upon the assessed valuation of the taxable property within the taxing limits of the corporation. The controlling assessment upon which the computation must be made is ordinarily the one last before the proposed incurring of indebtedness and usually that which has been acted upon by a final Board of Equalization in the state.[76]

75—S. C. Const., Art. 10, Sec. 5; City of Lawrence, 48 S. C. 395, 26 S. E. 682.

Lancaster School District v. Robinson-Humphrey Co., 64 S. C. 545, 42 S. E. 998, Const. Art. 10, Sec. 5, limiting the indebtedness of political division to 15 per cent of its taxable valuation does not require the state debt to be included therein. Welch v. Getzen (S. C.), 67 S. E. 294.

76—Dupont v. City of Pittsburg, 69 Fed. 13. The word "valuation" as used in Pa. Const., Art. 9, Sec. 8, limiting the debts of cities to 7 per cent of the assessed valuation of taxable property means the valuation by city authorities for city taxation and not that made by county officers for county purposes.

City of Gladstone v. Throop, 71 Fed. 341. In the absence of evidence of the assessed value of property, a sufficient amount will be presumed to support the validity of an issue of bonds based upon that valuation. Chilton v. Town of Gratton, 82 Fed. 873; Rathbone v. Board of Commissioners of Kiowa County, 83 Fed. 125, 27 C. C. A. 477; Board of Education, etc. v. National Life Insurance Co., 94 Fed. 324.

City Water Supply Co. v. City of Ottumwa, 121 Fed. 309. The 5 per cent limitation is to be computed on the assessed value of the property for taxation and not on the actual value where the two are not the same; but see, the later case of C. B. Nash Co. v. City of Council Bluffs, 174 Fed. 182, where it is held that the construction given by the State Supreme Court will be followed by the Federal courts, viz.: that the constitutional limitation of 5 per cent for the indebtedness of a city is to be computed on the actual and not the assessed value of its taxable property as shown by the tax list. Law v. City and County of San Francisco (Calif.), 77 Pac. 1014.

N. W. Halsey & Co. v. City of Belle Plaine (Iowa), 104 N. W. 404. The actual value of the property and not the taxable value prescribed by Code, Sec. 1305, determines the 5 per cent limit of indebtedness under Const. Art. 11, Sec. 3.

In a Nebraska case,[77] the word "assessment" as used in the law relating to the incurring of debts by public corporations was defined as being not only the act of the local assessor but the completed act of all the agencies employed in determining the amount of property available for taxation. The court said: "Besides, in our opinion, the term 'assessment' has a wider signification than simply the listing and valuation of taxable property by the assessor. * * * Under our system of taxation, the listing and estimate are not complete until after the county board has completed its work as a board of equalization. While as such board, they are authorized to assess all the lands that have been listed by the county clerk and not assessed by the assessor and otherwise to change the assessment, a large part of all railroad and telegraph property is assessed, not by the local assessor,

Board of Comm'rs, etc. v. Baker (La.), 48 So. 654. La. Const., Art. 281 authorizes drainage districts to issue bonds upon the basis of an ad valorem tax and also upon the basis of a specific tax on land. Bonds cannot be issued upon the theory that the two bases can be combined; the two methods are not concurrent. Thornburgh v. School Dist. No. 3 (Mo.), 75 S. W. 84.

Southworth v. City of Glasgow (Mo.), 132 S. W. 1168. The abstract showing assessed value of property upon which to base indebtedness properly includes the assessed value of railroads, bridges, telegraph and telephone lines within the city limits.

State v. Babcock (Nebr.), 39 N. W. 783. Where the assessed valuation has been reduced in the interim between an election authorizing the issue of bonds and their issue, the constitutional limit is based upon the last assessment.

Colburn v. McDonald (Nebr.), 100 N. W. 961. Holds as in a preceding case that the assessed valuation as last made before bonds are actually issued is the basis for determining the amount of such issue.

Kronsbein v. City of Rochester, 78 N. Y. S. 813. Special franchises granted by a city are to be considered as a part of its assessable real estate within Const., Art. 8, Sec. 10, relative to the limit of indebtedness. Levy v. McClellan (N. Y.), 89 N. E. 569; Ray v. School District No. 9, Caddo County (Okla.), 95 Pac. 480; Amort v. School District No. 80 (Ore.), 87 Pac. 761; Elliott v. City of Philadelphia, 229 Pa. 215, 78 Atl. 107; Rockwall County v. Roberts County (Tex.), 128 S. W. 369.

77—C. B. & Q. R. R. v. Village of Wilbur, 63 Nebr. 624, 88 N. W. 660.

but by the state board of equalization and certified to the county clerks in which the same is taxable and thus becomes a part of the basis upon which the levy of taxes is made. The basis for the issuance of bonds is 'the assessed valuation of the taxable property within said village' and is to be determined by 'the last preceding assessment.' To our minds it is clear that the assessment referred to is the completed act of all the agencies employed in determining the amount and value of property available for taxation."

§ 77. Payments under executory contracts not usually considered a debt.

A plan often suggested and followed resulting in the increase of corporate indebtedness beyond the limit allowed by law, is the making of contracts by a public corporation calling for the performance of certain acts during a series of years, the service performed or rendered under the contract to be paid for at an agreed rate from time to time as the services or contract obligations are rendered or performed. The courts have quite uniformly held that such contract obligations should not be considered an indebtedness or a debt within the meaning of constitutional or other express limitations for the reason that the payment of the obligation on the part of the public corporation being contingent upon the performance of the act or the rendition of the service by the other party to the contract so long as this contingency exists, it is not a fixed and definite obligation or charge within the meaning of the words "debt" or "indebtedness."[78]

78—Daviess County v. Dickinson, 117 U. S. 657; Doon Township v. Cummins, 142 U. S. 366; Hedges v. Dixon, 150 U. S. 182.

Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, affirming 60 Fed. 957. Such a contract does not create a debt except conditionally and the annual payment is dependent upon the performance of the conditions imposed upon the other party to the contract from year to year. Keihl v. City of South Bend, 76 Fed. 921; Cunning-

Such contracts are usually made with private corporations or individuals and have for their purpose the supplying of the commodities of water, and light, the public corporation itself not deeming it expedient or not being in financial condition to undertake the construction of water works or lighting plants sufficient for its needs, is obliged to leave this to private enterprise. The obligation on the part of the public corporation in such a case, it has been held repeatedly, is the payment of an annual or other fixed charge at a stated interval for the services ren-

ham v. City of Cleveland, 98 Fed. 657 C. C. A.; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; City of Centerville v. Fidelity Trust & Guaranty Co., 118 Fed. 332; Columbia Ave., etc. Trust Co. v. City of Dawson, 130 Fed. 152; Simons v. City of Eugene, 159 Fed. 307; Mercantile Trust & Deposit Co. v. City of Columbus, 161 Fed. 135; Lakey v. Fayetteville Water Co. (Ark.), 96 S. W. 622; Doland v. Clark (Calif.), 76 Pac. 658; McBean v. City of Fresno, 112 Calif. 159; Smilie v. City of Fresno, 112 Calif. 311; McMaster v. City of Waynesboro (Ga.), 50 S. E. 122.

Cain v. City of Wyoming, 104 Ill. App. 538. Contracts for the annual supply of such necessaries as water and light and which do not create a debt for the aggregate amount are not included within the constitutional limitation. City of Danville v. Danville Water Co., 180 Ill. 235.

Valparaiso v. Gardner, 97 Ind. 1. A city can contract to pay an annual water rent for twenty years provided it can be paid out of the current revenues although the aggregate of payments for the contract term exceed the constitutional limit. Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94; Foland v. Town of Frankton, 142 Ind. 546; Creston, Iowa, Works Co. v. Creston, 101 Ia. 687, 70 N. W. 739; Youngerman v. Murphy, 107 Iowa 686, 76 N. W. 648.

Overall v. City of Madisonville (Ky.), 102 S. W. 278. A lease of premises to be used in installing a lighting plant with an option to the city to continue it from year to year or to buy it at a fixed price does not contravene Const. Sec. 157 prohibiting cities from incurring a liability beyond the revenues of the year. Blanks v. City of Monroe (La.), 34 So. 921.

Houma Lighting & Ice Mfg. Co. v. Town of Houma (La.), 53 So. 970. A contract of a municipality for a public improvement payable out of the revenues of future years will not be held invalid when the evidence shows that it is reasonable and the financial condition of the municipality warrants the belief that future revenues will be sufficient to pay the contract obligation. Smith v. Inhabitants of Dedham, 144 Mass. 177, 10 N. E. 782; Ludington Water Supply v. Ludington, 119 Mich. 480, 78 N. W. 558; Saleno v. City of Neosha, 127 Mo. 627; Lamar Water & Electric Light Co. v. City of Lamar, 128 Mo. 188;

dered, this payment contingent upon the proper performance of the contract by the other party thereto.

The form of the contract, may, however, lead the courts to hold otherwise in some cases. Where there is a fixed and definite agreement on the part of a municipality to pay a certain sum from time to time irrespective of services performed, or the language imposes a general liability, such obligations or charges have been held to be of a sufficiently fixed and definite character as to come within the meaning of a constitutional or other provision prohibiting the incurring of an indebtedness or a debt beyond a certain sum.[79]

City of Lexington v. Lafayette County Bank, 165 Mo. 671; State v. City of Great Falls, 19 Mont. 518; Raton Water Works Co. v. Town of Raton, 9 New Mexico 870, 49 Pac. 898.

Kronsbein v. City of Rochester, 78 N. Y. S. 813. An indebtedness is not incurred by a city within Const. Art. 8, Sec. 10, through a contract which provides that it shall not be required or liable to make payments except when there shall be money or funds in the Treasury properly applicable to that specific purpose.

Giles v. Dennison (Okla.), 78 Pac. 174. A contract for the construction of a courthouse and jail providing for its payment through annual rental does not create a present indebtedness against a city in a sum equal to the aggregate amount of the rentals. City of St. Joseph v. Joseph Water Works Co., 111 Pac. 864.

Redding v. Esplin Borough (Pa.), 56 Atl, 431. Contract for the construction of sewers. Wade v. Oakmount Borough, 105 Pa. 479.

Bailey v. City of Sioux Falls, 103 N. W. 16. Contract for purchase of boilers.

City of Tyler v. L. L. Jester & Co. (Tex.), 74 S. W. 359. In the absence of evidence to the contrary, it will be presumed that contract payments are matters of ordinary expenditures and intended to be paid out of current revenues. Allison v. City of Chester (W. Va.), 72 S. E. 472; Stedman v. City of Berlin, 97 Wis. 505, 73 N. W. 57; Herman v. City of Oconto, 110 Wis. 660. See. also, Abbott Munic. Corp. Secs. 152 and 159 citing many cases.

Gray Limitations of Indebtedness, Sec. 2079, et seq. The citation of authorities under this and the following note is not exhaustive but a sufficient number have been given and from different jurisdictions to support the principle stated in the text.

79—Coulson v. City of Portland, Deady 481; City of Helena v. Mills, 94 Fed. 916; Ford v. City of Carterville, 84 Ga. 213, 10 S. E. 732.

City Council of Dawson v. Dawson Water Works Co., 106 Ga. 696, 32 S. E. 907. A contract for water

It will be noted from an examination of the cases cited that specific language of a contract determines in many cases the holding of the court and this condition will explain seeming inconsistencies in decisions of the same state though in Iowa, it will be noted from the later authorities that the courts have considerably relaxed their earlier and stricter construction of the constitutional

to run for twenty years each year's supply to be paid for semi-annually from year to year is operative only from year to year so long as neither party renounces or repudiates it. Prince v. City of Quincy, 128 Ill. 443, 21 N. E. 768; Pontiac Water, L. & P. Co. v. City of Pontiac, 149 Ill. App. 57; City of Chicago v. McDonald, 176 Ill. 404 overruling City of St. Louis v. East St. Louis Gaslight & Coke, 98 Ill. 415; City of Chicago v. Galpin, 183 Ill. 399.

B. & O. S. W. R. R. Co. v. People, 200 Ill. 541, 66 N. E. 148. A contract requiring a city to pay for a company's lighting plant by rentals from year to year creates an indebtedness within the Const. Art. 9, Sec. 12, and the contention that such a contract includes the payment of interest, taxes, repairs and insurances, sums not definitely known in advance and therefore not creating a debt cannot be sustained where it definitely provides for the payment of a specific sum which exceeds the debt limit. Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462; Evans v. Holman, 244 Ill. 596, 91 N. E. 723.

Voss v. Waterloo Water Co. (Ind.), 71 N. E. 208. A contract for water or light to be paid for at fixed periods by a town whose revenues are insufficient to meet the payments required by the contract creates an indebtedness in violation of Const. Art. 13, limiting municipal indebtedness. The plan in this case provided for the incorporation of a company to construct a water and light plant of which the city was to be a stockholder and issue bonds therefor. The city agreed to pay a specified sum per annum for twenty-five years as water rentals for hydrants and a specified sum per year for ten years as light rentals. These sums were required to be paid to trustees for the bondholders and to be applied on the bonds. Special taxes authorized by law for water and light and the general taxes of the town were pledged for the payment of the rentals. The whole scheme as noted above was held to create an indebtedness to the amount of the cost of the construction of the plant within the constitutional limitation; see, however, Indiana Laws, 1907, p. 499, c. 245; Allen v. City of Davenport, 107 Iowa 90, 77 N. W. 532.

Windsor v. City of Des Moines (Iowa), 81 N. W. 476. This case also holds that where it is entirely optional with a city whether it should pay anything further on a contract of the nature indicated in the text that such a contract did not create a debt to be included in computing its total debt, with reference to constitutional limitation.

provision in that state, and the decisions in Illinois have invariably followed the rule of strict construction in passing upon the question involved in this section.

§ 78. Indebtedness; payment from special sources or a special fund.

Many public corporations have engaged in the construction of works of local or internal improvement, the cost of which is to be paid from the proceeds of special taxes or assessments upon property benefited. The objection has been made where bonds are issued as obligations of a public corporation in payment of the cost of these improvements, that they are "debts" or constitute

Beard v. City of Hopkinsville, 95 Ky. 239; Mayfield Woolen Mills v. City of Mayfield (Ky.), 60 S. W. 43; State ex rel Knollman v. King (La.), 33 So. 776; Westminster Water Co. v. City of Westminster (Md.), 56 Atl. 990.

Niles Water Works v. Niles, 59 Mich. 311. A contract not authorized by popular vote for the use of water hydrants for thirty years at a yearly rental creates liability to the full extent of the thirty years rent and this being in excess of the revenue for any one year, the contract is void. State v. City of Helena (Mont.), 63 Pac. 99; Atlantic City Water Works Co. v. Reed (N. J.), 15 Atl. 10; Brockway v. City of Roseburg (Ore.), 79 Pac. 335; but see, the later case of City of Joseph v. Joseph Water Works Co., 111 Pac. 864; Brown v. City of Corry, 175 Pa. 528; Keller v. City of Scranton, 200 Pa. 130.

Earles v. Wells, 94 Wis. 285. The constitution of this state provides that "No county, city or town, village, school district or other municipal corporation shall be allowed to become indebted in any manner 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," that before "incurring such indebtedness" such municipality must "provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." It requires the authority of no adjudication to prove that this constitutional limitation means just what it says and is absolutely binding, not only upon every such municipality and officers but also upon the legislature itself. See, also, Culbertson v. City of Fulton (Ill.), 18 N. E. 781.

But see Burlington Water Works Co. v. Woodward, 49 Ia. 58, where

an "indebtedness" within the meaning of constitutional limitations and therefore invalid. The courts have quite generally held that it is the form of the obligation which determines its character as a general liability or otherwise with the consequent result of establishing it as an "indebtedness" or a "debt," or the reverse. If the bonds or obligations in their form and recitals are not a general liability of the corporation but payable principal and interest from the proceeds of the special taxes or assessments levied upon benefited property, and if the holders are limited in their recovery to such sums as can be collected from these special or local assessments, then the bond or other evidence of such indebtedness is not to be regarded as a general debt or charge against the municipality and should not be included within its indebtedness in determining whether the constitutional limitation has been reached.[80] If, however, the form of

the court said: "The obligation of the city is to levy a tax and see that the amount collected is applied to the specified purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby and there cannot be such an indebtedness. In a constitutional sense, the prohibited indebtedness must be a burden and payable from funds which could not constitutionally be appropriated to that purpose. Whether the fund legally provided will be sufficient for the designated purpose, we have no means of knowing. Nor is this regarded as material if no other charge is created on the city by the ordinance."

See, also, Woodward v. City of Waynesville (Idaho), 92 Pac. 840, where it was held that a city could not evade the statutory limitation by voting bonds to provide a partial payment on a contract, making no provision for the balance due.

80—United States v. Capdevielle, 118 Fed. 809; City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329; Sandford v. City of Tucson (Ariz.), 71 Pac. 903; Broad v. City of Moscow (Idaho), 99 Pac. 101; Comm'rs of Highways v. Jackson, 165 Ill. 172, 61 Ill. App. 381; Board of Comm'rs of Jackson Co. v. Branaman (Ind.), 82 N. E. 65; Smith v. Board of Comm'rs of Hamilton County (Ind.), 90 N. E. 881, reversing on rehearing 89 N. E. 867; Quill v. City of Indianapolis, 124 Ind. 292.

City of Clinton v. Walliker (Ia.), 68 N. W. 431. The court here say: "There ought to be no question

the bonds or evidences of indebtedness is of a general character or nature or does not limit the holder in his ultimate right of recovery to such special assessments or taxes, then they will be considered as obligations or indebtedness of the city to be included within its total or aggregate debt.[81]

that the district improvement bonds are payable from the special assessment made against the owners of abutting property, and in no other manner. We will not set out a copy of these bonds. They plainly provide for payment to be made from the special assessments and they are not general bonds against the city. This court held years ago that where a contractor for a service accepted certificates of assessments made upon adjacent property in full satisfaction of his work, such certificates did not create a debt against the city within the meaning of the article of the constitution, limiting the lawful indebtedness of a city to five per cent of the value of its taxable property.'' Corey v. City of Fort Dodge (Ia.), 111 N. W. 6; City of Catlettsburg v. Self (Ky.), 74 S. W. 1064; Adams v. City of Ashland (Ky.), 80 S. W. 1105; Guilfoyles' Exe'r v. City of Maysville (Ky.), 112 S. W. 666; Huoma Lighting & Ice Mfg. Co. v. Town of Huoma (La.), 53 So. 970; Kelly v. City of Minneapolis, 63 Minn. 125; Johnson v. Board of Comm'rs of Norman County (Minn.), 101 N. W. 180; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; Atkinson v. City of Great Falls, 16 Mont. 372; Vallelly v. Board of Park Comm'rs, etc., of Grand Forks (N. D.), 111 N. W. 615; Brockenbrough v. Board of Water Comm'rs, etc. (N. C.), 46 S. E. 28; Addyston Pipe & Steel Co. v. City of Corey, 197 Pa. 41; City of Houston v. Stewart (Tex.), 87 S. W. 663; Winston v. City of Spokane, 12 Wash. 524; Faulkner v. City of Seattle (Wash.), 53 Pac. 365; State v. Sup. Ct. of Whatcom County (Wash.), 85 Pac. 256. See, also, Abbott Munic. Corp., Sec. 152; note 278 and cases cited, and Sec. 77, ante, on executory contracts. But see City of Ottumwa v. City Water Supply Co., 119 Fed. 315, 120 Fed. 309; McGilvery v. City of Lewiston (Ida.), 90 Pac. 348.

81—United States v. Fort Scott, 99 U. S. 152; Kimball v. Grant County Comm'rs, 21 Fed. 145. Burlington Savings Bank v. City of Clinton, 111 Fed. 439. Bonds issued for street improvements.

Lobdell v. City of Chicago, 227 Ill. 218, 81 N. E. 354. Street railway certificates issued under ''Mueller Act'' so-called in case of default would be chargeable on the property of the city and not upon that of individuals and the principle involved in special assessments, the warrants for which do not constitute an indebtedness of the city within the meaning of the constitutional limitation, therefore does not apply. City of Logansport v. Jordan (Ind.), 85 N. E. 959; Allen v. City of Davenport (Ia.), 77 N. W. 532; Windsor v. City of Des Moines, 110 Ia. 176, 81 N. W. 476; Helena Water Works Co. v. City of

Other schemes devised have been to issue securities the interest and principal payable from the rentals, or the net income of specific property or to make the equivalent of a contract of purchase in the form of a lease, the contract obligations being met by the levy of special taxes or charges. These devices have often been used in the construction of plants for the purpose of supplying a municipality and its inhabitants with water, light, or a system of sewerage, the municipality being already indebted to the constitutional limit. They have been, almost without exception, held illegal as being what they are as a matter of fact, a scheme for evading a constitutional limitation.[82]

Helena (Mont.), 70 Pac. 513; Levy v. McClellan, 89 N. E. 569 (N. Y.); Winston v. City of Spokane, 12 Wash. 524, 41 Pac. 888; Fowler v. City of Superior, 85 Wis. 411.

82—City of Ottumwa v. City Water Supply Co., 119 Fed. 315, 120 Fed. 309; Hagan v. Comm'rs of Limestone Co. (Ala.), 49 So. 417; Doland v. Clark, 143 Calif. 170, 76 Pac. 958; Baltimore, etc. Ry. Co. v. People, 200 Ill. 541, 66 N. E. 148; Village of East Moline v. Pope, 224 Ill. 386, 79 N. E. 587.

Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462. A city ordinance providing for the extension of existing water works through the issuance of certificates payable out of a water fund created by the ordinance from the proceeds of water rents and out of special taxes which might be equally levied and available for that purpose is void as authorizing an indebtedness in excess of constitutional limit. Voss v. Waterloo Water Co. (Ind.), 71 N. E. 208; Scott v. La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Hall v. Cedar Rapids, 115 Ia. 199, 88 N. W. 448; Reynolds v. City of Waterville, 92 Me. 292.

Eaton v. Mimnaugh (Ore.), 73 Pac. 754. Construction of court house.

Brix v. Clatsop County (Ore.), 80 Pac. 650. Construction of court house. Melloe v. Pittsburg, 201 Pa. St. 397, 53 Atl. 1011.

McKinnon v. Mertz, 225 Pa. 85, 73 Atl. 1011. Construction of schoolhouse; Savage v. City of Tacoma (Wash.), 112 Pac. 78; Spillman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. 279.

But see Evans v. Holman, 244 Ill. 596, 91 N. E. 723, which holds that a municipality does not create an indebtedness by obtaining property to be paid for wholly out of the income thereof though this case in other respects is in accordance with the principle stated in the text.

Putnam v. City of Grand Rapids, 58 Mich. 416, 25 N. W. 330 and Kuhn v. Common Council, City of Detroit, 129 N. W. 879, where it is held that under Constitution, Amendment, 1908, Art. 8, Secs. 23

In deciding the Iowa case,[83] opinion by Judge Lochren, referred to above, where the indebtedness sought to be incurred involved a plan similar to that suggested, the court said, and its reasoning is so sound that it is quoted here in full: "Appellant's contention amounts to this, that notwithstanding the constitutional limitation referred to, and that the city, being already indebted beyond its limit, has no power, even with the legislative sanction, to incur any new indebtedness to the amount of a single dollar, it may nevertheless borrow money to the extent of $400,000, issuing its negotiable bonds therefor with interest, contracting to pay the same at specified dates, and that this will not create any indebtedness, if it shall at the same levy taxes to be collected annually from the taxable property of the city for a long term of years, or indefinitely till the sum borrowed is paid therefrom, and provide that the bonds shall only be paid

and 24, which authorizes any city to acquire, own or operate public utilities and to issue mortgage bonds therefor beyond the general limit of bonded indebtedness, provided such bonds shall not impose any liability on the city, bonds issued beyond the debt limit and which are secured only by the property and revenue of the public utilities do not come within Constitution, Art. 8, Sec. 20 restricting the powers of municipalities to contract debts. State ex rel. Smith v. City of Neosha (Mo.), 101 S. W. 99; Brokenbrough v. Board of Water Comm'rs, etc. (N. C.), 46 S. E. 28; Winston v. City of Spokane, 12 Wash. 524, 41 Pac. 888.

Dean v. City of Walla Walla (Wash.), 92 Pac. 895. City bonds issued for the purchase of water works and payable out of the general fund under the constitution are not included in the general indebtedness but constitute a portion of the five per cent additional indebtedness allowed for water, light and sewer purposes; see, also as passing upon the same question, Griffin v. City of Tacoma (Wash.), 95 Pac. 1107.

83—City of Ottumwa v. City Water Supply Co. (C. C. A.), 119 Fed. 315.

But see, Swanson v. City of Ottumwa, 118 Ia. 161, 91 N. W. 1048, where the Supreme Court of the State of Iowa in sustaining the validity of the scheme held void in the Federal decision above noted, based its opinion largely upon the reason that where a special fund is created or special and future revenues are assigned to creditors without recourse against the city, no debt is created within the meaning of the constitutional limitation.

from the taxes so specially levied. If this may be done to build waterworks, the city may go on and in the same way borrow and issue its bonds for an equal amount to build public buildings, and for another equal amount to construct a system of sewers, and for another equal amount to construct modern school houses, and an unlimited amount as bonus to some railroad, taking care in each case to levy once for all a sufficient annual tax to meet the maturing bonds; and though the property of the taxpayers may be thus practically confiscated, by being loaded down with taxes beyond any income which the property can produce and for periods beyond any expectation of life which the taxpayers can indulge in, still those taxpayers while groaning under such special levies, fixed upon them and extending hopelessly into the future, will have the happiness and satisfaction of knowing that they live in a city which has no municipal indebtedness large enough to cause uneasiness.

"The fact that these proposed bonds are to bear interest at 4½ per cent cannot be overlooked. Why should the city pay interest,—that constant, distinguishing, most irksome and disagreeable feature of indebtedness,—upon money which it does not owe; money which belonged to it before it was received; being only its own fixed revenues, gotten hold of for present use, a little in advance, by 'anticipation,' and in no wise incurring indebtedness?"

In the Maine case already cited,[84] a city hall commission was created and authorized to issue bonds for the construction of a city hall, the building to be leased to the city, the surplus of rentals as paid by the city, over expenses and interest to be paid into a sinking fund for the payment of bonds. A conveyance of the property was to be made upon the final payment of the indebtedness upon

84—Reynolds v. City of Waterville, 92 Me. 492, 42 Atl. 553.

the building. An injunction was granted restraining the execution of the scheme and the supreme court of the state said in the course of its opinion: "But under the guise of the principle thus stated, a municipality should not be allowed to pass off, as an agreement for renting a hall, an agreement which is not really entered into strictly for such purpose. And we feel that the transaction here in question must be repudiated upon that ground. The transaction has in some respects the semblance of a lease, but it is a misnomer to call it such. It is attempted to make it one thing in form, while in reality it is something else. It is apparent enough that the city is to have not merely the use of the building to be erected, but the building itself. It is not to get an annual service to be paid for out of annual revenues, but the city is to acquire a city hall presently, to be paid for by assessments of taxes for the long period of thirty years. It is a purchase. It would not be a misinterpretation to say that the city of Waterville, instead of leasing the property, undertakes to pay for it on the installment plan, and that what are called rentals for the hall are merely partial payments on its cost."

§ 79. Net or gross debt.

In determining whether a constitutional or statutory limitation in respect to the incurring of indebtedness has been reached, the question has often arisen in respect to whether the words of limitation mean the gross debt of the public corporation or its gross debt less certain deductable items or, in other words, its net debt. The courts have usually held that uncollected taxes and a current levy if actually made and in the process of collection should be deducted from the outstanding gross debt for the purpose of ascertaining the actual indebtedness.[85]

85—Soule v. McKibben, 6 Calif. 142; Bank for Savings v. Grace, 102 N. Y. 213; Brooke v. City of Philadelphia, 162 Pa. 123; Mc-

Deduction of Other Assets. The cash assets of the public corporation and its resources readily convertible into cash should also be deducted from outstanding indebtedness and also all funds or securities held in its sinking fund, if any.[86] The assets which can be deducted must, however, be those applicable to the payment of indebtedness or if uncollected revenues only those where the charge is definite and certain can be included.[87]

The rule applying to the deduction of sinking fund assets is well-stated in a Minnesota case,[88] where it was held that the amount of money and bonds in the sinking fund of Minneapolis was to be deducted from the total amount of outstanding bonds of the city in determining whether the indebtedness of the municipality had reached the con-

Cavick v. Independent School District of Florence (S. D.), 127 N. W. 476; State v. Hopkins, 13 Wash. 5; Graham v. City of Spokane, 53 Pac. 714; City of Eau Claire v. Eau Claire Water Co. (Wis.), 119 N. W. 555; Bach v. Beach (Wis.), 95 N. W. 132.

86—Stone v. Chicago, 207 Ill. 492, 69 N. E. 970.

Gold v. City of Peoria, 65 Ill. App. 602. The assumption by a private corporation of bonds on a water plant does not extinguish the debt as a liability against the city so as to reduce the total amount of its indebtedness. Kronsbein v. City of Rochester, 78 N. Y. S. 813.

Levy v. McClellan, 89 N. E. 569. City bonds held in sinking funds are not debts within Const. Art. 8 Sec. 10 and in determining the indebtedness of a city under that article and section there should be deducted cash in the sinking funds, bonds payable in that year for whose payment provision has been made in the budget of the year and cash in the Treasury from unallotted proceeds of bonds issued to pay debts incurred.

Brooke v. City of Philadelphia, 229 Pa. 215. The net debt of a city is ascertained by deducting from the gross amount, the moneys in the treasury, all outstanding solvent debts and all revenues applicable within one year to the payment of its debts. Williamson v. Aldrich (S. D.), 108 N. W. 1063.

City of Eau Claire v. Eau Claire Water Co. (Wis.), 119 N. W. 555. See also construing the New York Const. Art. 8, Sec. 10, as to excluding indebtedness incurred for rapid transit or dock investment by the city of New York, In Re Debt Limit of City of New York, 123 N. Y. S. 860.

87—Rice v. City of Milwaukee (Wis.), 76 N. W. 341.

88—Kelly v. City of Minneapolis, 63 Minn. 125.

stitutional limit. The court said: "That all of the bonds held by the sinking fund are the bonds of the city, hence the amount of the bonds and the amount in the fund must necessarily represent an equal amount of the outstanding and uncancelled bonds and indebtedness of the city which has already been realized from taxation to pay bonds, and to ascertain the further amount to be raised by taxation in order to extinguish the entire indebtedness of the city, it necessarily follows that the amount of the sinking fund is to be deducted from the entire amount of the apparent indebtedness of the city. The balance is its actual debt. The debt limit of the statute has reference to an actual indebtedness for the payment of which a tax must be levied, not an uncancelled apparent liability."

§ 80. The power of the United States to issue negotiable securities.

The United States is an independent sovereign and indisputably possesses the power to issue negotiable securities. In respect to the amount or the form there exist no constitutional limitations. Its capacity is limited only by its credit.

The suggestion has been made, however, that since it is a government of delegated powers only that it is limited by the principle that it can incur an indebtedness and issue negotiable securities only for a Federal public purpose, since the states are not only limited by constitutional provisions in many cases but also in all instances by the inherent doctrine that indebtedness incurred by them to be legal must be for a public purpose. This idea was suggested by the Supreme Court of the United States in passing upon the validity of an act granting aid to the Union Pacific Railroad Company. In this

case [89] the court by Mr. Justice Davis said, in sustaining the validity of the acts in question that the construction of the Union Pacific Railroad was regarded as a national public purpose. "This enterprise was viewed as a national undertaking for national purposes and the public mind was directed to the end in view rather than to the particular means of securing it. The project of building the road was not conceived for private ends and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work originating in national necessities and required a national assistance."

As ancillary to the power of the Federal government to issue negotiable securities there follows the rule that Congress has full power to legislate for territory within the jurisdiction of the United States not yet admitted as states. It may not only abrogate laws of territorial legislatures but it may legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territory and all the departments of territorial govments. This power has been exercised in connection with the issue of negotiable securities.[90]

§ 81. The power of the states to issue negotiable securities.

The different states of the Union in incurring indebtedness and issuing negotiable securities therefor, are subject to the specific limitations to be found in their several constitutions, either in respect to the amount to be issued or the purpose for which issued. They are also

89—United States v. Union Pacific R. R. Co., 91 U. S. 79.

90—National Bank v. County of Yankton, 101 U. S. 129; Utter v. Franklin, 172 U. S. 416, 43 L. Ed. 498; Lewis v. Pima County, 155 U. S. 54, 39 L. Ed. 67.

limited in the incurring of debts by the general principle that the purposes of taxation and of the issue of negotiable securities must be public in their nature and character. The several states of the Union are also subject to a limitation upon their powers in respect to the issue of negotiable securities resulting from their being members of the Federal Union. The original states and those subsequently admitted upon becoming members of the Union relinquished certain of their sovereign rights as independent states and in respect to these, the Federal Government is supreme. Under the compact between the states as evidenced by the Federal Constitution, certain powers are given to the Federal Government to be exercised by it exclusively and the exercise of these powers denied the states.

Article I, Sec. 10, Clause 1 of the Federal Constitution, provides: "No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts or grant any title of nobility."

The only provision contained in this clause which is pertinent to this work is that prohibiting the emission of bills of credit. This prohibition as well as the others is imperative and in order to determine the full power of the states to issue negotiable securities, it is necessary to consider the effect of this limitation.[91]

It might be well to state that the prohibition referred to applies only to the states and further that it does not include or describe contracts by which a state binds itself to pay money at a future day for services actually

91—Marshall's Const. Decisions Annotated by Dillon, note p. 639; Tucker Const. of United States, Vol. 2, Sec. 387; Sutherland, Notes on U. S. Const., p. 245; Burroughs Public Securities, Sec. 8; Daniel Negotiable Instruments, Vol. 2, Sec. 1715, et seq.; Thorpe, Const. Hist. of U. S. Vol. 2, pp. 510, 512; Miller Const. of United States, p. 581.

received or for money borrowed for personal use and which it is not intended shall pass or be received as money.[92]

The form or the name, however, is immaterial if the effect and purpose of a bill of credit as used in the Constitution, is accomplished. Chief Justice Marshall in the Craig v. Missouri case[93] in answer to the argument that the instruments involved in that case were certificates of debt, not bills, said: "Had they been termed 'bills of credit' instead of 'certificates' nothing would have been wanting to bring them within the prohibitory words of the Constitution, and can this make any real difference? is the purpose to be maintained that the Constitution meant to prohibit names and not things, that a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name. That the constitution in one of its most important provisions may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself."

A bill of credit has been defined as "a negotiable paper designed to pass as currency and circulate as money. Such a bill of credit as comes within the constitutional prohibition is a negotiable paper issued by the sovereign power of one of the United States and designed to pass as currency and circulate as money."[94]

To come within the constitutional prohibition a bill of credit is a paper issued by the state on the faith of the

92—Craig v. Missouri, 4 Pet. 433; Virginia Coupon Cases, 114 U. S. 270; Chaffin v. Taylor, 116 U. S. 567; Woodruff v. Miss., 162 U. S. 299; McCoy v. Washington County, 3 Wall. (U. S.) Jr. 381; Peyaud v. State, 13 Miss. 491; Antoni v. Wright, 22 Gratt 833; Laury v. Rogers, 24 Gratt 169.

93—4 Peters, 433.

94—Daniel Negotiable Instruments, Sec. 1716.

state and designed to pass as money. All of these attributes must exist and concur to render paper objectionable under the Constitution.[95]

The authorities following the Briscoe case have held that the prohibition does not apply to bills issued by state banks, although the state may guarantee their payment or even be the sole stockholder or owner of the bank;[96] that it further does not apply to bonds or negotiable securities issued by state or by subordinate subdivisions under its authority with interest coupons attached and which by law are or may be made receivable for taxes or other debts due the state or the public corporation, if such are not designed to pass as currency within the principles as laid down by the Supreme Court of the United States, in the cases cited in the note.[97]

§ 82. United States Supreme Court cases.

This subject, namely what constitutes a bill of credit, has been before the Supreme Court of the United States in a number of cases. The first decision rendered in 1830 was later substantially over-ruled in 1837, there having been a material change in the personnel of the court, Chief Justice Taney succeeding Chief Justice Marshall.

In the case of Craig v. State of Missouri,[98] the first one

95—Craig v. Missouri, 4 Pet. 433; Brisco v. Bank of Kentucky, 11 Pet. 318; Woodruff v. Trapnall, 10 How. 190; Darrington v. Branch of Bank of Alabama, 13 How. 12; Curran v Arkansas, 15 How. 318; Poindexter v. Greenhow, 114 U. S. 270; also known with other cases decided at the same time as the Virginia Coupon cases. Houston & Texas Cent. R. R. v. Texas, 107 U. S. 66; Wesley v. Eells, 177 U. S. 370; Lee v. Robinson, 196 U. S 64.

96—Briscoe v. Bank of Kentucky, 11 Pet. 318; Curran v. Arkansas, 15 How. 318; Poindexter v. Greenhow, 114 U. S. 270; Wesley v. Eells, 177 U. S. 370.

97—Poindexter v. Greenhow, 114 U. S. 284; Wesley v. Eells, 177 U. S. 370; Mayor v. State, 15 Md. 376; City Bank v. Mahan, 21 La. Ann. 751; Smith v. New Orleans, 23 La. Ann. 5; Delafield v. State (N. Y.), 26 Wend. 192; State v. Cardoza, 5 S. C. 297; Walker v. State, 12 S. C. 200; Antoni V. Wright, 22 Gratt 833; Maury v. Rogers, 24 Gratt 169.

98—4 Pet. 410.

decided by the Supreme Court of the United States, the action was upon a note the consideration of which was the loan of loan office certificates issued by the State of Missouri pursuant to an act of the legislature of that state. Chief Justice Marshall writing the majority opinion, in referring to the meaning of the clause in the constitution prohibiting a state from emitting bills of credit, said: "The word 'emit' is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood."

The court held the certificates as authorized by the state of Missouri void because they were in effect bills of credit; they were issued on account of loans made from time to time to the state and were held to have been issued to circulate as money. Three of the justices dissented.

In the next and subsequent case decided in 1837,[99] the same question as to the meaning of the term 'bills of credit' was raised and Mr. Justice McLean delivered the opinion of the court, in the meantime Chief Justice Marshall had died. The question involved was whether bank notes issued by the bank of the Commonwealth of Kentucky declared by the state act of incorporation to be exclusively the property of the Commonwealth were bills of credit. In the course of the opinion it was said by the court: "The term 'bills of credit' in their mercantile

99—Briscoe v. Bank of Kentucky, 11 Pet. 257.

sense comprehend a great variety of evidences of debt which circulate in a commercial country. * * * But the inhibition of the constitution applies to bills of credit in a more limited sense. It would be difficult to classify the bills of credit which were issued in the early history of this country. They were all to circulate as money being issued under the laws of the respective colonies." Reference is made in the course of the opinion to Craig v. Missouri including the dissenting opinions as to the meaning of the expression "bills of credit" and the following is added to the definition in that case: "The definition then which does include all classes of bills of credit emitted by the colonies or states is a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money." It was held that the bank notes did not come within the definition as then given by the court and therefore did not come within the constitutional prohibition. Mr. Justice Story delivered a vigorous dissent referring repeatedly to the well-known opinions of Chief Justice Marshall as expressed in the Craig case.

In Woodruff v. Trapnall,[1] the subject was again passed upon by Mr. Justice McLean in delivering the opinion of the court and it was held that the notes of the bank involved in that case were not "bills of credit" upon the authority of the Briscoe case. To the same effect also is Darrington v. Branch of the Bank of Alabama,[2] the opinion by Mr. Justice McLean. The state creating the bank in that case was the only stockholder and its credit was pledged for the ultimate redemption of the notes of the bank. The court held that it was impossible to hold that bills issued by the bank came within the definition of bills of credit. The definition of "bills of credit" as given in the Briscoe case was again referred to and the definition approved, viz: That the paper must be issued by a state

1—10 How. 190. 2—13 Howard 12.

upon its faith, designed to circulate as money, and to be received and used as such in the ordinary business of life.

In Poindexter v. Greenhow, with other cases decided at the same time known as the Virginia Coupon cases,[3] the question was again raised in connection with coupons attached to bonds issued by the Commonwealth of Virginia in the following form:

"Receivable at and after maturity for all taxes, debts, and demands due the state.

"The Commonwealth of Virginia will pay the bearer thirty dollars interest, due 1st January, 1884, on bond No. 2,731.

"Coupon No. 20.

"Geo. Rye, Treasurer."

It was contended that this coupon was a bill of credit in the sense of the constitution because receivable in payment of debts due the state, negotiable by delivery merely and intended to pass from hand to hand and to circulate as money.

Speaking of these particular coupons and in holding that they did not come within the constitutional inhibition, the court said: "They (the coupons) are issued by the state, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the state, but they are not emitted by the state, in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. And there is nothing on the face of the instruments nor in their form or nature, nor in the terms of the law which authorized their issue, nor in the circumstances of their creation or use as shown by the record, on which to found an inference that these coupons were designed to circulate, in the com-

3—114 U. S. 270.

mon transactions of business, as money, nor that in fact they were so used."

The fact that the coupons were receivable in payment of taxes and other dues to the state and hence might circulate from hand to hand as money was held to fall far short of showing their fitness for general circulation in the community as a representative and substitute for money in the common transaction of business which the court held was necessary to bring them within the constitutional prohibition against bills of credit.

In a still later case, Houston & Texas Central R. R. Co. v. Texas,[4] the same question was again discussed and in the opinion by Mr. Justice Peckham, a review was had of the cases theretofore decided by the Supreme Court of the United States. The court here held that a warrant drawn by state authority in payment of an appropriation made by the legislature for a debt due from the state to an individual and payable upon presentation if there be funds in the treasury, cannot be deemed a bill of credit in violation of Constitution, of the United States, Article I, Sec. 10, Clause 1, prohibiting the emitting of bills of credit by a state, although the state officers were directed to receive such warrants as money in payment of certain dues to the state and to deliver them to those who did receive them as money in payment of dues from the state. The warrants were not, however, to be re-issued when once they came back to the treasury of the state.

Under an act of the legislature of South Carolina, of March 2, 1872, revenue bond script so-called, was issued to relieve the state of all liability on its guaranty, endorsed upon railroad bonds by authority of a previous act of the state legislature. It appeared from the facts as found by the court that there was no outstanding liability represented by the guaranty. The question of whether this issue of revenue bond script constituted an

4—177 U. S. 66.

emission of bills of credit contrary to the Federal Constitution was first presented in the Circuit Court of the United States, for the District of South Carolina,[5] and Simonton, the Circuit Judge, held that it was invalid because in law and in fact, it constituted bills of credit. This judgment of the Circuit Court was affirmed by the Supreme Court of the United States in Lee v. Robinson.[6]

§ 83. Decisions by state and other courts.

The state and inferior Federal courts have followed from time to time the holdings of the Supreme Court of the United States.

In an early case in Illinois[7] following Craig v. Missouri, the notes of a state bank, receivable in payment of debts due the state and for the redemption of which the faith of the state was pledged were held to be bills of credit issued by the state. Later decisions following the Briscoe case, uniformly held that bills issued by state banks were not to be regarded as bills of credit issued by the state in the sense of that term as used in the Constitution of the United States.[8]

If the paper or obligation is intended to circulate as money whether issued by a state or one of its subordinate divisions, the constitutional prohibition applies.[9]

The constitutions of several of the states contain prohibitions against the issue by public corporations of bills or notes intended to circulate as money. In case of an attempted issue by such corporations, there exist the pro-

5—Robinson v. Lee, 122 Fed. 1012.

6—196 U. S. 64.

7—Linn v. State Bank, 1 Scam. 87; see also Wesley v. Eells, 90 Fed. 151.

8—Owen v. Branch Bank, 3 Ala. 258; McFarland v. State Bank, 4 Ark. 44; Bills v. State, 2 McCord 12; Jones v. Bank of Tenn., 8 B. Mon. 123; Craighead v. Bank, 1 Meigs 199.

9—Lindsay v. Rottaken, 32 Ark. 619; Cothran v. City of Rome, 77 Ga. 582; Dively v. Cedar Falls, 21 Iowa 565, 27 Iowa 227; Baltimore & Susq. R. R. Co. v. Faunce (Md.), 6 Gill 68.

hibitions to be found in both the Federal and state constitutions.[10]

The city of Richmond, Virginia, in 1861, issued small bills intended to circulate as currency. The Supreme Court of the United States [11] held that it was against public policy as well as express law for any person or body corporate, to issue small bills intended to circulate as currency; that the issuing of such bills was not one of the implied powers of a municipal corporation and that being not only contrary to positive law but also ultra vires, was an abuse of the public franchises conferred upon it.

§ 84. The power of subordinate public corporations to issue negotiable securities.

The power of the United States and of the several states as independent sovereigns to issue negotiable securities has been briefly considered in the immediately preceding sections. It is an exceptional instance when any controversy arises either in respect to the power to issue or the manner of issue of the United States or the several states. The reported cases almost entirely arise in connection with the issue or attempted issue of negotiable securities by subordinate civil subdivisions of the states.

The question of the implied right of these organizations to incur indebtedness and borrow money when not involving an issue of negotiable securities, has been considered in previous sections.[12]

The issue of negotiable securities follows as the last method by which an indebtedness can be incurred.[13]

10—Lee v. Robinson, 196 U. S. 64; Cothran v. City of Rome, 77 Ga. 582.

11—Thomas v. Richmond, 12 Wall. (U. S.) 349.

12—See Secs. 57 et seq. ante.

13—See Sec. 57 ante.

The first and an important question is whether the power to issue negotiable securities can be or ever is implied. The rule now established by an overwhelming weight of authority is that the power of a public corporation to issue negotiable securities must be expressly given and can never be implied. There are some modifications of this doctrine which will be noted later.[14]

The rule and the reason for it is vigorously and clearly stated in a leading case decided by the Supreme Court of the United States[15] which in effect over-ruled a number of earlier cases holding to the existence under certain conditions of an implied power to issue negotiable securities. The court in this case said in its opinion, by Mr. Justice Bradley: "It thus appears that the Police Jury had no express authority to issue the bonds in question, and that if they had any authority it must be implied from the general powers of administration with which they were invested. We have, therefore, the question directly presented in this case whether the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of bona fide holder for the purpose of raising money or funding a previous indebtedness.

This subject, as applied to various municipal bodies, has been much discussed in the courts of this country, and various conclusions have been reached, depending sometimes upon the peculiar character and statutory powers of corporation, sometimes upon the character of the

14—See Secs. 87 and 88 post.

15—Police Jury v. Britton, 15 Wall. (U. S.) 566.

objects to be attained, and sometimes upon the naked implication of power supposed to arise from the express power to make expenditures. That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement or rescission, in whole or in part, that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which recovery is now sought are commercial instruments, payable at a future day and transferable from hand to hand. Such instruments transferred before maturity to a bona fide purchaser leave behind them all equities and inquiries into consideration and the conduct of parties; and become, in the hands of an innocent holder, clean obligations to pay, without any power on the part of the municipality to demand any inquiry as to the justice or legality of the original claim, or to plead any corrupt practice of the parties in obtaining the security. * * * The power to issue such obligations, and thus irretrievably to entail upon counties, parishes and townships a burden for which perhaps they have received no just consideration, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing

for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. * * *

We do not mean to be understood that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money, implies the power to issue the ordinary securities for its repayment, whether in the form of notes, or bonds payable in the future. So the power to subscribe for stock in a railroad, or to purchase property for a market house, and other like powers which cannot be carried into execution without borrowing money, or giving obligations payable in the future, have been held sufficient to raise the implied power to such obligations. But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case." * * *

As stated in this opinion, there is a marked legal distinction between the power to become obligated to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in the open market, a negotiable bond as a commercial security with immunity in the hands of bona fide holders for value from equitable defenses.[16] The courts adhere

16—Mayor of Nashville v. Ray, 19 Wall. 468. Much less can any precedent be found (except of modern date and in this country) for the issue, by local civil authorities, of promissory notes, bills of exchange, and other commercial paper. At a period within the memory of man, the proposal of such a thing would have been met with astonishment. The making of such paper was originally confined to merchants. But its great convenience was the means of extending its use, first to all individuals and afterwards to private corporations having occasion to make promises to pay money. Being only themselves responsible for the paper

so strictly to the rule that the power to issue negotiable bonds must be expressly given, that every person dealing with a corporation, it has been held many times, must at his peril take notice of the authority of the corporation and its power and the terms of laws by which the power is supposed to be granted, even though that person be a bona fide holder for value of such securities.[17] In con-

they issue, no evil consequence can follow sufficient to counterbalance the conveniences and benefits derived from its use. They know its immunity, in the hands of a bona fide holder, from all defenses and equities. * * * The purposes and objects of municipal corporations do not ordinarily require the exercise of any such power. They are not trading corporations and ought not to become such. They are invested with public trusts of a governmental and administrative character they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order and general well being of the community as a political society and district; and invested with power by taxation to raise the revenues necessary for those purposes. * * *

Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders, absolute obligations to pay, however, irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied. Knapp v. Mayor etc., 39 N. J. L. 394; State v. City of Newark, 54 N. J. L. 62, 23 Atl. 129; Ketchum v. Buffalo, 14 N. Y. 356.

17—Town of South Ottawa v. Perkins, 94 U. S. 260; McClure v. Township of Oxford, 94 U. S. 429; Inhabitants of Pompton v. Cooper Union, 101 U. S. 196; Ogden v. City of Daviess, 102 U. S. 634; Nesbit v. Riverside Ind. School Dist., 144 U. S. 610, affirming 25 Fed. 625; Thomas v. Town of Lansing, 14 Fed. 618; National Bank of the Republic v. City of St. Joseph, 31 Fed. 216; Nat. Bank of Commerce v. Town of Granada, 54 Fed. 100; Travellers Ins. Co. v. Township of Oswego, 55 Fed. 361; Coffin v. Kearney Co. Com'rs, 57 Fed. 137; Riseley v. Vil-

sidering further this rule as to the power to issue negotiable bonds a difference is to be noted between a public and a private corporation. The power of a private corporation to issue negotiable instruments or commercial paper is implied so long as the proceeds are to be used in the carrying on of its legitimate business; borrowing money and issuing bonds, notes and bills as a rule are acts germane to the carrying on of its business. This is not true of public corporations. The ends for which they are organized or created are essentially different and in a broad sense the power to issue bonds for moneys borrowed is not included among the ordinary powers of such organizations.[18] They are governmental agents or bodies of limited powers and the rule of strict construction withholds a right or denies a power when it does not clearly exist or is not expressly given.

The power to borrow money and to issue bonds by the state or any of its political subdivisions is a legislative one.* It can be exercised by the proper legislative body

lage of Howell, 57 Fed. 544; Quaker City Nat. Bank v. Nolan Co. 66 Fed. 137; Rathbone v. Kiowa Co. Com'rs, 83 Fed. 125, 73 Fed. 395; Dunbar v. Canyon Co. Com'rs, 5 Ida. 407, 49 Pac. 409; Law v. People, 87 Ill. 385; Lippincott v. Town of Pana, 92 Ill. 24; Gaddis v. Richland Co., 92 Ill. 119; City of Aurora v. West, 22 Ind. 89; Wilson v. City of Shreveport, 29 La. Ann. 673; Goodnow v. Ramsey County Com'rs, 11 Minn. 31; Ruohs v. Town of Athens, 91 Tenn. 20, 185 S. W. 400; Silliman v. Fredericksburg, 27 Gratt 119.

18—City of Nashville v. Ray, 19 Wall. (U. S.) 468; City of Evansville v. Woodbury, 60 Fed. 71 C. C. A.

Law v. People, 87 Ill. 385. The court said: "The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act. Such corporations are created for governmental and not for commercial purposes. Hence, power to borrow money is not an incident to such local governments and the power cannot be exercised unless it is conferred by their charter and no one has the right to presume the existence of such a power and persons proposing to loan money to these bodies must see the power exists; State v. Newark, 54 N. J. L. 62, 23 Atl. 129; City of Williamsport v. Commonwealth, 84 Pa. St. 487; Commonwealth v. City of Pittsburgh, 88 Pa. 66.

of the state, or if that body so elects, delegated in its performance to such subordinate agencies as it may select, but limited by existing constitutional provisions.[19]

§ 85. The same subject further considered.

The capacity of public corporations to incur indebtedness is restricted through the application of every possible rule. The implied power is sometimes assumed as belonging to them of incurring indebtedness to pay current expenses or anticipating for a brief period only uncollected taxes. The burden of paying the obligations thus assumed is sustained by those incurring or authorizing the incurment of them, and to maintain the corporate organization or pay the wages of corporate employes depending on their daily earnings for a living, the courts have recognized the existence of the right suggested. The burden of paying negotiable bonds with interest coupons issued as evidences of indebtedness for other purposes than those suggested is usually not felt by those authorizing the issue or incurring such indebtedness. They are generally issued payable after the lapse of long periods of time, the payment of the annual interest charges alone resting upon those immediately incurring the debt, the principal payment falling upon taxable interests many years in the future. It is a comparatively easy matter for extravagant officials or even the people themselves to incur indebtedness payable by negotiable bonds without regard to the burdens that may thus be placed upon posterity. Men are prone to be generous or even extravagant with the moneys of others and indifferent to their burdens. Where the task of paying a debt falls

19—C. B. & Q. R. R. Co. v. Otoe County, 83 U. S. 667; Barnum v. Okolona, 148 U. S. 393; Board of Com'rs of Seward v. Aetna Life Ins. Co., 90 Fed. 222, 32 C. C. A. 585; Smith v. Board of Trustees, etc. (N. C.), 53 S. E. 524; Wharton v. City of Greensboro (N. C.), 62 S. E. 740.

upon the one creating it, greater care and more conservatism will be exercised. Expenditures will be considered not only with reference to their results and expediency, but also to tax levies. It is these considerations as well as the others already noted which have induced the courts to adopt and adhere to the rule stated at the beginning of this section, and there are found repeated iterations of the doctrine in the decisions of all courts, state as well as Federal.[20]

20—Mayor of Nashville v. Ray, 19 Wall. (U. S.) 968.

Wells v. Sup'rs, 102 U. S. 625. It is also settled that unless the power to issue bonds for the payment of municipal subscriptions to the stock of railroad companies is given in express terms or by reasonable implication, no obligation of that kind can be created.

Claiborne County v. Brooks, 111 U. S. 400, 4 Sup. Ct. Rep. 489. A county had authority to erect a courthouse, but was not authorized to issue bonds in payment therefor. Holding the bonds issued for that purpose to be void, the court say: "Our opinion is that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it."

Kelly v. Milan, 127 U. S. 139. Negative and inhibitory clauses of a statute confer no authority for the giving or loaning of credit by a municipality and confer no power to become a stockholder or issue bonds. Young v. Clarendon Township, 132 U. S. 340; Merrill v. Town of Monticello, 138 U. S. 673.

City of Brenham v. German American Bank, 144 U. S. 173, holds, Justices Harlan, Brewer and Brown dissenting, that the charter power of the city of Brenham, Texas, to borrow money "for general purposes not exceeding $15,000 on the credit of such city" carried with it no power to issue and sell negotiable bonds. Barnum v. Okolona, 148 U. S. 393.

Chisholm v. City of Montgomery, 2 Woods 584. The power to issue commercial securities the consideration of which cannot be inquired into in the hands of a bona fide holder is not inherent in a municipal corporation. Oelrich v. Pittsburgh, 1 Pittsb. 522; Katzenberger v. Aberdeen, 16 Fed. 745.

Watson v. City of Huron, 97 Fed. 449, 38 C. C. A. 264. Municipal corporations possess no power to incur debts and issue negotiable instruments therefore unless especially authorized to do so by their charters or by statute or the power can be clearly implied from some power

The power therefore of subordinate public corporations must be conferred by constitutional,[21] statu-

expressly given which cannot be fairly exercised without it.

Frances v. Howard Co., 50 Fed. 44. In Texas, counties have no power to issue negotiable securities in the absence of legislative authority following Nolan County v. State, 17 S. W. 826 and Robertson v. Breedlove, 61 Tex. 316.

Ashuelot Nat. Bank v. School Dist. No. 7, 56 Fed. 197. The court after referring to the rule laid down in Merrill v. Town of Monticello, 138 U. S. 673, and Brenham v. German American Bank, 144 U. S. 173, said: "We think, however, that we may fairly affirm that the two authorities heretofore cited do establish the following propositions: First, that an express power conferred upon a municipal corporation to borrow money for corporate purposes does not, in itself, carry with it an authority to issue negotiable securities: Second, that the latter power will never be implied in favor of a municipal corporation unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory; and third, that in every case where a doubt arises as to the right of a municipal corporation to execute negotiable securities, the doubt should be resolved against the existence of any such right." Coffin v. Board of Com'rs of Kearney Co., 57 Fed. 133; Rathbone v. Board of Com'rs of Kiowa County, 73 Fed. 395; Water v. City of Huron, 97 Fed. 449, 38 C. C. A. 264; Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Hancock v. Chicot County, 32 Ark. 575, 583; Dent v. Cook, 45 Ga. 323; Carter v. City of Dubuque, 35 Iowa 416; Reed v. City of Cedar Rapids (Ia.), 113 N. W. 773; Hardin County v. McFarlan, 82 Ill. 138; Law v. People, 87 Ill. 385; Coquard v. Village of Oquawka (Ill.), 61 N. E. 660, affirming 98 Ill. App. 648; Bordeaux v. Coquard, 47 Ill. App. 254; Com'rs of Delaware v. McClintock, 51 Ind. 325; Crittenden County Court v. Shanks (Ky.), 11 S. W. 468; Capmartin v. Police Jury, 23 La. Ann. 190; Smith v. Madison Parish, 30 La. Ann. Pt. 1, 461; Glass v. Parish of Concordia (La.), 37 So. 189; Washburn v. Commonwealth, 137 Mass. 139; Parsons v. Monmouth, 70 Me. 262.

Brown v. City of Newburyport (Mass.), 95 N. E. 404. A municipal corporation has no inherent power to issue notes.

Rogers v. Board of Commissioners, Minn. 59 N. W. 488; Vicksburg v. Lombard, 51 Miss. 111; Grady v. Lincoln, 18 Nebr. 283; State v. Weston (Nebr.), 96 N. W. 668; Starin v. Town of Genoa, 23 N. Y. 439; Wells v. Salina, 119 N. Y. 280; Young v. Henderson, 76 N. C. 420; Williamsport v. Commonwealth, 84 Pa. St. 487; Hall v. Hood River Irrigation Dist., 110 Pac. 405; Colburn v. Chattanooga West R. R. Co., 94 Tenn. 43, 28 S. W. 298; Richardson v. Marshall Co., 100 Tenn. 346; Ball v. Presidio County (Texas), 26 S. W. 1042; Daggett v. Lynch (Utah), 54 Pac. 1095; Exchange Bank v. Lewis County, 28 W. Va. 273.

21—Brown v. Village of Grangeville (Idaho), 71 Pac. 151; Riley v. Carrico (Okla.), 110 Pac. 738;

tory,[22] or charter [23] provisions. In view of the principles as stated controlling and determining the existence of an express or an implied power to issue negotiable securities, the reported cases deal almost entirely with a determination of whether in a particular instance the power is derived from the authority under which it is claimed.[24]

The question also arises whether the corporation attempting to exercise the power possesses sufficient or-

Board of Education v. McMahan (Okla.), 110 Pac. 907; Straw v. Harris (Ore.), 103 Pac. 777.

22—Ogden v. County of Daviess, 102 U. S. 634; Scotland v. Hill, 132 U. S. 107; Waite v. City of Santa Cruz, 89 Fed. 619; Corning v. Meade County Com'rs, C. C. A. 102 Fed. 57; City of Pierre v. Dunscomb, 106 Fed. 611; Babcock v. Helena, 34 Ark. 499.

Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544. Bonds issued "for corporate purposes" in this case by the Sanitary Dist. of Chicago were held sufficiently definite as to purpose. Young v. Tipton County Com'rs, 137 Ind. 323; Farmers & Merchants State Bank v. School Twp. etc. (Ia.), 92 N. W. 676; Crittenden County Court v. Shanks, 88 Ky. 475; Bain v. City of Lexington (Ky.), 120 S. W. 620, construing Ky. Stats. 1909, Sec. 3105; McCormick v. Village of West Duluth, 47 Minn. 272.

Evans v. McFarland (Mo.), 85 S. W. 873, construing laws of 1899, p. 65 relative to the borrowing of money and issuing of bonds by cities of the fourth class for the purpose of erecting water works, electric light works, etc. State v. Searle (Nebr.), 107 N. W. 588; Mittag v. Borough of Park Ridge, 61 N. J. L. 151, 38 Atl. 750; Culver v. Ft. Edward, 15 N. Y. Sp. Ct. 340; Smith v. Board of Trustees (N. C.), 53 S. E. 524; Peabody v. Westerly Waterworks, R. I., 37 Atl. 807; Ball v. Presidio County, 88 Tex. 60, 29 S. W. 1042; Darke v. Salt Lake County Com'rs, 15 Utah 467, 49 Pac. 257.

23—Hitchcock v. Galveston, 2 Woods 272; Fritz v. City and County of San Francisco (Calif.), 64 Pac. 566; McHugh v. City and County of San Francisco (Calif.), 64 Pac. 570; City of Evansville v. Woodbury, 60 Fed. 718; Lehman v. City of San Diego, 73 Fed. 105; City of Huron v. Second Ward Savings Bank, 86 Fed. 272; City of Cumberland v. Magruder, 34 Md. 381; Town of Klamath Falls v. Sachs, 35 Ore. 325, 57 Pac. 329; City of Memphis v. Bethel, 17 S. W. 191; City of Radford v. Heth, 100 Va. 16, 40 S. E. 99.

24—Tucker v. Raleigh, 75 N. C. 267; Smith v. Board of Trustees (N. C.), 53 S. E. 524; Shoemaker v. Goshen, 14 O. St. 569.

State v. Powers (Tenn.), 37 S. W. 1110. Drainage law, Sec. 39, is not in violation of Const. Art. 2, Sec. 29, as an illegal lending of the county's credit. Bennett v. Town of Nebagamon (Wis.), 99 N. W. 1039; see also cases cited in the last three preceding notes.

ganic capacity or comes within the particular class of corporations upon which the power is conferred by existing grants of authority or as to which a prohibition exists. The attempt has been made by public corporations to escape a limitation by employing some subordinate quasi organization within its territory to incur the indebtedness. The rule in respect to attempts of the nature last indicated is that the corporation cannot effect indirectly what it is prohibited from doing directly.[25]

The Supreme Court of the United States, as usual,

25—Harshman v. Bates County, 92 U. S. 569. A township included within provisions of Mo. Const., Art. of 1865, Art. 11, Sec. 14. Ogden v. County of Daviess, 102 U. S. 634.

Town of Enfield v. Jordan, 119 U. S. 680, 30 L. Ed. 523; 7 Sup. Ct. 358. The term "village" as used in the Act of Feb. 24, 1869, amending the charter of the Illinois Southeastern Ry. Co., and which authorizes "villages, cities, counties or" to make donations to it, etc. includes a town. Reversing Welsh v. Post, 99 Ill. 471.

Judson v. Plattsburgh, 3 Dill. 181. Question of population involved.

Bard v. City of Augusta, 30 Fed. 906; Kans. Laws, 1876, Chap. 107 as amended in 1877, expressly authorizes any city upon certain conditions to issue bonds for railroad purposes.

Deland v. Platte County, 54 Fed. 823. A strip of country which is only a portion of a township is not authorized to issue bonds under Missouri Act March 23, 1868.

Aetna Life Ins. Co. v. City of Burton, 75 Fed. 962. Construing laws of Kans. 1871, Chap. 60, relative to the power of a city of the third class to subscribe for railroad stock.

Clapp v. Otoe County (Nebr.), 104 Fed. 473. A precinct under the Stats. of Nebr. is a mere political subdivision of the county and not a municipal or quasi municipal corporation or entity. Board of Trustees v. Brattleboro Savings Bank (Ohio), 106 Fed. 986 C. C. A.

Wills v. Bates County, 170 Fed. 812. A drainage district not a quasi corporation.

Schmitz v. Special School Dist. of Little Rock (Ark.), 95 S. W. 438. A special school district is not within the constitutional prohibition which declares that no county, city, town or municipality shall issue any interest bearing evidence of indebtedness. See also as holding the same rule in respect to a city board of improvement; Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702.

Brown v. Village of Grangeville (Ida.), 71 Pac. 151. A village organized under the general laws is included within the word "town" as used in Const. Art. 12, Sec. 1 and an Act. of Feb. 2, 1899, Sec. 1. Sampson v. People (Ill.), 30 N. E. 781; Supervisors v. Wis. Cent. R. R., 121 Mass. 460; Turner v. City of Hattiesburg (Miss.), 53 So. 681; Straw v. Harris (Ore.), 103 Pac. 777.

supplies a leading authority on the questions involved. In Harshman v. Bates County,[26] in construing the provisions of the Missouri Constitution which prohibits "any county, city or town" to loan its credit to any company without a two-thirds vote of the electors, the court held that the bonds issued by a county in aid of a railroad on behalf of one of its townships without the required vote, were void. In the opinion by Mr. Justice Bradley, it was said: "A township is a different thing from a town in the organic law of Missouri—the latter being an incorporated municipality, the former only a geographical subdivision of a county. As said in State v. Linn County Court, 44 Mo. 510: 'It has no power by itself to make independent contracts, or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county, and the county to a certain extent controls and acts for it.' That the framers of the Constitution intended to require the assent of two-thirds of all the qualified voters of a 'county, city or town,' as a prerequisite to a subscription to a railroad or other company, and did not intend the same thing with regard to townships, seems almost absurd. It was undoubtedly supposed that every case was provided for. The 13th section of article 11 declared that the credit of the state should not be given or used in aid of corporations; the 14th section then imposes the restriction referred to with regard to counties, cities and towns. This specification embraced every political organization which could be supposed capable of making a subscription. To contend that the mere subdivision of counties into townships enabled the legislature to defeat the constitutional provision, is to ignore the manifest intention and spirit of that instrument. It cannot be possible that it was intended to restrict the legislature as to counties, and not to restrict it as to mere sectional portions of

26—92 U. S. 569.

counties. Had counties alone been mentioned, there might have been no restrictions as to cities and towns; because they are separate and distinct organizations, corporate in character, and often clothed with legislative functions. But in Missouri, in 1865, when the Constitution was adopted, a township had no corporate character; but as before stated was a mere geographical section of a county, partitioned off for purposes of local convenience in the matter of elections and a few other things. They had no power to act as corporate bodies. If the legislature could clothe these geographical portions of a county with power to subscribe to stock companies at all, it certainly could not set at naught the constitutional requirement of the people's consent thereto."

In view of the prevailing disposition to incur indebtedness constitutional limitations have been adopted in nearly every state of the Union and specific grants of authority are always to be construed and applied as limited by these provisions if they are to be found. The usual limitations are those which prohibit the incurring of indebtedness or the issue of negotiable securities in excess of a certain amount or per cent of an assessed valuation of property; except when authorized by a vote of the electors or except for a certain designated purpose or those relating to the form of the grant of authority. These questions will be discussed at length in the immediately following sections.[27]

27—Ogden v. Daviess, 102 U. S. 634.

C. B. & Q. R. R. Co. v. Otoe County, 83 U. S. 667. In the absence of a constitutional provision the state legislature has the right to grant unconditional power to county officials to issue bonds.

Board of Com'rs of Seward County (Kan.) v. Aetna Life Ins. Co., 90 Fed. 222, 32 C. C. A. 585. The power to incur indebtedness or issue bonds on behalf of the people of the state or any of its political subdivisions are essentially legislative powers which the legislature itself can exercise or delegate to municipal or quasi municipal corporations to be exercised freely except as limited by the Constitution of the state.

Van Cleve v. Passaic Valley Sew-

§ 86. De facto corporate existence necessary.

A public corporation must have, at least, a de facto existence that negotiable bonds issued by it under constitutional or statutory authority, be valid. Bonds issued by corporations organized under a law afterwards held void or unconstitutional are not regarded as legal outstanding obligations because their maker as an artificial person could not and therefore did not exist; this rule, however, does not necessarily invalidate, in the hands of bona fide purchasers, bonds issued for a public purpose. Such obligations may be enforceable against legal organizations embracing the territory and people voting upon or authorizing the issue of the bonds originally.[28]

§ 87. The power to issue negotiable securities; when implied.

In one of the immediately preceding sections, the rule was stated that the power to issue negotiable securities must always be expressly given and cannot be implied.[29]

erage Com'rs (N. J.), 58 Atl. 571, Art. 4, Sec. 6, Par. 4, New Jersey Const. relative to the creation of debt exceeding $100,000 without the previous approval of the people at a general election has no application to municipal indebtedness.

Wharton v. City of Greensboro (N. C.), 62 S. E. 740. The only limitation upon the indebtedness of municipal corporations is to be found in Revisal 1905, Sec. 2977 (1908).

Riley v. Carrico (Okla.), 110 Pac. 738, Const. Art. 16, providing for the establishment of a department of highways is not affected by Art. 10, Sec. 26, limiting the indebtedness of cities and counties.

Bennett v. Town of Nebagamon (Wis.), 99 N. W. 1039.

28—Aller v. Town of Cameron, 3 Dill. 198. But a town may be estopped from setting up as a defense that it was never incorporated. School Dist. No. 25 v. State, 29 Kans. 57; Oswego Township v. Anderson, 44 Kans. 214, 24 Pac. 486; Riley v. Garfield Township, 54 Kans. 463; Morton v. Carlin, 51 Nebr. 202, 70 N. W. 966.

Ruohs v. Athens, 91 Tenn. 20. Bonds issued by a municipality whose charter is void are even in the hands of a bona fide holder unenforceable. See also Norton v. Shelby County, 118 U. S. 425; Secs. 266 post, 18 et seq. and 60 ante.

29—Secs. 84 et seq. ante.

The reasons for this rule have been sufficiently given and attention called to many decisions discussing and elucidating these reasons. The principal one being that where an ordinary indebtedness is incurred, the equitable considerations can always be considered that may exist between the parties and their right to any modification, abatement or recission, in whole or in part, that may be just and proper in consequence of illegality or a disregard or a betrayal of the public interests. When, on the other hand, negotiable securities have been issued, these in the hands of a bona fide holder for value received are unimpeachable and not subject to the equities that under other circumstances might be considered as between the parties for the purpose of determining their respective rights and liabilities.[30]

It was also stated that some modifications of this doctrine exist. There is some confusion in the early cases and the subject can best, perhaps, be clarified by stating the conditions which some courts have held, warrant the existence of an implied power. The implied power to issue negotiable securities has been claimed under the following circumstances: (1) Where there has been the grant of an express power to borrow money or to contract indebtedness, and: (2) where the power has been claimed to arise under the grant of express authority to subscribe for the stock of a railroad company; to construct public buildings, to improve highways or make other necessary improvements or in general to execute some necessary and proper power directly given or impliedly existing.

The early cases in the Supreme Court of the United States held almost without exception that where authority was given to borrow money or to contract indebted-

30—Police Jury v. Britton, 15 Wall. (U. S.) 566; Merrill v. Town of Monticello, 138 U. S. 673; City of Nashville v. Ray, 19 Wall. (U. S.) 468. See also authorities cited generally in this and the following section and Secs. 84 et seq. ante.

ness for any public purpose that such a grant conferred the power to issue negotiable securities as the usual and ordinary way of accomplishing the objects of the grant. Corporate bonds bearing interest and negotiable by delivery being the usual and appropriate securities for engaging municipal credit.[31]

These decisions have all been expressly or substantially over-ruled by later cases in the Supreme Court of the United States, notably those of Merrill v. Monticello [32] and City of Brenham v. German American Bank.[33] In the first case cited, Mr. Justice Lamar, in the opinion, said, after reviewing many of the previous decisions of that court: "The logical result of the doctrines announced in the above-cited cases, in our opinion, clearly shows that the bonds sued on in this case are invalid. It does not follow that because the town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case all that can be contended for is that the town had the power to contract a loan, under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality." * * *

31—Gelpcke v. Dubuque, 1 Wall. 220; Meyer v. City of Muscatine, 1 Wall. 384; Rogers v. Burlington, 3 Wall. 654; Mitchell v. Burlington, 4 Wall. 270; Milner v. Pensacola, 2 Woods 632; Merrill v. Monticello, 22 Fed. 589, reversed 138 U. S. 678; Bard v. Augusta, 30 Fed. 906; City of Evansville v. Woodbury, et al., 60 Fed. 718.

32—138 U. S. 678.

33—144 U. S. 173.

And in the later case of the City of Brenham v. German American Bank, in the opinion of Mr. Justice Blatchford, three judges dissenting, after again reviewing the previous decisions of the court, commencing with Rogers v. Burlington,[34] it was said: "There is nothing in the charter of the defendant which gives it any power to issue negotiable, interest bearing bonds of the character of those involved in the present case. The only authority in the charter that is relied upon is the power given to borrow, for general purposes, not exceeding $15,000 on the credit of the city. The power given to the defendant by Sec. 4, of Article 11 of the Constitution, the defendant having a population of less than 10,000 inhabitants at the date of its charter and at the date of the ordinance, was only the power to levy, assess and collect an annual tax to defray the current expenses of its local government, not exceeding for any one year, one-fourth of one per cent.

"That in exercising its power to borrow not exceeding $15,000 for general purposes, the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper, is quite clear; but that does not cover the right to issue negotiable paper or bonds, unimpeachable in the hands of a bona fide holder. * * *

"The confining of the power in the present case of borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of 10 per centum per annum, semi-annually, for at least ten years. It is easy for the legislature to confer

34—3 Wall. (U. S.) 654.

upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case." * * *

"We, therefore, must regard the cases of Rogers v. Burlington and Mitchell v. Burlington as overruled in the particular referred to by latter cases in this court." * * *

There were cases decided prior to the Merrill v. Monticello case and which are cited in the note but these two and especially the Brenham decision expressly overruling prior decisions clearly stand as the authority at the present time.[35]

State cases holding to the doctrine of the existence of an implied power to issue negotiable securities where there has been an express grant of the power to borrow money have followed from time to time quite universally the decisions of the Supreme Court of the United States.[36]

Though there are some authorities to the contrary, the

35—Claiborne County v. Brooks, 111 U. S. 400; Hitchcock v. Galveston, 96 U. S. 341; Evansville v. Dennett, 161 U. S. 135; Whitewell v. Pulaski County, 2 Dill. 249; Ashuelot National Bank of Keene v. School District No. 7, 56 Fed. 197; Lehman v. City of San Diego, 73 Fed. 105, affirmed 83 Fed. 669 C. C. A.; Rathbone v. Kiowa County Com'rs, 73 Fed. 395, 83 Fed. 125; Village of Oquawka v. Graves, 82 Fed. 568; German Insurance Company v. County of Manning (Ia.), 95 Fed. 597. See also cases cited, Secs. 84 and 85, ante.

36—Mayor etc. of Griffin v. Inman, 57 Ga. 370; Witler v. Board of Supervisors (Iowa), 83 N. W. 1041; Vicksburg v. Lombard, 51 Miss. 111; New Orleans, etc. R. R. Co. v. McDonald, 53 Miss. 240; Hubbard v. Sadler, 104 N. Y. 223; Tucker v. City of Raleigh, 75 N. C. 267; Com'rs of Craven v. Atlantic, etc. R. R. Co., 77 N. C. 289; Commonwealth v. Pittsburgh, 34 Pa. St. 496.

Williamsport v. Commonwealth, 84 Pa. St. 487. Where a municipality has lawfully created a debt, it has the implied power unless restrained by its charter or a statute to evidence the same by a bill, bond, note or other incident. The power to contract the debt implies the right to issue the proper acknowledgment thereof.

sound doctrine unquestionably is that now prevailing without exception in the Federal courts.[37]

§ 88. The power as implied from the grant of other powers.

The existence of an implied power to issue negotiable securities following from an express or implied authority to levy specific taxes; to subscribe for stock to railroad corporations, to construct public buildings or to improve highways or make other necessary improvements or to carry out other powers directly or impliedly granted, depends largely upon the determination of whether without an issue of negotiable securities the grant of the power would be entirely nugatory.

The proposition involves, as will be noted, the question of whether a strict or a liberal rule of construction of corporate powers is to be followed by the courts.[38]

Again, the earlier cases were inclined, following undoubtedly the earlier rulings of the Supreme Court of the United States, to adopt a more liberal rule of construction and to hold that the power would be implied even when not indispensably and absolutely necessary to the exercise of other powers granted.[39]

37—Town of Klamath Falls v. Sachs (Ore.), 57 Pac. 329; Heins v. Lincoln, 102 Iowa 69, 71 N. W. 189; Goodnow v. Com'rs of Ramsey County, 11 Minn. 31. See also cases cited in the following section.

38—Hill v. Memphis, 134 U. S. 198; Witte v. Board of Supr's of Polk County (Ia.), 83 N. W. 1041; Swanson v. City of Ottumwa (Ia.), 106 N. W. 9; Nolan County v. State (Tex.), 17 S. W. 823.

39—To levy taxes. New Albany Bank v. Danville, 60 Ind. 504.

To subscribe for railroad stock. Curtis v. County of Butler, 24 How. 435; Seybert v. City of Pittsburg, 1 Wall. 272; Rogers v. Burlington, 3 Wall. 654; Van Hoffman v. City of Quincy, 4 Wall. 435; Evansville v. Dennett, 73 Fed. 966; Henderson v. Jackson County, 2 McCrary C. C. 615; City of Evansville v. Woodbury, et al. 60 Fed. 718; Commonwealth v. Town of Williamstown (Mass.), 30 N. E. 472; Commonwealth v. Pittsburg, 34 Pa. St. 496; Adams v. Lawrence County (Pa.), 2 Pittsb. 60; Bushnell v. Beloit, 10 Wis. 195.

To construct public buildings. Lynde v. The County, 16 Wall. 6;

The later decisions and the rule at the present time seems to be as established both by the Federal and the state authorities that an implied power to issue a negotiable security does not exist except where its exercise is indispensably and absolutely necessary to the exercise of powers granted, or stated in another way, where without an issue of negotiable securities the power granted would be entirely nugatory or incapable of being exercised.[40]

Board of County Com'rs v. Lewis, 133 U. S. 198; Holmes v. Shreveport, 31 Fed. 113; State v. Babcock, 23 Nebr. 278, 41 N. W. 155.

To make public improvements. Hubbard v. Sadler, 104 N. Y. 223; Ghiglione v. Marsh, 48 N. Y. S. 603. The town was here authorized to borrow money to improve its highway and to issue "obligations."

To exercise miscellaneous powers. Doty v. Ellsbree, 11 Kan. 209; Buffalo etc. Co. v. School District No. 4 (Kan.), 54 Pac. 115; New York & R. Cement Co. v. Davis, 71 N. Y. S. 5.

Authority given to purchase water works and pay for the same by the issue of bonds or other obligations. City of Mineral Wells v. Darby (Tex.), 51 S. W. 35; Bennett v. Town of Nebagamon (Wis.), 99 N. W 1039; Hyatt v. Williams (Calif.), 84 Pac. 41.

40—To levy taxes. Ogden v. County of Daviess, 102 U. S. 634; Wells v. Supervisors, 102 U. S. 625; Katzenberger v. Aberdeen, 121 U. S. 172; Middleport v. Aetna Life Ins. Co., 82 Ill. 562.

To subscribe for railroad stock. Town of Concord v. Robinson, 7 Sup. Ct. 937; Katzenberger v. City of Aberdeen, 7 Sup. Ct. 947; Kelly v. Town of Milan, 8 Sup. Ct. 1101; Norton v. Town of Dyersburg, 8 Sup. Ct. 1111; Hill v. City of Memphis, 134 U. S. 198; Wells v. Superv'rs, 102 U. S. 625; Lewis v. City of Shreveport, 108 U. S. 282; Concord v. Robinson, 121 U. S. 165; Young v. Clarendon Twp., 132 U. S. 340; Hill v. Memphis, 134 U. S. 198; Swanson v. City of Ottumwa (Ia.), 106 N. W. 9; Wittkowsky v. Board of Com'rs of Jackson County, 63 S. E. 275; Campbell v. Knoxville, etc. R. R. Co. (Tenn.), 6 Coldw. 598; Milan Taxpayers v. Tenn. Cent. R. R. Co., 11 Lea (Tenn.), 329.

To construct public buildings. Claiborne County v. Brooks, 111 U. S. 400. The doctrine of the charge (of the court below) is that the power of a county to erect a courthouse involves and implies the power to contract for its erection, and the power to contract involves and implies the power to execute notes, bonds, and other commercial paper as evidence or security for the contract; or, to state it according to its legitimate conclusion and result, it is this, that whenever a county has power to contract for the performance of any work or for any other thing, it has incidental power to issue commercial paper in payment thereof; that the one power implies the other. It being clear

If any criticism of the above rule were to be made, it is that it is according to the trend of court decision too liberal. As said by the Supreme Court of the United States, "It is easy for the legislature to confer upon a

that the county of Claiborne had power to erect a courthouse the court below held that this involved an implied power to contract out the work, and to issue negotiable bonds of a commercial character in payment thereof. We cannot concur in this view.

Our opinion is, that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes, to defray all public charges created, whether they are or are not formally invested with corporate capacity, have not authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it.

Gause v. Clarksville, 5 Dill. 165. It is a non sequitur, as applied to municipal and public corporations, to affirm that this power to create debt implies the power to give a negotiable bill, bond or note therefor, which shall be invested with all the incidents of negotiability. Such an implied power is denied in England even as to private corporations organized for pecuniary profit (other than banking or trading corporations), and this demonstrates that the alleged implication of such a power in municipal corporations is neither logically or legally sound. But if it be conceded that, as respects private corporations, the American doctrine is otherwise, and that is rightly so, still it does not follow that the same rule does not apply, or ought to apply, to municipal corporations. They are not created for trading, commercial, or business purposes. Private corporations are more vigilant of their interests than it is possible for municipal corporations to be. The latter are in their nature governmental agencies, having in general but one resource with which to meet their liabilities and that is by taxation, and it is upon this resource that creditors must be taken to rely. The frauds such a doctrine will enable unscrupulous officers successfully to practice, ought to weigh with decisive force against its unnecessary judicial entertainment.

Ashuelot National Bank of Keene v. School Dist. No. 7, 56 Fed. 197. Authority to issue negotiable bonds is not to be implied from authority to borrow money for the purpose of erecting and furnishing schoolhouses. Brown v. City of Lakeland (Fla.), 54 So. 716.

Witter v. Board of Superv'rs of Polk County (Ia.), 83 N. W. 1041. Authority to borrow money for the erection of public buildings and to issue bonds for such indebtedness confers no power, express or implied to issue negotiable bonds for a debt incurred in the purchase of a site for a courthouse. Rushe v. Town of Hyattsville (Md.), 81 Atl. 278; Richardson v. McReynolds (Mo.), 21 S. W. 901; State v. School

municipality when it is constitutional to do so, the power to issue negotiable bonds."[41]

§ 89. Power to issue "negotiable" bonds.

Statutory authority to issue bonds for any purpose authorized or to issue refunding bonds in place of those falling due contemplates and by necessary implication authorizes the issue of negotiable securities; since negotiability is the usual and the valuable feature of the bonds of public corporations as well as the usual and appropriate form of evidences of indebtedness.[42] This question will be considered later in the chapter relating to negotiability and bona fide holders of public securities.[43]

District, 16 Nebr. 182; Waxahachie v. Brown, 67 Tex. 519, 4 S. W. 207; Stratton v. Com'rs Court of Kinney Co. (Tex.), 137 S. W. 1170.

To make public improvements. Hitchcock v. Galveston, 96 U. S. 341; City of San Diego v. Potter (Calif.), 95 Pac. 46; Hansard v. Green (Wash.), 103 Pac. 40. To erect water works.

To exercise miscellaneous powers. Bissell v. Kankakee, 64 Ill. 249; Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660; Wilson v. Shreveport, 29 La. Ann. 673; Sykes v. Columbus, 55 Miss. 115; Neacy v. City of Milwaukee (Wis.), 126 N. W. 8.

41—City of Brenham v. German American Bank, 144 U. S. 173.

42—County of Carter v. Sinton, 120 U. S. 517. The county of Carter was authorized to borrow money and to issue its bonds therefor to pay its subscription for the stock of the railroad company. This it was held was sufficient authority for the issue of negotiable bonds. City of Cadillac v. Woonsocket Institute for Savings, 58 Fed. 935 C. C. A.

Ashley v. Board of Superv'rs of Presque Isle County, 60 Fed. 55 C. C. A. The general power to issue bonds must be taken to authorize bonds in the usual form of commercial obligations. That usual form embodies a contract and obligation negotiable in its form. West Plains Township v. Sage et al., 79 Fed. 943.

Howard v. Kiowa County, 73 Fed. 406. Statutory power to issue bonds includes power to make them negotiable unless restricted by positive enactment. German Insurance Company v. City of Manning, 78 Fed. 900; D'Esterre v. City of Brooklyn, 90 Fed. 586; Haeussler v. City of St. Louis (Mo.), 103 S. W. 1034; Nalle v. City of Austin (Tex.), 22 S. W. 668; Jennings Banking & Trust Co. v. City of Jefferson (Tex.), 70 S. W. 105.

43—See Chap. X, post.

§ 90. General and special laws.

In a previous section [44] attention was directed to the existence of constitutional provisions to be found in many of the states prohibiting the grant of corporate powers by special laws. In many cases the legal right of a subordinate public corporation to issue negotiable securities will depend upon the character of the law granting the authority as a general or special act. If a general law the authority will not be denied.[45]

44—Sec. 33 ante.

45—Read v. Plattsmouth, 107 U. S. 568. The language of the Constitution, forbidding special legislation of that description, evidently refers to grants of authority to be exercised by the body itself and in the future, and a consideration of the evil intended to be remedied by the prohibition will confine it to grants of that character, and will not include a statute like that now under discussion. Here the power of the legislative department of the State is directly exercised upon the transaction itself, and upon a matter clearly within the scope of its authority. It is not a special act conferring corporate power; it is merely a special act taking away from the corporation the power to interpose an unconscionable defense against a just claim, and to avoid an obligation to pay an equivalent for public benefits, which it has continued to enjoy.

Waite v. City of Santa Cruz, 184 U. S. 302. Legislation for all cities of the state except those of the first-class, namely, Act of March 15, 1883, as amended March 1, 1893, relative to refunding outstanding bonded indebtedness, is general, affirming 75 Fed. 967, and reversing 98 Fed. 387. Luling v. Racine, 1 Biss. 314.

Board of Comm'rs of Seward County v. Aetna Life Ins. Co., 90 Fed. 222, construing Kansas Laws 1893, c. 114.

Brattleboro Savings Bank v. Board of Trustees, 98 Fed. 524, 106 Fed. 986. A township is not a corporation within the meaning of Const. Art. 13, Sec. 1, providing that the legislature shall pass no special act conferring corporate powers and an act therefore authorizing a township to issue bonds is valid. Forman v. Hair (Ala.), 43 So. 827.

Farmer v. Town of Thompson (Ga.), 65 S. E. 180. Acts 1907, page 944, providing for the issuance of bonds for the building and equiping of schoolhouses not unconstitutional.

Boise City National Bank v. Boise City (Ida.), 100 Pac. 93, construing laws of 1905, p. 297, which provide for the issue of bonds for street improvements, etc., and holding it a general law and further not applicable to cities incorporated under special charters.

Emmett Irrigation District v. Shane (Ida.), 113 Pac. 444. Revis.

No universal rule can be stated which will enable one to determine whether a particular grant of authority is special or general in its nature. The line of construction adopted by a particular state court will determine this and cases involving the question raised in this section

Codes 1905, Secs. 2401, 2402, 2403, relative to the issue of bonds by irrigation districts do not violate Const. Art. 3, Sec. 19.

Kucera v. West Chicago Park Comm'rs, 221 Ill. 488, 77 N. E. 912, Laws of 1905, p. 340, relative to power of public park commissioners to issue bonds, held not special under Const. Art. 4, Sec. 22.

City of Belleville v. Wells (Kans.), 88 Pac. 47. Laws of 1905, c. 101 do not violate Const. Art. 12, Sec. 5, declaring that provision shall be made by general law as to the power of counties to borrow money.

State v. City of Lawrence (Kans.), 100 Pac. 485. Laws of 1870, c. 21, not a special act.

Revell v. City of Annapolis (Md.), 31 Atl. 695. Act of 1894, c. 620, authorizing the issue of bonds to raise money for a public school building held general. Seward v. Revere Water Co. (Mass.), 87 N. E. 749.

Kaiser v. Campbell (Minn.), 96 N. W. 916. Laws of 1903, c. 364, held special legislation.

Le Tourneau v. Hugo (Minn.), 97 N. W. 115. General Laws 1901, c. 75, relative to the construction of bridges by cities having a population of more than 50,000 and the issuance of bonds not special legislation.

State v. Rogers (Minn.), 100 N. W. 659. Laws of 1903, c. 83, authorizing cities having a population of 50,000 or upwards to issue bonds for the construction of an armory held general.

Wall v. St. Louis County (Minn.), 117 N. W. 611. General Laws of 1907, c. 130 not unconstitutional as a special legislation. The financial condition of counties as shown by the relation between bonded debt and assessed valuation being a proper basis for classification with reference to increase of indebtedness.

Farwell v. City of Minneapolis (Minn.), 117 N. W. 422. General Laws of 1907, c. 52, providing for the issuance of bonds by cities of 50,000 or more not unconstitutional.

State v. Ruhe (Nev.), 52 Pac. 274. Act of 1897, p. 50, incorporating the city of Reno not unconstitutional.

State v. Lytton (Nev.), 99 Pac. 855. Laws of 1907, c. 139, authorizing the construction of a courthouse and jail and the issue of bonds, held constitutional.

Herman v. Town of Guttenberg (N. J.), 44 Atl. 758. Laws of 1898, c. 40, held general.

Dickinson v. Board of Chosen Freeholders of Hudson County (N. J.), 58 Atl. 182. Act. of March 22, 1901, not special.

State v. City of Toledo (Ohio), 26 N. E. 1061. Act of Jan. 22, 1889, authorizing cities of the third grade of the first class to borrow money and issue bonds for supplying such cities and their citizens

will be found in this and the immediately preceding note.[46]

with natural gas held not a special act conferring corporate powers.

Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270. Laws of 1893, c. 311, granting cities of over 3,000 population operating under special charters to issue bonds for the improvement of streets and parks, not special within Const. Art. 4, Sec. 31.

Appleton Water Works Company v. City of Appleton (Wis.), 93 N. W. 262. Revis. Stats. of 1898, Sec. 926, authorizing issuance of bonds for water works is a general law.

46—In the following cases the grants of authority were held special and, therefore, invalid.

School District v. Insurance Company (Nebr.), 103 U. S. 707. An act authorizing school district No. 56 of Richardson County to issue bonds, etc., etc.

Sherman County v. Simons, 109 U. S. 735. The constitutional inhibition is not infringed by the passage of an act authorizing a county which was already indebted to issue its bonds for such indebtedness. City of Huron v. Second Ward Savings Bank, 86 Fed. 272.

City Council of Montgomery v. Reese (Ala.), 43 So. 116. Act of Sept. 26, 1903, authorizing the city of Montgomery to refund its bonded indebtedness, held unconstitutional. Dougherty County v. Boyt, 71 Ga. 484.

Wiggin v. City of Lewiston (Ida.), 69 Pac. 286. Act held special but authorized by Const. Art. 11, Secs. 2 and 3. School City of Rushville v. Hayes (Ind.), 70 N. E. 134. Acts 1903, p. 347; Anderson v. Board of Comm'rs of Cloud County (Kan.), 95 Pac. 583. Laws of 1907, c. 72; State v. Coffrey (La.), 22 So. 1008. Act No. 90 of 1896.

Powell v. Town of Providence (La.), 53 So. 429. Act No. 236, 1908, authorizing the town of Providence to issue bonds, held special.

Hetland v. Board of Comm'rs of Norman County (Minn.), 95 N. W. 305. General Laws 1903, c. 133, authorizing county comm'rs of certain counties to issue bonds, held special, the classification adopted being on an arbitrary and improper basis.

Clegg v. Richardson County School District, 8 Nebr. 178. Nebraska Act of 1875, c. 281, held special.

State v. Trenton, 42 N. J. L. 86. A statute conferring upon certain cities power to issue refunding bonds held special and therefore void.

City of Cincinnati v. Trustees of City Hospital (Ohio), 64 N. E. 420. An act authorizing the issue of bonds confers a "corporate power" within Const. Art. 13, Sec. 1, and is therefore, special and invalid.

Terry v. King County (Wash.), 86 Pac. 210. Const. Art. 2, Sec. 28, prohibiting the passage of private or special laws for the grant of corporate powers applied to municipal as well as private corporations.

Burnham v. City of Milwaukee (Wis), 10 N. W. 1018. Laws of 1897, c. 288, held special legislation and therefore void.

§ 91. Rules of construction.

In determining the force of a statutory or constitutional provision, either granting or limiting the power of a public corporation to issue negotiable securities, the ordinary rules of statutory construction and interpretation must be applied and also rules which are applied to these provisions considered independently as dealing with the subject in hand.

While the power to authorize the incurring of indebtedness or the issuance of securities is a legislative one, it must be exercised at all times subject to the paramount and organic law of a state, viz: the Constitution.[47]

Necessarily the reader must refer to general works on the subject of statutory interpretation for full discussion but a few principles will be stated as they have particularly arisen in connection with an issue of negotiable securities. Not only the intent of the legislature but the effect of the law must be considered and determined, not from a single clause but from the entire body of the act. It must be construed with reference to the subject matter contemplated in the act as a whole, by the legislature and not so as to allow its manifest purpose and design to be defeated by denying the use of means through which the main object could only be accomplished.[48]

47—Hill v. Memphis, 134 U. S. 198; Lewis v. Pima County, 155 U. S. 54; Aetna Life Insurance Company v. Pleasant Township, 62 Fed. 718, affirming 53 Fed. 214; Holton v. City of Camilla (Ga.), 68 S. E. 472.

Wulf v. Kansas City, 94 Pac. 207. Laws of 1907, c. 115, requiring the maintenance of a system of parks in cities of more than 50,000 inhabitants not unconstitutional on the ground of an invalid delegation of power of the park commissioners.

Ellis v. Trustees of Graded School of Oxford (N. C.), 72 S. E. 2; Cleveland v. Calvert (S. C.), 31 S. E. 871; Wood v. Ross (S. C.), 67 S. E. 449.

48—Moran v. Miami County Comm'rs, 2 Black 722.

Loeb v. Trustees of Columbia Twp., 179 U. S. 472. But as the court said in this case: "As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so one provision of a section may be in-

And further, all statutes in pari materia are to be read and construed together as if they formed a part of the same statute and were enacted at the same time.[49] A statute is not to be pronounced void unless its repugnancy to the Constitution be clear and that conclusion inevitable, every doubt is to be resolved in support of the validity of the enactment.[50]

The rule of strict construction is applied not only because the grant of authority is one affecting a public corporation and it will be remembered that the rule of strict construction invariably applies to their powers,[51] but also because it is the grant of authority to exercise an extraordinary power and one which results in the placing of a burden on the taxpayer.[52]

valid by its not conforming to the constitution, while all of the other provisions may be subject to no constitutional infirmity; one part may stand while the other will fall unless the two are so connected or dependent on each other in subject, matter, meaning or purpose that the good cannot remain without the bad.'' Town of Washington v. Coler, 51 Fed. 362 C. C. A.

Corning v. Board of Comm'rs of Mead County (Kan.), 102 Fed. 57. If the meaning of a word in a statute is doubtful a practical construction should be given to it. City of South St. Paul v. Lamprecht Bros., 88 Fed. 449 C. C. A.

Epping v. City of Columbus (Ga.), 43 S. E. 803. Constitutions are to be construed ordinarily in the sense the words convey to the popular mind.

Hettinger v. Good Road District No. 1, etc. (Ida.), 113 Pac. 721. The invalidity of one section where separable does not affect the validity of the remainder of an act.

49—City of Pierre v. Dunscomb, 106 Fed. 611; Red River Furnace Company v. Tennessee Central R. R. Co. (Tenn.), 87 S. W. 1016.

50—Pine Grove Township v. Talcott, 19 Wall. 66; Town of Darlington v. Atlantic Trust Company, 68 Fed. 849 C. C. A.

51—Daviess County Court v. Howard, 13 Bush (Ky.) 101.

State ex rel. Knollman v. King (La.), 33 So. 776. An act authorizing cities to borrow money in cases of emergency is not retroactive so as to validate a contract made by a city anticipating its revenues prior to the passage of such act.

Weston v. Hancock County (Miss.), 54 So. 307. The rule does not apply, however, to the manner of the exercise of the power. Graves v. Moore County Comm'rs (N. C.), 47 S. E. 134; Robertson v. Breedlove, 61 Tex. 316; see, also, Secs. 44 and 45 ante.

52—Kumpe v. Bynum (Ala.), 48 So. 55; Blanding v. Burr, 13 Calif. 343; Dunbar v. Board of Comm'rs

The object especially of the Federal courts as declared by them repeatedly has been and is to afford protection to bona fide holders of negotiable securities and to prevent through alleged technicalities their dishonor, for as said in one case: "Corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind and that they cannot by their representation or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced," but they have as frequently held that an act giving special privileges must be construed strictly that in case a word or sentence is capable of two meanings, a construction must be given favorable to the public.[53]

Mandatory words and provisions are generally construed as such when they involve the grant of the power to levy taxes or make other provisions for the payment of obligations.[54]

On this point the Supreme Court of the United States in an early case[55] where a statute of Illinois declared that "The board of supervisors under township organization in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, may if deemed advisable levy a special tax not to exceed in any one year one per cent upon the taxable property of any such county" held this language though

of Canyon County (Ida.), 49 Pac. 409.

Cincinnati, etc. Ry. Co. v. People, 206 Ill. 387, 69 N. E. 39. But a limitation upon the incurring of indebtedness would not affect power to levy a tax. State v. Moore (Nebr.), 63 N. W. 130; but, see, State v. Tampa Water Works Company (Fla.), 47 So. 358; Appleton Water Works Co. v. City of Appleton (Wis.), 93 N. W. 262; Maxey v. City of Oshkosh (Wis.), 128 N. W. 899.

53—Moran v. Miami County Comm'rs, 2 Black 722; Hill v. Memphis, 134 U. S. 198.

54—Supv'rs v. United States ex rel. 4 Wall. 435; City of Galena v. Amy, 5 Wall. 705; Tipton v. City of Shelbyville (Ky.), 107 S. W. 810; see, also, Secs. 362, 370 and 377, post.

55—Supv'rs v. United States ex rel. 4 Wall. 435.

permissive in form also peremptory, the court said: "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to evoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.' The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category."

When used in connection with the grant of a power to issue negotiable securities the same rule of strict construction does not apply and in some cases the words have been interpreted as being optional in their nature rather than obligatory.[56]

A grant of power is not derived from constitutional negative or prohibitory provisions and in all cases the courts have held that legislative authority is necessary to confer power. It is not to be assumed that because the constitution prohibits the issuance of negotiable securities except under certain conditions that there is thereby granted affirmatively the authority to issue un-

56—Town of Queensbury v. Culver, 19 Wall. 83; Williams v. Duanesburgh, 66 N. Y. 129.

der the existence of the conditions specified. There must be found an independent grant of authority.[57]

In conflict with a general law, a special act must give way,[58] but it has been held in some cases that where a general law conflicts with a special charter provision previously passed that the charter provision prevails and the authority to issue securities will be derived from the special grant.[59]

An act enlarging the legal authority of public corporations to issue negotiable securities supersedes prior acts of a narrower scope.[60]

The usual rule obtains in respect to the effect of repeal-

57—Allen v. Louisiana, 103 U. S. 80.

Kelly v. Milan, 127 U. S. 139. The enactments in that clause are entirely inhibitory and negative in their character. They do not confer any authority. Norton v. Board of Comm'rs, etc., 129 U. S. 479; Fidelity Trust, etc. Co. v. Lawrence County (Tenn.), 92 Fed. 576; Dudley v. Board of Comm'rs of Lake County (Colo.), 80 Fed. 672, C. C. A.; Robertson v. City of Staunton (Va.), 51 S. E. 178; see, also, Thompson v. Lee County, 3 Wall. 327.

58—Fidelity Trust, etc. Co. v. Lawrence County (Tenn.), 92 Fed. 570. A constitutional provision repeals by implication contrary statutory provisions. Hampton v. Hickey (Ark.), 114 S. W. 707; Cleveland v. Calvert (S. C.), 31 S. E. 871; Thornburgh v. City of Tyler (Tex.), 43 S. W. 1054.

But see Covington & C. Bridge Company v. Davidson (Ky.), 102 S. W. 339, where it was held that Const. Sec. 157, relative to the incurring of debts by municipalities did not limit the power of the general assembly in adjusting taxation.

59—City of Huron v. Second Ward Savings Bank, 86 Fed. 272; Law v. City and County of San Francisco (Calif), 77 Pac. 1014; City of San Diego v. Potter (Calif.), 95 Pac. 146; Brook v. City of Oakland (Calif.), 117 Pac. 433; Reed v. City of Cedar Rapids (Ia.), 113 N. W. 773; Calvert v. Brock, 142 Ky. 833, 135 S. W. 293; American Electric Co. v. City of Waseca (Minn.), 113 N. W. 899; Love v. Holmes (Miss.), 44 So. 835; Cottrell v. Town of Lenoir (N. C.), 61 S. E. 599; City of Eugene v. Willamette Valley (Ore.), 97 817; but, see, Choate v. City of Buffalo (N. Y.), 60 N. E. 1108; Wharton v. City of Greensboro (N. C.), 59 S. E. 1043.

60—City of Pierre v. Dunscomb, 106 Fed. 611; Clark v. City of Los Angeles (Calif.), 116 Pac. 722; Hampton v. Hickey (Ark.), 114 S. W. 707; Schmitz v. Zeh (Minn.), 97 N. W. 1049; Evenson v. Demann (Minn.), 123 N. W. 930; Mittag v. Borough of Park Ridge (N. J.), 38 Atl. 750; Mauldin v. City Council of Greensville (S. C.), 11 S. E.

ing acts, viz: that repeals by implication are not favored by the courts.[61]

The power of public corporations to issue in specific instances may also be denied because the act granting authority contravenes a constitutional provision relative to the passage of special legislation, a subject considered in the immediately preceding section or some provision relative to, the passage of the act; its form as involving the subject of its title or further because violating some principle relative to the classification of cities or towns. Some cases on these points will be cited in the note and others found in subsequent sections discussing the subject of the validity of general legislation.[62]

The legislature of Kansas passed a general law pro-

434; Todd v. City of Laurens (S. C.), 26 S. E. 682; Wood v. Rose (S. C.), 67 S. E. 449.

61—Corning v. Board of Comm'rs of Mead County (Kans.), 102 Fed. 57 C. C. A.; Stone v. City of Chicago, 207 Ill. 492, 69 N. E. 970; State v. Kansas City, 83 Kans. 431, 111 Pac. 493; Tillotson v. City of Saginaw, 94 Mich. 240, 54 N. W. 162; Beck v. City of St. Paul (Minn.), 92 N. W. 328; State v. Benton, 25 Nebr. 756, 71 N. W. 953; see, also, Sec. 442, post.

62—Forman v. Hair (Ala.), 43 So. 827; People v. Brislin, 80 Ill. 423.

Baltimore, etc. Ry. Co. v. Pumphrey (Md.), 21 Atl. 559, publication of act.

State v. Ames (Minn.), 91 N. W. 18. Act in question remedial and general legislation.

Beck v. City of St. Paul (Minn.), 92 N. W. 328. Correct classification of cities involved.

Merchants National Bank v. City of East Grand Forks (Minn.), 102 N. W. 703. Validity of act sustained, not embracing more than one subject not expressed in its title.

State ex rel. City of Centralia v. Wilder (Mo.), 109 S. W. 574. Insufficient population may invalidate a bond issue even though the city had assumed the contrary.

State ex rel. City of Chillicothe v. Gordon (Mo.), 135 S. W. 929. Subject of bill as expressed in its title involved.

Foley v. City of Hoboken (N. J.), 38 Atl. 833. Improper classification. Hooker v. Town of Greenville (N. C.), 42 S. E. 141. Act authorizing bonds held unconstitutional having been passed without the recording of the ayes and nays of the House on either the second or third readings.

Giddings v. San Antonio, 47 Tex. 548. Insufficient title. See Sec. 434, et seq., post.

viding that no bonds of any kind shoul be issued by any county, township or school district within one year after the organization of such new county. This has been especially construed in a number of cases.[63]

63—Rathbone v. Board of Com'rs of Kiowa County, 73 Fed. 395. This law prohibits not only the issuance of bonds within the year but also the taking of any of the prescribed preliminary steps. This decision reversed in 83 Fed. 125, where the proviso in favor of Kiowa County as expressed in the law was held valid and in Corning v. Board of Comm'rs of Mead County, 102 Fed. 57, the Act was held not to prohibit taking within the year the preliminary steps.

Sage v. Township, 107 Fed. 383. Bonds issued within a year void and the same is also held in State v. Marlowe (Kans.), 19 Pac. 362.

CHAPTER IV.

LIMITATIONS ON THE POWER TO ISSUE NEGOTIABLE SECURITIES

§ 92. Construction of limiting provisions.

The courts in construing the extent and application of charter, statutory and constitutional limitations upon the power of a public corporation to incur an indebtedness, whether represented by negotiable bonds or other instruments, have constantly in mind the general limitations which should be applied in determining the extent of power attempted to be exercised by them. The strict rule of construction therefore is the one most generally adopted. In this there is a difference between a public and a private corporation. The liberal rule of construction is the one usually adopted by the courts in cases of doubt in dealing with the attempted exercise of corporate powers by a private corporation, because that construction tends to facilitate the promotion of the enterprise, and the courts in such cases always hold that where this can be accomplished through the adoption of the liberal rule of construction it should be done, rather than the contrary one which might lead to the defeat of the enterprise or to the impairment of its success. The fundamental differences between a public and a private corporation necessarily lead the courts to adopt the strict rule of construction as applied to all acts of public organizations. These differences consist in the purpose of organization, source of revenue, and expenditure of funds. Through the strict rule of construction the power to incur indebtedness of whatever character is denied in

cases of doubt. There exists the difficulty already suggested that the indebtedness may be one morally binding upon a community but in excess of the legal limitation or not incurred pursuant to the formal acts required by law. In these cases, the courts, in order to render substantial justice as between the parties, may adopt the less strict rule of construction which will permit the enforcement of a moral obligation.[1]

§ 93. Retroactive effect of limitations.

The retroactive effect of constitutional or statutory provisions limiting the incurring of indebtedness or the powers of public corporations to issue negotiable securities has been the occasion of some controversy. The uniform decision, however, of the courts has been that the adoption of constitutional provisions or the passage of legislation limiting and restricting the power of public corporations in this regard does not render void indebtedness which was valid at the time of the adoption of the limiting constitutional provisions or legislation though the indebtedness may be in excess of the limit as fixed at the later date.[2]

1—See Secs. 31 and 50, ante.

2—Louisville. v. Savings Bank, 104 U. S. 469; Enfield v. Jordan, 119 U. S. 680; County of Ralls v. Douglass, 105 U. S. 728; Scotland County Court v. United States ex rel. Hill, 140 U. S. 41.

Fidelity Trust, etc. Co. v. Lawrence County, 92 Fed. 576, C. C. A. The adoption of a Constitution provision abrogates and annuls all laws inconsistent therewith.

Sibley v. City of Mobile, 3 Woods 535. Legislation affecting a contract obligation lawfully entered into and resulting in the incurring of an indebtedness is inoperative so far as it impairs the contract. City of Ashland v. Culbertson, 103 Ky. 161.

Kansas City v. Wyandotte Gas Co., 9 Kan. App. 325, 61 Pac. 317. The passage of a subsequent law limiting assessments for the purpose of lighting streets and other public places does not authorize a municipality to repudiate a legal contract entered into before the passage of such legislation; State v. Graham, 23 La. Ann. 622; Baird v. Todd, 27 Nebr. 782, 43 N. W. 1143; City of Tiffin v. Griffith (Ohio), 77 N. E. 1075; Lawrence County v. Meade County, 10 S. D. 175; Pleasant Valley Coal Co. v. Salt Lake County

It has also been held that debts created prior to the adoption of a State Constitution are not to be included in determining the indebtedness of a county with reference to the limitation placed upon county indebtedness by the Constitution.[3]

The prevailing rule stated briefly is that all constitutional or statutory limitations are prospective only in their operation and effect and not retroactive. The reason for this rule is apparent.[4]

In Illinois in 1870, a constitutional provision was adopted which prohibited donations and subscriptions in aid of railroads by public corporations with a saving clause applying to subscriptions or aid theretofore voted, but not yet consummated. It was held in a number of cases that donations and subscriptions in aid of railroads voted by municipal corporations under existing laws prior to its adoption were within the saving clause and still obligatory but that obligations assumed could not, after its adoption be enlarged or materially changed either by the action of the people of the municipality or its corporate authorities.[5]

Comm'rs, 15 Utah 97, 48 Pac. 1032; Neal v. Wood County Ct., 43 W. Va. 90.

3—Rollins v. Rio Grande County Com'rs, 90 Fed. 575, citing Lake County v. Rollins, 130 U. S. 662; Wilder v. Rio Grande County Com'rs, 41 Fed. 512; Lake County Com'rs v. Strandley, 24 Colo. 1, 49 Pac. 29; People v. Rio Grande County Com'rs, 11 Colo. App. 124, 52 Pac. 748; Myers v. City of Jeffersonville, 145 Ind. 431, 44 N. E. 452.

4—Town of Concord v. Portsmouth Savings Bank, 92 U. S. 625; County of Calloway v. Foster, 93 U. S. 567; Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; Cass County v. Gillette, 100 U. S. 585; Louisiana v. Taylor, 105 U. S. 454; Howard County v. Paddock, 110 U. S. 384; Christian County Court v. Smith (Ky.), 12 S. W. 134; State v. Town of Clark, 23 Minn. 422; Mittag v. Borough of Park Ridge (N. J.), 38 Atl. 750; Fosdick v. Perrysburg, 14 Ohio St. 472.

5—Town of Concord v. Portsmouth Savings Bank, 92 U. S. 625; Concord v. Robinson, 121 U. S. 165; Middleport v. Aetna Life Insurance Company, 82 Ill. 562; People v. Town of Bishop, 111 Ill. 124; Richeson v. People, 115 Ill. 450; Casey v. People (Ill.), 24 N. E. 570; Hutchinson v. Self, 153 Ill. 542, 39 N. E. 27; see, also, People v. Sup'rs of Town of Gravesend,

§ 94. When self-executing.

Constitutional provisions relative to the incurring of indebtedness may prohibit absolutely and in express terms the assumption or creation of debts in excess of a certain specified amount. These are construed by the courts as self-executing, i. e., no further legislative action is required or necessary to carry them into effect and securities issued in excess of the amount named are ipso facto invalid.[6]

In some of the states there are no constitutional provisions of the character noted in the preceding paragraph but instead are to be found provisions like that in Mississippi.[7] "Provision shall be made by general laws to prevent the abuse by cities, towns and other municipal corporations of their powers of assessment, taxation, borrowing money, and contracting debts," or in Michigan,[8] "The Legislature shall provide by a general law for the incorporation of cities and by a general law for the incorporation of villages, such general laws shall limit their rate of taxation for municipal purposes and restrict their powers of borrowing money and contracting debts."

The courts hold as to these that legislation is necessary to put them into effect, i.e., in the one case, the legislature must determine by positive enactment what is an abuse of the power of contracting debts and in the other fix limits beyond which indebtedness cannot be incurred.[9]

In all cases as already noted in a preceding section, the

154 N. Y. 381, 48 N. E. 813; Falconer v. Buffalo, etc. R. R. Co., 69 N. Y. 491; Nelson v. Haywood County, 11 S. W. 885, 3 Pickle 781.

6—Norton v. Board of Comm'rs of the Tax District of Brownsville, 129 U. S. 479; N. W. Halsey & Co. v. City of Belle Plaine, Iowa, 104 N. W. 494; Robertson v. City of Staunton (Va.), 51 S. E. 178.

7—Art. 4, Sec. 80.

8—Art. 8, Sec. 20, Const. 1908.

9—Dixon County v. Field, 111 U. S. 83; Turner v. City of Hattiesburg (Miss.), 53 So. 681; Turner v. City of Forest (Miss.), 53 So.

courts universally hold that the existence of a constitutional prohibition however worded does not in and of itself confer authority to incur debts or issue negotiable securities.[10]

§ 95. Limitations involving the phrase "current expenditures."

A frequent class of limitations provide that public corporations shall not in any one year expend moneys in excess of the revenues of that year. The questions involved in the use of the phrases "current revenues" and "current expenditures" as used in these limitations upon analysis are logically divided into three classes: (1) Where either expressly or indirectly public corporations are permitted to incur debts in anticipation of their current revenues; (2) where the incurring of indebtedness in excess of current revenues is directly and expressly prohibited by statutory or constitutional provisions or where it is prohibited unless provision for the indebtedness has been made by the making of an appropriation or the levy of a tax, and (3) whether a debt is created by incurring obligations resultant upon and following from the performance of the ordinary duties of public corporations. In connection with the last class, the ancillary question arises of the authority to determine what is a current expense. These classes will be considered in the order named.

§ 96. Anticipation of current revenues.

In some states by direct and express provision public corporations, especially municipal, are permitted to incur indebtedness in anticipation of their current revenues as

684; Reineman v. Covington, etc. Ry. Co., 7 Nebr. 310; Robertson v. Staunton (Va.), 51 S. E. 178.

10—See sec. 91, ante.

may be determined by the action of the proper officials in making up a fiscal budget.[11] Indebtedness incurred under such circumstances is not to be included in any computation for the purpose of ascertaining whether a constitutional or statutory limitation has been exceeded.

§ 97. Expenditures in excess of current revenues; when prohibited.

Many states contain constitutional or statutory provisions prohibiting the public corporations therein named from incurring any indebtedness in excess of the current revenues for the year or prohibiting them from becoming indebted to an amount exceeding in any year the income or revenue provided for such year without special authority from the voters at an election [12] or in excess of sums for which in a lawful manner and within taxing powers provision has been made for their payment.[13] Cases

11—Ala., Art. 11, Sec. 225; Ga., Art. 7, Sec. 7, par 1; Md., Art. 12, Sec. 7; Mo., Art. 9, Sec. 19; N. Y., Art. 8, Sec. 10; S. C., Art. 8, Sec. 7; Va., Art. 8, Sec. 127; Taylor v. Manson (Calif.), 99 Pac. 410.

12—Ala., Art. 12, Sec. 225; Calif., Art. 11, Sec. 18; Idaho, Art. 8, Sec. 3; Ky., Sec. 157; Mo., Art. 10, Secs. 11 and 12; Utah, Art. 14, Sec. 3; Wyo., Art. 16, Sec. 4.

13—Glenn County v. Klemmer (Calif.), 94 Pac. 894; Turney v. Town of Bridgeport (Conn.), 12 Atl. 520; McCord v. City of Jackson (Ga.), 69 S. E. 23; Litz v. Village of West Hammond, 230 Ill. 310, 82 N. E. 634.

Kraus v. Lehman, 84 N. E. 769. Rehearing 83 N. E. 714 denied. City of Logansport v. Jordan (Ind.), 85 N. E. 959; Coombs v. Jefferson Township, Boone County (Ind.), 67 N. E. 274.

Lawrence County v. Lawrence Fiscal Court (Ky.), 113 S. W. 824. Under Const. Sec. 157, it is only necessary that a county shall be able to pay its indebtedness out of its ordinary resources for the year which are reasonably solvent and may fairly be relied upon as the equivalent of cash. Murphy v. Police Jury, St. Mary Parish (La.), 42 So. 979.

Blood v. Beal (Me.), 60 Atl. 427. A loan though temporary in its inception, if carried over into the next municipal years loses its temporary character and becomes a debt of the city within Const. Art. 22, limiting municipal indebtedness to five per cent of the city valuation. Brown v. Inhabitants of Melrose (Mass.), 30 N. E. 87; Webb

construing such constitutional or statutory provisions are noted below.[14]

The purpose of the provisions of the character noted being to prohibit the anticipation of the revenues of future years and to abolish so far as possible a credit system in the administration of public affairs and thereby limit the power of public corporations to extravagantly

Granite, etc. Co. v. City of Worcester (Mass.), 73 N. E. 639; Rogers v. Le Sueur County, 57 Minn. 434, 59 N. W. 488; Küchli v. Minn. Brush Electric Co., 58 Minn. 418, 59 N. W. 1088; Helena Water Works Co. v. City of Helena (Mont.) 78 Pac. 220.

Conner v. City of Nevada (Mo.), 86 S. W. 256. The constitutional prohibition only applies to indebtedness which arises ex contractu.

State v. Weir (Nebr.), 49 N. W. 785 Comp. Stats. of Nebr., c. 18, Art. I, Sec. 34, has no application to the salaries of county officials. F. C. Austin Mfg. Co. v. Colfax County (Nebr.), 93 N. W. 185; Village of Canandaigua v. Hayes, 85 N. Y. S. 488; Lines v. Village of Otego, 91 N. Y. S. 785; City of Mt. Vernon v. State (Ohio), 73 N. E. 515; City of San Antonio v. Tobin (Tex.), 101 S. W. 269; City of Cleburn v. Gutta Percha & Rubber Mfg. Co. (Tex.), 127 S. W. 1072; School District No. 3, etc. v. Western Tube Company (Wyo.), 80 Pac. 155.

14—Audit Company of New York v. City of Louisville (Ky.), 185 Fed 349; Weaver v. City and County of San Francisco (Calif.), 43 Pac. 979; Pacific Undertakers v. Widber (Calif.), 45 Pac. 273; Law v. City and County of San Francisco (Calif.), 77 Pac. 1014.

Tehama County v. Sisson (Calif.), 92 Pac. 64. Each year's revenue must pay each year's indebtedness. Bannock County v. C. Bunting & Co. (Ida.), 37 Pac. 277; McNutt v. Lemhi County (Ida.), 84 Pac. 1054; Atkinson v. Board of Com'rs of Ada County (Ida.), 108 Pac. 1046; Grady v. Landram (Ky.), 63 S. W. 284; Chaplin, etc. Road Co. v. Nelson County (Ky.), 77 S. W. 377; Ramsey v. City of Shelbyville (Ky.), 83 S. W. 116.

City of Providence v. Providence Electric Light Co. (Ky.), 91 S. W. 664. A city cannot by refusing to levy the full amount of the taxes authorized, defeat the collection of debt on the ground that the revenue for the year is less than the amount of the indebtedness created.

Overall v. City of Madisonville (Ky.), 102 S. W. 278. The income and revenue designated in Const. Sec. 157 includes delinquent taxes of previous years which may be collected and the maximum tax which could have been legally levied. It does not include moneys derived from sources uncertain and indefinite,—such as fines and license fees.

But see Rice v. City of Milwaukee, 100 Wis. 516, 76 N. W. 341, as holding that the item of receipts from license fees is too uncertain to be considered. Lawrence County v. Lawrence Fiscal Ct. (Ky.), 113 S. W. 824.

Kentucky Light & Power Co. v. James H. Williams & Co. (Ky.),

or needlessly run in debt, to compel so far as possible the adoption of a cash or "pay as you go" system.[15]

The rule seems to obtain that where provision has been made in good faith either by appropriation of specific revenues or the levy of specific taxes for meeting an expenditure, that in case the revenues provided are insufficient through a failure to receive or collect the sums anticipated that the debts will still be regarded as valid.[16]

§ 98. Current expenses.

The question of a debt incurred in the transaction of the ordinary business of a public corporation is somewhat closely allied, so far as it is to be considered a debt within the meaning of constitutional limitations, to the subject of voluntary and compulsory obligations which have been considered in a previous section.[17]

124 S. W. 840. A two-thirds majority of those voting sufficiently complies with Const., Sec. 157. Anderson v. Ripley County (Mo.), 80 S. W. 263; State v. Town of Columbia (Mo.), 20 S. W. 90; Connor v. City of Nevada (Mo.), 86 S. W. 256; Trask v. Livingston County (Mo.), 109 S. W. 656; Murphy v. City of Salem (Ore.), 87 Pac. 532.

15—Tehama County v. Sisson (Calif.), 92 Pac. 64. A county is not estopped from defending against a claim incurred in violation of Const. Art. XI, Sec. 18; Trask v. Livingston County (Mo.), 109 S. W. 656.

16—Wilkins v. Waynesboro, 116 Ga. 359, 42 S. E. 767; Murphy v. Police Jury St. Mary's Parish (La.), 42 So. 979; State ex rel. Columbia v. Allen, 183 Mo. 283, 82 S. W. 103; Appeal of Erie, 91 Pa. St. 398; Wade v. Oakmount Borough, 165 Pa. St., 41, 476 Atl. 1035; Addyston Pipe & Steel Co. v. Cory, 197 Pa. St. 41, 46 Atl. 1035; but, see, Schwartz v. Wilson, 75 Calif. 504, 17 Pac. 449; Smith v. Broderick, 107 Calif. 644, 40 Pac. 1033.

17—See Sec. 71, ante; Martin-Strelan Co. v. City of Dubuque (Ia.), 127 N. W. 1013; Overall v. City of Madisonville (Ky.), 102 S. W. 278; Connor v. City of Nevada (Mo.), 86 S. W. 356; State v. Weir (Nebr.), 49 N. W. 785; Ellison v. Town of Williamston (N. C.), 67 S. E. 255; Eaton v. Mimnaugh (Ore.), 73 Pac. 754.

Wolfe v. School District No. 2, Columbia County (Wash.), 108 Pac. 492. The maintenance of a public school throughout a school year of eight months is not such a necessity as to warrant the school directors in over-riding the constitutional and statutory limitations as to the amount of indebtedness a school district may lawfully incur.

It will be remembered that the weight of authority is in favor of the rule that a constitutional limitation applies to so-called necessary and current expenses equally with voluntary obligations assumed in the exercise of extraordinary powers. There are many and conflicting cases upon the subject of "current expenses." Some have been noted in the section upon executory contracts [18] as a form of indebtedness. One line of authorities sustain the principle that a debt is incurred for purposes of constitutional computation and prohibition when the expense has been incurred and the obligation created unless there are at that time funds in hands with which to meet it.[19] Other cases hold to the contrary.[20] The rule adopted by the latter is the correct one when the authority has been granted to incur current expenses or certain disbursements in the form of annual supplies for water or light.[21]

Where a public corporation has reached the constitutional limits of indebtedness and under the authorities,

18—Doland v. Clark, 143 Calif. 176, 76 Pac. 958; Lamar, etc. Water Co. v. City of Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756; see many authorities cited in Sec. 77, ante.

19—Trask v. Livingston County (Mo.), 109 S. W. 656; La Porte v. Gamewell Fire Alarm, Telegraph Co., 146 Ind. 466, 45 N. E. 588.

20—Toomey v. City of Bridgeport (Conn.), 64 Atl. 215.

Board of Comm'rs of Perry County v. Gardner, 155 Ind. 165, 57 N. E. 908. A contract is not void nor do its obligations create a debt where it does not appear that a county will be unable to pay out of its current revenue all of its current expenses as well as the installments to become due under the contract. City of Logansport v. Jordan (Ind.), 85 N. E. 959; Webb Granite, etc. Co. v. City of Worcester (Mass.), 73 N. E. 639.

Camden Clay County v. Town of New Martinsville (W. Va.), 68 S. E. 118. There can be no lawful objection to a municipal contract if its obligations do not exceed the dependable current resources of the town when the contract is made.

21—Eillison v. Town of Williamston (N. C.), 67 S. E. 255. See the following Constitutional Provisions: Ala., Art. 12, Sec. 225; Calif., Art. 11, Sec. 18; La., Sec. 281; Mont., Art. 13, Sec. 6; N. Y., Art. 8, Sec. 10; N. D., Art. 12, Sec. 183; S. D., Art. 13, Sec. 4; Utah, Art. 14, Sec. 4; Va., Art. 8, Sec. 127; Wash., Art. 8, Sec. 6; Wyo., Art. 16, Sec. 5.

it still has the power to pay its reasonable and necessary current expenses, the determination of what is a current expense is a question for the courts to decide although whether a particular current expense is reasonable and necessary in the absence of fraud or an abuse of discretion is not subject to review by the courts.[22]

§ 99. Degree of limitation; percentile.

Upon an examination of the provisions from the constitutions of the different states and to be found in Chapter XVIII of this work and also of various statutory limitations passed pursuant to constitutional provisions and not quoted for obvious reasons, it will be noted that the limitations upon the powers of the various classes of public corporations to incur indebtedness are either numerical in form or more commonly elastic, i. e., a certain percentage of the valuation of certain designated taxable property within the jurisdiction of the corporation.[23]

22—Helena Water Works Co. v. City of Helena (Mont.), 78 Pac. 220. An expenditure to install and operate a water system is not a "current expense" and therefore nor authorized.

23—See Chap. XVIII. For cases construing constitutional or legislative provisions fixing a maximum numerical amount, see note 26, this section.

Cases construing constitutional or statutory limitations fixing a maximum based upon a percentage. Doon Township v. Cummins, 142 U. S. 366 (Iowa).

Atlantic Trust Co. of New York v. Town of Darlington, 63 Fed. 76 (S. C.). Authority to bond "in any amount" construed to mean any amount within the constitutional percentage; John Hancock, etc. Ins. Co. v. City of Huron, 80 Fed. 652 (S. D.), affirmed 100 Fed. 1001 C. C. A.; Dudley v. Board of Commissioners of Lake County (Colo.), 80 Fed. 672; Farmers Loan & Trust Co. v. City of Sioux Falls (S. D.), 131 Fed. 890.

Goodson v. Dean (Ala.), 55 So. 1010. The validity of an issue of bonds depends upon the county indebtedness when the bonds were issued, not at the time of the election authorizing them. Wiggin v. City of Lewiston (Ida.), 69 Pac. 286; Reynolds v. Lyon County (Iowa), 96 N. W. 1096; N. W. Halsey & Co. v. City of Belle Plaine (Ia.), 104 N. W. 494.

Reed v. City of Cedar Rapids (Ia.), 113 N. W. 773. Laws of 1906, page 33, limiting the debts of municipal corporations to one

The better form, undoubtedly, of the limitation is that stated in the title of this section, viz: a percentage basis. Although from the standpoint of the creditor when considering the means of payment, this has one drawback. In many of the states a limit of taxation is fixed either by the Constitution or by the Legislature pursuant to its provisions; since the amount of the revenue derived and which can be appropriated for any designated purpose is limited to the amount of the assessed valuation, where indebtedness has been incurred in case of a decrease in the assessment roll although the rate remains the same, the revenues available for the payment of either the principal or interest of outstanding negotiable securities may be insufficient.

The following states have adopted a percentage basis for the incurring of indebtedness,[24] though a general

and one-fourth per cent of the actual value of the taxable property do not apply to special charter cities, the debt limit of which is fixed by Const., Art. III, Sec. 5. Miller v. Dearborn County Comm'rs, 66 Ind. 162; Town of Crowley v. F. R. Fulton Co. (La.), 36 So. 334.

American Electric Co. v. City of Waseca (Minn.), 113 N. W. 899. The city of Waseca with a special charter controls Secs. 1099-1639 of Gen. Stats. 1894, limiting the indebtedness of municipal corporations to five per cent.

Coler v. Board of Comm'rs of Santa Fe County (N. Mex.), 27 Pac. 619. Legislative authority authorizing railroad aid bonds to any railroad passing through the county authorizes bonds to the extent of five per cent to each road traversing the county when so ordered by a vote of the people. Horton v. City of Greensboro (N. C.), 59 S. E. 1043.

Germania Savings Bank v. Town of Darlington (S. C.), 50 S. C. 327, 27 S. E. 846. An act authorizing railroad aid bonds "to any amount" will be construed in connection with the constitutional provision fixing a limitation of eight per cent. Robertson v. City of Staunton (Va.), 51 S. E. 178; Smith v. Milton (Fla.), 54 So. 719; Rehmke v. Goodwin, 2 Wash. St. 676, 27 Pac. 473.

24—Constitutional Provisions. Ariz., Art. 9, Sec. 8; Ala., Art. 11, Secs. 213, 214; Calif., Art. 11, Sec. 18; Colo., Art. 11, Secs. 3, 8; Ga., Art. 7, Sec. 7, par. 1; Ida., Art. 8, Sec. 1; Ill., Art. 9, Sec. 12; Ind., Art. 13, Sec. 1; Ia., Art. 11, Sec. 3; La., Art. 281; Me., Art. 22; Mich., Art. 8, Sec. 12; Minn., Art. 9, Sec. 15; Mo., Art. 10, Sec. 12; Mont., Art. 13, Secs. 5, 6; N. Y., Art. 8, Sec. 10; N. D., Art. 12, Sec. 183; New Mex., Art. 9, Secs. 8, 13; Pa., Art. 9, Sec. 8; S. C., Art. 8,

reference only can be made here, as exceptions to the general limitations are very numerous. The limit is often raised for special issues or special kinds of issues, it is often figured on different basis of valuation, it is often subject to a vote of the people and in the case of a statutory limitation, to action by the legislature. In several states where a certain maximum percentage is fixed for general purposes, indebtedness in additional amount can be incurred for the construction of water or lighting plants, a sewerage system and other like purposes.[25]

Sec. 7; Art. 10, Sec. 5; S. D., Art. 13, Sec. 4; Utah, Art. 14, Sec. 4; Va., Art. 8, Sec. 127; Wash., Art. 8, Sec. 6; W. Va., Art. 10, Sec. 8; Wis., Art. 11. Sec. 3; Wyo., Art. 16, Secs. 1, 3.

The territories in Sec. 3, Act of Congress, July 30, 1886, 24 Stats. at Large, 170. Hawaii Territory. Act of Congress 1900, Chap. 339, Sec. —. Philippine Islands, Act of Congress, 1902, Secs. 66-73.

Pursuant to constitutional provisions in some of the states delegating to the legislature power to pass laws fixing the limit of indebtedness for public corporations various acts have been passed from time to time establishing a maximum rate of indebtedness either upon a percentage or some other basis. These are subject, of course to constant change and no reference is made to them for obvious reasons.

25—Ariz., Art. 9, Sec. 8; Ala., Art. 11, Secs. 224, 225; Ind., Art. 13, Sec. 1; Ky., Sec. 158; N. Y., Art. 8, Sec. 10; Okla., Art. 10, Sec. 27; Nebr., Art. 12, Sec. 2; N. Mex., Art. 9, Secs. 11, 13; Pa., Art. 9, Sec. 8; S. C., Art. 10, Sec. 5; S. D., Art. 13, Sec. 4; Utah, Art. 14, Sec. 4; Wash., Art. 8, Sec. 6; Wyo., Art. 16, Secs. 3, 5.

Cases construing constitutional or statutory limitations providing for an additional amount either for special purposes or when authorized by the voters at an election. Dixon County v. Field (Nebr.), 111 U. S. 83; State v. Kansas City, 83 Kan. 431, 111 Pac. 493; Purcell v. City of East Grand Forks (Minn.), 98 N. W. 351; Evans v. McFarland (Mo.), 85 S. W. 873; State ex rel. City of Carthage v. Gordon (Mo.), 116 S. W. 1099; Butler v. Andrus (Mont.), 90 Pac. 785; State v. Searle (Nebr.), 107 N. W. 588; Sweet v. City of Syracuse, 14 N. Y. S. 421; Cahill v. Hogan, 89 N. Y. S. 1022, affirmed 90 N. Y. S. 1091; Cottrell v. Town of Lenoir (N. C.), 61 S. E. 599; Bradshaw v. City of High Point (N. C.), 66 S. E. 601; Town of Klamath Falls v. Sachs (Ore.), 57 Pac. 329; Wells v. City of Sioux Falls (S. D.), 94 N. W. 425; but see Dring v. St. Lawrence Township (S. D.), 122 N. W. 664; People v. City Council of Salt Lake City (Utah), 64 Pac. 460; State v. Quayle (Utah), 71 Pac. 1060; State v. Heber City (Utah), 102 Pac. 309; Grace v. Town of Hawkinsville (Ga.), 28 S. E. 1021; Williams v. City of Caldwell (Ida.), 114 Pac.

§ 100. Limitations; amount or tax rate.

In other states, the degree of limitation is measured either by a fixed amount [26] or to a certain degree of elas-

519; Du Toit v. Village of Belview (Minn.), 102 N. W. 216.

City of Hazlehurst v. Mayes (Miss.), 51 So. 890. Statutory authority to issue bonds and enumerating the objects for which they may be issued limits power to issue them except for the purposes specified, and within the amount named. Stroud v. Consumer's Water Co. (N. J.), 28 Atl. 578; Tyson v. Salisbury (N. C.), 66 S. E. 532.

26—Constitutional provisions fixing limits for state indebtedness only. Ga., Art. 7, Sec. 3; Ill., Art. 4, Sec. 18; Ia., Art. 7, Sec. 2; Kans., Art. 11, Sec. 5; Ky., Sec. 14; Me., Art. 9, Sec. 14; Md., Art. 3, Sec. 34; Mich., Art. 10, Sec. 10; Minn., Art. 9, Secs. 5, 14a; Mo., Art. 4, Sec. 44; Mont., Art. 13, Sec. 2; Nebr., Art. 12, Sec. 1; Nev., Art. 9, Sec. 3; N. J., Art. 4, Sec. 6, Subd. 4; N. Y., Art. 7, Secs. 2, 12; N. D., Art. 12, Sec. 182; Okla., Art. 10, Sec. 23; N. Mex., Art. 9, Sec. 7; Ohio, Art. 8, Sec. 1; Ore., Art. 11, Sec. 7; Pa., Art. 4, Sec. 13; S. D., Art. 13, Sec. 2; Tex., Art. 3, Sec. 49; Utah, Art. 14, Sec. 1; Wash., Art. 8, Sec. 1; Wis., Art. 8, Sec. 6.

In the Constitutions of Missouri, Art. 10, Secs. 12, 12a; Montana, Art. 13, Sec. 5; and Oregon, Art. 11, Sec. 10; fixed amounts apply either to all civil subdivisions or those specifically named. Stevens v. Anson, 73 Me. 489.

Smith v. City of Vicksburg (Miss.), 38 So. 301. Floating indebtedness cannot be liquidated by an issue of bonds in excess of the limits prescribed by its amended charter. Bell County v. Lightfoot (Tex.), 138 S. W. 381.

County of Chicot v. Lewis (Ark.), 103 U. S. 164. A statute which authorized the issue of railroad aid bonds to an amount not exceeding $100,000 confers a general power to subscribe but no subscription can exceed the amount named. Hefferlin v. Chambers (Mont.), 40 Pac. 787; Altheimer v. Plum Bayou Levee District (Ark.), 95 S. W. 140.

Clark v. City of Los Angeles (Calif.), 116 Pac. 722. A charter provision fixing a maximum city debt does not invalidate an issue of bonds voted in excess of that amount but not issued before an amendment fixing a new limit within which the issue falls.

Rogers v. Trustees Graded School (Ky.), 13 S. W. 587. An issue bonds for a larger amount than authorized held invalid. Tinkel v. Griffin (Mont.), 68 Pac. 859; Wheeler v. Plattsmouth, 7 Nebr. 270.

Fishblatt v. Atlantic (N. J.), 73 Atl. 125. An ordinance is not void for indefiniteness because providing for the issue of bonds "in an amount not exceeding $500,000." Highway Comm'rs, etc. v. C. A. Webb & Co. (N. C.), 68 S. E. 211; Eaton v. Mimnaugh (Ore.), 73 Pac. 754; Mauldin v. City Council of Greenville (S. C.), 11 S. E. 434; City of Memphis v. Bethel (Tenn.), 17 S. W. 191.

ticity by a designated tax rate.[27] Exceptions as above noted in respect to a percentage basis are equally numerous where the indebtedness is a determinate amount or based upon an established rate.

§ 101. The purpose of the debt as an inherent limitation.

Limitations upon the power of a public corporation to incur indebtedness may exist either as an inherent, implied, or fundamental principle of law or as a written and express restriction found in the charter of the corporation, the statutes, or the constitution of the state. There is found, as an implied and inherent limitation on the power of every public corporation to incur a debt, the one, namely, that the purpose for which it may be contracted or the uses to which the funds realized shall be put must be public in their character. This limitation impliedly and inherently exists, based upon the differences between a public and private corporation. A public corporation is an agency of the government, an aid to the sovereign in carrying out its purposes and performing duties which are public in their nature and intended to protect and benefit society at large, the community rather than the individual. If the individual is benefited by the establishment and maintenance of an organized government, it is not because of the purpose to directly accomplish that result but because the individual indirectly and as a member of a community or society shares in the benefits and advantages of that government. To the government belongs the exercise of certain powers and performance of certain duties. There can be no

27—Constitutional Provisions; Colo. Art. 11, Sec. 6; Ida. Art. 7, Sec. 11; Ky. Sec. 157; La. Art. 281; Utah Art. 13, Sec. 9; Francis v. Howard County (Fla.), 50 Fed. 44; Millsaps v. City of Terrell, Texas, 60 Fed. 193; Whitney v. Kentucky Midland Ry. Co. (Ky.), 63 S. W. 24; Tipton v. City of Shelbyville (Ky.), 107 S. W. 810; State v. Babcock (Nebr.), 31 N. W. 8; Russell v. Cage, 66 Tex. 428, 1 S. W. 270; Bodenheim v. Lightfoot (Tex.), 132 S. W. 468.

question of the character of certain of these powers and duties. The exercise of the police power, the maintenance of government, the construction of public buildings, the provision for a system of public education and others, will be recognized clearly as governmental duties.[28] Other acts will be clearly recognized as not belonging to this category, and there are still others which it is difficult sometimes to assign to either class and which lie along the dividing line between the two. It is clearly beyond the power of a public corporation or the state itself to appropriate public property for private purposes or to expend public moneys for the personal advantage and benefit of private individuals or personal and private enterprises, such funds raised through a system of public taxation designed for the benefit and advantage of the public at large, the legality of the system based upon the idea that the use of the proceeds shall be public.[29] There is no controversy about the soundness

28—See Secs. 103, 116 et seq. post.

29—See Abbott Munic. Corp. Secs. 145, et. seq., citing many cases. Hill v. Memphis, 134 U. S. 194.

Citizens Savings & Loan Association v. City of Topeka, 20 Wall. 664. Justice Miller in delivering the opinion of the court said: "And in deciding whether, in the given case, the object for which the taxes are assessed falls on the one side or on the other of this line (between a public or private purpose), they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." Ziegler v. Menges, 121 Ind. 99, 22 N. E. 782.

Brooks v. Incorp. Town of Brooklyn (Ia.), 124 N. W. 868. "Where the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, though it also incidentally involves an expense which, standing alone, is unlawful, but where the primary object is not to subserve a public municipal purpose, but to promote a private end, the expenditure is illegal, though it may incidentally serve a public purpose." Allen v. Inhabitants of Jay, 60 Me. 124; Lowell v. City of Boston, 111

of this principle; the dispute arises in its application. What is or is not a public purpose has been considered by the courts in many cases where there has been a questionable expenditure of public moneys for purposes which result indirectly to the good, benefit and advantage of the community, and yet, which should not be permitted because contrary to that broad and underlying principle that sufficient purposes can be found, in respect to which there is no doubt, for the use of all funds raised by taxation, and not creating an excessive burden upon the taxpayer, without expending public funds for objects as to the character of which grave doubts arise. Economy is not a characteristic of public officials or public corpora-

Mass. 454; Wheelock v. City of Lowell (Mass.), 81 N. E. 977.

Baker v. City of Grand Rapids (Mich.), 106 N. W. 208. For a city to engage in a commercial enterprise such as the buying and selling of coal is not a use of public moneys for a public purpose. See also as holding the same Opinion of Justices, 182 Mass. 605, 66 N. E. 25; State v. Switzler, 143 Mo. 287; State v. Cornell, 53 Nebr. 556; Sweet v. Hulbert, 51 Barb. N. Y. 312; Weismer v. Village of Douglas, 64 N. Y. 91.

Sharpless v. City of Philadelphia, 21 Pa. 147. Quotations from this case, in which the opinion was written by Chief Justice Black are frequently made on the question of the right of the legislature to levy a tax for a private purpose, he said in part: "Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder." Wisconsin Industrial School for Girls v. Clark County (Wis.), 79 N. W. 422; Simonton Municipal Bonds, Sec. 36; Burroughs' Pub. Securities, page 388.

The principal stated in the text is supported by a universal and overwhelming weight of legal decision. There is no rule which is more firmly established or for better reasons. No attempt is made to cite all of the leading authorities, much less an exhaustive list. Many of the cases will be found given in the immediately following notes and others in Abbott's Munic. Corps., Sec. 416, et seq., upon the disbursement of public moneys. See also as treating the subject in an exhaustive way, Gray's Limitations of Taxing Power, Chap. 4.

tions. Without considering the possibility of a corrupt or dishonest administration of public affairs, it stands undenied as an author has said: "That private self-interest stimulated by the hope of gain no less than by the fear of loss will drive a sharper bargain than will public authorities who have nothing particular at stake. The restraining influences should be invoked of every principle which can be made available to prevent unwise and extravagant expenditure of public moneys. However desirable or just it may seem that a questionable, in this respect, use of moneys should be authorized, the safest, and in fact the only public policy to be pursued, is the one above indicated, and the rule of strict construction applied in the incurring of indebtedness in all its vigor and severity.

The character of certain uses for which public moneys may be expended is established beyond question as well as certain purposes to which they shall not be put. It is impossible to give an exact definition of public purpose. Whether the purpose is a public one for the expenditure of moneys is a question exclusively for the courts to determine. Legislative bodies cannot be the judges of their own infraction of fundamental law. Justice Folger, in a New York case,[30] distinguished a public from a private purpose in language that is often quoted: "It may also be conceded that this is a public purpose from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take unto his

30—Weismer v. Village of Douglas, 64 N. Y. 91.

own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof. He may not be made to depend for it on the spontaneous action of others, or to receive it in uncertain degree or manner or roundabout way, or hampered with discriminating distinctions and conditions."

The term can best be defined by giving concrete illustrations of expenditures which courts have authorized as having such a character.

§ 102. Constitutional limitations as to purpose of debt.

At the present time, most of the state constitutions contain express prohibitions in respect to the incurring of indebtedness for the benefit of or the grant of aid directly or indirectly by either the state or any of its subordinate civil subdivisions to any private individual or corporation or for any enterprise under whatever guise, which is essentially private in its nature. These constitutional provisions are based primarily upon the principles stated in the preceding paragraph and the reasons given by the courts in sustaining that principle are concrete expressions of it. The constitutional provisions as found in Alabama,[31] "The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association or corporation."

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to, any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company by issuing bonds or otherwise," are illustrative and typical of those to

31—Art. 4, Secs. 93 and 94.

be found as already stated, in the organic law of nearly every state in the Union.[32]

§ 103. The construction of buildings; a public purpose.

The cases hold without dissent that public moneys expended in the construction of buildings for use by government officials or departments in the performance of their public or governmental duties is a proper and legal expenditure for a "public purpose," and if such buildings are constructed in a lawful manner and upon legal authority, the indebtedness incurred by the corporation is a valid one and capable of enforcement. The power to construct public buildings is considered an implied one not only as necessary to corporate existence but also as a proper and convenient means for carrying into effect

32—Ala. Art. 4, Sec. 93, 94; Ariz. Art. 9, Sec. 7; Ark. Art. 12, Sec. 5; Art. 16, Sec. 1; Calif. Art. 4, Secs. 30, 31; Art. 12, Sec. 13; Colo. Art. 11, Secs. 1, 2; Conn. Art. 25; Del. Art. 8, Secs. 4, 8; Fla. Art. 9, Secs. 7, 10; Ga. Art. 7, Secs. 1, 5, 6, Par. 1; Sec. 16, Par. 1; Idaho Art. 8, Secs. 2, 4; Art. 12, Sec. 4; Ill. Art. 4, Sec. 20; Art. 8, Sec. 3. See also separate sections adopted in 1870 on "Municipal subscriptions to railroads or private corporations" and "Canals." Ind. Art. 10, Secs. 6, 7; Ia. Art. 7, Sec. 1; Art. 8, Secs. 3, 4; Kan. Art. 11, Sec. 8; Ky., Secs. 177, ,179; La. Arts. 58, 270; Me. Art. 9, Sec. 14; Md. Art. 3, Secs. 34, 54; Mich. Art. 10, Secs. 12, 14; Minn. Art. 9, Sec. 10; Miss. Art. 4, Sec. 66; Art. 7, Sec. 183; Art. 14, Sec. 258; Mo. Art. 4, Secs. 6, 45-47, 49; Art. 9, Secs. 6; Mont. Art. 5, Sec. 38; Art. 13, Sec. 1; Nebr. Art. 11, Munic. Corp. Sec. 1; Art. 12, Secs. 2, 3; Nev. Art. 8, Secs. 9, 10; N. H. Pt. 2, Art. 5; N. J. Art. 1, Secs. 19, 20; Art. 4, Sec. 6, Subd. 3; N. Mex. Art. 9, Sec. 14 N. Y. Art. 3, Sec. 20; Art. 7, Sec. 1; Art. 8, Secs. 9, 10; N. D. Art. 12, Sec. 185; Ohio Art. 8, Secs. 4, 6; Art. 12, Sec. 6; Okla. Art. 10, Sec. 15; Ore. Art. 11, Secs. 6, 9; Pa. Art. 9, Secs. 6, 7; S. C. Art. 10, Sec. 6; S. D. Art. 13, Sec. 1; Tenn. Art. 2, Secs. 29, 31; Art. 11, Sec. 10; Texas Art. 3, Secs. 50-52; Art. 11, Sec. 3; Va. Art. 13, Sec. 185; Wash. Art. 8, Secs. 5, 7; Art. 12, Sec. 9; W. Va. Art. 10, Sec. 6; Wis. Art. 8, Secs. 3, 10; Wyo. Art. 3, Sec. 39; Art. 10 R. R., Secs. 5, 6; Art. 16, Sec. 6; Seattle Dock Co. v. Seattle & L. W. Waterways Co., 195 U. S. 624.

Rockefeller v. Taylor, 74 N. Y. S., 812. Appropriation of public moneys for the payment of a claim which is neither legal nor equitable contravenes Const. Art. 8, Sec. 10.

governmental powers expressly granted. School houses,[33] town halls,[34] court houses and jails,[35] hospitals, poor-

33—Wetmore v. City of Oakland, 99 Calif. 146, 33 Pac. 769; Law v. City and County of San Francisco (Calif.), 77 Pac. 1014; City of Cartersville v. Baker, 73 Ga. 686; Sherlock v. Winnetka, 68 Ill. 530; Marks v. Purdue Univ., 37 Ind. 155; State v. Terre Haute, 87 Ind. 212; Taylor v. Brownfield, 41 Ia. 264; Board of Education of Topeka v. Welch (Kans.), 33 Pac. 654; Board of Education of City of Topeka v. State (Kan.), 67 Pac. 559.

Frost v. Central City (Ky.), 120 S. W. 369. The erection of a school building was held a "municipal purpose" for which the city was authorized to issue bonds.

State v. Board of County Com'rs (Nebr.), 48 N. W. 146. Bonds held invalid, however, on account of wrong recitals.

State v. City of Bayonne (N. J.), 8 Atl. 114. The authority to erect "public buildings" does not authorize the enlargement of a schoolhouse. Pierce Butler etc. Co. v. Bleckwen, 131 N. Y. 570; People v. Seaman, 69 N. Y. S., 55; Jordan v. City of Greenville (S. C.), 60 S. E. 973.

Ransom v. Rutherford Co. (Tenn.), 130 S. W. 1057. Bonds issued by counties and municipalities in aid of public normal schools are valid, under Const. 1870, Art. 2, Sec. 29. East Tenn. Univ. v. City of Knoxville, 65 Tenn. 166; Wis. Indian School for Girls v. Clark County (Wis.), 79 N. W. 422.

Maxey v. City of Oshkosh (Wis.), 128 N. W. 899. Under authority for the "erection, construction and completion" of school buildings, a city may issue bonds for the erection, construction and equipment of a manual training-school.

School Dist. No. 3 Carbon v. Western Tube Co. (Wyo.), 80 Pac. 155. A school district has authority to incur a debt reasonably necessary to install a heating plant in a new schoolhouse.

34—Foster v. City of Worcester, 164 Mass. 419; Linn v. City of Omaha (Nebr.), 107 N. W. 983; Hightower v. City of Raleigh (N. C.), 65 S. E. 279; City of Akron v. Dobson (Ohio), 90 N. E. 123.

State v. Barnes (Okla.), 97 Pac. 997. A convention hall to be owned and used exclusively by a city to accommodate public gatherings is "public utility" within the meaning of that term as used in Const. Art. 10 Sec. 27.

Oklahoma City v. State (Okla.), 115 Pac. 1108. Public fire stations held public utilities within Const. Art. 10, Sec. 27. Bates v. Bassett, 60 Vt. 530.

Terry v. King County (Wash.), 86 Pac. 210. Laws of 1903, c. 115 providing for the construction of an armory, etc., held a special act conferring corporate powers in violation of Const. Art. 2, Sec. 28.

35—Pauly Jail Bldg. etc. Co. v. Kearney County Com'rs, 68 Fed. 171; Lewis v. Lofley, 92 Ga. 804; Jackson v. Rendleman, 100 Ill. 379; Johnson v. Wilson Co. Com'rs, 34 Kan. 670; Callam v. City of Saginaw, 50 Mich. 7; Chaska Company v. Board of Sup'rs, 6 Minn. 204; Evenson v. Denmann (Minn.), 123 N. W. 930; Dawson County Com'rs v. McNamara, 10 Nebr. 276; State

houses, public markets,[36] state [37] and county buildings, may be properly erected through the expenditure of public funds.[38]

§ 104. Private schools and charitable institutions.

The rule stated in the preceding section that the construction of school buildings, hospital and other charitable institutions is a proper use for public moneys does not apply where the schools are sectarian in their character and the charitable institutions, private.[39]

Nearly all of the states of the Union have constitutional provisions which prohibit the granting of aid, levying of taxes, or the appropriation of public moneys to any school or educational institution which is sectarian or denominational in its character. The provision found in Illinois [40] is illustrative of this class of constitutional prohibitions: "Neither the general assembly nor any county, city, town, township, school district or other public corporation shall ever make any appropriation or pay from any public fund whatever, anything in aid of

v. Lincoln County Com'rs, 18 Nebr. 283; State v. Lytton (Nev.), 99 Pac. 855; Black v. Buncombe County Com'rs, 129 N. C. 121; 39 S. E. 818.

36—Taggart v. City of Detroit (Mich.), 38 N. W. 714; State v. Perry (N. C.), 65 S. E. 915 Market house; Smith v. City of Newbern, 70 N. C. 14; Allentown v. Wagner, 214 Pa. 210, 63 Atl. 697 Hospital; Lind v. Chippewa County, 93 Wis. 640.

37—Davenport v. Elrod (S. D.), 107 N. W. 833; State v. McGraw, 13 Wash. 311.

38—Schneck v. City of Jeffersonville (Ind.), 52 N. E. 212; Creager v. Snyder (Kan.), 26 Pac. 21; Wall v. St. Louis County (Minn.), 117 N. W. 611.

39—Henry v. Cohen, 66 Ala. 382; Cook County v. Chicago Industrial School for Girls, 125 Ill. 540, 18 N. E. 183; Jenkins v. Andover, 103 Mass. 94; County of Hennepin v. Brotherhood of Gethsemane, 27 Minn. 460, 8 N. W. 595; People ex rel. etc., 154 N. Y. 14, 47 N. E. 983; Philadelphia v. Masonic Home, 160 Pa. St. 572, 28 Atl. 954; Synod of South Dakota v. State, 2 S. D. 366, 50 N. W. 632; Curtis v. Whipple, 34 Wis. 350; Wisconsin Industrial School v. Clark County, 103 Wis. 651, 79 N. W. 422; but see Sargent v. Board of Education, 177 N. Y. 317, 69 N. E. 722.

40—Art. VIII, Sec. 3.

any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the state or any such public corporation to any church or for any sectarian purpose."

§ 105. Public purposes continued, "light."

In a case in the Supreme Court of the United States the court held in construing an exclusive contract for the use of the streets in supplying gas to the city and people of New Orleans that the proper lighting of public highways and streets was a valid exercise of the police power, having for its purpose the protection of the lives and property of the people of the community, a governmental purpose. Properly lighted streets and public places give a certain degree of immunity from attack by thieves or burglars at night and also make them safer for their proper use. A public corporation consequently is justified in attending to this so it is claimed, a governmental duty, and supplying, either through a system of its own or through an exclusive contract, or otherwise, with private [41] corporations or individuals, artificial light for

41—New Orleans v. Clark, 95 U. S. 644; Fellows v. Walker, 39 Fed. 651; Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla. 229; Middleton v. City of St. Augustine (Fla.), 29 So. 421; Heilbron v. City of Cuthbert, 96 Ga. 312; Rushville Gas Company v. City of Rushville, 121 Ind. 206; City of Belleville v. Wells, Kan., 88 Pac. 47; City of Newport v. Newport Light Company, 84 Ky. 167; Opinion of Justices, 150 Mass. 593; Mitchell v. City of Negaunee, 113 Mich. 359; Janeway v. City of Duluth, 65 Minn. 292; State ex rel. Town of Canton v. Allen (Mo.), 77 S. W. 868.

State ex rel. City of Chillicothe v. Wilder (Mo.), 98 S. W. 465. Although a city under Const. Art. X, Sec. 12a, has the power to become indebted in excess of the five per cent limit specified in Sec. 12 for the purpose of purchasing or constructing works or electric light

lighting public places when necessary. Public moneys therefore when used for such purpose are properly and legally expended, and debts incurred or obligations created will be enforceable as against a corporation unless other considerations enter into the determination of their validity.[42]

The statement made in the preceding paragraph in respect to the legality of certain indebtedness applies also to that incurred for this purpose. An Iowa case held that the necessity for an electric light plant constituted

plants, it has no power to issue bonds to maintain and operate the same. Mason v. Cranbury Township, Middlesex County (N. J.), 52 Atl. 568; Hequembourg v. Dunkirk, 2 N. Y. S. 447.

Mayo v. Town of Washington (N. C.), 29 S. E. 343. The proposition to erect an electric light plant must be submitted under legislative authority to the voters. See also as holding the same. Davis v. Town of Fremont (N. C.), 45 S. E. 671; Town of Klamath Falls v. Sachs (Ore.), 57 Pac. 329; Seitzinger v. Borough of Tamaqua, 187 Pa. 539; Smith v. City of Nashville, 88 Tenn. 464; Lewis v. City of Port Angeles, 7 Wash. 190, 34 Pac. 914; Petros v. City of Vancouver, 13 Wash. 423, 43 Pac. 361; Parkersburg Gas Co. v. City of Parkersburg, 30 W. Va. 435; Ellenwood v. City of Reedsburg, 91 Wis. 131.

Neacy v. City of Milwaukee (Wis.), 26 N. W. 8. Under authority to issue bonds for the construction or purchase of a light plant none can be issued to defray the expense of maintenance, repair or operation. See also Abbott's Municipal Corp., Sec. 472, with many cases cited.

But see Biddle v. Town of Riverton (N. J.), 33 Atl. 279. Power denied because of lack of special authority. Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421.

42—See cases cited in preceding note. McMaster v. City of Waynesboro (Ga.), 50 S. E. 122; Houma Lighting and Ice Mfg. Co. v. Town of Houma (La.), 53 So. 970.

Bay City Traction & Electric Co. v. Bay City (Mich.), 119 N. W. 440. A resolution determining the expediency of providing for a city electric lighting plant must be first adopted by a two-thirds vote of the aldermen elect before the city council has this power. State ex rel. Town of Canton v. Allen (Mo.), 77 S. W. 868; Palmer v. City of Helena (Mont.), 107 Pac. 512; Potsdam Electric Light & Power Co. v. Village of Potsdam, 99 N. Y. S. 551.

Henderson Water Co. v. Trustees of Henderson Graded School (N. C.), 65 S. E. 927. The supplying of light is a necessary expense and is a power necessarily and reasonably implied in the general grant of powers of a municipality. The mode for its exercise provided by the charter is exclusive.

no excuse or justification for the construction of such a plant when this would result in an increase of the municipal indebtedness beyond the constitutional limitation. The purpose of the expenditure is not attacked, but the contemplated amount.[43]

In many states express constitutional or statutory provisions are found especially authorizing the incurring of indebtedness and the issue of negotiable securities for the purposes indicated in this section.[44]

§ 106. Illustrations of a public purpose continued; "water."

It is clearly within the limits of a governmental or a public purpose to care for, maintain and protect the public health and safety. Modern authorities agree that one of the agencies most conducive to the maintenance and protection of the public health is a system by which a sufficient supply of pure and wholesome water may be furnished to a community. The expenditures of public moneys therefore for the establishment and maintenance of a system of water supply is now considered legal, such use of purpose being a public one and within the power of the corporation.[45] That a certain expenditure may have for its purpose the furnishing of a water supply does not necessarily make it valid. A constitutional or charter limitation upon the amount of municipal indebtedness controls always independent of the purpose for which such indebtedness is incurred. Purpose or use does not in all cases determine its validity.

43—Windsor v. City of Des Moines, 110 Ia. 175, 81 N. W. 476.

44—Ala. Art. 12, Sec. 225; Colo. Art. 11, Sec. 8; Idaho Art. 12, Sec. 4; N. Y. Art. 8, Sec. 10; N. D. Art. 12, Sec. 183; S. D. Art. 13, Sec. 4; Utah Art. 14, Sec. 4; Wash. Art. 8, Sec. 6. See also Sec. 99 ante, and the following sections for constitutional provisions authorizing the incurring of additional amounts for the purpose of constructing water and light plants, etc.

45—See the following constitutional provisions expressly authorizing expenditures for water or the

The authorities referred to in this section and the notes are considered abstractly without regard to such limitations. Some of the cases cited, it will be found upon an examination, hold the indebtedness invalid not

incurring of debts in an additional amount upon vote of the electors. Ala. Art. 12, Sec. 225; Calif. Art. 11, Sec. 18; La. Art. 281; Mont. Art. 13, Sec. 6; N. Y. Art. 8, Sec. 10; N. D. Art. 12, Sec. 183; S. D. Art. 13, Sec. 4; Utah Art. 14, Sec. 4; Colo. Art. 11, Sec. 8; Va. Art. 8, Sec. 127; Wash. Art. 8, Sec. 6; Wyo. Art. 16, Sec. 5.

In view of the unquestioned right of municipalities to incur debts and issue negotiable securities for the purposes indicated in this section but few authorities will be cited. Buchanan v. Litchfield, 102 U. S. 278.

National Bank of Commerce v. Town of Granada, 41 Fed. 87. It is finally insisted by the learned counsel for the defendant that section 1, Art. 2, of the state constitution prohibits in strong terms such municipal corporations from lending their credit in any form in aid of any individual, association or corporation whatsoever; but by section 8 of the said article special exception is made in favor of the power by such corporations to create debts for the purpose of supplying themselves with water for irrigation, for suppressing fires, and for domestic use. There seems to be no limit to the extent of the debts which may be incurred for such purposes. Fergus Falls Water Company v. City of Fergus Falls, 65 Fed. 586; Omaha Water Company v. City of Omaha, 147 Fed. 1; Sykes v. City Water Company v. Santa Cruz, 184 Fed. 752; Derby v. Modesto, 104 Calif. 515; Platt v. City and County of San Francisco (Calif.), 110 Pac. 304; City of Cripple Creek v. Adams (Colo.), 85 Pac. 184; State v. Tampa Water Works (Fla.), 47 So. 358; Grace v. Town of Hawkinsville, 101 Ga. 553, 28 S. E. 1021; Ostrander v. City of Salmen (Ida.), 117 Pac. 692.

Scott v. City of La Porte (Ind.), 68 N. E. 278. The purpose in this case held lawful but the particular scheme for securing a water works plant held illegal. Culbertson v. City of Fulton, 127 Ill. 30; Prince v. City of Quincey, 105 Ill. 138, 128 Ill. 443; Commonwealth v. City of Covington (Ky.), 107 S. W. 231; Hibbard v. Barker, 84 Kan. 848, 115 Pac. 561; State v. Caffery (La.), 22 So. 1008; Revere Water Company v. Inhabitants of Town of Winthrop, 78 N. E. 497; Daniels v. Long, 111 Mich. 562.

Richardi v. Village of Bellaire (Mich.), 116 N. W. 1066. No authority to borrow money for the maintenance of water works. Woodbridge v. City of Duluth (Minn.), 59 N. W. 296; Truelson v. Mayor of Duluth (Minn.), 63 N. W. 714; State ex rel. City of Columbia v. Allen (Mo.), 72 S. W. 103.

Village of Grant v. Sherrill (Nebr.), 98 N. W. 681. Negotiable bonds cannot be issued by a village to aid private parties in the construction of a system of water works. Village of Ft. Edward v. Fish, 156

because of its purpose but on account of a constitutional limitation.

§ 107. Public utilities.

It is the author's belief that the proper functions of a public corporation are to regulate and govern and that it is neither desirable nor legal that it engage in undertakings, do those things or transact that business, which, properly, should be left to private enterprise. To govern and regulate efficiently and rightly requires complete disinterestedness, a condition which cannot exist where hope of gain or fear of loss are attendant essentials of certain acts and transactions. It is difficult to separate completely at all times the radically different acts of governing and regulating and engaging in a pursuit or undertaking having for its ultimate purpose the making of a profit. As has been said, "the fundamental powers of a state are limited to safeguarding political and industrial equality between its citizens or the groups of citizens who are created legal persons by its authority. This safeguarding necessarily requires judicial and impartial relations to the subject of control. Such relations can be maintained only where the controlling power has no interest in the subject of control either as beneficiary, an owner or a user of its services." These, as some of the considerations, have impelled the courts, until comparatively recent times, to withdraw from all public corpora-

N. Y. 363; Village of Champlain v. McCrea, 165 N. Y. 264, 59 N. E. 83; Territory v. Whitehall (Okla.), 76 Pac. 148; Town of Klamath Falls v. Sachs (Ore.), 57 Pac. 329.

Tone v. Tillamook City (Ore.), 114 Pac. 938. The power of a city to provide a water system held strictly proprietary. Wood v. Ross (S. C.), 67 S. E. 449; Dring v. St. Lawrence, Township (S. D.), 122 N. W. 664; Ellenwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885; City of Eau Claire v. Eau Claire Water Co. (Wis.), 119 N. W. 555; Edwards v. City of Cheyenne (Wyo.), 114 Pac. 677. See also Abbott Munic. Corp., Secs. 177 et seq. and 455 et seq., citing many authorities.

tions, including municipalities, the legal right to engage in the business of securing and supplying water, either for their own use or that of the individual members of the community.

It is now unquestioned that water works are public utilities and the power to own or otherwise provide a system has a relation to public purposes and for the public and appertains to the corporation in its political or governmental capacity.

In respect to the illegality from a purely governmental standpoint of furnishing a supply of light for private use and consumption by the inhabitants of a municipal corporation there is no doubt although the legal right to secure a supply for its own use is not unquestioned.

In recent years, statutory authority has been given to municipalities in some states to own and operate public utilities including street railways or similar enterprises. From the strictly legal point of view, it would seem that the grant of a right of this character is unjustifiable since clearly it is not a governmental function to supply the commodity of transportation.[46]

46—Platt v. City and County of San Francisco (Calif.), 110 Pac. 304.

Clark v. City of Los Angeles, 116 Pac. 966. Under Los Angeles City charter as amended in 1909, it was held that the city had authority to incur indebtedness, to construct docks, wharves and harbors, to open and maintain streets and highways to navigable waters and to construct canals and waterways.

Holton v. City of Camilla (Ga.), 68 S. E. 472. The construction of an ice plant held not unconstitutional on account of climatic condition.

McCleary v. Babcock (Ind.), 82 N. E. 453. Legislative authority to aid in the construction of railroads by cities and towns includes street railroads.

Barsaloux v. City of Chicago, 245 Ill. 598; 92 N. E. 525, construing "Mueller Law;" Laws of 1903, Sec. 1, authorizing cities to own, etc. street railways.

Prince v. Crocker, 166 Mass. 347, 44 N. E. 446. Expenditures for construction of subway held valid.

Sears v. Board of Street Com'rs of the City of Boston, 180 Mass. 274, 62 N. E. 397. The widening of streets to make a union railroad passenger station accessible, held legal.

Billings Sugar Co. v. Fish (Mont.), 106 Pac. 565. The public

§ 108. The construction of local and internal improvements.

Some of the purposes enumerated in preceding sections come clearly within that class or use denominated "a public purpose" or "a public use," and there is no doubt as to the authority of the public corporation to incur indebtedness or expend public moneys therefor.

Considering other uses or purposes not so clearly within those authorized by law, works of internal improvement, as they are termed, may constitute a use to the construction of which public moneys can be properly appropriated,[47] although some cases hold squarely to the contrary doctrine.[48] The protection of the public health is clearly a governmental power and duty. To execute this power and perform this duty all usual, necessary, convenient and proper means may be employed. To construct or aid in the construction of works of in-

policy of the state as evidenced by former legislative enactments and decisions of the court may be looked to, to determine what has been regarded as a public utility.

Sun Printing & Publishing Association v. Mayor, etc., of New York, 152 N. Y. 257. Act providing for the construction of a subway and the issue of city bonds to pay its cost, held valid and not contrary to that provision of the constitution relative to the incurring of municipal indebtedness except for municipal purposes or that provision prohibiting the city to give or loan money or credit to any private enterprise. Murphy v. City of Salem (Ore.), 87 Pac. 532.

City of Burlington v. Central Vt. Ry. Co. (Vt.), 71 Atl. 826. Acts of 1906, p. 356, authorizing the city of Burlington to construct and maintain a public wharf and to borrow money for this purpose, are valid. But see Attorney General ex rel. Barber v. Pingree, 120 Mich. 550, 79 N. W. 814. Counterman v. Dublin Township, 38 Ohio State 515.

January 28, 1911, the Attorney General of New York State rendered an opinion to the effect that cities and towns cannot issue bonds and vote special taxes for the construction, and maintenance of wharves freight terminals, etc. and that the legislature could not under the Constitution pass an Act giving such authority.

47—Thompson v. Lee Co., 3 Wall. 327. The power exists unless restrained by organic law. Reineman v. Covington etc. R. R., 7 Nebr. 310.

48—See cases cited in the following notes to this section.

ternal improvement is not so clearly a governmental power or duty. The character and purpose of a work of internal improvement depends largely upon the determination by public officials that the enterprise in question is not only one of the usual, proper, necessary and convenient means for performing or exercising a governmental duty or power, but that it is itself such a power or duty. It certainly is unsafe to leave without restraint such a far-reaching and conclusive determination to public officials. The opportunity for the insidious and unconscious influence of self-interest is too apparent.[49]

In Tennessee,[50] the policy of encouraging internal improvements has been affirmatively adopted in the following constitutional provision: "Internal improvements are to be encouraged. A well regulated system of internal improvement is calculated to develop the resources of the state and promote the happiness and prosperity of her citizens; therefore it ought to be encouraged by the general assembly.

In many of the other states, however, acting upon the reasons in the quotation from Judge Cooley, constitutional provisions have been adopted prohibiting the state from engaging in works of internal improvement.[51]

That of Minnesota [52] is typical of this class of prohibitions: " * * * The State shall never contract any debts for works of internal improvement or be a party in carrying on such works except in cases where grants of land or other property shall have been made to the state especially dedicated by the grant to specific purposes and in such cases the State shall devote thereto the avails

49—Attorney General v. Pingree, 120 Mich. 550, 79 N. W. 814.

50—Art. 11, Sec. 10.

51—Ala., Art. 4, Sec. 93; Ill., separate sections adopted in 1870; Kans., Art. 11, Sec. 8; Md., Art. 3, Sec. 34; Mich., Art. 10, Sec. 14; Minn., Art. 9, Sec. 5; Nebr., Art. 12, Sec. 2, except by vote; N. D., Art. 12, Sec. 185, except by 2/3 vote of people; Ohio, Art. 12, Sec. 6; S. D., Art. 13, Sec. 1; Va., Art. 13, Sec. 185, except as to roads; Wis., Art. 8, Sec. 10; Wyo., Art. 16, Sec. 6, except by 2/3 vote of people.

52—Art. 9, Sec. 5.

of such grants and may pledge or appropriate the revenues derived from such works in aid of their completion."

In the states where the prohibitory policy has been affirmatively adopted, the decisions found arise upon the question of whether in the particular instance the specific enterprise aided is a work of internal improvement or the contrary as prohibited by the state.[53]

In a recent Wisconsin case[54] the court, in discussing the meaning of the word "internal improvements" said: "There can be no doubt that this quarter century of vehement discussion has produced a fairly definite conception, of what has come to be designated 'internal improvements.' * * * We think it clear that such conception included those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which

53—Town of Burlington v. Beasley, 94 U. S. 310 (Kan.), Grist mill held an internal improvement.

Osborn v. Adams County, 106 U. S. 181 (Nebr.). Steam grist mill not a work of internal improvement. See also as holding the same, State v. Adams County, 15 Nebr. 568.

Perkins County v. Graff, 114 Fed. 441. An irrigation canal held a work of internal improvement.

City of Kearney v. Woodruff, 115 Fed. 90. A canal constructed for water power is only a work of internal improvement under the statutes when it is to be devoted to public uses.

Garden City, etc. R. R. Co. v. Nation, 82 Kan. 345, 108 Pac. 102. The railroad aid statute not a violation of Const. Art. 11, Sec. 8, forbidding the state to carry out internal improvements.

Ryerson v. Uttley, 16 Mich. 269. Dredging sand flats held within the constitutional prohibition.

Anderson v. Hill, 54 Mich. 477, 20 N. W. 549 and Wilcox v. Paddock, 65 Mich. 23, 31 N. W. 609, hold the deepening and straightening of a river within the constitutional prohibition.

Rippe v. Becker, 56 Minn. 100, 57 N. W. 331. Construction of a grain elevator held a work of internal improvement and therefore prohibited by the state constitution.

Getchell v. Benton (Nebr.), 47 N. W. 468, a mill for the manufacture of beet sugar which is not subject to public control is not an internal improvement within the meaning of the statute.

54—State ex rel. Jones v. Froelich, 115 Wis. 32, 91 N. W. 115.

primarily and preponderantly merely facilitate the essential functions of government. Of course this line of classification does not exclude the possibility that the dominant characteristics of one class may be present in illustrations of the other. A toll-gathering canal, which gathers spreading waters within its banks, may promote public health, as may also a drainage system undertaken for improvement of the lands of those who construct it. Improvement of the grounds of a state institution may improve access to, and enhance the value of, neighboring property. But in each case the dominant purpose is obvious, and therefore the classification along the line of distinction above stated."

There are certain works of local and internal improvement, using the term in its broad sense, in regard to the construction of or granting of aid in the construction of which the law is well fixed, namely, the establishment of public highways,[55] and

55—Railroad Co. v. County of Otoe, 16 Wall. 667; Chilton v. Gratton, 82 Fed. 873; Johnson v. Williams (Calif.), 95 Pac. 655; Devine v. Sacramento County Sup'rs, 121 Cal. 670; State v. Kansas City, 60 Kan. 518; Favalora v. Police Jury of Parish of St. Bernard (La.), 36 So. 467; Elting v. Hickman (Mo.), 72 S. W. 700.

Catron v. La Fayette County, 107 Mo. 659. Act 1868 recognizes a bridge as part of a road and the county court has authority to issue bonds for "repairing" roads. Ghiglione v. Marsh, 48 N. Y. S. 604; Queens County Sup'rs v. Phipps, 51 N. Y. S. 203; Board of Trustees of Youngville Twp. v. Webb (N. C.), 71 S. E. 520; State v. Warren County Comm'rs, 17 Oh. St. 558.

Dingman v. City of Sapulpa (Okla.), 111 Pac. 319. Street improvements are not public utilities within Const. Art. 10, Sec. 27. See also as holding the same Hooper v. State, 110 Pac. 912.

Sears v. Steele (Ore.), 107 Pac. 3. The word "highway" as used in Const. Art. V, Sec. 23, prohibiting the Legislature from passing any local law for opening its highways, means ordinary roads and not railroads or canals.

Jones v. City of Camden, 44 S. C. 319. A debt contracted for paving streets is for a municipal purpose and bonds may be issued in payment when express legislative authority is conferred.

Bonds issued for improvement of streets and highways. Gause v. City of Clarksville, 5 Dill. 165; Hitchcock v. City of Galveston, 2 Woods 272; Sturtevant v. City of Alton,

canals,[56] the improvement of navigable waters,[57] the establishment of a sewerage system[58] or the digging of ditches, having for their purpose the draining of large tracts of low and swampy land. The construction of the last is justified by the double reason, the removal of a nuisance detrimental to the public health and the addition to the tillable and arable lands of the state.[59]

3 McLean 393; State v. Benton, 25 Nebr. 756; State v. Benton, 26 Nebr. 154.

But special district bonds cannot be issued for curbing and guttering of street intersections. Hubbard v. Sadler, 104 N. Y. 223; State v. Fayette County Comm'rs, 37 Oh. St. 526; Mall v. City of Portland, 35 Ore. 89; City of Williamsport v. Com., 84 Pa. 487; Com. v. Council of Pittsburgh, 88 Pa. 66; Neely v. Town Council of Yorkville, 10 S. C. 141; Jones v. City of Camden, 44 S. C. 319; Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270.

56—Perkins County v. Graff, 114 Fed. 441 (Canal); City of Kearney v. Woodruff, 115 Fed. 90; Nelson v. Fleming, 56 Ind. 310; Cummings v. Hyatt, 54 Nebr. 35, 74 N. W. 411; New York etc. Co. v. City of Brooklyn, 71 N. Y. 580.

Waterloo Water Mfg. Co. v. Shanahan, 128 N. Y. 345, 28 N. E. 358. Authority held not granted in this case because act was not passed by two-thirds vote as required by New York constitution. Hubbard v. City of Toledo, 21 Oh. St. 379; State v. City of Toledo, 48 Oh. St. 112, 26 N. E. 1061.

State v. King County (Wash.), 88 Pac. 935. No authority is conferred by Laws 1889-90, page 37, Sec. 2, to issue bonds for the construction of a ship canal for the benefit of the Federal Government. Bilger v. State (Wash.), 116 Pac. 19.

57—Taylor v. Newberne County Com'rs, 55 N. C. 141; Sowens v. City of Racine, 10 Wis. 271; Curtis Admr. v. Whipple, 24 Wis. 350.

58—Carter v. Barclay (Calif.), 112 Pac. 556; City of Atchison v. Price (Kan.), 25 Pac. 605; City of Louisville v. Board of Park Comm'rs (Ky.), 65 S. W. 860; Pryor v. City of Kansas City, 153 Mo. 135, 54 S. W. 499; State v. Babcock (Nebr.), 35 N. W. 941; Contoocook Fire Precinct v. Town of Hopkinton (N. H.), 53 Atl. 797; Orton v. Andrus, 191 N. Y. 231, 83 N. E. 1120; Robinson v. City of Goldsboro, 122 N. C. 211.

State v. Millar (Okla.), 96 Pac. 747. A sewer is a public utility within Constitution, Art. 10, Sec. 27, authorizing an incorporated city by a majority vote to incur indebtedness in a larger amount than specified in Sec. 26 to purchase or construct public utilities. Naylor v. McColloch (Ore.), 103 Pac. 68; Cleveland v. Calvert (S. C.), 31 S. E. 871; Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270.

59—Hagar v. Reclamation Dist., 111 U. S. 701; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112; Tregea v. Modesta Irr. Dist., 164 U. S. 179; Kimball v. Reclamation Fund Comm., 45 Calif. 344; In re Madera Irr. Dist., 92 Calif. 296, 28

In other states where, by reason of the physical topography of the country, certain portions are subject to inundation, either by express constitutional or statutory provision or as policy of the state expenditures for the construction and maintenance of levees, are held as proper and justifiable from the viewpoint of the purpose as a public one.[60]

The erection of bridges [61] has also been held a purpose for which public moneys can be properly used.

Pac. 272; Hughson v. Crane, 115 Calif. 404, 47 Pac. 120; Inglin v. Hoppin (Calif.), 105 Pac. 582; Greeley v. Jacksonville, 17 Fla. 174; Zigler v. Menges, 121 Ind. 99, 22 N. E. 782; Lussem v. Sanitary Dist. of Chicago (Ill.), 61 N. E. 544; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 62 N. E. 201; In re Drainage Dist. No. 3 (Ia.), 123 N. W. 1059; Town of New Iberia v. New Iberia etc. Drainage Dist., 106 La. 651, 31 So. 305; Butler v. Board of Directors of Fourche Drainage Dist. (La.), 137 S. W. 251; State ex rel. Utick v. Comm'rs of Polk County, 87 Minn. 325, 92 N. W. 216; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 70 S. W. 721; Hoertz v. Jefferson etc. Co. (Mo.), 84 S. W. 1041; State ex rel. Applegate v. Taylor (Mo.), 123 S. W. 892; State ex rel. Marshall v. Bugg, 123 S. W. 827 (Mo.); Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; Billings Sugar Co. v. Fish (Mont.), 106 Pac. 565; Cummings v. Hyatt, 54 Nebr. 35, 74 N. W. 411; Campbell v. Youngson (Nebr.), 114 N. W. 415; O'Neill v. City of Hoboken (N. J.), 60 Atl. 50; Tidewater Co. v. Coster, 18 N. J. Eq. 54; In re Spring Valley Swamp, 123 N. Y. S. 269; People v. Wiggins, 128 N. Y. S. 344; Matter v. Tuthill, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781; Brown v. Keener, 74 N. C. 714; Moller v. City of Galveston (Tex.), 57 S. W. 1116; Louis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Prescott Irrigation Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; see also Lodenslager v. Atlantic City (N. J.), 77 Atl. 1060. Other irrigation cases; State of Kansas v. State of Colorado, 206 U. S. 46; Ore. Short Line R. R. Co. v. Pioneer Irr. Dist. (Ida.), 102 Pac. 904.

Drainage Dist. No. 1 v. Richardson County (Nebr.), 125 N. W. 796. A drainage district organized under Statutes 1909, c. 89 Art. 4, is a public and not a private corporation.

60—Eldridge v. Trezevant, 160 U. S. 452; Hart v. Orleans Levee Com'rs, 54 Fed. 559; State v. Board of Com'rs of Shawnee County, 83 Kan. 199, 110 Pac. 92; Williams v. Cammack, 27 Miss. 209; Daily v. Swope, 47 Miss. 377; Morrison v. Morey, 146 Mo. 543, 48 S. W. 629; State v. Wall., 153 Mo. 220, 54 S. W. 465; Redfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151; Johnston v. Galveston County (Tex.), 85 S. W. 511.

61—County Com'rs v. Chandler, 96 U. S. 205. A public bridge

Judge Cooley in his History of Michigan, published in 1885, says: "Our state had, once before, a bit of experience of the evils of government connecting itself with works of internal improvement. In a time of inflation and imagined prosperity the state had contracted a large debt for the construction of a system of railroads and the people were oppressed with heavy taxation in consequence. Moreover, for a portion of this debt, they had not received what they bargained for and they did not recognize their legal or moral obligation to pay it. The good name and fame of the state suffered in consequence. The result of it all was that a settled conviction fastened itself upon the minds of our people that works of internal

though a toll bridge is a work of internal improvement and its construction therefore legal.

United States v. Dodge County Com'rs, 110 U. S. 156. Wagon bridge a work of internal improvement, and its construction legal. Rondo v. Rogers Township, 99 Fed. 202 C. C. A.; City of South St. Paul v. Lamprecht Bros., 88 Fed. 449 C. C. A.; Gilbert v. Canyon County (Idaho), 94 Pac. 1027; Town of Stites v. Wiggins Ferry Company, 97 Ill. App. 157; Pritchard v. Magoun, 109 Ia. 364, 80 N. W. 512.

Cumberland v. Magruder, 34 Md. 381. Affirmative vote necessary to incur indebtedness for the building of a bridge to cost in excess of charter limitations. Bradley v. Franklin County, 64 Mo. 638; Catron v. Lafayette County, 106 Mo. 659, 17 S. W. 577.

Haeussler v. City of St. Louis (Mo.), 103 S. W. 1034. Expenditures limited by constitutional debt limitation.

Jenkins v. Newman (Mont.), 101 Pac. 625. Constitutional limitation contained in Art. XIII, Sec. 5, limits expenditures for bridge purposes. State v. Babcock (Nebr.), 36 N. W. 474.

Union Pac. R. R. v. Com'rs, 4 Nebr. 450. Nebraska cases are uniform in holding that a public bridge is a work of internal improvement. Fremont Bldg. Assoc'n v. Sherwin, 6 Nev. 48; Lehigh Valley R. R. Co. v. Canal Board, 125 N. Y. S. 227; McKethan v. Cumberland County Com'rs, 92 N. C. 243; Bruce v. City Council of Greenville, 89 S. C. 241, 71 S. E. 817.

Mitchell County v. City National Bank (Fed.), 43 S. W. 880. Expenditures for bridges limited by taxing provisions of Const. Art. 11, Sec. 2 and Art. 8, Sec. 9.

But see Dunbar v. Board of Com'rs of Canyon County (Ida.), 49 Pac. 409. Building a bridge is not an ordinary and necessary expense within the meaning of the Const. Art. 8, Sec. 3. State v. Board of Com'rs of Vanderburgh County (Ind.), 94 N. E. 716.

improvement should be private enterprises; that it was not within the proper province of government to connect itself with their construction or management, and that our imperative state policy demanded that no more burdens be imposed upon the people by state authority for any such purpose. Under this conviction they incorporated in the constitution of 1850 several provisions expressly prohibiting the state from being a party to, or engage in carrying on, any work of internal improvement."

§ 109. Railway aid.

For many years the granting of public aid in the construction of railways owned and operated by private individuals or corporations was not permitted, the purpose not being, as the courts then held, a "public one." The doctrine now is clearly established that such aid is valid, and the voting of public moneys, unless restrained by constitutional provisions, to aid in the construction of railways, is an appropriation for a public use. This holding is based upon the principle that a railway is a quasi public highway; that one of the duties of the state is to furnish means of safe and rapid communication within its limits, and having the power, even considered by some in the light of a duty to do this directly, it can accomplish the same result indirectly through private agencies. The tendency of public corporations to incur unwise debts and to make lavish expenditures is too great without giving public officials the least latitude and the power is one of doubtful expediency. The doctrine, however, is thoroughly established by a long line of decisions, all of which it is unnecessary to cite. A few will be given in the notes.[62]

62—Knox County v. Aspinwall, 62 U. S. 208; St. Joseph v. Rogers, 16 Wall. 644; Town of Queensbury v. Culver, 19 Wall. 83; Talcott v. Township of Pine Grove, 19 Wall. 666; Taylor v. Ypsilanti, 105 U. S.

In Iowa, the early decisions were against and the later cases are in favor of the legality of railway aid. In Michigan, the state courts have uniformly ruled against the validity of such a contribution on the part of public corporations and in Wisconsin, the recent course of judicial decision has been for the granting of aid.[63]

The decisions of the Supreme Court of Michigan have, however, been reversed in effect by the Supreme Court of the United States, notably Supervisors of Pine Grove Township v. Talcott,[64] where in an exhaustive opinion that court held an act of the legislature of Michigan authorizing the issue of railroad aid bonds constitutional.

In several of the states constitutional provisions have been adopted relative to the granting of aid to railroad

60; City of Savannah v. Kelly, 108 U. S. 184; Pleasant Township v. Aetna Life Ins. Company, 138 U. S. 67; Rogers v. City of Keokuk, 154 U. S. 546; Folsom v. Ninety-six, 159 U. S. 611; Evansville v. Dennett, 161 U. S. 434; Town of Darlington v. Atlantic Trust Co., 68 Fed. 849; McCleary v. Babcock (Ind.), 82 N. E. 453; Sup'rs of Portage v. Wis. Central R. R. Co., 121 Mass. 460; Gibson v. Mason, 5 Nev. 283; Perry v. Keene, 56 N. H. 514; Wood v. Com'rs of Oxford (N. C.), 2 S. E. 653; Glen v. Wray, 126 N. C. 730, 36 S. E. 167; Wittkowsky v. Board of Com'rs of Jackson County (N. C.), 63 S. E. 275; State v. Nealy, 30 S. C. 587; Madrey v. Cox, 73 Tex. 53, 11 S. W. 541; Jennings Banking & Trust Co. v. City of Jefferson (Tex.), 70 S. W. 1005, 79 S. W. 876.

63—Iowa Cases. Stokes v. Scott County, 10 Iowa 166; McClure v. Owen, 26 Ia. 243.

Hanson v. Vernon, 27 Iowa 28; but see in favor of railroad aid: Stewart v. Polk County Sup'rs, 30 Ia. 9; Renwick v. Davenport & N. W. R. R. Co., 47 Iowa 511.

Michigan Cases. People v. Township Board of Salem, 20 Mich. 452; People v. State Treasurer, 23 Mich. 499; Dodge v. Van Buren County Ct. Judge, 118 Mich. 189.

Wisconsin Cases. Foster v. City of Kenosha, 12 Wis. 688; Hasbrouck v. City of Milwaukee, 13 Wis. 42.

Whiting v. Sheboygan & F. R. R. R. Co., 25 Wis. 167. The constitutionality of the same act considered in the Whiting cases was before the supreme court of the United States in Olcott v. Fond du Lac Sup'rs, 16 Wall. 678, and its validity sustained. See the later cases sustaining the validity of railroad aid of Rogan v. Watertown, 30 Wis. 259; Lawson v. Milwaukee, etc. R. R. Co., 30 Wis. 598; Oleson v. Green Bay etc. Ry. Co., 36 Wis. 383.

64—19 Wall. 666.

companies, in some of the states noted the prohibition applies with certain exceptions,[65] and in the following states, the granting of aid is either expressly permitted or allowed upon the conditions specified.[66]

In some states the decisions are to the effect that constitutional provisions prohibiting cities, towns, counties, etc., or the state from lending credit or granting public moneys to individuals, associations, or corporations, apply to raliroads.[67]

The principle being established that the grant of aid to a railroad corporation is for a public purpose, the only practical questions remaining for the bond buyer are to determine: whether (1) there is a constitutional or statutory prohibition against the granting of such aid; (2) whether in specific instances the aid granted is within the debt limitation of the public corporation extending the same, and (3) whether all the conditions required by law when the grant of aid is authorized have been complied with.

§ 110. Railway aid securities, further considered.

In the preceding section,[68] the authorities are cited which clearly establish the rule that where legal authority exists public corporations may issue negotiable securities for the purpose of construction or aiding in the

65—Conn., Art. 25; Ill. separate section; Ky., Sec. 177; Md., Art. 3, Sec. 54; Miss., Art. 7, Sec. 183; Mo., Art. 4, Sec. 49, exception provided in Art. 9, Sec. 6; Mont., Art. 3, Sec. 38; Nebr., Art. 11, Munic. Corp., Sec. 1; New Mex., Art. 9, Sec. 14.

S. C., Art. 10, Sec. 6 as amended in 1910 where there is a special exception in favor of the Greenwood and Saluda R. R. Co. Wyo., Art. 3, Sec. 39; Art. 10, Sec. 5 and Art. 16, Sec. 6; Town of Adell v. Woodall (Ga.), 50 S. E. 481.

66—La., Art. 270; Nev., Art. 8, Sec. 10; Va., Art. 13, Sec. 185, conditioned on vote; Tenn., Art. 11, Sec. 29 by specified vote.

67—Southern Ry. Co. v. Hartshorne (Ala.), 50 So. 139; Higgins v. City of San Diego (Calif.), 45 Pac. 824; Atkinson v. Board of Com'rs of Ada County (Idaho), 108 Pac. 1046.

68—See Sec. 109, ante.

construction of lines of railway through or adjacent to them. At the present time many of the states have constitutional provisions prohibiting the granting of such aid and in other states the practice has been substantially if not entirely discontinued.[69]

The consideration of many cases relating to the granting of aid to railroad companies by public corporations would be, in view of present conditions, largely academic. In the briefest way, attention will be called to some of the leading cases, however, bearing especially upon the question of the performance of conditions required of railway companies as precedent to the issue of the grant to them of aid in any form whether through subscriptions to their stock or actual donations.

The authorities quite uniformly agree upon the proposition that a public corporation will not be released from a subscription to railroad stock or aid extended in the form of a proposed donation by or through the consolidation of that railroad with others.[70] Nor will the consoli-

69—See Sec. 109, ante.

70—Ray County v. Vansycle, 96 U. S. 675; City of Columbus v. Dennison, 69 Fed. 58; Morrill v. Smith County, 89 Tex. 529, 36 S. W. 56; Bates County v. Winters, 112 U. S. 325; Livingston County v. First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18; Chicago, K. & W. R. Co. v. Stafford County Com'rs, 36 Kan. 121, 12 Pac. 593; Southern Kansas & P. R. Co. v. Towner, 41 Kan. 72; Vicksburg, S. & P. R. Co. v. Scott, 52 La. Ann. 512; Tagart v. Northern Cent. R. Co., 29 Md. 557. A consolidation of two railroad companies extinguishes all previously existing arrangements for the conversion of bonds into stock of one of the roads at the will of the holder.

Farnham v. Benedict, 107 N. Y. 159, 13 N. E. 784. Municipal bonds issued to aid the construction of a line of railway become void when the charter of such corporation expires by limitation before the delivery of the bonds.

Town of Mt. Morris v. Thomas, 158 N. Y. 450, affirming Town of Mt. Morris v. King, 8 App. Div. 495, 40 N. Y. Supp. 709; Wright v. Milwaukee & St. P. R. Co., 25 Wis. 46; Lynch v. Eastern, L. & M. R. Co., 57 Wis. 430; Nugent v. Sup'rs, 19 Wall. 241; Scotland County v. Thomas, 94 U. S. 682; County of Schuyler v. Thomas, 98 U. S. 269, 25 L. Ed. 88; Empire v. Darlington, 101 U. S. 87, 25 L. Ed. 878; Harter v. Kernochan, 103 U. S. 562, 26 L. Ed. 411; New Buffalo v. Cambria Iron Co., 105 U. S. 73, 26 L. Ed. 102; Green County

dation or reorganization of the railroad company originally intended by the public corporation as the party to whom bonds or aid was to be given or the fact of its reorganization affect the validity of railroad aid bonds theretofore issued under legal authority.

This rule holds true where under the laws of the state such consolidation or reorganization was permissible—although in some of the cases cited the question of the consent of the public corporation to the consolidation was held necessary to make the subscription or the aid effectual.

§ 111. Incomplete organization; charter changes.

If a railroad company is a corporation de facto, its corporate existence and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it.[71] And it has also been held that it is no defense to the validity of bonds if the railroad company to which they were issued was not incorporated until the day of election at which the railroad aid bonds were voted.[72]

The North Carolina cases, however, hold that that provision of the North Carolina Code, Section 1996, which

v. Conness, 109 U. S. 104, 27 L. Ed. 872; Livingston County v. First National Bank of Portsmouth, 128 U. S. 102, 32 L. Ed. 359; Pope v. Board of Com'rs of Lake County, 51 Fed. 769; Board of Com'rs of Henderson County v. Travelers Ins. Co., 128 Fed. 817 C. C. A.; Society for Savings v. New London, 29 Conn. 174; Thomas v. County of Morgan, 59 Ill. 479; Nelson v. Haywood County, 3 Pick. (Tenn.) 781, 11 S. W. 885; but see Harshman v. Bates County, 92 U. S. 569.

Town of Big Grove v. Wells, 65 Ill. 263. Bonds issued to different company than that named in the call for the election authorizing the same are null and void.

71—Com'rs of Douglas County v. Bolles, 94 U. S. 104, 24 L. Ed. 46.

County of Macon v. Shores, 97 U. S. 272, 24 L. Ed. 889. The doctrine of estoppel applied. County of Daveiss v. Huidekoper, 98 U. S. 98, 25 L. Ed. 112; County of Ralls v. Douglass, 105 U. S. 728, 26 L. Ed. 975.

72—County of Cass v. Johnson, 95 U. S. 360, 24 L. Ed. 419.

provides that boards of county commissioners may subscribe to the stock of any railroad company applies only to railroads which had been commenced prior to the adoption of the Constitution of 1868, and which had not been completed.[73]

A slight charter change will not invalidate railroad aid bonds[74] and under the Statutes of Missouri, 1866, Chapter 63, where the route of the railroad merely is designated under a vote pursuant to its provisions the county authorities have a right to select the particular corporation to which the bonds shall be issued.[75]

If a railroad company becomes extinct for failure to begin construction as required by the law of its organization, municipal bonds issued in its aid become void.[76]

§ 112. Donations.

The power to make a donation in aid of a railroad company is dependent upon legislative action the same as in the case of a subscription to its stock although as the Supreme Court of the United States said, the inducement to a subscription may be greater than the inducement to a donation for in the one case there may be a hope of reimbursement in the stock obtained; in the other there is no such expectation.[77]

73—Board of Com'rs of Stanley County, N. C. v. Coler, 96 Fed. 284 C. C. A.; Board of Com'rs of Stanley County v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439; Board of Com'rs of Wilkes County v. Call, 123 N. C. 308, 31 S. E. 481; Com'rs of Buncombe County v. Payne, 123 N. C. 434, 31 S. E. 711.

74—Ranney v. Baeder, 50 Mo. 600; Powell v. Sup'rs of Brunswick County, Va., 14 S. E. 543.

75—Knox County v. Ninth National Bank, 147 U. S. 91; see, also, Com'rs of Johnson County v. Thayer, 94 U. S. 631, 24 L. Ed. 133; Scipio v. Wright, 101 U. S. 665; but see Baltimore & D. P. R. R. Co. v. Pumphrey (Md.), 21 Atl. 599.

76—Farnum v. Benedict (N. Y.), 13 N. E. 784.

77—Queensbury v. Culver, 19 Wall. 83; Converse v. City of Fort Scott, 92 U. S. 503, 23 L. Ed. 621; State v. Board of Com'rs of Clinton County (Ind.), 68 N. E. 295.

The donation or the subscription may be based upon the assent of a required percentage of the voters [78] and where there is statutory authority for subscription to the stock but none for a donation if the latter is given in the absence of conditions which would warrant the application of the doctrine of estoppel bonds issued or a donation extended will be held invalid.[79]

§ 113. Performance of conditions precedent required of railway companies.

The issue of negotiable bonds by public corporations to aid in the construction of railway lines through, into or adjoining them, has been of frequent occurrence under lawful authority, the basis of the legality of such issue being the supposed public advantage and benefit derived by the community issuing such bonds from the construction of such enterprises.[80] Railway lines are broadly regarded by the courts quasi public highways affording facilities for the rapid and economical transportation of the products of the country and its inhabitants. They are considered works of internal improvement of such a character and of such public utility and advantage as to authorize the issue of negotiable bonds considered with reference to use of public funds, but this fact of itself does not create such legal right. Legislative or constitu-

78—Jarrolt v. Moberly, 103 U. S. 580, 26 L. Ed. 492; see Secs. 109 and 110, ante.

79—Post v. Pulaski County, 49 Fed. 628 C. C. A.; Choisser v. People (Ill.), 29 N. E. 546; Rogan v. Watertown, 30 Wis. 259.

But see City of Cairo v. Zane, 149 U. S. 122, where it was held the particular transaction in question would not convert a subscription authorized by statute into an unauthorized donation.

80—Massachusetts & S. Const. Co. v. Cherokee Twp., 42 Fed. 750; Chilton v. Town of Gratton, 82 Fed. 873; Carpenter v. Greene County, 130 Ala. 613, 29 So. 194.

See Secs. 109 and 110, ante, and also Elliott R. R.'s Chap. 4, where the subject is thoroughly and exhaustively treated; City of Macon v. East Tenn. V. & G. R. Co., 82 Ga. 501.

tional authority must exist, and when this is wanting, aid granted in the form of a negotiable bond will be regarded illegal and therefore void. The basis of the issue being as suggested it follows that if there is a failure to perform the conditions required by the act giving authority, the bonds may be regarded illegally issued and therefore void even in the hands of bona fide purchasers.[81] They may be issued when specially authorized not

81—Aspinwall v. Daviess County Com'rs, 22 How. (U. S.) 364; Gunn v. Barry, 82 U. S. (15 Wall.) 610, 623; Harshman v. Bates County, 92 U. S. 569, and German Sav. Bank v. Franklin County, 128 U. S. 526; Green v. Dyersburg, 2 Flip. 477, Fed. Cas. No. 5,756; Mercer County v. Provident Life & Trust Co. (C. C. A.), 72 Fed. 623; Commissioners Ct. of Limestone County v. Rather, 48 Ala. 433; Alley v. Adams County Sup'rs, 76 Ill. 101.

Chiniquy v. People, 78 Ill. 570. Where bonds are issued and delivered before the performance of required conditions, this will be considered a waiver by the county.

Land Grant R. & T. Co. v. Davis County Com'rs, 6 Kan. 256. A vote by a county to subscribe for stock of the railway company and to issue bonds in payment therefor does not create a contract between the county and the railway company enforceable by a delivery of the bonds even when all the conditions required had been performed by the railway company. Harrington v. Town of Plainview, 27 Minn. 224; Bound v. Wisconsin Cent. R. Co., 45 Wis. 543; Town of Duanesburgh v. Jenkins, 40 Barb. (N. Y.) 574; Cumberland & O. R. Co. v. Barren County Ct., 73 Ky. (10 Bush.) 604. Buffalo & Jamestown R. R. Co. v. Faulkner, 103 U. S. 821.

Purdy v. Lansing, 128 U. S. 557, 32 L. Ed. 531. Under the law a railroad company must designate the counties through which it will pass.

Green County v. Quinlan, 211 U. S. 582, 53 L. Ed. 335, modifying judgment in 157 Fed. 33. A condition that a county shall be exonerated from a prior subscription to the stock of another railway company is a condition precedent to the lawful issue of the bonds but the issue of bonds will be presumptive though not conclusive evidence of a performance of the condition.

Breckenridge County v. McCracken, 61 Fed. 191 C. C. A. Where a road has been completed before bonds are delivered the provisions of Kentucky Act of April 9, 1873 requiring a bond from the president of the road for the faithful application of the proceeds of the railway aid bonds to the construction of the road will not apply.

Bras v. McConnell (Ia.), 87 N. W. 290. Contract for railway connections the condition required in this case.

Parker v. Smith, 3 Ill. App. 356. A condition that the railroad should be built within one-half mile of

only for aiding in the construction of the line,[81a] but for the purpose of constructing within corporate limits terminal yards and facilities consisting of engine houses,

the courthouse is not complied with by the construction of a line terminating nine miles from the town. Alley v. Adams County, 76 Ill. 101; Middleport v. Aetna Life Ins. Co., 82 Ill. 562; Eagle v. Kohn, 84 Ill. 292.

Green County v. Shortell (Ky.), 75 S. W. 251. Construction of road within prescribed time.

Commonwealth v. Town of Williamstown (Mass.), 30 N. E. 472. Deposit of first mortgage bonds of railroad company required as security for advances. State v. Minneapolis, 32 Minn. 501; Town of Birch Cooley v. First National Bank (Minn.), 90 N. W. 789.

Township of Midland v. County Board of Gage County, 37 Nebr. 582, 56 N. W. 317. Location of road. Oswego County Savings Bank v. Town of Genoa (N. Y.), 65 N. E. 1120, affirming 72 N. Y. S. 786. The entire route and terminus of a proposed road must be located as a condition precedent to the issue of railroad aid bonds.

State v. City of Morristown, (Tenn.), 24 S. W. 13. Location of line.

Sweeney v. Tenn. Central R. R. Co. (Tenn.), 100 S. W. 732. Where the location of shops is a condition precedent a bill to have a subscription by a city to railroad stock declared void on account of failure to perform the condition must allege the location of shops elsewhere, otherwise it is demurrable. Eckols v. City of Bristol (Va.), 17 S. E. 943.

Ravenswood, etc. Ry. Co. v. Town of Ravenswood (W. Va.), 24 S. E. 597. Location of road.

81a—Rogers v. Runyan, 9 How. Pr. (N. Y.) 248; Coleman v. Marin County Sup'rs, 50 Cal. 493. It is not necessary to construct a line upon the route selected at the time the aid was granted. Com. v. Chesapeake & O. R. Co., 12 Ky. L. R. 709, 15 S. W. 53; Oldtown & L. R. Co. v. Veazie, 39 Me. 571; Penobscot & K. R. Co. v. Dunn, 39 Me. 587.

Smith v. County of Clark, 54 Mo. 58. The question of the legal existence of the railroad corporation to which aid had been granted cannot be raised in a suit on aid bonds.

Lynch v. Eastern, L. & M. R. Co., 57 Wis. 430. Aid may be granted to that railway company which shall first complete its line to a given point. The court said: "The town was clearly authorized to aid either of the companies in the construction of its road from Monroe to Gratiot and it was undoubtedly competent for the electors of the town to make it conditioned upon the event that the company receiving its aid should build its road from Monroe to Gratiot before a road should be built over the same line by the other company. * * * The only object of the electors of the town of Gratiot was to procure the construction of a line of railway from Monroe to Gratiot; they had no peculiar interest in the construction of the line west of the village of Gratiot, and consequently it was a matter of indifference to them which of the two

shops, or general office buildings [82] or the purchase of ground upon which to locate them.[83] The extent of aid granted may be dependent on mileage constructed [84] or upon the maintenance of terminal facilities within the corporate limits.[85] The condition most frequently to be found in acts authorizing the issue of bonds for this

railway companies constructed such line. The object of the taxpayers of Gratiot would be as well accomplished by its construction by one as by the other of said companies." People v. Schenectady County Sup'rs, 35 Barb. (N. Y.) 415.

Van Hostrup v. Madison City, 1 Wall. 291, 17 L. Ed. 538. It is not necessary that the line of a railway to which aid is extended should come within the city under the particular grant of authority considered in the case.

82—Trustees of Elizabethtown v. Chesapeake, O. & S. W. R. Co., 94 Ky. 377, 22 S. W. 609; Echols v. City of Bristol, 90 Va. 165, 17 S. E. 943.

State v. Minneapolis, 32 Minn. 501. Where the condition for the issue of railroad aid bonds is the location of general offices and headquarters, the operating headquarters of the road must be established in the city before it can be compelled by mandamus to issue the bonds.

Board of Trustees, etc. v. Chesapeake, etc. R. R. Co. (Ky.), 22 S. W. 609. A railroad received aid on the condition that it locate its machine shops at the place extending the aid, which was done. Subsequently the defendant company purchased the road and removed its machine shops to another town. It was held that the town authorities had no cause of action on account of the removal.

83—Converse v. City of Ft. Scott, 92 U. S. 503.

84—Nevada Bank v. Steinmitz, 64 Cal. 301; Casady v. Lowry, 49 Iowa, 523; Atchison, C. & P. R. Co. v. Phillips County Com'rs, 25 Kan. 261.

85—Chicago, K. & W. R. Co. v. Chase County Com'rs, 49 Kan. 399, 30 Pac. 456; Coe v. Caledonia & M. R. Co., 27 Minn. 197. The condition here being the location of a station within the town, the court say: "The construction of a railway into a town or village always and inevitably operates to the peculiar advantage of some, over and above the general advantage, as well as to the peculiar disadvantage of some. Yet, considerations of this kind have not prevented the legislature of this and other states, in a vast number of instances from authorizing municipal subscriptions and bonds in aid of such construction. This settles the question of public policy. It shows that the legislature has not regarded the existence of motives of personal and private advantage of the kinds mentioned as furnishing any reason why such subscriptions and bonds should not be authorized and voted. In our opinion the condition as to the location of the depot was a proper condition, and in no way invalidated the petition or the vote. It may be added that there is nothing in this condition which binds the company

purpose are those fixing the time [86] and the manner [87] of the construction and use of the line or the terminal facilities upon which the issue is conditioned. These elements may be regarded as the consideration of the transaction granting aid. A speedy or proper completion of the

to refrain from locating such other depots in, or in the vicinity of the village as the convenience of the public may require.'' State v. City of Minneapolis, 32 Minn. 501. Chicago, Kansas & Western R. R. Co. v. Harris (Kans.), 30 Pac. 456.

Water, Light & Gas Co. v. Hutchinson Interurban Ry. Co. (Kan.), 87 Pac. 883. The Laws of Kansas do not authorize a city to extend aid to a railway whose entire line is confined within the corporate limits of the city.

86—Buffalo & J. R. Co. v. Falconer, 103 U. S. 821; German Sav. Bank v. Franklin County, 128 U. S. 526, and cases cited by counsel on both sides. The time originally fixed for the completion of the road and which was made a condition precedent was held to control the validity of the bonds issued, and the fact that an extension of this time was made by certain public officials could not change this. Grattan Tp. v. Chilton (C. C. A.), 97 Fed. 145, and cases cited in majority opinion.

Eddy v. People, 127 Ill. 428. The power to extend the time originally fixed for the completion of the road in this case it was held did not exist.

Tipton County Com'rs v. Indianapolis, P. & C. R. Co., 89 Ind. 101; Nixon v. Campbell, 106 Ind. 47; State v. Wheadon, 39 Ind. 520. The time required by Ind. St. within which a railway company to which aid has been granted by a public corporation shall begin work, commences with the date of the order by the county commissioners for the levying of the aid tax.

McManus v. Duluth, C. & N. R. Co., 51 Minn. 30. A delay in this case, caused by the neglect of the railway company to secure the right to cross another railroad, held not excusable. Sawyer v. Manchester & K. R. Co., 62 N. H. 135. Where the record failed to show the time within which the road should be completed, its subsequent amendment, it was held, could not defeat the claim of the road to the aid granted, although it was not completed within the time as originally intended. West Virginia & P. R. Co. v. Harrison County Ct., 47 W. Va. 273, 34 S. E. 786. The right to make a subscription conditional discussed and determined.

Clark v. Town of Rosedale (Miss.), 12 So. 600. Failure to finish road in time specified entitles town to a cancellation of bonds. Coleman v. Broad River Twp., 50 S. C. 321, 20 S. E. 774.

87—Taylor v. City of Ypsilanti, 105 U. S. 60; Purdy v. Town of Lansing, 128 U. S. 557. The adoption of an entire route held necessary. Mercer County v. Provident Life & Trust Co. (C. C. A.), 72 Fed. 623; Grattan Tp. v. Chilton (C. C. A.), 97 Fed. 145; Bras v. McConnell, 114 Iowa 401, 87 N. W. 290; Falconer v. Buffalo & J. R. Co., 69 N. Y. 491; Oswego County

enterprise may be necessary in order that the public corporation reap the advantage and benefits supposedly derived,[88] and if the railway company fails in either of

Sav. Bank v. Town of Genoa, 66 App. Div. 330, 72 N. Y. Supp. 786.

Wilson County v. Third National Bank of Nashville, 103 U. S. 770. It is not necessary there should be a final and definite survey and location of the entire line of the company's road.

Kirkbride v. Lafayette County, 108 U. S. 208, 27 L. Ed. 705. In this case authority was given to extend aid to a railroad to be built "into, through or near such township." Bonds were issued and interest paid upon them for three years when default was made. In an action on interest coupons it was urged as a defense that no authority existed to extend the aid because the railroad was not built as required by the law authorizing the aid, the court said: "The word 'near' is relative in its signification. What would be near in one locality would not be in another, each case must be governed by special circumstances. The main inquiry is whether a railroad when constructed would be near enough to contribute to the convenience or advance the business interests of the particular township involved." The bonds were held good. Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, 42 L. Ed. 1156; Massachusetts & S. Construction Co. v. Township of Cherokee, 42 Fed. 750.

Holland v. State, 15 Fla. 455. A legislative act authorizing aid to a line of railway differing essentially and fundamentally from the line to which the power thus to aid was limited by the Constitution is void.

Aid may be extended to a line of road outside the limits of the public corporation granting it. R. R. Co. v. County of Otoe, 16 Wall. 667, 21 L. Ed. 375; Moulton v. Evansville, 25 Fed. 382; City of Columbus v. Dennison, 69 Fed. 58 C. C. A.

88—City of Macon v. East Tennessee, V. & G. R. Co., 82 Ga. 501; Thomas v. County of Morgan, 59 Ill. 479; Chicago, P. & S. W. R. Co. v. Town of Marseilles, 84 Ill. 145; Cantillon v. Dubuque & N. W. R. Co. (Iowa), 35 N. W. 620; Cedar Rapids, I. F. & N. W. R. Co. v. Elseffer, 84 Iowa, 510, 51 N. W. 27; Baltimore & D. P. R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559; Town of Birch Cooley v. First Nat. Bank, 86 Minn. 385; Clark v. Town of Rosedale, 70 Miss. 542; Midland Tp. v. County Board of Gage County, 37 Neb. 582; Oswego County Sav. Bank v. Town of Genoa, 66 App. Div. 330, 72 N. Y. Supp. 786; Murfreeshoro R. Co. v. Hertford County Com'rs, 108 N. C. 56, 12 S. E. 952; State v. City of Morristown, 93 Tenn. 239, 24 S. W. 13; Ravenswood, S. & G. R. Co. v. Town of Ravenswood, 41 W. Va. 732, 32 L. R. A. 416; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370. Conditions as approved by popular vote cannot be subsequently changed.

West Virginia & P. R. Co. v. Harrison County Ct., 47 W. Va. 273, 34 S. E. 786; Town of Platteville v. Galena & S. W. R. Co., 43 Wis. 493; State v. Common Council of Toma-

these respects the courts have generally held that there exists such a failure to perform the conditions precedent prescribed as will render void the bonds issued. The validity of these bonds, however, may be sustained through the doctrine of estoppel or recitals to be subsequently considered. The courts do not generally require more than a substantial compliance with such conditions. If by the act the railway is required to be built and in use by a certain date, such result at approximately that time will be considered sufficient, and the same principle will apply so far as the manner of the construction of the road is concerned. The law in this respect looks to the fact that there has been a substantial compliance with required conditions; that the public corporation has received the benefits it expected and, therefore, although there may be a failure to technically comply with conditions precedent, yet such failure should not be available to the public corporation as a defense in an action brought to enforce the payment of either the principal or interest of such bonds in the hands of bona fide holders.[89]

hawk, 96 Wis. 73, 71 N. W. 86. Railroad aid bonds held in escrow awaiting the completion of a line of road in aid of which they were granted should not be considered an indebtedness of the city until after their delivery.

89—Coleman v. Marin County Sup'rs, 50 Cal. 493; Stockton & V. R. Co. v. City of Stockton, 51 Cal. 334; Nevada Bank v. Steinmitz, 64 Cal. 301; People v. Holden, 82 Ill. 93; Nixon v. Campbell, 106 Ind. 47. The court here held that if the prescribed expenditure had been made within the township limits a forfeiture of the aid granted could not be declared although the road had failed to complete its line within the time prescribed. Barner v. Bayless, 134 Ind. 600.

To be "completed" means to be in a condition to be operated and of benefit to the people who are to pay the bonds. Pittsburgh, C., C. & St. L. R. Co. v. Harden, 137 Ind. 486, 37 N. E. 324. But see Lamb v. Anderson, 54 Iowa 190, holding that a railroad company cannot perform the required condition as to the construction of its line by the purchase of another road to complete it to the point specified, and also as holding the same Iowa, M. & N. P. R. Co. v. Schenck, 56 Iowa 626; Courtright v. Deeds, 37 Iowa 503; First Nat. Bank of Cedar Rapids v. Hendrie, 49 Iowa 403;

The principles as stated in this section apply equally to donations of money or subscriptions to the capital stock of the corporation and the issue of negotiable bonds. Some of the cases cited refer to such acts rather than the issue of negotiable bonds.

In connection with this subject it is well to distinguish, however, between a failure to perform conditions precedent as required by the terms of the authority, and prom-

Chicago, K. & W. R. Co. v. Makepeace, 44 Kan. 676; Chicago, K. & W. R. Co. v. Chase County Com'rs, 49 Kan. 399; Guillory v. Avoyelles R. Co., 104 La. 11, 28 So. 899; State v. City of Hastings, 24 Minn. 78; McManus v. Duluth, C. & N. R. Co., 51 Minn. 30. A delay of two weeks in the completion of a line was not held a substantial compliance and the aid granted was forfeited.

Town of Birch Cooley v. First Nat. Bank of Minneapolis, 86 Minn. 385. Although there was a substantial compliance with the required conditions for the granting of aid, the court, quite contrary to the commonly accepted rule, held the railroad company not entitled to the aid bonds issued.

Pacific R. Co. v. Seely, 45 Mo. 212; Workman v. Campbell, 46 Mo. 306; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263. "The road was fully completed for all purposes of transportation of passengers and freight and put into full operation and this was the evident object which the parties had in view. The terms of the contract are to 'complete and put in operation,' and this was done, though the company did not own one mile of track which it then used. This defense, we conclude, is without merit."

Townsend v. Lamb, 14 Neb. 324; Virginia & T. R. Co. v. Lyon County Com'rs 6 Nev. 68. A substantial compliance with the terms of the statute granting aid with reference to the point of construction of the road does not entitle the company to the aid granted even though a complete compliance would be impracticable. The court say: "But counsel for plaintiff claim that the condition has been substantially complied with and to that end offer evidence to prove that to have built the road on a line passing the point named would have rendered it an impracticable road for working purposes, in other words, as is claimed not a first-class road; and that the point touched is the nearest practicable point. * * * But it is not a substantial compliance with a contract to perform another and different matter and the fact that to have built a road as directed would have been to ruin it simply proves that the plaintiff agreed to do something which it either could not do or deemed it better not to do; but it was bound to do that thing substantially before it could claim any performance from defendants." Jackson v. Stockbridge, 29 Tex. 394. Sawyer v. Manchester & K. R. R. Co., 62 N. H. 135; Grattan Twp. v. Chilton, 97 Fed. 145 C. C. A.; Es-

ises or oral conditions made by officers or agents of the railway at the time when the aid is solicited and having for their purpose the inducing of such aid. The performance of conditions precedent required by law is necessary to the validity of the bonds. The fact that promises or oral agreements are not fulfilled when not made a part of the authority does not, necessarily, affect their validity in the hands of bona fide holders.[90]

till County, Ky. v. Embry, 144 Fed. 913; Chicago, etc. R. R. Co. v. Schewe, 45 Ia. 79.

People v. Holden, 82 Ill. 93. The condition that a road shall be completed to a certain city within a given time is complied with by its completion within that time to a point about a mile from the city and an arrangement with another road for the running of its trains into the city. Southern Kansas & Pac. R. R. Co. v. Towner, 41 Kan. 72, 21 Pac. 221.

90—Town of Brooklyn v. Aetna Life Ins. Co., 99 U. S. 362, where the authorities of a town, duly authorized, subscribed in its behalf for stock in a railroad company and issued coupon bonds in payment therefor, the town, when sued by a bona fide purchaser for value of the coupon before maturity, cannot set up as a defense that the company disregarded its promise to construct the road, or that the town officers delivered the bonds in violation of special conditions not required by statute and of which they had no knowledge or notice.

Carpenter v. Greene County, 130 Ala. 613, 29 So. 194; Town of Eagle v. Kohn, 84 Ill. 292. The provision of act April 16th, 1869, that municipal railroad aid bonds or subscriptions shall not be valid and binding until a compliance with the conditions precedent prescribed by the act does not make a performance of the conditions before the subscription or issuance of the bonds essential to their validity, a subsequent performance thereof being sufficient.

Chicago, K. & W. R. Co. v. Ozark Tp., 46 Kan. 415, 26 Pac. 710; Kansas City & P. R. Co. v. Rich Tp., 45 Kan. 275. In State v. City of Minneapolis, 32 Minn. 501, the city voted to issue bonds in aid of a railroad provided the terminus, general offices, and headquarters should be located there. It was held that the location of the operating headquarters of the road must be there established before the city could be compelled by mandamus to issue the bonds. See, also, Wullenwaber v. Dunigan, 30 Nebr. 877, 13 L. R. A. 811, where the railroad company represented as an inducement that it would locate its depot on a certain section and after the electors had voted the aid bonds the depot was located on another section, the court restrained the issue of the bonds. People v. Morgan, 55 N. Y. 587. Kennicott v. Sup'rs, 16 Wall 452.

§ 114. Miscellaneous provisions.

Where bonds have not been issued or delivered and the conditions have not been performed as agreed, their issue will be restrained.[91]

The enabling act usually designates the person or tribunal which shall have the power to determine when conditions precedent have been performed. This is a discretionary and an official duty and its performance cannot be delegated.[92]

Where the enabling act does not delegate to any person or tribunal the power to determine whether the conditions prescribed have been performed or to pass upon the manner of their performance, the body authorized to issue the bonds must necessarily determine the question.[93]

§ 115. Waiver of conditions.

The performance of conditions required by the Act giving authority to extend railroad aid either in respect to the manner or location of the line of railway, the time of its completion or any other condition which may be imposed may be waived by the public corporation in whose favor such conditions have been imposed. The waiver may be evidenced by the issue of securities by those officers to whom has been delegated the power to determine the performance of the condition or by the people of the locality in an acquiescence with existing conditions, the payment of interest upon bonds issued and in other ways.[94]

91—Jackson County Sup'rs v. Brush, 77 Ill. 59; Wullenwaber v. Dunigan, 30 Nebr. 877, 13 L. R. A. 811; Virginia & T. R. Co. v. Lyon County Com'rs, 6 Nev. 68.

92—Jackson County Sup'rs v. Brush, 77 Ill. 59; Belo v. Forsythe County Com'rs, 76 N. C. 489.

93—Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Knox County Com'rs v. Nichols, 14 Ohio St. 260.

94—County of Randolph v. Post, 93 U. S. 502, 23 L. Ed. 957; Converse v. City of Fort Scott, 92 U. S. 503; Coleman v. Board of Sup'rs,

Where bonds issued in aid of a railroad company fail to disclose on their face the fact that a county had imposed conditions on its liability to the railroad company under Act of Illinois of April 16, 1869, the fact that such conditions were not complied with will not affect their validity in the hands of bona fide and innocent purchasers.[95]

§ 116. Miscellaneous illustrations of a public purpose.

In the preceding sections certain purposes were named, the character of which has been clearly established as public, cases have been decided involving the character of other enterprises which, while private in their organizations, yet in their nature or the transaction of their business partake of a public character to such an extent that if the law specifically names them as capable of receiving public aid, indebtedness incurred in pursuance of that authority will be held valid and enforceable. This rule applies, as already stated, to the granting by public corporations of aid in the construction of railway lines through their territory or such adjoining territory as to result in a substantial benefit or advantage to them.[96]

The character of the industry carried on by mills in frontier districts has also been held to partake of this public nature so as to authorize under a law declaring such enterprises to be public, the incurring of a valid indebtedness either through the issue of bonds or otherwise.[97]

50 Calif. 493; Chiniquy v. People, 78 Ill. 570; Leavenworth, etc. R. R. Co. v. Com'rs of Douglas County, 18 Kan. 169; but see Neale v. County Court of Wood County (W. Va.), 27 S. E. 370; Plattville v. Galena, etc. R. R. Co., 43 Wis. 493; see, also, the later discussion of the subject of estoppel, Sec. 274 et seq., post.

95—Graves v. Saline County, 161 U. S. 359.

96—See Secs. 109 and 110, ante.

97—Township of Burlington v. Beasley, 94 U. S. 310; Blair v. Cumming County, 111 U. S. 363; Traver v. Merritt County Com'rs, 14 Nebr. 327. But see Osborn v. Adams County, 2 McCrary 97.

Aid has also been extended to other enterprises which have been held public in some instances and private in others.[98]

98—(a) Validity of aid or debt incurred denied.

Osborn v. Adams County, Nebr. 106 U. S. 181. Steam grist mill not a work of internal improvement.

Loan Assoc'n v. Topeka, 20 Wall. 655. In this case aid granted to a manufacturing concern was held not to be for a public purpose, the court said: "In the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufactures there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of the aid of the citizens by forced contributions."

Parkersburg v. Brown, 106 U. S. 487. Following Loan Association v. Topeka, 20 Wall. 655. The court held that bonds issued by the city of Parkersburg to aid a private manufacturing enterprise were not issued for a public purpose, the court said: "The city is to pay the principal and interest of the bonds according to their tenor, whether the borrower pays the city or not, no other source of payment being provided for the city, the implication is that the city is to raise the necessary amount by taxation. * * * Taxation to pay the bonds in question is not taxation for a public object, it is taxation which taxes the private property of one person for the private use of another."

Ottawa v. Carey, 108 U. S. 110. Bonds issued to be used in developing resources and surroundings of the city and in the improvement of the water power upon the Illinois and Fox rivers within the city and its immediate vicinity held not for a proper corporate purpose. Other bonds of the same issue were involved in Hackett v. Ottawa, 99 U. S. 76 and Ottawa v. First National Bank of Portsmouth, 105 U. S. 342.

Cole v. La Grange, 113 U. S. 1. The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities, or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject.

Dodge v. Mission Township, Shawnee County, Kansas, 107 Fed. 827 C. C. A. The erection and operation of sugar mills is a private and not

Payment of debts. The payment of debts is universally considered a public use of funds, and where the authority exists to issue negotiable securities under the principles already stated, bonds can be issued for their liquidation.[99]

a public purpose and bonds issued therefor as well as the statutes authorizing their issuance are void.

Eufaula v. McNab, 67 Ala. 588. Bonds issued in payment of land purchased to aid in a private enterprise in holding annual fairs are not for a public purpose.

Bissell v. Kankakee, 64 Ill. 249. Bonds issued as a donation to assisting a company to embark in the manufacture of linen fabrics not issued for a public purpose.

Commercial National Bank v. City of Iola, 9 Kan. 689. Aid to a foundry and iron works void, likewise bonds issued to aid in the construction of mill for the manufacture of wool. McConnell v. Hammond, 16 Kans. 228.

Union Pacific R. R. Co. v. Smith, 23 Kans. 145. Bonds issued to aid in constructing a dam and building a mill held void.

Lowell v. City of Boston, 111 Mass. 454. Bonds issued to relieve individuals whose homes had been destroyed by an extensive fire, held void. Coates v. Campbell, 37 Minn. 498. Construction of a dam. Powell v. Heisler, 45 Minn. 549, 49 N. W. 411.

Getchell v. Benton (Nebr.), 47 N. W. 468. A mill for the manufacture of beet sugar which is not subject to public control is not an internal improvement within the meaning of the statute. Wells v. Town of Salina, 119 N. Y. 280, 23 N. E. 870; Strock v. City of East Orange (N. J.), 72 Atl. 34; Ohio Valley Iron Works v. Town of Moundsville, 11 W. Va. 1.

(b) Aid or debt incurred permitted. Blair v. Cumming Co., 111 U. S. 363. City of Chicago v. Pittsburgh etc. Ry. Co., 91 N. E. 422. An agreement between the city of Chicago and a railway company relative to track elevation and the assumption of damages by the city held not obnoxious to that provision of the Constitution providing that no city shall make the donation or loan its credit in aid of a private corporation. In re House Bill No. 284 (Nebr.), 48 N. W. 275. Seed grain bonds.

Parsons v. Van Wyck, 67 N. Y. S. 1054. Bonds issued to pay cost of erection of Soldiers' and Sailors' Memorial Arch.

Cox v. Comm'rs of Pitt County (N. C.), 60 S. E. 516. County bonds issued to aid in the establishment of a training school for teachers, held for a public purpose.

State v. Nelson County (N. D.), 45 N. W. 33. Seed grain bonds held to come within the exception stated in Const., Sec. 185.

Ransom v. Rutherford County (Tenn.), 130 S. W. 1057. Acts of 1909, c. 580, authorizing the issue of bonds in aid of public Normal Schools not unconstitutional.

State v. Common Council of Madison, 7 Wis. 688. Purchase of cemetery bonds.

§ 117. Local improvements.

As distinguished from "internal improvements," which is a phrase usually applied to those works of general improvement made by the state itself, or its subordinate civil divisions in the exercise under lawful authority of their governmental duties, the term "local improvements" is used which is the phrase generally applied to the laying out or improvement of public streets. The word street usually designating an urban highway. The word highway being a generic one and including all public ways or means of communication and passage. In the common understanding and acceptance, a highway is a suburban road.[1]

The improvement of a street as used in its limited sense in this section, includes ordinarily its opening and construction, its grading, paving, general improvement and repair, including sidewalks as an integral part. The incurring of debt for any one or all of these objects is unquestionably considered a public purpose for which public corporations may, when authorized by the state, use their credit or issue negotiable securities for the immediate payment of their cost.[2]

99—City of New Orleans v. Clark, 95 U. S. 644; People v. McCreery, 34 Calif. 432; Hanley v. Sims, (Ind.), 94 N. E. 401; re-hearing denied; Stone v. City of Chicago, 207 Ill. 492, 69 N. E. 970; Heinl v. City of Terre Haute (Ind.), 66 N. E. 450; Doty v. Elsbree, 11 Kan. 209; Town of Jonestown v. Ganong (Miss.), 52 So. 692; Fisher v. City of Seattle (Wash.), 104 Pac. 655; see also Chap. IX, on refunding bonds.

1—Elliott, Roads & Streets, First Ed., Secs. 1 et seq.; State v. Moriarity, 74 Ind. 103; Inhabitants of Waterford v. Oxford County Com'rs, 59 Me. 450; State v. Davis, 68 N. C. 297; Century Dictionary, "street." See also, Abbott Munic. Corp., Secs. 422, et seq.

2—Hitchcock v. Galveston, 96 U. S. 341; Town of Millvalley v. House (Calif.), 76 Pac. 658; City of San Diego v. Potter (Calif.), 95 Pac. 146; City of Covington v. Nadaud (Ky.), 45 S. W. 498.

State v. Benton (Nebr.), 41 N. W. 1068. The cost of paving street intersections must be paid from sources other than by an issue of district bonds. Jones v. City of Newbern (N. C.), 67 S. E. 173; Effner v. City of Toledo (Ohio),

The payment of the cost of local improvements is commonly made a specific charge upon property especially benefitted and the question of whether this indebtedness is to be included as a part of the general or corporate indebtedness in ascertaining whether this has exceeded the legal limitation has been considered in a previous section.[3]

The rule seems to be clearly established that where the legal authority provides for the issue of negotiable securities or the incurring of indebtedness for a specified purpose, the proceeds cannot be used for any other though closely related or connected in its character.

§ 118. Public parks and boulevards.

The incurring of debt for objects having for their purpose the protection and the betterment of the good morals and health of the people has always been regarded not only legitimate but praiseworthy. To supply the opportunity for diversion and amusement in the open air is a purpose of this character and may be effected through the establishment and maintenance of public parks and boulevards.[4]

80 N. E. 8; Jones v. City of Camden, 44 S. C. 319, 23 S. E. 141.

3—See Sec. 78 ante.

4—See Abbott Munic. Corps., Secs. 182, 436; Shoemaker v. United States, 147 U. S. 282; Fritz v. City and County of San Francisco, 132 Calif. 373, 64 Pac. 566; followed in McHugh v. City and County of San Francisco, 132 Calif. 381, 64 Pac. 570; City of Oakland v. Thompson (Calif.), 91 Pac. 387; Cook v. South Park Com'rs, 61 Ill. 115; People v. Brislin, 80 Ill. 423; City of Lexington v. Kentucky Chautauqua Assembly (Ky.), 74 S. W. 943; Foster v. Boston Park Com'rs, 131 Mass. 225; Boston Water Power Co. v. City of Boston, 143 Mass. 546, 10 N. E. 318; In re Adams, 165 Mass. 497.

Bird v. Common Council of City of Detroit, 111 N. W. 860. The establishment and maintenance of a park system is not a work of internal improvement within the constitutional provision forbidding cities to engage in such enterprises, this particular undertaking being a contribution to the public safety and welfare. Brightwell v. Kansas City (Mo.), 134 S. W. 87; Seaside Realty & Improvement Co. v. Atlantic City (N. J.), 64 Atl. 1081;

The same principle has also been held to justify the acquirement of large tracts or limited areas of land, to which is attached some event of historic nature, for the purpose of converting them into public grounds.[5]

The rule is equally true as applied to other forms of local improvements that the cost and maintenance of public parks, grounds, or boulevards is generally met by arbitrary assessment upon benefited adjoining or abutting property. Local parks or boulevards are usually paid for in this way but those including large areas and intended for the use and benefit of the entire community are established and maintained as a general charge or from general revenues.

The issue of negotiable securities when authorized by law is unquestionably for a public purpose in the sense in which that term is used in this discussion.

Sewers. The subject of sewers as a local improvement has already been noted and some cases cited.[6]

The principles of law holding the various objects named in the preceding sections as legitimate uses of public moneys are so well established and their character so unquestionably determined by all the authorities as public that no attempt has been made to give exhaustive citations. The questions arising in connection with the expenditure of moneys, the incurring of debts or the issue of negotiable securities for the various purposes named are those which relate to the existence of authority for the expenditure or debt, a construction of the conditions attached and the manner of its exercise.

Choate v. City of Buffalo, 167 N. Y. 597, 60 N. E. 1108; City of Memphis v. Hastings (Tenn.), 86 S. W. 609; Johnson v. City of Milwaukee, 88 Wis. 383.

5—United States v. Gettysburg Electric Co., 160 U. S. 668, reversing 67 Fed. 869; Higginson v. Inhabitants of Nahant, 93 Mass. 530; In re Mt. Washington Road Co., 35 N. H. 134; Fishblatt v. Atlantic City (N. J.), 78 Atl. 257; People v. Adirondack R. R. Co., 160 N. Y. 225; but see Town of Woodstock v. Gallup, 28 Vt. 587.

6—See Sec. 108 ante.

These points will all be found discussed under the appropriate sections throughout this book.

§ 119. Construction of conditional grants of authority.

The authority of public corporations to issue negotiable securities is originally derived from constitutional provisions. In exercising the power, whether derived from constitutional grants which are self-enforcing and self-executing, or from affirmative legislative permission pursuant to organic law, the rule of strict construction is generally applied both to the authority and the mode of its exercise.[7]

The issue of negotiable securities from the standpoint of the taxpayer is one which is to be carefully guarded for the many reasons already suggested. To protect public funds and taxpaying interests many conditions are imposed in either general or special grants of authority relative to the exercise of the power. The authority of public officials to act for and bind the public corporations is restricted by every legal device known. Common conditions are those requiring the assent of the voters; provisions for the payment of the debt incurred; limitations upon the tax rate and others which will be noted from time to time. The performance of many of these conditions are held to be precedent to the validity of the bonds issued and following this principle it is unnecessary, perhaps, to say that if in the issue of bonds or incurring of indebtedness there is any substantial departure from constitutional or statutory authority by any of the officials or official bodies to whom is delegated the performance of specific duties or the exercise of the power in any de-

7—Sheboygan County v. Parker, 3 Wall. 93; Wells v. Supervisors, 102 U. S. 625; Claiborne County v. Brooks, 111 U. S. 400; Young v. Clarendon Township, 132 U. S. 340; Barnum v. Okolona, 148 U. S. 393; Cowdery v. Canadea, 16 Fed. 532; Board of Com'rs of Jackson County v. Brush, 77 Ill. 59; Webster v. Town of White Plains, 87 N. Y. 783.

tail, the action of the public corporation will be held void,[8] the authority must be strictly followed. This rule is modified only by the principles to be hereafter considered under the chapters relating to the negotiability of securities, bona fide holding and estoppel.[9] This rule is also modified by the principle that authority for the issuance of municipalities of bonds for necessary public improvements should be so construed as not to defeat the manifest object of the enactments. Where this rule is followed a substantial compliance with formalities is generally held sufficient.[10] Many authorities involving the general principles stated above in this section will be found cited under the appropriate section or paragraph in this book in which the particular subject is considered.

§ 120. Provision for payment when debt is incurred.

In addition to the various limitations, constitutional and otherwise, upon the power of the State or of subordinate corporations to incur indebtedness and which have been noted in the preceding sections, in many states are to be found grants of authority for the power but which

8—Creed v. McCombs (Calif.), 80 Pac. 679; Woodward v. City of Grangeville (Ida.), 92 Pac. 840; Barker v. Town of Oswegatchie, 10 N. Y. S. 834; Lytle v. Lansing, 147 U. S. 59; Barnett v. Dennison, 145 U. S. 135; Merrill v. Monticello, 138 U. S. 673; Norton v. Dyersburg, 127 U. S. 160; Bissell v. Spring Valley, 110 U. S. 162; Buchanan v. Litchfield, 102 U. S. 278; Bates County v. Winters, 97 U. S. 83; McClure v. Oxford, 94 U. S. 429.

9—Citizens Savings Assoc'n v. Perry County, 156 U. S. 692; Manhattan v. City of Ironwood, 74 Fed. 535; Hillsborough County v. Henderson (Fla.), 33 So. 997; Gilbert v. Canyon County (Ida.), 94 Pac. 1027; Tukey v. City of Omaha (Nebr.), 74 N. W. 613; Schultze v. Township Committee of Manchester Township (N. J.), 40 Atl. 589; Culver v. Ft. Edward, 8 Hun. 340; Duanesburg v. Jenkins, 40 Barb. 574; Appleton Water Works Co. v. Appleton (City of), Wis. 93 N. W. 262; see chapters X and XII post.

10—Territory v. Whitehall (Okla.), 76 Pac. 148; City of Cheyenne v. State (Wyo.), 96 Pac. 244.

make its exercise conditional upon a provision for the payment of the debt being made at the time of its incurrence. The sound policy and wisdom of such provisions cannot be denied.[11]

11—Calif., Art. 11, Sec. 18; Art. 16, Sec. 1; Colo., Art. 11, Secs. 4, 8; Ga., Art. 7, Sec. 7, Pars. 1, 2; Sec. 10; Ida., Art. 8, Secs. 1, 3; Ill., Art. 9, Sec. 12; Art. 4, Sec. 18; Iowa, Art. 7, Sec. 5; Kan., Art. 11, Sec. 5; Ky., Sec. 50 & Sec. 159; La., Art. 281; Md., Art. 3, Sec. 34; Minn., Art. 9, Sec. 5; Mo., Art. 10, Sec. 12; Mont., Art. 13, Sec. 2; Nebr., Art. 12, Sec. 1; Nev., Art. 9, Sec. 3; N. J., Art. 4, Sec. 6, Subdiv. 4; N. Y., Art. 7, Secs. 11, 12; Art. 8, Sec. 10; N. D., Art. 12, Secs. 182, 184; Pa., Art. 9, Sec. 10; S. C., Art. 8, Sec. 7; S. D., Art. 13, Secs. 2, 5; Tex., Art. 11, Sec. 7; Utah, Art. 13, Sec. 2; Va., Art. 8, Sec. 127; Wash., Art. 8, Sec. 3; Wyo., Art. 10, Sec. 8; Wis., Art. 8, Sec. 6; Art. 11, Sec. 3.

City and County of Denver v. Hallett (Colo.), 83 Pac. 1066. Under Const. Art. XI, Sec. 8, a city may issue bonds maturing in fifteen years after date, some falling due each year throughout the period so that one-fifteenth of the entire debt will be extinguished each year.

City of Cripple Creek v. Adams (Colo.), 85 Pac. 184. Bonds issued by a municipality for the purchase of water rights are not within 2 Mills' Ann. Stats., Secs. 4447; 4449; State v. Williams (Conn.), 35 Atl. 24; Potter v. Lainhart (Fla.), 33 So. 251.

Wilkins v. City of Waynesboro (Ga.), 42 S. E. 767. Construing Const. Art. 7, Sec. 7, Par. 2, and holding that under this provision the maturity of the bonds issued may be fixed at any time within the period of thirty years from the date of issue.

White v. City of Atlanta (Ga.), 68 S. E. 103. The assumption of the debt of a town annexed is not the incurring of a new debt in violation of the provision that municipal corporations shall not incur any debt until provision shall have been made therefor.

Lussem v. Sanitary Dist. of Chicago (Ill.), 61 N. E. 544. The fact that no provision is made for the levy of a tax to pay the interest for a period when no interest falls due does not invalidate bonds. Chicago & Alton Ry. Co. v. People, 205 Ill. 625, 69 N. E. 72.

Cincinnati etc. Ry. Co. v. People, 206 Ill. 387, 69 N. E. 39. The presumption of legality obtains.

Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610. Interest bearing orders issued in payment for repairs on a court house do not create an indebtedness of the character contemplated by Const., Art. IX, Sec. 12, this section provides only for a bonded or analagous indebtedness with annual interest and falling due all at one time or from year to year. West Chicago Park Com'rs v. City of Chicago, 216 Ill. 54, 74 N. E. 771; Talcott v. Parish of Iberville, 24 La. Ann. 190; Citizens Bank v. Town of Jennings, 107 La. 547, 32 So. 66;

The phraseology of the Illinois Constitution, Article IX, Sec. 12 is typical of this class of limitations and it will be quoted as illustrative of them: " . . . Any county, city, school district or other municipal corporation incurring any indebtedness as aforesaid shall before or at the time of doing so provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

In other states there is added a further condition for the establishment of a sinking fund beside the requirements for the levy of taxes to pay the annual interest charges. Article XI, Section 5, of the Texas Constitution, is illustrative of those provisions including such phraseology: " . . . and no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon." [12]

Durbridge v. State (La.), 42 So. 337.

State ex rel. City of Columbia v. Allen (Mo.), 82 S. W. 103. An objection to the validity of bonds based on the possibility that the assessed valuation might decrease and the tax levied would therefore be insufficient to pay the principal and interest is untenable.

Carlson v. City of Helena (Mont.), 102 Pac. 39. The fact that the tax imposed was illegal does not affect the validity of municipal bonds. Hamlin v. Meadville, 6 Nebr. 227.

City of Rome v. Whitestown Water Works Co., 100 N. Y. S. 357; Const., Art. 8, Sec. 10, has no application to a case where the ten per cent limit of indebtedness has not yet been reached by the city in question. State v. McMillan (N. D.), 96 N. W. 310; Rainsburgh Borough v. Ryan, 127 Pa. St. 74.

Conek v. Skeen (Va.), 63 S. E. 11, Const., Sec. 187, applies and refers only to a debt contracted by the state. Maxey v. City of Oshkosh (Wis.), 28 N. W. 899; but see Welch v. Getzen, 67 S. E. 294; Village of Waverley v. Waverley Water Co. (N. Y.), 87 N. E. 1129, affirming 111 N. Y. S. 541.

12—Berlin Iron Bridge Co. v. City of San Antonio, 62 Fed. 882. A contract to pay a certain sum for the erection of a bridge one-half on delivery of the material and the remainder on completion and acceptance of the bridge pay-

The accumulations of the sinking fund or the taxes required to be levied, it is calculated will at the time the indebtedness falls due be sufficient or approximately so to meet it.

As expressed in one case before a legal indebtedness can be incurred adequate provision must be made for the

ment of which is secured by proceeds of bonds of the city paid into its treasury is void under the constitutional provision noted in the text. Quaker City National Bank v. Nolan County, 59 Fed. 660, affirmed 66 Fed. 883 C. C. A. City of Columbus v. Woonsocket Institute of Savings, 114 Fed. 162.

City of Terrill v. Dissant (Tex.), 9 S. W. 593. A note given by a city and payable with interest two years after date is a debt within the meaning of the Texas Const., provision for the payment of which must be made at the time of its incurrence. Howard v. Smith, 91 Tex. 8, also 38 S. W. 15.

Morrill v. Smith County (Tex.), 33 S. W. 899. Where the tax levied is insufficient to pay the annual interest on the bonds and 2% of the principal as required by the Const., the bonds will be valid up to the amount on which the tax actually levied will pay such interest and percentage. But see the same case in 36 S. W. 56, where it is held that if the tax is insufficient, an additional amount can be levied and the bonds will not be invalid because of the fact that the levy made before their issuance was insufficient.

Noel v. City of San Antonio (Tex.), 333 S. W. 263. Notes payable annually for ten years at six per cent interest in payment for the construction of garbage furnaces constitute a debt under the constitution for which provision for payment must be made. Nalle v. City of Austin (Tex.), 42 S. W. 780.

Fourth National Bank v. City of Dallas (Tex.), 73 S. W. 841, the issue of interest bearing obligations in payment of the cost of the erection of a city hall creates a debt within the constitutional provision.

City of Tyler v. L. L. Jester & Co. (Tex.), 74 S. W. 369. The constitutional provision does not apply to an instrument merely acknowledging or extending the time of payment of valid outstanding obligations of city but this rule does not cover the renewal of a debt barred by the statute of limitations.

City of Houston v. Potter (Tex.), 91 S. W. 389. When a new contract has been made in respect to the obligations of which proper provision has been made as required by the constitution, it will not be held as an attempted ratification of an originally void contract. Ault v. Hill County, 116 S. W. 359; Patching v. Hutchinson (Tex.), 18 S. W. 878.

City of Cleburne v. Gutta Percha & Rubber Mfg. Co., 127 S. W. 1072. The true test of whether the note given by a city is a debt within the meaning of the constitutional provision is "does it im-

payment of both the interest as it accrues from time to time and the principal when it falls due.[13]

Provisions of the character noted are usually construed as mandatory in their character and not addressed to the discretion of legislative body.[14]

Their existence, it has been held, also gives to the public corporation the implied power to levy taxes for the purpose indicated without further legislative action and the performance of the duty in respect to the levy of taxes with which public officials are thus arbitrarily charged can be compelled by creditors of the corporation.[15] Bonds issued under these provisions, regular at

pose a burden on the revenues of the city for future years?''

Stratton v. Com'rs Court of Kinney County, 130 S. W. 1170. A debt can be created for the construction of a court house and jail if provision is made for its payment as required by the Constitution.

Sandifer v. Foard Co. (Tex.), 134 S. W. 823. A contract by which a county lists land with a broker for sale does not create a debt within the meaning of the Constitution. See also Secs. 373 et seq. post.

13—Seibert v. Lewis, 122 U. S. 284; Polo v. Stevens, 120 N. Y. S. 227.

Bingham v. Board of Sup'rs of Milwaukee County (Wis.), 106 N. W. 1071. If the tax rate is sufficient to meet all installments of principal and interest as they mature it is immaterial that some of the taxes may remain temporarily uncollected.

14—Wilkins v. City of Waynesboro (Ga.), 42 S. E. 767.

Knox v. Baton Rouge, 6 La. Ann. 427. The assent of the voters does not dispense with a requirement to the validity of bonds that provision shall be made at the time of the creation of the debt for paying the principal and interest. Oubre v. Town of Donaldsonville, 33 La. Ann. 386; Gray v. Tax Collector, 107 La. Ann. 671, 32 So. 42; Citizens Bank v. City of Terrill, 78 Tex. 450, 14 S. W. 1003. See also cases cited under note 12 ante which hold, except the citations stated, that bonds issued without complying with the prescribed constitutional provisions are void.

15—See also Secs. 377 et seq., post. Rock Island County Sup'rs v. United States, 4 Wall. 435.

Village of Kent v. United States, 113 Fed. 232, affirming 107 Fed. 190. ''But it is well settled in statutory interpretation that the word 'may' may be read 'shall.' * * * This language seems to us applicable to the statute under consideration. The power to levy this tax is given for the benefits of the creditors in this case to meet a demand adjudicated to be right and proper after full trial. It imposes a duty upon the council which,

the time of issue cannot be subsequently rendered void by a neglect of the public duty devolving upon subordinate officials.[16]

While it is true that negotiable securities issued contrary to these limitations are necessarily void yet in many cases, the courts do not construe them so strictly as

in our judgment, they are required to exercise so long as they are able to do so within the limit imposed by the law upon the amount of taxation for any given year. We therefore construe this section as though it read, 'the council shall levy a sum sufficient to pay the interest on the public debt to be applied for no other purpose.' * * * Where a city has a discretion to levy a tax yet where that tax is required for the payment of a public debt, the city may be required to levy a tax if it refuses to do so.''

Evans v. McFarland (Mo.), 85 S. W. 873, Const., Art. X, Sec. 12, is self-enforcing and a levy of a tax to meet the interest and provide a sinking fund is mandatory without a direct vote of the people on the tax levy itself.

Town of Lamberton v. John Nuveen & Co. (N. C.), 56 S. E. 940. The validity of bonds is unaffected by the fact that the rate of taxation as levied will be insufficient to pay the annual interest and provide a sinking fund for the commissioners may be compelled to levy an additional tax to meet any deficiency.

Morril v. Smith County (Tex.), 36 S. W. 56. If the tax levied is insufficient to comply with the requirements of the constitution, an additional amount can be levied.

Presidio County v. City National Bank (Tex.), 44 S. W. 1069. Where the statutes require the commissioners court to levy a tax to pay the interest and create a sinking fund for the redemption of bonds, the constitutional requirement is complied with and a failure of the commissioners court to levy the tax does not render the bonds invalid. See also Watson v. De Witt County (Tex.), 46 S. W. 1061 and Hardeman County v. Foard County, 47 S. W. 30; Berlin Iron Bridge Co. v. City of San Antonio, 93 Tex. 388, 50 S. W. 408.

Keyes v. St. Croix County (Wis.), 83 N. W. 637. Form of resolution providing for levy of taxes held insufficient. Cooley Taxation, 2nd. Ed., p. 685.

16—Wade v. Travis, 174 U. S. 499, reversing, 72 Fed. 985.

Marion County v. Coler, 67 Fed. 60, C. C. A. The failure of county authorities to perform their duty at the time specified, it was here held, could not affect the validity of bonds issued. The point involved in this case was the effect of a failure of the proper authorities, subsequent to the original issue of the bonds to provide for the levy and collection of taxes, for the payment of the interest and to create a sinking fund for the payment of the principal of the bonds as required by the constitution. Mitchell County v. City National Bank (Tex.), 39 S. W. 628.

to render the bonds worthless in the hands of bona fide holders. The essentials of and the principles involved are considered broadly and vitality is given to the issue for the reasons therein indicated.[17]

§ 121. Illustrative cases.

In this section, attention is called to some illustrative cases passing upon the questions involved in the preceding section and which also decided other points not stated there. By a law of New Jersey, the expenditures of the county board were restricted to the amount raised by taxation for the fiscal year. The county board of the county including Jersey City purchased certain real estate upon which to erect a court house and other buildings for the county and pay for the same by issuing to the vendor bonds of the county in the sum of $150,720, but no provision was made by the board for the payment of the bonds beyond the general declaration that they should be paid out of the amount appropriated for the next fiscal year. A suit was brought by a taxpayer of the county to compel the board to re-convey the land to the vendor and to compel him to return the bonds for cancel-

17—Epping v. City of Columbus (Ga.), 43 S. E. 803. It is not necessary that provision for the payment of the debt as required by the constitution should be made before the application to validate. Pettibone v. West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387.

St. Louis, etc. R. R. Co. v. People, 225 Ill. 418, 80 N. E. 303. Where there has been a failure to comply with the constitutional provision annual taxes may be levied for the payment of the interest and the creation of a sinking fund.

Jones v. City of Newbern (N. C.), 67 S. E. 173. The failure to provide a sinking fund or a special tax for the payment of interest does not affect the legality of city bonds. Bassett v. El Paso, 88 Tex. 168, 30 S. W. 893.

But see Montpelier Savings Bank & Trust Co. v. School Dist. No. 5 (Wis.), 92 N. W. 439. Where it was held the presumption did not exist in support of the validity of bonds that a proper tax was voted at some special meeting properly called, held before the meeting at which the bonds were voted; see also Secs. 370 and 373 et seq. post.

lation. The relief prayed for was granted and the court said: "The object of the statute of New Jersey defining and limiting its (the board) powers would be defeated if a debt could be contracted without a present provision for its payment in advance of a tax levy upon a simple declaration that out of the amount to be raised in a future fiscal year it should be paid." [18]

Under Louisiana Act, No. 10 of 1890, it was held that the Board of Liquidation of the City of New Orleans could not issue bonds except in exchange for outstanding securities and for sale to provide a special fund to pay certain bonds and judgments against the city in that act specified.[19]

Where city authorities levied certain taxes and appropriated certain revenues for the payment of the principal and interest of bonds as required by the Texas constitution, it was held that the bonds would be valid only to the amount that the taxes contemporaneously levied would provide for by paying the interest and creating a sinking fund of two per cent per annum. This amount to be determined by the last preceding assessment.[20]

In California, it is held that under the provisions of the Constitution, Art. XI, Section 18, it is sufficient if provision be made for the levy of the taxes to pay the principal and interest as required. It is not necessary that the actual levy of the tax be made at the time the debt was incurred.[21]

18—Crampton v. Zabriskie, 101 U. S. 601.

19—United States v. Board of Liquidation of City Debt, New Orleans, 60 Fed. 387.

20—City of Columbus v. Woonsocket Institution of Savings, 114 Fed. 162. But see Morrill v. Smith County, 36 S. W. 56.

21—Howland v. Board of Sup'rs, San Joaquin County, 109 Calif. 152, 41 Pac. 864. See also as holding the same, Johnson v. Williams (Calif.), 95 Pac. 655, also Epping v. City of Columbus (Ga.), 43 S. E. 803; Woodall v. Town of Adell (Ga.), S. E. 102. Provision for the collection of the annual tax can be made at or before the time of incurring the bonded indebtedness. Black v. Early (Mo.), 106 S. W. 1014; Heffner v. City of Toledo

In Texas, the authorities uniformly hold that where in the legislative authority for the issuance of bonds provision is made for the levy and collection of the necessary taxes, a failure of the commissioners' court of a county issuing bonds pursuant thereto does not render the bonds invalid.[22]

§ 122. Affirmative vote as precedent to valid issue.

In many states by constitutional or statutory provision, the incurring of an indebtedness is made dependent upon the consent of the people, thus giving an opportunity to the taxpaying interests to pass upon the question of the original incurrence of or an increase of indebtedness.[23]

(Ohio), 80 N. E. 8; State v. Millar, 96 Pac. 747.

Bassett v. El Paso, 88 Tex. 168. Where a method exists for levying and collecting taxes to pay off the principal and interest of a bond issue, the fact that provision therefor was not made at or before the time of issuance does not invalidate the bonds.

Thornburg v. City of Tyler (Tex.), 43 S. W. 1054. Bonds issued before the tax is actually levied are not invalid. Mitchell County v. National Bank of Paducah, 91 Tex. 361.

22—Mitchell County v. Bank of Paducah, 91 Tex. 361, 43 S. W. 880; Presidio County v. City National Bank (Tex.), 44 S. W. 1069; Watson v. De Witt County, 46 S. W. 1061; Hardeman County v. Foard County (Tex.), 47 S. W. 30. See also Jefferson v. Jennings Banking & Trust Co. (Tex.), 79 S. W. 876; Wade v. Travis County, 174 U. S. 499, reversing 72 Fed. 985; Howland v. San Joaquin County, 109 Calif. 152, 41 Pac. 864; Pettibone v. West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387; Union Bank v. Board of Com'rs of Town of Oxford (N. C.), 21 S. E. 410.

23—Rock Creek v. Strong, 96 U. S. 271; Sup'rs v. Galbraith, 99 U. S. 214; Kelly v. Milan, 127 U. S. 139; Young v. Clarendon Township, 132 U. S. 340; Hill v. City of Memphis, 134 U. S. 198; Town of Alden v. Easton, 113 Fed. 60; Howard v. Town of Eastlake (Ala.), 46 So. 754; People v. Hanford Union High School District (Calif.), 84 Pac. 193; Schuyler County v. People, 25 Ill. 181; Marshall County v. Cook, 38 Ill. 52; Strodtman v. Menard County, 56 Ill. App. 20; Choisser v. People (Ill.), 29 N. E. 546; People v. School Directors etc. 139 Ill. App. 620; Kucera v. West Chicago Park Com'rs, 221 Ill. 488, 77 N. E. 912; Cassidy v. Woodbury County, 13 Ia. 113.

Taylor v. Brownfield, 41 Ia. 264. The fact that a former election had resulted unfavorably to an issue of

In some states [24] the limitation applies to all forms of indebtedness; in others [25] the authority to issue negotiable securities or to incur indebtedness to a certain maximum amount is conferred upon the proper officials without the consent of the voters but this limit can be increased to a designated amount or for certain extraordinary and excepted expenditures only by and with their consent.[26]

bonds will not invalidate a subsequent one. Reed v. City of Cedar Rapids (Ia.), 113 N. W. 773; Grady v. Pruit (Ky.), 63 S. W. 283; Carpenter v. Town of Central Covington (Ky.), 81 S. W. 919; Howard v. Trustees of School District No. 27 (Ky.), 102 S. W. 318; Bonta v. Fiscal Court of Mercer County, 144 Ky. 241, 137 S. W. 1084; Cumberland v. Magruder, 34 Md. 381; Seward v. Revere Water Co. (Mass.), 87 N. E. 749; New Orleans, etc. R. R. Co. v. McDonald, 53 Miss. 240.

Carlson v. City of Helena (Mont.), 102 Pac. 39. Two elections are not necessary—one to extend the limit of indebtedness and another to issue the bonds. People v. Sup'rs, 34 N. Y. 516; Mead v. Turner, 112 N. Y. S. 127; Trustees of Goldsborough Graded School v. Broadhurst, 109 N. C. 228, 13 S. E. 781; Stern v. City of Fargo (N. D.), 122 N. W. 403; Henderson v. City of Cincinnati (Ohio), 89 N. E. 1072; North v. McMahan (Okla.), 110 Pac. 1115; Conklin v. City of El Paso (Tex.), 44 S. W. 879; Davis v. Wayne County Court, 38 W. Va. 104, 18 S. E. 373; Appleton Water Works Co. v. City of Appleton (Wis.), 93 N. W. 262; Connor v. City of Marshfield (Wis.), 107 N. W. 639.

24—Ala., Art. 12, Sec. 222; Calif., Art. 11, Sec. 18 and Art. 16, Sec. 1, State Debt; Colo., Art. 11, Sec. 5, 6, 7 and 8; Ga., Art. 7, Sec. 7, Par. 1; Ida., Art. 8, Sec. 1, State Debt; Ill., Art. 9, Sec. 12; Art. 14, Sec. 18, State Debt; Ind., Art. 13, Sec. 1; Iowa, Art. 7, Sec. 5, State Debt; Kan., Art. 11, Sec. 7; Art. 11, Sec. 6, State Debt; Ky., Sec. 50, State Debt; Sec. 157; La., Art. 281; Md., Art. 12, Sec. 7; Mich., Art. 4, Sec. 49; Mo., Art. 4, Sec. 44, State Debt; Art. 10, Sec. 12; Mont., Art. 13, Sec. 6; Art. 13, Sec. 2, State Debt; N. J., Art. 4, Sec. 6, sub-div. 4, State Debt; N. Y., Art. 7, Sec. 4, State Debt; N. C., Art. 6, Sec. 6; Art. 7, Sec. 7; Pa., Art. 9, Sec. 8; S. C., Art. 8, Sec. 7; Art. 10, Sec. 11; S. D., Art. 13, Sec. 4; Tex., Art. 11, Sec 7; Utah, Art. 14, Sec. 3, 7; Va., Art. 8, Sec. 127; Wash., Art. 8, Sec. 2; Art. 8, Sec. 3, State Debt; Wyo., Art. 16, Sec. 4; Art. 16, Sec. 2, State Debt; Tenn., Art. 2, Sec. 29.

25—See constitutional provisions cited in preceding note.

26—Robinson v. City of Goldsboro, 47 S. E. 462; Theis v. Board of Com'rs of Washita County, 9 Okla. 643, 60 Pac. 505.

State v. Millar (Okla.), 96 Pac. 747. Such a provision it is held

Provisions requiring the consent of the voters either in respect to a special issue of securities or otherwise, are of such common occurrence that one of the first inquiries in respect to the legality of public securities should be directed to ascertaining the constitutional and statutory provisions relative to the consent of the tax payer as a necessary requirement of validity. It is needless to say that securities unless issued in conformity with the prescribed condition noted in this section are not valid unless the public corporation is estopped by the principles and rules to be found stated in subsequent sections.[27]

§ 123. Written assent of voters.

In one or two states, notably New York, the written assent of a certain proportion of the resident taxpayers is or was formerly necessary to a valid issue of securities.[28]

The authority as conferred by the people at the elec-

is a self-executing grant of power. State v. Tolly (S. C.), 16 S. E. 195; Duncan v. City of Charlestown, 39 S. E. 265, 60 S. C. 532.

Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462. The assent of the legislature instead of the voters may be the required condition. State v. City of Pullman, 63 Pac. 265; Rauch v. Chapman, 16 Wash. 568, 48 Pac. 253; see Secs. 99 and 100 ante.

27—See Secs. 274 et seq. post. Howard v. Trustees of School District No. 27 (Ky.), 102 S. W. 318; French v. South Arm Township (Mich.), 81 N. W. 557; Steines v. Franklin County, 48 Mo. 167; State v. School District No. 5 of Barnes County (N. D.), 120 N. W. 555; Lynchburg etc. R. R. Co. v. Board of Com'rs of Person County, 109 N. C. 159, 13 S. E. 783.

28—See Sec. 126 post. Scipio v. Wright, 101 U. S. 665; Pratt v. Luther, 45 Ind. 250; People v. Hutton, 18 Hun. N. Y. 116.

Venice v. Breed, 1 Thomp. & C. (N. Y.), 13. The want of consent of two-thirds of the taxpayers render bonds issued void.

Starin v. Genoa, 23 N. Y. 439. Strict compliance with the law relative to the written assent of two-thirds of the resident taxpayers is necessary to make bonds issued valid.

Ontario v. Hill, 99 N. Y. 324. Where a legislative act makes the assessor's certificate that the requisite consent of taxpayers have been obtained evidence on which bonds

tion must be strictly exercised and securities issued in a larger amount or for another purpose will not be valid though [29] the validity of an issue less than the amount authorized will be sustained.

An existing debt or obligation on the part of a public corporation is not ordinarily a condition precedent to its power to vote bonds for the purpose authorized.[30]

§ 124. Election, when not necessary.

The phraseology of constitutional and statutory provisions in the different states varies and it will be found upon an examination of these provisions as quoted in the chapter containing an abstract of them, that in many instances the requirements for an election does not apply to certain excepted public corporations [31] when the existing debt is under a certain specified amount [32] or to debts incurred for certain designated purposes.[33]

may be issued, public officers acting in good faith are protected by this certificate, although the consents were not as a matter of fact obtained.

29—Stebbins v. Perry, 167 Ill. 567, 47 N. E. 1048; Tukey v. City of Omaha (Nebr.), 74 N. W. 613.

30—State v. City of Topeka (Kan.), 74 Pac. 647.

31—See Chapter XVIII post.

Railroad Company v. County of Otoe, 16 Wall. 667. The legislature many dispense entirely with the condition of popular vote.

Burr v. Chariton County, 2 McCrary Ct. 603. The charter of a railroad company may authorize it to receive subscriptions to its stock without a vote of the people. Purcell v. City of East Grand Forks (Minn.), 98 N. W. 351. Board of Com'rs of Seward County (Kans.) v. Aetna Life Ins. Company, 90 Fed. 222.

32—Trustees of Common School District No. 32, etc. v. Thomas Kane & Co. (Ky.), 87 S. W. 321; Common Council of Muskegon v. Gow, 94 Mich. 453, 54 N. W. 170; Le Tourneau v. City of Duluth (Minn.), 88 N. W. 529.

33—Spalding County v. W. Chamberlain & Co. (Ga.), 61 S. E. 533.

City of Lawrenceville v. Hennessey, 244 Ill. 464, 91 N. E. 670. Existing legislation providing for submission to the voters does not apply to bonds issued under the local improvement act, Hurd's Rev. Stats. 1908, c. 24, Secs. 507-605; see also as holding the same, City of Chicago v. Crozer, 246 Ill. 511, 92 N. E. 947; and City of Nokomis v. Zepp (Ill.), 92 N. E. 809; Frantz v. Jacob (Ky.), 11 S. W. 654; Red

The constitution of North Carolina, for illustration, provides, Article VII, Section 7: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any taxes be levied or collected by an officer of the same except for the necessary expenses thereof unless by a vote of the majority of the qualified voters therein." The construction of the phrase "necessary expenses" has been naturally a question for determination by the courts not only in North Carolina but in other states where a similar phraseology is to be found in constitutional or statutory provisions either conferring or limiting the debt incurring powers of public corporations.[34]

In Georgia the constitution, Article VII, Section 7, Paragraph 1, prohibits any county or municipal corporation from incurring debts in excess of seven per cent of the assessed value of the taxable property and further provides that no county or municipal corporation "shall incur any new debt except for a temporary loan or loans to supply casual deficiencies or revenues not to exceed one-fifth of one percentum" of such assessed value with-

River Furnace Co. v. Tenn. Central R. R. Co. (Tenn.), 87 S. W. 1016.

Rauch v. Chapman, 16 Wash. 568, 48 Pac. 253, Const., Art. 8, Sec. 6, providing that no county shall for any purpose become indebted in any manner above a certain amount without the assent of three-fifths of the voters, does not apply to costs and expenses of the state in criminal cases. Griffin v. City of Tacoma (Wash), 95 Pac. 1107; see also sec. 71 ante on compulsory debts and expenses.

34—Hopkins County v. St. Bernard Coal Co. (Ky.), 70 S. W. 289. The wages of guards employed for the purpose of protecting property a necessary expense. Com'rs of Town of Hendersonville v. C. A. Webb & Co. (N. C.), 61 S. E. 670; Jones v. City of Newbern (N C.), 67 S. E. 173.

Ellis v. Trustees of Graded School of Oxford, 72 S. E. 2. A graded school district cannot issue bonds for the purpose of erecting a school building without the approval by a majority of the qualified voters.

Evans v. Cumberland County Com'rs, 89 N. C. 154. The purchase of a bridge a necessary expense—and the same ruling was held in respect to the building of a court house—in Holcombe v. Haywood Co. Com'rs, 89 N. C. 346.

out the assent of two-thirds of the qualified voters at an election.[35]

The construction of water and electric light plants have been held to be a necessary expense within the meaning of the term as used.[36]

Attempts have been made to evade constitutional limitations relative to the incurring of debts, by claiming that a certain expenditure is not included within a constitutional or statutory prohibition.[37]

35—Office Specialty Mfg. Co. v. County of Elbert, 73 Fed. 324. A contract for county supplies to be paid for one-half in thirteen months and one-half a year later, requires an election to establish its validity. City of Macon v. Jones (Ga.), 50 S. E. 340; see also People v. City of Geneva, 92 N. Y. S 91. Where a city charter provided that extraordinary expenditures to be valid must be submitted to the taxpayers, an expenditure for voting machines is an "extraordinary expenditure."

36—Ellison v. Town of Williamstown (N. C.), 67 S. E. 255. If the legislative authority conferring the power requires an election, it is necessary. Fawcett v. Town of Mt. Airy (N. C.), 45 S. E. 1029.

City of Greensboro v. Scott & Stringfellow (N. C.), 50 S. E. 589. Bonds issued to provide a city with a water works plant and a sewerage system and to enable it to grade and pave its streets are issued for necessary expenses and do not require a popular vote for the creation of the debt.

Com'rs of Town of Hendersonville v. C. A. Webb & Co. (N. C.), 61 S. E. 670. Cost of maintaining streets a necessary expense, see also as holding the same; Town of Hendersonville v. Jordan (N. C.), 63 S. E. 167.

Swenson v. Town of Mt. Olive (N. C.), 61 S. E. 569. Cost of constructing a town hall and market place a necessary expense.

Hightower v. City of Raleigh (N. C.), 65 S. E. 279. Cost of construction of a municipal building a municipal necessity and a necessary expense.

Bradshaw v. City of Highpoint (N. C.), 66 S. E. 601. Sewerage system and city water plant a necessary expense, see also as holding the same; Underwood v. Town of Asheboro (N. C.), 68 S. E. 147 and Town of Murphy v. C. A. Webb & Co. (N. C.), 72 S. E. 460.

McCreight v. Zemp (S. C.), 26 S. E. 984. Vote not required for the issue of bonds to pay a debt incurred for paving streets.

Carrison v. Kershaw County, 83 S. C. 88, 64 S. E. 1018. Legislature may in the absence of a constitutional provision requiring a popular election authorize the creation of a bonded indebtedness without a vote of the electors.

37—City of Graymount v. Stott (Ala.), 49 So. 683. An election held for the purpose of authorizing bonds to extend a sewerage system within two years after one held

§ 125. Petition for election.

The holding of an election at which is to be submitted the question of issuing negotiable securities is frequently contingent upon the filing of a petition signed by the requisite number of qualified voters or electors of a taxing district directed to the proper officials and in which they are requested to call an election.[38]

The requirements of the petition and the right of individuals to sign is prescribed by statute and no general rule can be stated which will apply in all cases. Its filing, however, signed by the proper number of qualified petitioners is held to be jurisdictional and the foundation of the validity of all subsequent proceedings. If the petition is lacking or deficient either in form or signatures, it cannot serve as the basis of a valid official call for an election at which the question of the proposed debt is to be passed upon. The petition is the basis of official action regarding the proposed election.[39] A liberal rule of

for the purpose of issuing bonds for the construction of a sewerage system confers no authority to issue bonds being in contravention of Code 1907, Sec. 1421; the general purposes of the two issues being the same.

Lettice v. American National Bank (Ga.), 67 S. E. 187. An arrangement with a bank by which it will take up warrants, the payment of which has been refused by the county treasurer for lack of funds, is invalid.

38—Slack v. Blackburn, 64 Ia. 73. Berkeley v. Board of Education of Lexington (Ky.), 58 S. W. 506; Tolson v. Police Jury of St. Tammany Parish (La.), 43 So. 1011.

Smith v. Police Jury of Claiborne Parish (La.), 51 So. 701. The statute does not require the publication of the names of all the signers of the petition.

Hamilton v. Village of Detroit (Minn.), 88 N. W. 419. A petitioner who has no realty in his own name in the village and resides on land owned by his wife is not a freeholder within the meaning of the statute. Thomas v. Board of Sup'rs of Lee County (Miss.), 53 So. 585; State v. Town of Newberry, 47 S. C. 418; Cleveland v. City Council of Spartanburg, 54 S. C. 83; Allen v. Adams, 66 S. C. 344, 44 S. E. 938; but see Clark v. Town of Noblesville, 44 Ind. 83.

39—Rich v. Mentz Township, 134 U. S. 632; People v. Cline, 63 Ill. 394; Chicago, K. & W. R. R. Co. v. Harris, 43 Kan. 760, 23 Pac. 1064; Taxpayers of Webster Parish v.

construction, however, is generally followed in determining the effect of the petition and where it is not so defective or ambiguous in its essentials as to mislead the voters subsequent proceedings held thereunder, will not be held invalid.[40]

Signers to the petition have the right to withdraw their names [41] and it has been held that the filing of a remon-

Police Jury, 52 La. Ann. 465, 27 So. 102; Hamilton v. Village of Detroit (Minn.), 88 N. W. 419; State v. Babcock, 21 Nebr. 187; Wullenwaber v. Dunigan, 30 Nebr. 887, 50 N. W. 428; Hoxie v. Scott, 45 Nebr. 199, 63 N. W. 387.

Cummings v. Hyatt, 54 Nebr. 35. A married woman may be a freeholder and qualified under the statutes to sign a petition for an election to pass upon an issue of municipal bonds. Allen v. School District Nos. 19 and 41 (Nebr.), 131 N. W. 1050; Craig v. Town of Andes, 93 N. Y. 405; but see Kline v. City of Streator, 78 Ill. App. 42.

40—County of Moultrie v. Fairfield, 105 U. S. 370. A mistake in naming a railroad company in a petition for an election on the proposition to donate the bonds of the county to the company does not invalidate the election nor the bonds issued in pursuance thereof, when the name given indicates the company intended, especially when the records of the board give the correct name.

Jussen v. Lake County Com'rs, 95 Ind. 567. A petition for aid to construct a railroad asking for an appropriation by the board of commissioners "rather than by the township" is not so defective as to vitiate proceedings had thereon.

K. C. & Pac. R. R. Company v. Rich Township (Kan.), 25 Pac. 595. A petition which purports to be signed by two-fifths of the "legal voters" of the township instead of "taxpayers" as required by statute is subsequently susceptible of proof that the petition was signed by taxpayers as required.

State v City of Topeka (Kan.), 74 Pac. 647. The petition is sufficient in respect to its subject matter if it refers to the statutory authority where details are to be found.

Claybrook v. Board of Com'rs of Rockingham County (N. C.), 19 S. E. 593. The fact that petitioners style themselves "voters and taxpayers" while in the act required a petition by "resident taxpayers" is immaterial.

State v. Evans (S. C.), 25 S. E. 216. A petition by a majority of the "freehold voters" is sufficient under Const., Art. 2, Sec. 13, which requires a petition from a majority of the "freeholders."

In De Forth v. Wis. & Mich. R. R. Co., 53 Wis. 320. It was held that procuring and affixing signatures on Sunday was "business" and unlawful and conferred no authority upon the sup'rs to issue bonds.

41—Biddle v. Borough of Riverton (N. J.), 33 Atl. 279. The withdrawal from the petition of a certain number of petitioners so as to reduce the amount of taxable

strance by a petitioner is the equivalent of a withdrawal of his name from the petition.[42] The fact that inducements were offered to petitioners may invalidate the proceedings,[43] and signatures attached with conditions annexed are to be included in computations for determining the legal number asking for the election.[44]

Although official action upon a petition for an election is discretionary in a large measure yet officials required to act cannot arbitrarily refuse to call the election as petitioned.[45]

§ 126. New York decisions.

The Laws of New York, 1869, Chapter 907, Section 1, provided for the issuance of railroad aid bonds whenever a majority of the tax payers of any municipal corporation whose names appear on the preceding tax list as owning a majority of taxable property in the corporate limits shall make application to the county judge by petition setting forth that they are such majority of taxpayers and represent such a majority of the taxable property. This statute was amended in 1871, Chapter 975, Section 1, which defined the persons authorized to petition as a majority of the taxpayers those who were taxed or assessed for property not including those taxed for dogs or highway taxes only upon the last preceding assessment roll. Under this Act as amended, it was held

property to less than that required by law destroys the authority of officials to proceed upon such petition. Simonton Municipal Bonds, Sec. 65; People v. Sawyer, 52 N. Y. 296; Town of Springport v. Teutonia Savings Bank, 84 N. Y. 403; but see as to effect of withdrawal, Town of Andes v. Ely, 158 U. S. 312 and Calhoun v. Town of Miller, 121 N. Y. 69, 8 L. R. A. 248.

42—Noble v. Vincennes, 42 Ind. 125.

43—Wullenwaber v. Dunigan, 30 Nebr. 887, 50 N. W. 428.

44—Town of Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. R. 954.

45—State v. County of Reno, 38 Kan. 317, 16 Pac. 337; State ex rel. Witmer v. Conrad, 147 Mo. 65, 49 S. W. 857.

in Rich v. Town of Mentz,[46] that the petition must affirmatively show the jurisdictional facts and failing it conferred no power upon the public officials to issue the bonds. The case further held that a compliance with the requirements of the law was jurisdictional. Under an earlier Act [47] it was held by the New York Court of Appeals that the affidavit required of certain town officers was not conclusive as to the requisite consent of a majority of the taxpayers but was only prima facie evidence and could be disputed in a suit brought upon the bonds by one taking them in good faith and for value.[48]

The case in the Supreme Court of the United States follows the New York cases which all hold substantially to the effect that the petition for the election to authorize a bond issue must comply strictly with the statute and is jurisdictional.[49]

A petition that the undersigned representing a majority of the town was held equivalent to the statement that the petitioners were themselves such majority.[50]

The fact that some of the signatures attached to a petition were conditional does not deprive the county judge

46—134 U. S. 632; see also Sec. 123 ante.

47—Laws of 1866, Chapter 398, Section 2.

48—Cagwin v. Hancock, 84 N. Y. 532; but see Town of Scipio v. Wright, 101 U. S. 665.

49—Clarke v. Town of North Hampton, 105 Fed. 312, 120 Fed. 661 C. C. A. An insufficient petition confers no jurisdiction and an adjudication based thereon and bonds issued in pursuance thereof are void for lack of statutory power. Bank of Rome v. Rome, 19 N. Y. 20; Gried v. Town of Sterling, 23 N. Y. 456; People v. Smith, 45 N. Y. 772; People v. Spencer, 55 N. Y. 1; Green v. Smith, 55 N. Y. 135; Wellsborough v. N. Y. etc. R. R., 76 N. Y. 182; Cagwin v. Hancock, 84 N. Y. 532; Town of Mentz v. Cook, 108 N. Y. 504, 15 N. E. 541; Angel v. Hune, 17 Hun. (N. Y.) 374.

50—Town of Solon v. Williamsburg Savings Bank, 114 N. Y. 122, 21 N. E. 168; see also Whiting v. Potter, 18 Blatchf 165, where it was held that the petition and affidavit were to be considered together in determining the sufficiency of the petition.

of jurisdiction and his determination in favor of the issue of the bonds is conclusive until legally reversed.[51]

Taxpayers who have signed a petition under the provisions of various New York Acts permitting municipal corporations to aid in the construction of railroads have the right to withdraw their names at any time prior to the final submission of the case to the judge and upon the withdrawal, the name and taxable property of the petitioner so withdrawing, must be excluded from the calculation on the part of the applicants.[52]

§ 127. The notice or order for election.

The question of an incurrence of indebtedness may be submitted either at a general or a special election. This is determined generally by the grant of authority. The reason undoubtedly for provisions calling for a special election being that the expression of the taxpayers' choice will be less affected by political or other considerations than if the question was passed upon at a general election involving the determination of other issues than that of the incurrence of the debt.[53] Irrespective, however, of this fact, the statutes require that notice shall be given in the form prescribed, of the purpose of the election, and the questions to be submitted to the voters at such election.[54] In connection with this subject, con-

51—Town of Andes v. Ely, 158 U. S. 312.

52—People v. Sawyer, 52 N. Y. 296; People v. Hatch, 1 Thomp. & C. (N. Y.) 113; see also preceding section.

53—Coler v. Wyandotte County, 3 Dill. 391, Fed. Cas. No. 2987.

Gardner City, G. & N. W. R. R. Co. v. Masch, 82 Kan. 795, 109 Pac. 684. The authority of a county to hold a bond election is not exhausted on the holding of a first election; see also as holding the same; Robinson v. City of Goldsborough (N. C.), 30 S. E. 324; but see to the contrary Barr v. City of Philadelphia, 191 Pa. St. 438, 43 Atl. 335; Baker v. City of Seattle (Wash.), 27 Pac. 462.

54—Allen v. Louisiana, 103 U. S. 80; Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723.

Manhattan Co. v. City of Ironwood, 74 Fed. 535. If at the time of the election on the question of issuance of bonds there was no authority for calling or holding it,

trary opinions are to be noted as to the effect of an insufficient notice upon the validity of bonds voted to be issued at the election held pursuant thereto, the Supreme Court of the United States holding that the law will presume the giving of a proper notice in such cases under the rule that where the performance of a prior act is necessary to the legality of a subsequent act proof of the latter carries with it a presumption of the due performance of the former.[55] The determination of the question may, apparently, turn upon the fact of the actual delivery of the bonds to bona fide purchasers, the cases holding uniformly that where the aid has been voted and

the bonds involved are void; Brown v. Ingalls Township, 81 Fed. 485; Wilson v. Pike County (Ala.), 39 So. 370. Provision for special notice held directory only. Jenkins v. Williams (Calif.), 111 Pac. 116; Murphy v. City of San Luis Obispo, 119 Calif. 626; Woodward v. Reynolds (Conn.), 19 Atl. 511; City of Perry v. Norwood, 99 Ga. 300; Hettinger v. Good Road District No. 1 of Washington County (Ida.), 113 Pac. 721; Gaddis v. Richland County, 92 Ill. 119. Notice of election given by unauthorized official renders bonds invalid. Jacksonville etc. R. R. Co. v. Wirden, 104 Ill. 339.

Young v. Webster City & S. W. R. R. Co. (Ia.), 39 N. W. 234. An election may be ordered by two of the township trustees though the third was not present at or notified of the meeting. Callaghan v. Town of Alexandria, 52 La. Ann. 1013.

Buard v. Board of Com'rs, etc. (La.), 49 So. 204. The board of commissioners of drainage districts are authorized to call elections for the issue of bonds. Seward v. Revere Water Co. (Mass.), 87 N. E. 749; Hubbard v. Woodson, 87 Me. 88; Thornburgh v. School District No. 3 (Mo.), 75 S. W. 81; Cook v. City of Beatrice, 32 Nebr. 80.

City of Asheville v. Webb (N. C.), 46 S. E. 19. In the absence of a statutory requirement, no public notice is required, so held in construing a special law authorizing a city to issue bonds.

Red River Furnace v Tenn. Central R. R. Co. (Tenn.), 87 S. W. 1016. The fact that registration commissioners styled themselves "commissioners of election" in a notice calling a special election was a mere clerical error and insufficient to invalidate the election. State v. Salt Lake City (Utah), 99 Pac. 255. The notice of election is jurisdictional. Packwood v. Kittitas County, 15 Wash. 88, 33 L. R. A. 673; McVichie v. Town of Knight, 82 Wis. 137.

55—Knox County v. Ninth National Bank, 147 U. S. 91; Wilmington etc. R. R. Co. v. Board of Com'rs of Onslow County (N. C.), 21 S. E. 205.

pursuant to such authority the proper officials have executed and delivered the bonds to bona fide purchasers, independent of the doctrines of estoppel or recitals the insufficiency or invalidity of the notice will not affect their legality.[56] If, however, they still remain undelivered in the hands of public officials, their delivery may be restrained by proper proceedings.[57] The legality of all subsequent proceedings, involving the validity of the bonds issued, will be sustained in an indirect attack upon the sufficiency of the notice either as to its form or the manner of its service or publication, upon the ground that the regularity or sufficiency of the notice cannot be raised collaterally, the suit in question being upon the bonds issued at the election called by such notice.[58]

When it is required by constitutional, statutory or charter provisions the notice of or order for the election must state the amount of the tax levy to be made for the payment of the proposed issue of bonds with the interest accruing thereon from time to time,[59] and when such

56—Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Flagg v. City of Palmyra, 23 Mo. 440; Mutual Benefit Life Insurance Co. v. City of Elizabeth, 42 N. J. L. 235; Cotton v. Inhabitants of New Providence, 47 N. J. L. 401.

57—Knox County v. Ninth National Bank, 147 U. S. 91.

Skinner v. City of Santa Rosa, 107 Calif. 464, 40 Pac. 742, 29 L. R. A. 512. A notice of election provided for an issue of bonds "payable in gold or lawful money" and with interest payable "annually;" the bonds as issued were payable "in gold coin of the present standard of weight and fineness" and with interest "semi-annually." The court held the bonds invalid when the question was raised before their delivery to purchasers. City of Athens v. Hemerick, 89 Ga. 674; Hanswirth v. Mueller, 25 Mont. 156, 64 Pac. 324.

58—Roberts v. Bolles (Ill.), 101 U. S. 119. An act is constitutional, providing that bonds issued under it should not be invalid because of errors in calling the election, when the canvas or return of votes shows a majority at the election in favor of their issue. Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Knox County Com'rs v. Wallace, 21 How. 546; National Bank v. Town of Grenada, 41 Fed. 87; Thomas v. Board of Sup'rs of Lee County (Miss.), 53 S. O. 585; but see, Thatcher v. People, 93 Ill. 240.

59—Parks v. West (Tex.), 108 S. W. 466.

authority requires to be so stated, the amount of bonds to be issued, it is essential that the notice or order for the election contain the amount of the bonds which it is proposed to issue and for which the assent of the voters is asked.[60]

The same rule also applies where the maturity of the bonds, the times of payment of interest and other similar provisions are required to be stated in the notice or order.[61]

A substantial compliance only is commonly required with provisions of the character noted and if reference

60—Chostkov v. City of Pittsburgh, 177 Fed. 936. Neither the Pennsylvania Constitution nor the statutes relative to municipal indebtedness require that the electors shall pass upon the purpose of a contemplated loan. People v. Counts (Calif.), 26 Pac. 612.

Hollywood Union High School District v. Keyes (Calif.), 107 Pac. 129. The omission from a notice to designate the time of payment of interest is fatal. Boen v. Town of Greensboro (Ga.), 4 S. E. 159; City Council of Dawson v. Dawson Water Works Co., 106 Ga. 696, 32 S. E. 907; Smith v. City of Dublin (Ga.), 327; Wilkin v. City of Waynesboro (Ga.), 32 S. E. 767.

State ex rel. Ark. So. R. R. Co. v. Knowles (La.), 41 So. 439. The amount is sufficiently stated in a petition where it can be figured from the percentage there given. Tolson v. Police Jury of St. Tammany Parish (La.), 43 So. 1011; State v. Saline County Court, 45 Mo. 242.

C. B. & Q. R. R. v. Village of Wilber (Nebr.), 88 N. W. 660. A proposition for the issue of bonds is sufficiently definite as to amount if it fixes a maximum to be issued and vests the village with authority to issue a less amount. Schultze v. Township Committee of Manchester Township (N. J.), 40 Atl. 589; Stern v. City of Fargo (N. D.), 122 N. W. 403; Parks v. West (Tex.), 108 S. W. 466.

Taylor v. Board of Sup'rs (Va.), 10 S. E. 433. An order for an election is sufficient where it specifies the maximum aid to be granted per mile of railroad without stating its aggregate. Neacy v. City of Milwaukee (Wis.), 126 N. W. 8; but see Turner v. Woodson County Com'rs, 27 Kan. 314.

61—Wilkins v. City of Waynesboro (Ga.), 42 S. E. 767; State v. School District No. 1 of Cascade County (Mont.), 38 Pac. 462; Carleon v. City of Helena (Mont.), 102 Pac. 39; Hughes v. Horsky (N. D.), 122 N. W. 799; State v. Heber City (Utah), 102 Pac. 309.

See, also, People v. Hart, 67 Ill. 62. Where the law conferring authority does not require such details in the notice the fact that they are inserted will not invalidate the bonds.

is made to an existing law or such data given is in the notice of or order for the election that the tax rate or the amount of the bonds can be definitely ascertained, it will be sufficient.[62]

The object of provisions requiring the amount, maturity of and rates of interest on bonds, to be stated is to give the voters such information as will enable them to consider the merits of the proposition and to avail themselves of the opportunity so given to acquire information as to the necessity of the proposed expenditure and the amount of the indebtedness necessary to enable the public corporation to carry out its plans; to enable the taxpayer to act intelligently with references to the indebtedness proposed to be incurred.[63]

§ 128. Form of order or notice for election.

The statutes of a state generally prescribe the form of the notice or order calling for an election. These provisions are considered mandatory, at least so far as the essentials of the notice are concerned,[64], but not the pre-

62—City of San Luis Obispo v. Hoskin, 91 Calif. 549, 27 Pac. 929; E. M. Derby & Co. v. City of Modesto, 104 Calif. 515, 38 Pac. 900; Arbuckle v. McKinney (Ky.), 97 S. W. 408; McGinnis v. Board of Trustees (Ky.), 108 S. W. 289; Rees v. Kranth (Ky.), 120 S. W. 370; Gooden v. Police Jury of Lincoln Parish (La.), 48 So. 196; Weston v. Hancock County (Miss.), 54 S. O. 307.

State ex rel. City of Columbia v. Allen (Mo.), 82 S. W. 103. It is not necessary for the electors to vote on a tax rate where it is the duty of the city council under Const. Art. 10, Sec. 12, to fix a levy sufficient to meet the interest and create a sinking fund for the payment of the principal within twenty years. Carlson v. City of Helena (Mont), 102 Pac. 39; Town of Lumberton v. John Nuveen & Co. (N. C.), 56 S. E. 940.

Parks v. West (Tex.), 108 S. W. 466. The use of the word "bond" instead of the word "coupon bond" in an order for an election does not invalidate it. Itasca Independent School District v. McElroy (Tex.), 124 S. W. 1011.

63—Stern v. City of Fargo (N. D.), 122 N. W. 403.

64—City of Thomasville v. Thomasville Electric Light & Gas Co. (Ga.), 50 S. E. 169; Williams v. People, 132 Ill. 574; Taylor v. Sparks (Ky.), 118 S. W. 970; Baltimore, etc. R. R. Co. v. Pumphrey,

cise wording or phraseology. The test of the sufficiency or validity of a notice is not whether the words and punctuation as prescribed by the statutes were used, unless so required, but whether the voters at the election held pursuant to such notice understood the questions submitted to them.[65] If these are clearly expressed in unmistakable

74 Md. 86, 21 Atl. 559; Martin v. Bennett (Mo.), 122 S. W. 779.

Hanswirth v. Mueller (Mont.), 64 Pac. 324. Notice held invalid for failure to designate polling place where objection was made before bonds were issued. Stern v. City of Fargo (N. D.), 122 N. W. 403.

Major v. Aldenborough, 209 Pa. 247, 58 Atl. 490. A notice is not invalidated by the addition of matter not required by the statute. Bullitt v. City of Philadelphia, 230 Pa. 544, 79 Atl. 752; but see, Marshall v. Silliman, 61 Ill. 218; People v. Town of Hart, 67 Ill. 62; Hutchinson v. Selb, 153 Ill. 542.

Hurd v. City of Fairbury (Nebr.), 128 N. W. 639. Where it was held a notice of election was sufficient in respect to designation of the polling places when it recited that the election would be held "at the regular polling places in the city."

65—In National Bank of Commerce v. Town of Grenada, 41 Fed. 87, the notice published called for an election on the proposition to issue waterworks bonds. The ordinance the basis of the notice showed that the question to be submitted was one relative to refunding the floating indebtedness of the municipality. The court held the bonds valid.

Brown v. Ingalls Township, 81 Fed. 485. Here the court said that the notice was sufficient if it contained the information necessary to enable the electors to pass upon and determine intelligently the question submitted. People v. Counts (Calif.), 26 Pac. 612; City of San Luis Obispo v. Haskin, 91 Calif. 549; Derby v. City of Modesto, 104 Calif. 515.

Burges v. Mabin, 70 Iowa, 633, 27 N. W. 464, followed by Yarish v. Cedar Rapids, I. F. & N. W. R. Co., 72 Iowa 556, 34 N. W. 417. The court also held in this case that a notice specifying the point to which the railway company shall have its line of road "ironed and cars running thereon" complies with the Iowa statutes requiring the notice to specify to what point the road shall be "fully completed." Bartemeyer v. Rohlfs (Ia.), 32 N. W. 673; Garden City, G. & N. R. R. Co. v. Masch, 82 Kan. 795, 109 Pac. 684, Stone v. Gregory, 23 Ky. L. R. 1, 61 S. W. 1002; Troutman v. Hayes (Ky.), 101 S. W. 976.

Taylor v. Sparks (Ky.), 118 S. W. 970; Hamilton v. Village of Detroit, 83 Minn. 119, 85 N. W. 933.

State ex rel. City of Carthage v. Gordon (Mo.), 116 S. W. 1099. Recitals as to rate of interest bonds were to bear involved.

Chicago, B. & Q. R. Co. v. Village of Wilber, 63 Nebr. 624, 88 N. W. 660. The notice was held sufficiently definite where a maxi-

language in the notice it will be held sufficient, and therefore, all subsequent proceedings had thereunder, valid. Where the purpose of the election is the grant of railroad aid, unless required by statute, the notice or order need not contain the name of the corporation to which the proposed aid is to be given,[66] though a notice calling for

mum amount of bonds was named but giving the village the option to issue less.

Fletcher v. Borough of Collingwood (N. J.), 59 Atl. 90. A notice of time and place of election were sufficient where it stated that it was to be held at the time of the annual election for municipal officers. Weston v. City of Newburgh, 67 Hun. 127, 22 N. Y. Supp. 22; Cartwright v. Village of Sing Sing, 46 Hun. (N. Y.) 548.

State v. Carbon County (Utah), 104 Pac. 222. A notice is sufficient which calls for the holding of an election on a designated date as provided by law although it does not name the polling places; see, also, same case, 114 Pac. 522. Taylor v. Greenville County Sup'rs, 86 Va. 506; Neale v. Wood County Ct. 43 W. Va. 90, 27 S. E. 370.

McBryde v. City of Montesano, 7 Wash. 69. It is not necessary that the ordinance itself providing for the purchase of water works should be set out in full in the election notice where the latter contains a fair statement of the matters to be voted upon.

Seymour v. City of Tacoma, 6 Wash. 138, 32 Pac. 1077. Under the provisions of a city charter requiring all ordinances to be published for three days consecutively, a notice of an election required to be published for thirty days need not contain such ordinance but only a fair statement of its contents.

But see the following cases which held the notice insufficient:

Brown v. Carl, 111 Iowa 608, 82 N. W. 1033. A proposition submitted to the electors held misleading.

Bowen v. Town of Greensboro, 79 Ga. 709, 4 S. E. 159. Notice held insufficient in not stating the amount of bonds, the rate of interest, the proportion of principal and interest to be paid annually, and further because not published for thirty days prior to the election, as required by Ga. Code, Sec. 5081. See, also, City of Athens v. Hemerick, 89 Ga. 674.

Smith v. City of Dublin, 113 Ga. 833, 39 S. E. 327. The notice here held insufficient under Georgia Code.

State v. School District No. 1 of Cascade County, 15 Mont. 133, 38 Pac. 462. A notice of election not stating the rate of interest at the time when the proposed bonds were to become payable and redeemable held insufficient under Comp. St. Sec. 1950 as amended by Act Feb. 14, 1893.

66—Block v. Bourbon County Com'rs, 99 U. S. 686.

Ninth National Bank v. Knox County, 37 Fed. 75. The court here held that where the proposed route was described with reasonable certainty, it would be sufficient. National Life Insurance Co. v. Board

alternative aid in favor of several roads has been held insufficient and the election void.[67]

In Kansas, however, the authorities hold that some existing corporation must be named in the election order or notice as the recipient of the proposed aid.[68]

§ 129. Notice or order of election; its service or publication.

The posting or publication of the notice or order calling the election must be made in the manner[69] and for the time,[70] required by law if such provisions are to be

of Education, 62 Fed. 778; Clapp v. Otoe County, 104 Fed. 473; but, see Burges v. Mabin (Ia.), 27 N. W. 464; Yarish v. Cedar Rapids, etc. Ry. Co. (Ia.), 34 N. W. 417.

67—Williams v. People, 132 Ill. 574, 24 N. E. 647. Bonds in the hands of innocent purchasers held good though authorized at an election where the question submitted to the voters was the issuing of railroad aid bonds to any railroad that may be built within two certain points within the next five years. Lewis v. Com'rs, 12 Kan. 186; Christian County Court v. Smith, 12 S. W. 134, 13 S. W. 276; State v. Roggen, 22 Nebr. 118, 34 N. W. 108.

68—Lewis v. Bourbon County, 12 Kan. 186.

69—Tylee v. Hyde (Fla.), 52 So. 968. A newspaper must be one devoted to the publication of the current news and circulated among all classes of people. Kemp v. Town of Hazlehurst (Miss.), 31 So. 908; Turner v. Leflore County (Miss.), 46 So. 258; State ex rel. Town of Canton v. Allen (Mo.), 77 S. W. 868.

State ex rel. City of Carthage v. Gordon (Mo.), 116 S. W. 1099. The publication of matter not required by the statute is unnecessary and the fact that it was so published does not invalidate the election. State v. Babcock, 25 Nebr. 500, 41 N. W. 450.

70—Davis v. Dougherty (Ga.), 42 S. E. 764; Wiley v. Silliman, 62 Ill. 170; Williams v. People (Ill.), 24 N. E. 647; State v. City of Clay Center (Kan.), 91 Pac. 91; City of Chanute v. Davis, 85 Kan. 188, 116 Pac. 367.

Baltimore, etc. R. R. Co. v. Pumphrey (Md.), 21 Atl. 599. Art. 3, Sec. 54 Maryland Constitution, providing that no county shall contract any debt in the construction of railroad, etc. unless authorized by an act of the Assembly "which shall be published for two months before the next election for members of the House of Delegates in the newspapers published in such county," is mandatory.

Cole v. Caledonia & Miss. Ry. Co., 27 Minn. 197. The notice posted on May 13th for a meeting on May 23rd "is posted at least ten days

found. If there is a failure to publish or serve for the time or in the manner required, the election held in pursuance is not regarded legal, though the presumption that it is usually obtains.[71] This presumption, however, does not follow when there is a failure to publish or post the notice.[72]

When bonds are issued pursuant to vote of the electors, the recitals therein contained by public officials authorized to make the same under the doctrines of estoppel as to recitals, control and the public corporation cannot set up as against their validity a failure to comply with statutory provisions relative to the details of an election. This subject will be considered in later chapters, here, perhaps, it is sufficient as illustrative of the great weight of authority to call attention to Humboldt Township v. Long[73] where the notice was not published or given for the length of time required by the statute. The court in part said: "It is plain that the bonds are not invalid, because all the notice of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice and whether the requisite majority of votes had been cast in favor of a subscription and consequent bond issue, were questions which the law sub-

prior" to such meeting. Town of Clarksdale v. Broaddus (Miss.), 28 So. 954; State ex rel., etc. v. Wilder (Mo.), 98 S. W. 465; Southwood v. City of Glasgow (Mo.), 132 S. W. 1168; State v. Cherry County (Nebr.), 79 N. W. 825; Wilber v. Wyatt (Nebr.), 88 N. W. 499; State v. Weston (Nebr.) 93 N. W. 728; Mittag v. Borough of Park Ridge, 61 N. J. L. 151, 38 Atl. 750; Cleveland v. Calvert (S. C.), 31 S. E. 871.

71—Knox County v. Ninth National Bank, 147 U. S. 91.

72—Town of Clarksdale v. Broaddus, 77 Miss. 667; 26 So. 954.

73—92 U. S. 642. See chapter XII, post on validity of public securities and estoppel.

mitted to the board of county commissioners and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued 'in pursuance of and in accordance with the act of the legislature.' Thus, the plaintiff below took them without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board, that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments." Some cases hold that the burden of the proof rests upon the purchaser of bonds issued by authority of such election to prove the sufficiency of the notice both as to its form and the time and manner of its service or publication, but these form an exception to the general rule.[74]

In common with many requirements fixing and controlling the details relative to the election at which the assent of the voters is required, the courts hold that a substantial compliance with the law in its essentials is sufficient and that election irregularities which do not affect the merits, will not invalidate bonds issued pursuant to such authority and this principle is especially applicable where the bonds have passed into the hands of bona fide purchasers for value.[75]

74—Post v. County of Pulaski, 47 Fed. 282, 49 Fed. 628 C. C. A., 145 U. S. 650, 36 L. Ed. 860; City of Santa Cruz v. Waite, 98 Fed. 387; Williams v. People, 132 Ill. 574, 24 N. E. 647; Choisser v. People, 140 Ill. 21, 29 N. E. 546.

75—In re Derby, 104 Calif. 515; Sommercamp v. Kelly (Ida.), 71 Pac. 147; Hamilton v. Village of Detroit (Minn.), 85 N. W. 933.

Lodgord v. City of East Grand Forks (Minn.), 117 N. W. 341. The fact that a city clerk signed the same as city recorder where no one is misled by this error and in all other respects the election proceedings were regular, is not fatal to the validity of the election. Weston v. Hancock County (Miss.), 54 So. 307.

City of Ardmore v. State (Okla.), 104 Pac. 913. Where the general voting public had notice of an election and participated therein the failure to publish notice of a municipal public utility bond issue elec-

§ 130. Questions to be submitted.

The purpose of statutory or constitutional provisions requiring the assent of the voters of taxpayers to the issue of negotiable securities or the incurring of indebtedness is to enable them to pass their judgment upon the advisability of the proposed action and to ascertain their will in respect to the creation of the proposed obligations. Having this reason clearly in mind the inquiry then arises of the form in which the questions for determination are to be submitted to the voters.[76]

tion as required will not invalidate the election.

Seymour v. City of Tacoma, (Wash.), 32 Pac. 1077. A notice of election for the purchase of a water plant by virtue of an ordinance and required by statute to be published for thirty days need not contain the ordinance but only a fair statement of its contents.

76—Brown v. Ingalls Township, 86 Fed. 261. The right to issue bonds is conferred by the assent of the voters, not the certificate of that fact.

City of San Diego v. Potter (Calif.), 95 Pac. 146. Where several propositions are submitted separately and clearly stated, the fact that in respect to one the city had no power to incur the debt does not invalidate the others.

Williams v. People (Ill.), 24 N. E. 647. If bonds have passed into hands of innocent purchasers the form of submission thereof will not affect their validity.

Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048. Where by the statutes the power to incur indebtedness is limited to $100,000 a vote upon the proposition to incur debt to the amount of $150,000 confers no authority.

Brown v. Carl (Ia.), 82 N. W. 1033. The proposition "Shall the town issue bonds not to exceed the sum of $3500 for the purpose of erecting, maintaining and operating a system of water works?" is misleading.

Bauman v. City of Duluth (Minn.), 69 N. W. 919. Competing propositions cannot each be voted for by the electors.

Maybin v. City of Biloxi (Miss.), 28 So. 566. Where two propositions are separately and distinctly stated, the submission of the two does not render the election invalid.

Carlson v. City of Helena (Mont.), 114 Pac. 110. The proposition as submitted, if not misleading, is valid.

State v. Roggen (Nebr.), 34 N. W. 108. A proposition to issue railroad aid bonds in the alternative is not effectual. Elyria Gas & Water Co. v. City of Elyria, 57 Ohio State 374, 49 N. E. 335.

Coleman v. Frame (Okla.), 109 Pac. 928. A proposition for the incurring of indebtedness under Constitution Art. 10, Sec. 27, must

The rule is universal that the propositions must be clearly stated and in such a manner as to enable the voter to exercise his independent judgment and choice in respect to each one submitted if there is more than one.[77]

Unrelated and diverse propositions to incur indebtedness or authorize the issue of bonds cannot be properly submitted to the voters as a single question but must be stated separately.[78] The authorities also hold in some instances that the questions cannot be submitted to the

be stated in such specific language as to apprise the voters of the nature of the public utility the city wishes to purchase, construct and repair.

Aylmore v. City of Seattle, 92 Pac. 932. The entire plan of providing for the constructing of public works must be submitted to the voters.

Neale v. County Court of Wood County (W. Va.), 27 S. E. 370. The details of the plan proposed relative to incurring of indebtedness need not be submitted to the voters.

77—Farmers Loan & Trust Co. v. City of Sioux Falls, 131 Fed. 890; Clark v. City of Los Angeles (Calif.), 116 Pac. 966; City of Denver v. Hayes (Colo.), 63 Pac. 311; Rea v. City of Lafayette (Ga.), 61 S. E. 707; Ostrander v. City of Salmon (Ida.), 117 Pac. 692; Platt v. City of Payette (Ida.), 114 Pac. 25; Gray v. Mount, 45 Ia. 591; City of Leavenworth v. Wilson (Kan.), 76 Pac. 400.

State ex rel. City of Bethany v. Allen (Mo.), 85 So. 531. A proposition for the construction of a public building and for improvements in the water works and electric light plant cannot be submitted as for one purpose. State ex rel. City of Joplin v. Wilder (Mo.), 116 S. W. 1087; Twitchell v. Sea Isle City (N. J.), 73 Atl. 75; Village of Hempstead v. Seymour, 69 N. Y. S. 462.

Stern v. City of Fargo (N. D.), 122 N. W. 403. If the object for which bonds have been issued have a material or necessary connection, they do not include more than one purpose—but a mere verbal connection cannot make two unrelated purposes one. Dick v. Scarborough, 73 S. C. 150, 53 S. E. 86; Chase v. Gilbert (S. C.), 65 S. E. 735; Ross v. Lipscomb, 83 S. C. 136, 65 S. E. 451. A notice failing to submit the amount of bonds to be voted for separately for electric lights, water works, and to establish a sewerage system is insufficient; see, also as holding the same; Johnson v. Roddey (S. C.), 65 S. E. 626; and Wood v. Ross (S. C.), 67 S. E. 449.

Red River Furnace Co. v. Tenn. Cent. R. R. Co. (Tenn.), 87 S. W. 1016; State v. Carbon County (Utah), 114 Pac. 522; McBryde v. City of Montesano, 7 Wash. 69, 34 Pac. 559.

78—Blaine v. Hamilton (Wash.), 116 Pac. 1076.

qualified voters in connection with other issues foreign to the matter of the debt sought to be incurred.[79]

It is, however, generally sufficient if independent questions are separately submitted in such a manner as to give the voters opportunity to express their will upon each proposition.[80]

79—Cain v. Smith (Ga.), 44 S. E. 5.

80—C. B. Nash Co. v. City of Council Bluffs, 174 Fed. 182. The proposition "to purchase or build" a system of water works is valid submission and an affirmative vote confers authority for either purpose. Ryan v. Mayor, etc. of Tuscaloosa (Ala.), 46 So. 638.

Coleman v. Town of Eutaw (Ala.), 47 So. 703. The submission to the voters of a proposed bond issue to purchase a water works and electric light plant is not objectionable as involving the submission of a double purpose.

Carey v. Blodgett (Calif.), 102 Pac. 668. The issuance of bonds for the construction of combined plant to supply water and light may be submitted as a single purpose.

Potter v. Lainhart (Fla.), 33 So. 251. Special statutory authority may confer authority to submit various questions as an entirety. Gilbert v. Canyon County (Ida.), 94 Pac. 1027.

Howard v. Independent School District No. 1 (Ida.), 106 Pac. 692. The equipment and construction of three separate schoolhouses is for one purpose and may properly be submitted together. Woolfolk v. City of Paducah (Ky.), 80 S. W. 186; McWilliams v. Board of Directors of Iberville Parish (La.), 54 So. 928. Hubbard v. Woodson, 87 Me. 88, 32 Atl. 802; Hamilton v. Village of Detroit (Minn.), 85 N. W. 933.

Kemp v. Town of Hazlehurst (Miss.), 31 So. 908. An election at which the question was submitted of the issuance of bonds "for the erection of electric lights and water works" was not invalidated because for a double purpose. State ex rel. Town of Canton v. Allen (Mo.), 77 S. W. 868.

State ex rel. City of Columbia v. Allen (Mo.), 82 S W. 103. Const. Art. 10, Sec. 12a does not restrict the cities therein named to one of the two alternatives requiring them to submit to the voters either a proposition to incur indebtedness to build and construct public utility plants or a proposition simply to buy an existing one. State ex rel. City of Chillicothe v. Wilder (Mo.), 98 S. W. 465; Carlson v. City of Helena (Mont.), 102 Pac. 39.

Hurd v. City of Fairbury (Nebr.), 128 N. W. 638. The proposition "for the purpose of raising a sum sufficient to purchase or install and establish an electric light system within said city" is not void because dual in its purpose. State v. Miller (Okla.), 96 Pac. 747; Oklahoma City v. State (Okla.), 115 Pac. 1108; City of Eugene v. Willamette Valley Co. (Ore.), 97 Pac. 817; Seymour v.

§ 131. The election.

Where the authority to issue negotiable securities is to be determined by popular assent, this may be secured at an election called especially to consider the one question,[81] or it may be submitted to the voters for their determination at a general election.[82] The legality of an act providing for a special election although questioned has never been decided adversely and as a question of expediency it would seem that the question of an issue of bonds or the incurring of indebtedness could be considered impartially and according to the merits at such an election rather than at a general one where other questions are to be decided and which may influence the voters independent of the merits. The authority, however, for the election whether special or general, must proceed from some valid constitutional or statutory provision.[83]

This rule especially applies where an election is held before the act authorized has gone into effect or where an insufficient time has elapsed between the passage of the act and the holding of the election.[84] The election

City of Tacoma (Wash.), 32 Pac. 1077; Blaine v. Hamilton (Wash.), 116 Pac. 1076.

81—B. & O. R. R. v. City of Jefferson, 29 Fed. 305; Frost v. Central City (Ky.), 120 S. W. 367; Byrne v. Parish of East Carol (La.), 12 So. 5214; Gooch v. Town of Patterson (La.), 52 So. 555.

82—Belknap v. City of Louisville, 99 Ky. 474, 36 S. W. 1118; City of Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441.

83—Farmers Loan & Trust Co. v. City of Sioux Falls, 13 Fed. 890; Marshall v. Silliman, 61 Ill. 218. Turpin v. Madison County Fiscal Court (Ky.), 48 S. W. 1085. Where the Fiscal Court failed to exercise its authority to issue bonds under a former vote, another election can be held for the same purpose.

84—Humboldt Township v. Long, 92 U. S. 642; Farmers Loan & Trust Co. v. City of Sioux Falls, 13 Fed. 890; State v. Little Rock, etc. R. R. Co., 31 Ark. 701; see, also, Mittag v. Borough of Park Ridge (N. J.), 38 Atl. 750.

But see, Mason v. Shawneetown, 77 Ill. 532. Where it was held that an election for the issue of bonds for levee purposes held prior to the adoption of the Illinois Constitution in 1870, authorized the issue of bonds in excess of the maximum

should further be held in the manner and in accordance with the laws controlling general elections unless the authority especially provides otherwise[85] the hours during which the polls shall be kept open,[86] the manner of balloting,[87] the proper officials to be in charge,[88] and the conduct of the election generally,[89] are regulated by gen-

limit designated in the constitution as adopted in that year.

85—Town of Oregon v. Jennings, 119 U. S. 74; Town of Concord v. Robinson, 121 U. S. 165; Post v. Pulaski County, 47 Fed. 282; People v. Town of Berkeley, 102 Calif. 298, 36 Pac. 591; City Council of Dawson v. Dawson Water Works Co., 106 Ga. 696, 32 S. E. 907; Brumby v. City of Marietta (Ga.), 64 S. E. 321; Harding v. Rockford, etc. R. R. Co., 65 Ill. 90; Bras v. McConnell, 114 Ia. 401, 87 N. W. 290; F. B. Williams Cypress Co. v. Police Jury (La.), 55 So. 878; Union Bank of Richmond v. Board of Com'rs of Town of Oxford, 116 N. C. 339, 21 S. E. 410; Knight v. Town of West Union (W. Va.), 32 S. E. 163.

86—Murphy v. City of San Luis Obispo, 119 Calif. 624, 51 Pac. 1085, 39 L. R. A. 444; Hammond v. City of San Leandro (Calif.), 67 Pac. 692.

Red River Furnace Co. v. Tenn. Central R. R. Co. (Tenn.), 87 S. W. 1017. Irregularities in holding an election in respect to polling places, etc. may be cured by a subsequent act of the legislature.

87—Frost v. Central City (Ky.), 120 S. W. 367.

88—Oregon v. Jennings, 119 U. S. 74, the court said: "We are of the opinion that, under the act of 1869, the election in a town could properly be conducted in the manner prescribed by law for the election in towns of town officers, namely, by a moderator and the town clerk, the town clerk having given, as required by the act, the prior notice of the election, and the return of the election being filed in the office of the town clerk, and the two officers being paid by the town."

Ryan v. Mayor, etc. of Tuscaloosa (Ala.), 46 So. 638. If the officials are de facto, it is sufficient. Chicago & Iowa R. R. Co. v. Mallory, 101 Ill. 583.

Harmon v. Auditor of Public Accts. (Ill.), 13 N. E. 161, affirming 22 Ill. App. 129. An election conducted by a moderator held invalid. Hughes v. Roberts, 142 Ky. 142, 134 S. W. 168; Esteves v. Board of Com'rs, etc. (La.), 46 So. 992.

Stackhouse v. Rowland (S. C.), 68 S. E. 561. Where an election is ordered and held by officials other than those authorized by law but in good faith and fairly conducted if there is no protest or objection of any kind by the voters or taxpayers either before or after the election it will be recognized as valid. Verner v. Mueller (S. C.), 71 S. E. 654.

89—Carpenter v. Green County (Ala.), 29 So. 194. Promises made as inducements for voters but unperformed will not affect the val-

eral laws in respect to these conditions or special authority if such applies.

Place and time of holding. The legal place and time of holding an election is also to be determined by existing and applicable laws.[90] The recitals of officers when authorized by law in respect to the legality of the election as affected by the time, notice, place and manner of holding, are ordinarily regarded as conclusive.[91]

idity of bonds in the hands of innocent purchasers.

Epping v. City of Columbus (Ga.), 43 S. E. 803. An election will not be invalidated because the voters were improperly influenced to vote in favor of incurring the debt.

Arkansas So. R. R. Co. v. Wilson (La.), 42 So. 976. The subject as expressed in the ballot controls any representations which may have been made by way of electioneering arguments.

Blaine v. Seattle (Wash.), 114 Pac. 164. An election under Const. Art. 8, Sec. 6 must be held in such a manner as to obtain a free expression of the voters approval or otherwise of the debt so to be incurred.

90—Wilson v. Pike County (Ala.), 39 So. 370. Voters are chargeable with notice of the place of the election. Kline v. City of Streator, 78 Ill. App. 42.

Taylor v. Sparks (Ky.), 118 S. W. 970. An election held in a place specified in the notice but elsewhere than as provided by law is not invalid where it does not appear that this fact interfered with the full attendance of the voters. State ex rel. Town of Canton v. Allen (Mo.), 77 S. W. 868. Hurd v. City of Fairbury (Nebr.), 128 N. W. 638. A notice that an election would be held "at the regular polling places in the city" sufficient.

Verner v. Mueller (S. C.), 71 S. E. 654. The improper location of a polling place is not material where a rejection of all the votes there cast did not change the result. State v. Salt Lake City (Utah), 99 Pac. 255.

State v. Carbon County (Utah), 114 Pac. 522. A county bond election notice held not invalid because not designating polling places.

91—See Secs. 292, et seq., post.

Town of Coloma v. Eaves, 92 U. S. 484; Humboldt Township v. Long, 92 U. S. 642; Robert v. Bolles, 101 U. S. 119; Anderson County Com'rs v. Beal, 113 U. S. 227; Nelson v. Haywood, 3 Pickle 781, 11 S. W. 885.

Phoenix Water Co. v. City Council of City of Phoenix (Ariz.), 84 Pac. 1095. A return showing a proposition to have been carried by a lawful majority cannot be attacked collaterally for errors or fraud in the conduct of the election. Madison County Sup'rs v. Brown, 67 Miss. 684.

§ 132. Ballots; form of.

Many states provide by law for the form of ballots to be used at elections where the question of incurring in debtedness is to be submitted and the form thus prescribed must be substantially if not literally followed.[92] Separate ballots may be also required for the various questions submitted where more than one proposition is to be decided by the voters.[93] If the notice or order call-

92—Coleman v. Town of Eutaw (Ala.), 47 So. 703, construing Const. 1901, Sec. 222, relative to form of ballot and holding this to be mandatory. Potter v. Lainhart (Fla.) 33 So. 251; Brown v. Village of Grangeville (Ida.), 71 Pac. 151.

Bras v. McConnell (Ia.), 87 N. W. 290. Act of the 24th Gen. Assembly, c. 33, providing for the "Australian Ballot System" does not apply to a special election held for the purpose of voting taxes. Calahan v. Handsaker (Ia.), 111 N. W. 22.

Clark v. Montgomery County Com'rs, 33 Kan. 202, 52 Am. Repts. 526. A ballot containing the words "for the bonds" with a line drawn through them and the word "against" written underneath should be counted. Stone v. Gregory (Ky.), 61 S. W. 1002.

Wightman v. Village of Tecumseh (Mich.), 122 N. W. 122. It is not necessary that the ballot shall contain all the words relative to the loan as prescribed by the council. Kemp v. Town of Hazlehurst (Miss.), 31 So. 908.

Tinkel v. Griffin (Mont.), 68 Pac. 859. Ballots printed containing the words "for the loan" and "against the loan" are sufficient without further specifying the purpose and the nature of the proposed loan. People v. Seaman, 69 N. Y. S. 55; State v. Miller (Okla.), 96 Pac. 747.

McLaughlin v. Summit Hill Borough, 73 Atl. 975. The ballots used must be furnished by the county com'rs and in the form prescribed by act of April 29, 1903.

Stern v. Bethlehem Borough (Pa.), 80 Atl. 984. An election held invalid where the form of ballots as prescribed by the act is not followed.

Dick v. Scarborough, 73 S. C. 150, 53 S. E. 86. Any form of ballot substantially following the previous notice and giving the voter full knowledge of the issue involved is sufficient. But see Weston v. City of Newburgh, 22 N. Y. S. 22.

93—Coleman v. Town of Eutaw (Ala.), 47 So. 703.

Bryan v. City of Lincoln (Nebr.), 70 N. W. 252, 35 L. R. A. 752. The fact that a separate ballot box was used for the votes on a proposition to issue city bonds submitted at a general election does not constitute it a separate election.

Fletcher v. Borough of Collinswood (N. J.), 59 Atl. 90. Boroughs are exempt from the provi-

ing for the election provides a special form of ballot, this is to be followed.

§ 133. Canvass of election returns.

The election returns, unless otherwise provided, should be canvassed by those officials upon whom the duty usually devolves.[94]

The purpose of laws requiring the canvass of returns within a prescribed period after the election is to secure promptness of action on the part of the returning board in order not to deprive the electors of the rights authorized to be exercised, through the casting of the necessary affirmative votes.[95] Such regulations as well as those providing for the record of the official returns are, usually, considered directory. A canvass, therefore, of the election returns, although made shortly after the

sions of public laws of 1898, p. 264, Secs. 52, 85, relative to the designation of a ballot as the "official ballot." The use of separate ballot boxes and separate ballots where the question of indebtedness is submitted at an annual election, does not make it a special election.

Town of Lumberton v. John Nuveen & Co. (N. C.), 56 S. E. 940. Where statutory authority provides that the question of issuing bonds "may" be voted on in separate ballot boxes, the word "may" is not necessarily construed as mandatory.

Smith v. Town of Belhaven (N. C.), 63 S. E. 610. That a proposition to issue town bonds for several purposes was voted for on one paper ballot does not affect the validity of bonds.

94—Brown v. Ingalls Township, 81 Fed. 485. Refunding bonds issued pursuant to a vote canvassed by an unauthorized board are void. Board of Education of Topeka v. Welch (Kan.), 33 Pac. 654.

City of Louisville v. Board of Park Com'rs (Ky.), 768 S. W. 860. A re-canvass of the vote may be had where none of the bonds authorized to be issued have passed into the hands of innocent purchasers. McGinnis v. Board of Trustees, etc. (Ky.), 108 S. W. 289; Snyder v. Board of Trustees, etc., 142 Ky. 139, 135 S. W. 271; Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163.

95—Stockton v. Powell (Fla.), 10 So. 688.

Reynolds & Henry Construction Co. v. City of Monroe (La.), 13 So. 400. An official declaration of the result of the election is necessary to the validity of the tax voted.

time limited or prescribed by law has expired, does not, necessarily, invalidate the result of such election.[96]

§ 134. Necessary votes.

The affirmative vote necessary to the authority secured at an election for an issue of negotiable bonds may be fixed, either in the constitution, the general statutes of the state or the special authority providing for the issue of bonds and calling the election.[97] Such provisions may require either a certain proportion of the total number registered and qualified to vote or of the vote cast at the election upon the particular question, viz: The issue of bonds without regard to the total vote upon other propositions, for candidates for public offices or the total voters registered. The greater number of authorities hold that, unless required by law, the prescribed proportion of the legal voters necessary to carry the question need not be of the total number of registered qualified voters, or those voting upon other questions but such proportion of those who actually voted at the election and upon the question submitted, namely, the issue of negotiable bonds.[98] Where, however, the law provides that the re-

96—Syracuse Township v. Rollins, 104 Fed. 958; Turpin v. Madison County Fiscal Court (Ky.) 48 S. W. 1085.

Claybrook v. Board of Com'rs of Rockingham County (N. C.), 19 S. E. 593. The canvass of election returns on the second day after the election instead of the third as provided by law is immaterial but this case further holds that a statement by the county commissioners in declaring the result of the election that "after due canvass the foregoing returns of election are correct," does not show a majority of the qualified voters in favor of the bond issue. Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163.

97—Henry County v. Nicolay, 95 U. S. 619.

Cass County v. Gillette, 100 U. S. 585. The constitutional provision requiring a two-thirds vote does not apply to public charters granted prior to the adoption of the constitution. Jarrott v. Moberly, 5 Dill. 253; Office, etc. Mfg. Co. v. County of Elbert, 73 Fed. 224; Town of Decatur v. Wilson, 96 Ga. 251.

98—St. Joseph Township v. Rogers, 16 Wall. 644.

Cass County v. Johnston, 95 U. S. 360. All qualified voters who

quired proportion shall be of the total number registered and qualified voters, such total number must then be considered in determining the question whether the required number voted affirmatively in favor of the issue of

absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience and ought not to be adopted unless the legislative will to that effect is clearly expressed.

Over-ruling Harshman v. Bates County, 92 U. S. 569, 23 L. Ed. 747 to the contrary.

Carroll County v. Smith, 111 U. S. 556. The term "qualified voters" as used in the Mississippi Const. must be taken to mean "not those qualified and entitled to vote but those qualified and actually voting—in that connection a voter is one who voted—not one who although qualified to vote does not vote." Disapproving Hawkins v. Carroll County, 50 Miss. 735; Norton v. Taxing District of Brownsville, 36 Fed. 99; Madison County v. Priestly, 42 Fed. 817; Cronley v. City of Tucson (Ariz.), 56 Pac. 876, construing Act of Congress, March 4, 1898; Howland v. Board of Sup'rs of San Joaquin County, 109 Calif. 152, 41 Pac. 864, construing Const. Art. 11, Sec. 18; Fritz v. City and County of San Francisco (Calif.), 64 Pac. 566; Potter v. Lainhart (Fla.), 33 So. 251; Mayor v. Inman, Swan & Co., 57 Ga. 370; Howell v. City of Athens, 91 Ga. 139; City of South Bend v. Lewis (Ind.), 37 N. E. 986; Brown v. Carl (Ia.), 82 N. W. 1033.

Worthington v. Board of Education, etc. (Ky.), 71 S. W. 879. The assent of two-thirds of those voting on the question is sufficient. Board of Education of Winchester v. County of Winchester (Ky.), 87 S. W. 768; Frost v. Central City (Ky.), 120 S. W. 367; Iglehart v. City of Dawson Springs, 143 Ky. 140, 136 S. W. 210; Cutler v. Madison County Sup'rs, 56 Miss. 115.

Evans v. McFarland (Mo.), 85 S. W. 873. Special statutory for the holding in this case; Tinkel v. Griffen (Mont.), 68 Pac. 859; May v. Bermel, 45 N. Y. S. 913; Murphy v. City of Long Branch (N. J.), 61 Atl. 593; Nugent v. City of Newark (N. J.), 72 Atl. 11; Fabro v. Town of Gallup (New Mex.), 103 Pac. 271.

Louisville & N. R. R. Co. v. County Court, etc., 33 Tenn. (1 Sneed) 638. How can we know how many legal voters there are in a county at any given time? We cannot judicially know it. If it were proved that the vote was much larger in the last preceding political election, or by the last census by the official returns, or the examination of the witnesses, it would only be a circumstance, certainly not conclusive that such was the case at the time of this election. * * * When a question or an election is put to the people, and is made to depend on the vote of the majority, there can be no other test of the number entitled to vote but the ballot box. If in fact, there be some or many who do not

bonds.[99] This rule is also true where statutory provisions require the affirmative vote of a prescribed number of all the legal electors voting at the election; then the whole number of votes cast at the election must be taken into consideration in ascertaining whether or not the necessary affirmative vote has been cast without considering the vote alone on the question of a bond issue.[1]

attend and exercise the privilege of voting, it must be presumed that they concur with the majority who do attend, if indeed they can be known at all to have an existence. Faulkner v. City of Seattle (Wash.), 86 Pac. 379; Miller v. School District No. 3 (Wyo.), 39 Pac. 870.

But see Town of Hendersonville v. Jordan (N. C.), 63 S. E. 167. Special ballot provision.

99—Cass County v. Jordan, 95 U. S. 373; Jordan v. Cass County, 3 Dill. 185; Floyd County v. State, 112 Ga. 794; Smith v. County of Dublin, 113 Ga. 833, 39 S. E. 327; Wilkins v. City of Waynesboro (Ga.), 42 S. E. 767; Farmer v. Town of Thompson (Ga.), 65 S. E. 180; Onstott v. People, 123 Ill. 489, 15 N. E. 34; State v. Curators of State University, 57 Mo. 178; State v. Brasfield, 67 Mo. 331.

State v. Harris, 96 Mo. 29, 8 S. W. 794. It was here held that under Mo. Const. 1865, Art. II, Sec. 14, requiring an assenting vote of two-thirds of all the qualified voters of the corporation, "two-thirds of the qualified voters voting at an election was not sufficient; mere inaction of voters in failing to vote did not express assent."

Hawkins v. Carroll County Sup'rs, 50 Miss. 73, disapproved in Carroll County v. Smith, 111 U. S. 556; Kemp v. Town of Hazleburst, 80 Miss. 443, 31 So. 908; Southerland v. Town of Goldsborough (N. C.), 1 S. E. 760.

Duke v. Brown (N. C.), 1 S. E. 873. Those who failed to vote are not to be counted as acquiescing in what is done by those who do vote. McDowell v. Rutherford Ry. Construction Co. (N. C.), 2 S. E. 351; Lynchburg & D. R. R. Co. v. Person County Com'rs, 109 N. C. 159; McDowell v. Mass. & S. Construction Co., 96 S. C. 514; Wilson v. City Council of Florence, 39 S. E. 397, 17 S. E. 835; Williamson v. Aldrich (S. D.), 108 N. W. 1063.

1—St. Joseph v. Rogers (Ill.), 16 Wall. 644. "A majority of the legal voters of the township" interpreted to mean only a majority of the legal voters of the township voting at the election.

Cronley v. City of Tucson (Ariz.), 56 Pac. 876, construing Act of Congress, March 4th, 1898. Law v. City and County of San Francisco (Calif.), 77 Pac. 1014; People v. Town of Berkeley, 102 Calif. 298; People v. Wyant, 48 Ill. 263; Belknap v. City of Louisville (Ky.), 36 S. W. 1118, 34 L. R. A. 256; McGoodwin v. City of Franklin (Ky.), 38 S. W. 481; City of Ashland v. Culbertson (Ky.), 44 S. W. 441; Bardstown & L. Turnpike Co. v. Nelson County (Ky.),

In an Indiana case [2] the court in an elaborate opinion discusses the leading cases on the question of statutory and constitutional provisions relative to the points involved in this section and from them deduces four leading principles which it states may be considered as fully established, namely: "First, where a measure is proposed to the people and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote even though those voting constitute a minority of those entitled to vote. Second, where a question is required to be submitted at a certain regular election and is made to depend upon a majority of the votes cast at such election, a majority of all the votes cast at the election is meant and not merely a majority of the votes cast on that particular question. Third, where at a general election a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary. Fourth, where a legislative body provides that a proposition shall be submitted to the voters, that those in favor of the proposition cast an affirmative vote and that those electors opposed to the proposition shall cast a negative vote, and that 'a majority of the votes given' shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the

78 S. W. 851; Stebbins v. Judge of Superior Court of Grand Rapids (Mich.), 66 N. W. 594.

Wightman v. Village of Tecumseh (Mich.), 122 N. W. 122. Ballots illegal because of distinguishing marks cannot be counted to determine whether the necessary two-thirds vote have been cast. Everett v. Smith, 22 Minn. 53; Ranney v. Bader, 50 Mo. 600; State v. Benton (Nebr.), 45 N. W. 794; Bryan v. County of Lincoln (Nebr.), 75 N. W. 252, 35 L. R. A. 752; State v. Ruhe (Nev.), 52 Pac. 274; Day v. City of Austin (Tex.), 22 S. W. 757.

2—City of South Bend v. Lewis, 138 Ind. 512, 37 N. E. 986.

measure is adopted or not, are those which are given on the particular question involved. Of the correctness of these four principles, we think there can be no dispute."

§ 135. Voters and their qualifications.

The qualifications of voters at such an election may be fixed by either constitutional provision or legislative action [3] and the privilege of voting limited to the taxpayers, the male taxpayers, qualified voters, freeholders, or such other classes as may seem advisable. The validity of these provisions has been universally sustained since the act of voting is not a right but a mere privilege to be granted as a matter of favor by the sovereign state.[4] This privilege may be granted to women under certain

3—Stockton v. Powell (Fla.), 10 So. 688. The payment of a capitation tax not required under Act of June 11, 1891, authorizing Duval County to vote bonds for the improvement of the navigation of St. John's River. Kentucky Union Ry. Co. v. County of Bourbon (Ky.), 2 S. W. 687; Wooley v. Louisville So. Ry. Co., 19 S. W. 595.

4—B. & O. R. R. Co. v. County of Jefferson, 29 Fed. 305. Taxpayers.

McKenzie v. Wooley (La.), 3 So. 128. Taxpayers.

Spitzer v. Village of Fulton, 68 N. Y. S. 660. A village charter requiring a property qualification for voters voting on the question of an issue of bonds by the village is not unconstitutional.

State v. Miller (Okla.), 96 Pac. 747. Qualified property taxpayers. Wilson v. City Council of Florence (S. C.), 17 S. E. 835.

McLaurin v. Tatum (S. C.), 67 S. E. 560. A "qualified voter" is one who presents to the managers of the election his registration certificate and proof of payment of all taxes including the poll tax assessed against him and collectible during the previous year.

Red River Furnace Co. v. Tenn. Central R. R. Co. (Tenn.), 87 S. W. 1016. The legislature has no authority to pass an act validating an election carried by bribery.

Hendrick v. Culberson (Tex.), 56 S. W. 616. One against whom no property tax has been or could have been assessed for the year in which the voting occurred is not a taxpayer within the meaning of the acts of 1899, p. 258, Sec. 1, which prohibits the issue of bonds unless a majority of the qualified voters of the county who are property taxpayers have voted to issue the same. Eggborn v. Board of Sup'rs of Culpepper County (Va.), 63 S. E. 424; Hall v. City of Madison (Wis.), 107 N. W. 31.

conditions.[5] The findings or conclusions of officials authorized to pass upon all matters of fact in connection with these qualifications, the number of votes cast or the questions submitted, are generally regarded as conclusive and the public corporation estopped to deny them;[6] this principle of law is especially true in regard to those matters dehors the record.[7]

In Citizens' Savings & Loan Association cited in the above note, the court said: "We have seen that the county court at its special term in November, 1871, not only certified, upon its record, that all the conditions prescribed by its order at the January term, 1870, had been complied with by the railroad company but authorized the county judge to make a similar certificate under oath. It even certified upon its records that the subscription had been voted for by a majority of the qualified voters as the standard the vote cast at the preceding general

5—Cummins v. Hyatt (Nebr.), 74 N. W. 411. A married woman holding lands in fee is a freeholder.

Olive v. School District No. 1 (Nebr.), 125 N. W. 141. Women owning real or personal property are authorized to vote at any school district meeting and may therefore lawfully vote for or against school district bonds.

Gould v. Village of Seneca Falls, 121 N. Y. S. 723. A woman otherwise qualified except for sex is entitled to vote on the question of the levy of a tax on the property of the village to pay water works bonds. See also as holding the same Ward v. Kropf, 120 N. Y. S. 476, 127 N. Y. S. 1148.

6—County of Moultrie v. Rockingham Ten-Cent Saving Bank, 92 U. S. 621; Township of Rock Creek v. Strong, 96 U. S. 271; Livingtone County v. First National Bank of Portsmouth, 128 U. S. 127; Davis v. Hert (Ind.), 90 N. E. 634; Syracuse Township, Hamilton County, Kansas v. Rollins, 104 Fed. 958; Reynolds & H. Const. Co. v. City of Monroe, 45 La. Ann. 1024, 13 So. 400; State v. School District No. 13, 13 Nebr. 466; McDowell v. Construction Co., 96 N. C. 514, 2 S. E. 351; Cleveland v. City of Spartanburg, 54 S. C. 83, 31 S. E. 871; Nelson v. Haywood, 89 Tenn. 781, 11 S. W. 885.

Nichols v. Board of Directors of School District, etc. (Wash.), 81 Pac. 325. In the absence of fraud or malfeasance the action of a canvassing board is final and conclusive. But see McDowell v. Rutherford Ry. Construction Co. (N. C.), 2 S. E. 351.

7—Citizens Saving & Loan Association v. Perry County, 166 U. S. 692; Louisville & N. R. R. Co. v. Davidson County Court, 33 Tenn. (1 Sneed) 638.

election for county officers. The number of such voters who, at the time of election lived in the county was a fact dehors any official record of votes and was to be ascertained by the county court or county judge upon examination. * * * It would be rank injustice to permit the county, after the lapse of so many years to say that a majority of the voters living in the county at the time of the election—a matter not determinable by any public record—did not vote for the subscription." The presumption of law exists that electors voting possess the right to exercise the franchise, that the votes received were legal and that no undue influence was exercised by those affirmatively interested in the issue of the bonds.[8] Allegations in pleadings contesting the legality of the election either as to its time, place or manner of holding, the number of votes cast or the right of those voting to vote must be definite and point out with particularity the alleged illegal acts or conditions.[9]

The necessity of a registration or preliminary registration of voters as a requisite qualification for voting at an election will be determined from the laws then in force.[10]

8—Wooley v. Louisville So. R. R. Co., 93 Ky. 223. It is clear that it could have been ascertained with judicial certainty how many legal votes were cast for and against the subscription and the appellant's silence upon that subject creates the presumption that the subscription obtained a majority of the legal votes and the declared result was in accordance with the vote. Cleveland v. Calvert (S. C.), 31 S. E. 871.

But see Hendrick v. Culberson (Tex.), 56 S. W. 615. Where it was held that an election was prima facie illegal when the tax rolls failed to show that persons voting were taxpayers.

9—Davis v. Hert (Ind.), 90 N. E. 634; George v. Oxford Township, 16 Kan. 72; Wooley v. Louisville So. R. R. Co., 93 Ky. 223; McWilliams v. Board of Directors of Iberville Parish (La.), 54 So. 928; Luzader v. Sargent (Wash.), 30 Pac. 142.

10—Pacific Improv. Co. v. City of Clarksdale, 74 Fed. 528.

Kaigler v. Roberts (Ga.), 15 S. E. 542. No preliminary registration required for a special election.

Howell v. City of Athens (Ga.), 16 S. E. 966. No preliminary regis-

§ 136. Proceedings to issue by municipal councils or other official bodies.

In many instances the power to issue bonds is vested in the legislative body of a municipality or in the quasi legislative or administrative board of a public quasi corporation. In other cases where the power is dependent upon the assent of the voters, the right to initiate proceedings for the purpose of determining this is granted to the same bodies or officials.[11] In either case the rule obtains that all provisions of the law conferring the authority must be strictly followed if the bonds when finally issued are to be considered valid unless the corporation is estopped by some one or more of the principles to be discussed later. It will be remembered that this rule is also applied in those cases where the initial steps were left to the voters themselves. The rule of strict construction is applied to all of the proceedings of the voters including the petition, the notice or order for the election, the election itself,—including the time, place and manner of holding it, the necessary votes and the

tration required for a special election.

Heilbron v. City of Cuthbert, 96 Ga. 312; 23 S. E. 206; Town of Decatur v. Wilson, 96 Ga. 251, 23 S. E. 240. Registration required.

Brumby v. City of Marietta (Ga.), 64 S. E. 221. Where irregularities in registration would not affect the result, the bonds authorized must be validated.

Coggeshall v. City of Des Moines, 117 N. W. 309 Code, Sec. 1131. Exempting a woman from registration not contrary to Const. Art. 1, Sec. 6, which provides that privileges or immunities shall not be granted to any citizens or class of citizens which shall not on the same terms belong equally to all citizens. Cox v. Com'rs of Pitt County (N. C.), 60 S. E. 516; Cottrell v. Town of Lenoir (N. C.), 61 S. E. 599.

Claybrook v. Com'rs of Rockingham County, 117 N. C. 456, 23 S. E. 360. The registration list is prima facie evidence of who are qualified voters.

11—Board of Education of City of Atchison v. De Kay, 148 U. S. 591; Swan v. City of Arkansas City, 61 Fed. 478; Portsmouth Savings Bank v. Village of Ashley, 91 Mich. 670; Brown v. Bon Homme County (S. D.), 46 N. W. 173.

qualification of voters; the canvass of the returns and the declaration of the result.[12]

While mere irregularities and informalities, the courts have sometimes held, will not affect the result where there has been a substantial compliance with the law yet since the exercise of the power to incur indebtedness or issue negotiable securities is one which places a burden and in many cases a substantial one on the taxpayer, a failure to follow constitutional or statutory provisions conferring the authority usually raises a serious question in respect to the validity of the action.[13]

§ 137. Authority conferred by ordinance.

It is customary to confer upon municipalities the power to incur indebtedness or to issue securities by the affirmative action of its municipal council through the passage of an ordinance which is the usual method for legislative action by these bodies.[14]

12—People v. Florville, 207 Ill. 79, 69 N. E. 623. An ordinance after having been sanctioned by vote cannot be subsequently amended without further action by the people. Blaine v. City of Seattle (Wash.), 114 Pac. 164; see, also, Sec. 122 et seq., ante.

13—Swan v. City of Arkansas, 61 Fed. 478; National Bank of Commerce v. Town of Granada, 54 Fed. 100 C. C. A.; Force v. Town of Batavia, 61 Ill. 99; Town of Middleport v. Aetna Life Insurance Company, 82 Ill. 562; Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161.

14—National Bank of Commerce v. Town of Granada, 44 Fed 262. It is true that section 3419 of the Colorado Statute which provides for the funding of the debts of towns does not in terms say that the submission to the qualified voters of the questions of funding and the order directing the issue of the bonds shall be by ordinance. But an examination of the whole statute concerning towns and cities has satisfied my mind beyond a doubt, that it was in the contemplation of the law makers, and is a necessary deduction from the tenor of the whole act that wherever the governing body of such municipalities is empowered to create a debt on the whole constituency, or to take action looking to the issue of municipal bonds it should proceed in the more formal and solemn mode of an ordinance. Irwin v. Lowe, 89 Ind. 540; Bills v. City of Goshen, 117 Ind. 221; Newman v. Emporia, 32 Kan. 456; Ranney v. Baeder, 50 Mo. 600; Linn v. City of Omaha (Nebr.), 107 N. W. 983;

An ordinance is a "local law prescribing a general and permanent rule of conduct." It is a local law of a "municipal corporation duly enacted by the proper authorities prescribing general, uniform and permanent rules of conduct relating to the corporate affairs of the municipality." [15]

The legislative body of a municipal corporation having the power to legislate for those within its jurdisdiction must necessarily act in the same manner under the same conditions and controlled by the same general principles of law and the special restrictions that may exist for its prototype, the legislative body of the state or nation. Its enactments are laws in all their essential characteristics but limited in operation only with respect to territory.[16]

These principles are unquestioned and it necessarily follows that legislative action of the character indicated to be valid must possess all of the characteristics of a general law. There are many constitutional and statutory provisions relative to the power to pass, the form, the mode of passage and the publication of general laws which must be complied with to establish their validity. These questions will be considered so far as applicable to the subject in hand in a later chapter relating to the validity of general legislation as affecting the power of public corporations to issue negotiable securities and in the same chapter the cases will be referred to which apply especially to municipal ordinances when involving the subjects above referred to.[17]

Horton v. City of Greensboro (N. C.), 59 S. E. 1043; Hoffman v. City of Pittsburg, 229 Pa. 36, 78 Atl. 26.

15—Citizens Gas & Mining Co. v. Town of Elwood, 114 Ind. 332; Mason v. City of Shawnee Town, 77 Ill. 533; McQuillin Municipal Ordinances; Abbott Municipal Corps., Secs. 514, et seq.

16—Pittsburg, etc. R. R. Co. v. Hood, 94 Fed. 618; Murphy v. City of San Luis Obispo, 119 Calif. 624, 39 L. R. A. 444; State v. Tryon, 39 Conn. 183; State v. Clark, 25 N. J. L. 34; Abbott Munic. Corps., Sec. 513.

17—See Chapter XVI, post.

It is immaterial as to the method to be followed by a public corporation when that method is established by a grant of authority from the state. The law is well settled that a municipal corporation especially may declare its will as to matters within the scope of its corporate powers either by a resolution or an ordinance unless its charter requires it to act by ordinance and generally it is of little significance whether a legislative measure is couched in the language of an ordinance or of a resolution where it is enacted with the same formalities which usually attend the adoption of ordinances.[18]

The point to be observed is that the method prescribed in order to confer authority must be strictly pursued.

Constitutional, statutory, or charter provisions empowering a municipal corporation to issue negotiable securities, establish the measure of the powers of the corporation in this respect. Securities issued without such action or after action not taken in the manner prescribed by legal authority will not be regarded as valid and in many cases it has been held that the buyer of municipal securities is charged with the duty of ascertaining and with the knowledge of the manner in which the initial and subsequent proceedings have been taken. Legal action by the corporation is jurisdictional and forms a basis for all the subsequent steps and acts of public officials acting pursuant to it.[19] These principles apply to

18—Board of Education of City of Atchison v. De Kay, 148 U. S. 591; City of Alma v. Guaranty Savings Bank, 60 Fed. 203; Butler v. Passaic, 44 N. J. L. 171; Sower v. Philadelphia, 35 Pa. St. 231; City of Tyler v. L. L. Jester & Co. (Tex.), 74 S. W. 359; see, also, Abbott's Munic. Corps., Secs. 514-517.

19—National Bank of Commerce v. Town of Granada, 54 Fed. 100 C. C. A., affirming 44 Fed. 262, 48 Fed. 278 and following Dixon County v. Field, 111 U. S. 83; Hinckley v. City of Arkansas City, 69 Fed. 768 C. C. A.; McCoy v. Briant, 53 Calif. 247; Law v. City and County of San Francisco, 77 Pac. 1014.

Ellinwood v. City of Reedsburgh, 91 Wis. 131, 64 N. W. 885. The plan for the construction of waterworks as presented in an ordinance does not preclude the council from afterwards changing it, where this

many conditions relating to the form and passage of the ordinance or resolution as above stated and also to its necessity as a basis for the election [20] and further preliminary action may be required of municipal councils in respect to estimates of costs, declarations of necessity or other similar provisions.[21]

§ 138. Authority conferred by resolution.

In many instances the public corporation, especially a municipality, acts with equal force by ordinance or by resolution, and while a resolution, ordinarily, is adopted with less formality and in a determination of its legal effects, it is construed more strictly than where an ordinance is the method followed, yet bonds issued in pursuance of a resolution and not an ordinance should not be declared invalid unless the charter of the city contains unmistakable evidence that the council could not lawfully act otherwise than by an ordinance.[22]

To state the rule more concisely, where under existing laws a municipality can act with equal force by either ordinance or resolution, bonds issued pursuant to either will be considered valid. If the authority to act is con-

is within its discretion. See also Secs. 248, et seq., post.

20—City of Tarkio v. Cook (Mo.), 25 S. W. 202; Hershoff v. Beardsley, 45 N. J. L. 288; see cases cited under notes 16, 17 ante.

21—Clark v. City of Los Angeles (Calif.), 116 Pac. 722; Richardi v. Village of Bellaire (Mich.), 116 N. W. 1066; but see Com'rs of Parks, Boulevards, etc. v. Comptroller of City of Detroit, 84 Mich. 154, 47 N. W. 676. It is not necessary that park and boulevard bonds should be approved by the board of estimates before they can be issued.

Naegely v. City of Saginaw, 101 Mich. 532, 60 N. W. 46. A declaration of necessity is not a condition precedent to the issue of bonds by the city to pay its proportion of the cost of a local improvement.

22—Atchison Board of Education v. DeKay, 148 U. S. 591; Alma v. Guaranty Savings Bank, 60 Fed. 203; City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. 756; Swan v. Arkansas City, 61 Fed. 478; Ryan v. Mayor, etc. of Tuscaloosa (Ala.), 46 So. 638; Kline v. City of Streator, 78 Ill. App. 42; State v. Babcock (Nebr.), 31 N. W. 8; City of Patterson v. Barnett, 46 N. J. L. 62.

ferred only upon the adoption of an ordinance, securities issued under and by virtue of a resolution unless other principles are applicable and operate as an estoppel will not be considered valid.

§ 139. What the ordinance or resolution should contain.

Since the passage of the ordinance or resolution authorizing the issue of bonds is held to be jurisdictional, great care and particularity should be exercised in its drafting. It should be passed pursuant to authority duly given and in the manner provided. Since it is a law, it should contain within it the technical essentials of a law which have been held to include a title and enacting clause, the body or substance of the law, repealing clause, the operative clause and the proper and necessary signatures and approvals.[23]

In some cases it is held there should also be included a recital of the reasons for its passage. The provisions of the constitution or statutes conferring authority to issue the securities in question in respect to their purpose, denomination, maturity, time of payment and rate of interest if mandatory should be literally followed.[24]

23—Atkins v. Phillips, 26 Fla. 281. Defects in respect to form cannot be remedied by a subsequent motion. Bills v. City of Goshen, 117 Ind. 221; Naegely v. City of Saginaw, 101 Mich. 532, 60 N. W. 46; Elyria Gas & Water Co. v. City of Elyria, 7 Ohio Dec. 527.

Elliott v. City of Philadelphia, 229 Pa. 215, 78 Atl. 107. It is sufficient if the ordinance sets out the purpose or purposes for which the debt is to be incurred.

State v. Salt Lake City (Utah), 99 Pac. 255. Mere irregularities in the statements of an ordinance do not render it invalid in the absence of a showing that voters were induced to vote for the bonds by such statements. See Abbott's Munic. Corps., Secs. 522, et seq.

24—Knox County v. Ninth National Bank, 147 U. S. 91; Quaker City Bank v. Nolan, 59 Fed. 660; Potter v. Lainhart (Fla.), 33 So. 251; Hillsboro County v. Henderson (Fla.), 33 So. 997; Mayor, etc. of Baltimore v. Ulman, 30 Atl. 43; State v. Ziegler, 32 N. J. L. 262; Smith v. Gouldy, 58 N. J. L. 562; Coates v. New York, 7 Bow. 585; Welker v. Potter, 18 Ohio State 85.

In respect to the effect of a misrecital of authority in an ordinance upon the validity of the bonds, see Sec. 288, post.

§ 140. Official action by officials or quasi-legislative bodies.

In other instances and especially where public quasi corporations are involved, the power to initiate proceedings looking to an issue of public securities is vested by law in certain designated public officials or in various quasi-legislative and administrative bodies: boards of education, park boards, county courts, boards of county commissioners, school district trustees, drainage trustees and other similar bodies are typical illustrations.[25]

The same rules apply in respect to action by these various official bodies which are applied to similar action by municipal councils and of the people when they are vested with the power to initiate proceedings by petition or otherwise. The initial steps prescribed by law are regarded as jurisdictional and a failure to comply with them renders their subsequent action with its attendant results voidable if not entirely void.[26]

25—Goodson v. Dean (Ala.), 55 So. 1010.

Pollock v. City of San Diego (Calif.), 50 Pac. 760—Under San Diego charter the certificate of the auditor that the proposed liability can be incurred without violating any of its provisions is necessary. Johnson v. Williams (Calif.), 95 Pac. 655; Akin v. Ordinary of Barton County, 54 Ga. 59.

Brown v. Tinsley (Ky.), 21 S. W. 535. It is not necessary that a justice of the peace be associated with the county judge of a county court when the order is made submitting the question, of subscription to the capital stock of a railway company, to the voters of a county. See also Shortell v. Green County (Ky.), 59 S. W. 522.

Kockrow v. Whisenand (Nebr.), 130 N. W. 287. A Board of Education may submit a proposition to issue school bonds by a two-thirds vote of its members without a petition from the electors. Christie v. Board of Chosen Freeholders of Bergen County (N. J.), 66 Atl. 1073; Frick v. Mercer County (Pa.), 21 Atl. 6; Alley v. Mayfield (Tex.), 131 S. W. 295.

26—Rondot v. Rogers Township, 99 Fed. 202 C. C. A. The failure of a township in Mississippi to pass a resolution directing the issue of bonds held not to render the bonds invalid where it appears they are issued by direction of the township board. Wetumpka v. Wetumpka Wharf Co. (Ala.), 73 Ala. 611.

Potter v. Lainhart (Fla.) 33 So. 251. A resolution of the Board of

The cases, however, observe this distinction in connection with the various papers and records prepared and kept by them. It is commonly recognized that bodies of the character noted in this section as compared with municipal councils are less accustomed to legal proceedings and in many instances less qualified to prepare official resolutions and documents and therefore irregularities and informalities in their proceedings are more liable to occur.

For this reason the courts do not apply so frequently the rule of strict construction to their acts and proceedings and securities which might otherwise be regarded as void, the validity of them will be sustained.

Their power in a given instance must be determined from an inspection of the legal authority under which they assume to act. The principle already stated equally applies to such officials as to all public officers that they are agents of the public corporation they represent having only a special and limited power and authority, their

County Commissioners relative to the issue of bonds if it otherwise complies with the law is not invalid though the minutes of the board do not recite that the resolution was seconded and formally voted upon by the board. Hillsboro County v. Henderson (Fla.), 33 So. 997; Hogan v. State (Ga.), 67 S. E. 268; Gem Irrigation District v. Johnson (Ida.), 115 Pac. 924; Force v. Town of Batavia, 61 Ill. 99; State v. Board of Com'rs of Newton County (Ind.), 74 N. E. 1091.

First National Bank v. Van Buren School Trustees (Ind.), 93 N. E. 863. Construing the term "emergency" as used in Burns' Annotated Stats. 1908, Sec. 9595, authorizing the borrowing of money. Berkeley v. Board of Education (Ky.), 58 S. W. 506.

Board of Com'rs, etc., Drainage District v. Baker (La.), 50 So. 16. Irregularities in the call for an election upon a bond issue may be cured by a second election properly held.

Wilson v. Borough of Collinswood (N. J.), 80 Atl. 335, affirming 77 Atl. 1033. A borough must first obtain the approval of the state board of health and the state water supply commission under P. L. 1909, p. 457, Sec. 3 and P. L. 1910, p. 551, before it can hold an election to authorize the construction of water works and the issuance of bonds.

acts must be within the terms of that power as expressly given and strictly and literally construed and applied.[27]

Action by them must be had at meetings held pursuant to lawful authority and in their official and representative capacity.[28]

27—St. Louis, etc. Ry. Co. v. People, 200 Ill. 365, 65 N. E. 715; Lincoln School Township v. Union Trust Co. (Ind.), 73 N. E. 623; see Secs. 52 and 65, et seq., ante.

28—Shoshone County v. E. H. Rollins & Sons (Ida.), 82 Pac. 105. Township Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58, reversing 81 Ill. App. 359. Where a regular meeting has been previously provided for no special notice to the members of the Board of Education of that meeting is necessary. Advisory Board of Coal Creek Township v. Levandowski (Ind.), 84 N. E. 346; State v. Board of Com'rs of Marion (Ind.), 85 N. E. 513.

CHAPTER V.

TAXATION

§ 141. Definition and nature.

The power of taxation is one of the inherent attributes of sovereignty. It is that power, political and governmental in its nature, which can compel, if and when necessary, a contribution for the support of the government from those within its jurisdiction. Theoretically, it has no limit. It is that power most necessary to the existence and maintenance of government and the exercise of the various functions which are universally recognized as proper. It is through the exercise of this power by the state that its ordinary expenses are paid, and, in addition, it is enabled to maintain the various beneficent agencies having for their purposes the safety, advancement and the advantage of society. Under some theories the individual is supposed, in return for a surrender to government of the right to tax his person and property, to receive the obligation of that government to protect him in the proper use and enjoyment of his property and to guard his personal rights, but ordinarily the power of taxation is a governmental and political necessity and there is no legal obligation to render a return.[1] Judge

1—Pine Grove Township v. Talcott, 19 Wall. 66; New Orleans v. Clark, 95 U. S. 644; County of Mobile v. Kimball, 102 U. S. 691; Preston v. Sturgis Milling Co., 183 Fed. 1; Smith v. Stevens (Ind.), 91 N. E. 167; Lucas v. Purdy (Ia.), 120 N. W. 1063; La. Ry. & Nav. Co., v. Madere (La.), 50 So. 609; In re Opinion of the Justices (Mass.), 84 N. E. 499; Rolph v. City of Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R A. 646; Hanson v. Franklin (N. D.), 123 N. W. 386; Yamhill County v. Foster (Ore.), 99 Pac. 286; Salt Lake City v. Christensen Co. (Utah),

Cooley in his work on Taxation [2] has given an excellent statement of the first theory: "The justification of the demand is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the state over all persons and property within its limits for governmental purposes. The person upon whom the demand is made, or whose property is taken, owes to the state a duty to do what shall be his just proportion towards the support of government, and the state is supposed to make adequate and full compensation, in the protection which it gives to his life, liberty and property, and in the increase to the value of his possessions, by the use to which the money contributed is applied." However pacifying to the taxpayer this rule may seem, it remains none the less a fact that the power to tax in its very nature acknowledges no limitations and may be carried, subject to constitutional restrictions only, even to the extent of exhaustion and destruction. If the power is abused or threatened with abuse, relief and security can only be found in the responsibility of the legislative body that imposes the tax to the constituency which must pay it.[3]

95 Pac. 523; State v. Clement National Bank (Vt.), 78 Atl. 944.

Myers v. Commonwealth (Va.), 66 S. E. 824. Power of taxation an attribute of sovereignity and its exercise is vested exclusively in the legislative department. Courts will not interfere on the ground of inexpediency.

2—Cooley on Taxation, Second Ed., pp. 1 and 2; Chicago & N. W. Ry. Co. v. State (Wis.), 108 N. W. 557.

3—County of Mobile v. Kimball, 102 U. S. 691. It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws, or treaties, of the United States is invaded. In all

The power of taxation, therefore, being a governmental and political one in the abstract sense as already stated, is without limitation and can be exercised without restrictions. In this country there are well established and clearly defined limitations upon the right of the sovereign state to levy taxes. These limitations and restrictions are to be found in the constitution of the United States and those of the different states; various statutory enactments passed pursuant to constitutional authority and in what might be termed for want of a better phrase some fundamental principles of equity.[4]

The power of a sovereign to delegate to subordinate bodies or agencies its powers of taxation is unquestioned though such grant conveys no unlimited or irrevocable rights. The limitations upon the power usually applied by the courts have for their purpose the imposition of taxes in a uniform, orderly and impartial way, both as to the subjects and methods of taxation and the enforcement of the power.[5] It is not a discretionary power when

other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious leg islation, so far as that is practicable and be more mindful than their predecessors of the public interests. Louisiana v. Pilsbury, 105 U. S. 278; Marion County v. Coler, 67 Fed. C. C. A.; Harders Fire Proof Storage & Van Co. v. City of Chicago, 235 Ill. 58, 85 N. E. 245; State v. Board of Com'rs of Marion County (Ind.), 82 N. E. 482; Judy v. Beckwith (Ia.), 114 N. W. 565; Wolf County v. Beckitt (Ky.), 105 S. W. 447; Succession of Levy, 39 So. 37; Billings Sugar Co. v. Fish (Mont.), 106 Pac. 565; Mercantile Incorporating Co. v. Junkin (Nebr.), 123 N. W. 1055; Anderson v. Ritterbusch (Okla.), 98 Pac. 1002; In re McKenan's Estate (S. D.), 126 N. W. 611; State v. Eldridge (Utah), 76 Pac. 337; Chicago & N. W. Ry. Co. v. State (Wis.), 108 N. W. 557.

4—Pine Grove Township v. Talcott, 19 Wall. 66; New Orleans v. Clark, 95 U. S. 644; Davidson v. New Orleans, 96 U. S. 97; See also cases cited under Note 3, this section.

5—Citizens' Savings & Loan Association v. City of Topeka, 20 Wall. 655; W. C. Peacock & Co. v. Pratt, 121 Fed. 772; Risley v. City of Utica, 173 Fed. 502, 179 Fed. 875; Stein v. City of Mobile, 24 Ala. 591; Vance v. City of Little Rock, 30 Ark. 435; Livingston County Sup'rs v. Weider, 64 Ill.

once granted and its exercise for legitimate purposes can be compelled by those who would suffer from a failure or neglect to tax.[6] It is a continuing power, the exercise or non-use of which does not defeat the right to tax whenever necessary subject to legal limitations. To be legally exercised by a delegated agency of the sovereign, it must be expressly granted and further is one of a limited and restricted nature. Provisions granting it cannot be extended or enlarged by implication beyond the clear import of the language used in the granting clause.[7]

Where the authority to tax does not exist no court has the power to issue process compelling its exercise.[8]

427; State v. Owsley, 122 Mo. 68; State v. Mason, 153 Mo. 23.

Jones v. Com'rs of Stokes County (N. C.), 55 S. E. 427. An act providing that county taxes derived from railroad property situated within that county which has issued bonds in aid thereof shall be used exclusively by said county in payment of said obligations is constitutional. Appeal of Durach, 62 Pa. 491; East Tennessee University v. City of Knoxville, 65 Tenn. 166; Bates v. Bassett, 60 Vt. 530; Peters v. City of Lynchburg, 76 Va. 927; Gasaway v. City of Seattle (Wash.), 100 Pac. 991; see also cases cited Abbott Munic. Corp., notes 5 and 6, pp. 672, et seq.

6—Meriwether v. Muhlenburg County Court, 120 U. S. 354; Mayfield Woolen Mills v. City of Mayfield, 111 Ky. 172, 61 S. W. 43; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; State v. City of Cincinnati, 19 Ohio 178; see also Secs. 358, et seq., post.

7—Gamble v. Erdrich Bros. Marx (Ala.), 39 So. 297; People v. Opel (Ill.), 91 N. E. 458; Metropolis Theatre Co. v. City of Chicago, 246 Ill. 20, 92 N. E. 597; People v. McElroy, 248 Ill. 574, 94 N. E. 81; School County of Marion v. Forrest (Ind.), 78 N. E. 187; Smith v. Board of Com'rs of Hamilton County (Ind.), 90 N. E. 881; German Washington Fire Association v. City of Louisville (Ky.), 80 S. W. 154; Adams v. Ducate (Miss.), 38 So. 497; Jersey City v. North Jersey City Street Ry. Co. (N. J.), 73 Atl. 609; Ex parte Unger (Okla.), 98 Pac. 999; State v. Braxton County Court (W. Va.), 55 S. E. 382; but see State v. City of Bristol (Tenn.), 70 S. W. 1031.

8—Vance v. City of Little Rock, 30 Ark. 435; see Secs. 358 et seq. and 420, et seq., post.

§ 142. Municipal power to tax; how limited.

The legislature in delegating it should provide for its exercise in an equal and uniform manner. The power of taxation in a municipal corporation as a rule is not general in its nature. Municipal or subordinate corporations are local agencies of the government operating within a limited and definite locality, the municipal power to tax, therefore, is restricted to community or local purposes.[9] General taxes cannot be levied therefore by one for the support either of the nation, the state or of communities of an equal or an inferior grade to itself. On the contrary it is quite generally held that for purely local or municipal uses the legislature cannot require a subordinate corporation to levy taxes. This principle has been applied to acts attempting to compel municipal authorities to issue bonds for the cost of acquiring and maintaining public parks.[10]

9—United States v. City of New Orleans, 98 U. S. 381. The position that the power of taxation belongs exclusively to the legislative branch of the government no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern. Southern R. R. Co. v. St. Clair County, 124 Ala. 491; Nevada National Bank v. Board of Sup'rs of Kern County (Calif.), 191 Pac. 122; Board of Com'rs, etc. v. Board of Pilot Com'rs, etc. (Fla.), 42 So. 697; Wells v. City of Savannah, 107 Ga. 1; Clark v. City of Davenport, 14 Ia. 494; McDonald v. City of Louisville, 113 Ky. 425, 68 S. W. 413; Merrick v. Inhabitants of Amherst, 94 Mass. 500; Turner v. City of Harrisburg (Miss.), 53 So. 681; Penrose v. Ventnor City (N. J.), 77 Atl. 1061.

Yamhill County v. Foster (Ore.), 99 Pac. 286. A county may be required by law to apply all or part of its funds to any legitimate public purpose so long as it does not conflict with some "constitutional provision." Hope v. Deaderick, 27 Tenn. 1.

10—Sutter County v. Nicols (Calif.), 93 Pac. 872; People v. City of Chicago, 51 Ill. 17; Livingston v. Weider, 53 Ill. 302.

State v. Edwards (Mont.), 111 Pac. 734. The object of Const. Art. 12, Sec. 4, prohibiting the Legislature from levying taxes for municipal purposes, but authorizing the Legislature to vest by law in corporate authorities of cities the power to assess and collect taxes

In Illinois and Michigan, this principle has been emphasized in several decisions. In People v. Chicago, already cited, the court said in part: "While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have, in their franchises, no vested right, and whose powers and privileges the creating power may alter, modify or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the state, over which, and their rights and effects, the state may exercise a general superintendence and control, we are not of opinion that power, such as it is can be so used as to compel any one of our many cities to issue its bonds against its will, to erect a park or for any other improvement—to force it to create a debt of millions,—in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of individuals owning the property within its limits, the lots and blocks which compose it and the structures which adorn them. What would be the universal judgment should the legislature, sua sponte, project magnificent and costly structures within one of our cities—triumphal arches, splendid columns, and perpetual fountains and require in the act creating them, that every owner of property within the city limits should give his individual obligation for his proportion of the cost and

for such purposes, is to secure to the people of the municipalities the measure of local self-government which they enjoyed at the time of the adoption of the Constitution, and to preserve the theory of local self-government in matters of purely private concern primarily affecting only the inhabitants of the particular city but permitting the Legislature to coerce a city in the performance of a public duty in which the people of the state have with the people of the city a common interest. State v. Nelson, 105 Wis. 111.

impose such costs as a lien upon his property forever? What would be the public judgment of such an act and wherein would it differ from the act under consideration?''

In Michigan, court decisions have been equally emphatic.[11]

§ 143. Limitations upon the power.

In addition to the general limitations upon the power to tax as suggested in the preceding section, there will be found special limitations based upon specific grounds relating either to the amount raised or its purpose. Constitutional limitations of whatever nature as affecting the power of taxation cannot be overridden by a legislative body or public officials in whom the power is vested of levying and collecting taxes.[12] In this country it is the desire of the individual that the exercise of the power shall not result in a confiscation of private property. As a measure of precaution and to secure this end the amount of taxation which can be levied either by the government itself or any of its subordinate agencies upon property within their jurisdiction for a stated period of time is generally fixed by constitutional or

11—People v. Common Council of Detroit, 28 Mich. 228.

Blades v. Water Com'rs of Detroit, 122 Mich. 366, 81 N. W. 271.

The court in its opinion in this case in part said: ''that it was not within the power of the legislature to compel taxation of city property for local purposes without the consent of the electors of the city; therefore, an act was unconstitutional and void providing for the operation and maintenance of city waterworks without a submission of the question to the voters.'' See also Sec. 32, ante.

12—United States v. County of Macon, 99 U. S. 582; County of Moultrie v. Fairfield, 105 U. S. 370; City of Cleveland v. United States, 111 Fed. 341; City of Logansport v. Jordan (Ind.), 85 N. E. 959; State ex rel. v. Mississippi River Bridge Co. (Mo.), 35 S. W. 592. Presumption of validity in levy of taxes obtains. State v. Royce (Nebr.), 98 N. W. 459; see also cases cited in the immediately following notes.

statutory provisions. These maximum limitations may be established by a rate, a stated per cent or the gross amount which can be raised. The following states contain constitutional provisions of the general character above indicated.[13]

A consideration of the tax rate as prescribed by constitutional or statutory provisions and as cited in the preceding note is only pertinent to the subject of this work in so far as it affects the means of payment for negotiable securities or other valid indebtedness which may have been issued or incurred by a particular public corporation.[14]

In some states, the rate fixed or the amount levied may be increased to within a certain specified additional maximum for certain designated purposes, either with or without the assent of the voters.[15] And in some the rate authorized to be levied or the amount can be

13—For constitutional provisions, see references under section 358, post.

Town of Bardwell v. Harlin (Ky.), 80 S. W. 773. Construing constitution, Secs. 157, 158 and 159, and holding that a town of the sixth class after levying a tax of 50 cents on each $100 for current expenses has no authority to levy an additional tax of 50 cents on each $100 to pay interest on and provide a sinking fund for water works bonds.

Bonta v. Fiscal Court of Mercer County, 144 Ky. 241, 137 S. W. 1084. Fiscal Court may levy a tax of 50 cents on each $100 exclusive of school taxes and taxes to pay debts incurred before the adoption of the constitution.

Brown v. Ringdahl (Minn.), 122 N. W. 469. The tax levy authorized by General Laws of 1909, c. 27, to pay certificates of indebtedness issued for building of a new prison do not contravene Constitution, Art. 9, Secs. 2, 5, 6, 7 and 8.

Fremont, etc. R. R. Co. v. Pennington County (S. D.), 116 N. W. 75. The total county tax rate provided by laws of 1899 c. 41, was intended to include sinking fund levies. Ault v. Hill County (Texas), 111 S. W. 425; Chambers v. Cook (Tex.), 132 S. W. 865.

14—See chapter XIV post on payment of public securities, especially Secs. 458, et seq.

15—See Secs. 99, 100 ante.

Desha County v. State (Ark.), 84 S. W. 625. Additional half of one per cent may be levied for the purpose of paying an indebtedness existing at the time of the ratification of the Constitution. People v. Chicago & Eastern Ill. R. R. Co., 248 Ill. 118, 93 N. E. 761; Marion Water Co. v. City of Marion (Ia.), 96 N. W. 883; Fiscal Court of

increased to within a certain designated maximum when for a specific purpose without the assent of the voters.[16]

In Texas, in Snyder v. Baird Ind. School Dist., 102 Tex. 4, decided June 17th, 1908, the State Supreme Court handed down an opinion holding the rate of taxes then levied by the Baird Independent School District unconstitutional. This was a test case and involved the validity of several millions of school bonds issued by independent school districts throughout the state. A constitutional amendment, however, was subsequently adopted by the voters in 1908 enabling them by increasing the tax in school districts from 20 cents to 50 cents to provide means for the payment of outstanding obligations.

A tax in excess of the limitation provided by law is not necessarily void as a whole but will be sustained as to the portion within the limit if the excess can be separated from it.[17]

Such limitations are not generally construed as grants of power to the various civil subdivisions to levy taxes

Franklin County v. Commonwealth (Ky.), 117 S. W. 301; City of St. Joseph v. Pitt (Mo.), 83 S. W. 544.

16—See Secs. 95, et seq., ante; People v. Peoria & Eastern Ry. Co., 216 Ill. 221, 74 N. E. 734; People v. Chicago, etc. R. R. Co. (Ill.), 79 N. E. 151; Emdon v. City of Monroe (La.), 36 So. 681; Wightman v. Village of Tecumseh, 122 N. W. 122; Wells v. McNeil (Miss.), 48 So. 184; Black v. Com'rs of Buncombe County (N. C.), 39 S. E. 818.

17—Keech v. Joplin (Calif.), 106 Pac. 222; People v. Nichols, 49 Ill. 517; Mix v. People, 72 Ill. 242.

Whaley v. Commonwealth (Ky.), 161 S. W. 35. The general rule on this subject is that if the illegal tax or an illegal item embraced in the levy be separate from the remainder, that which is above the legal limit will be void, while that within will be upheld—many eminent authorities may be cited to support this doctrine. State v. Mississippi Bridge Co., 134 Mo. 321; Mowry v. Mowry, 20 R. I. 74, 37 Atl. 306; State v. Kelly, 45 S. C. 457; City of Austin v. Cahill (Tex.), 88 S. W. 542.

Southern Railway Company v. Board of Com'rs of Buncombe, Buncombe County, 61 S. E. 700. The excess of a tax levied for the payment of interest on bonds cannot be applied to the payment of general expenses. Holcomb v. Johnson's Estate (Wash.), 86 Pac. 409.

without restraint up to and including the maximum amount. Legislative authority, it is generally held, must be given to enable a public corporation to exercise the power of taxation.[18]

§ 144. Organizations coincident in territory.

The subject of the power of subordinate public corporations coincident in territory to incur indebtedness within a constitutional maximum has been considered in a preceding section and it will be remembered that the general rule was there stated that each might incur indebtedness up to and including the constitutional limit unless especially prohibited, upon the theory of a separate and independent existence as a corporation of each of the several subdivisions. Following this principle the cases commonly hold that in the absence of constitutional restrictions subordinate civil subdivisions coincident in territory can each levy for the various purposes authorized by law, taxes up to and including the constitutional statutory limitation. From the viewpoint of a constitutional limitation as protection to the taxpayer, the absurdity of this rule is apparent.[19]

This rule obtains unless one of the subordinate divisions under the authority creating it is regarded not a distinct corporation but as constituting and forming a part of some public corporation within whose boundaries it may be located.[20]

18—Federal etc. Ry. Co. v. City of Pittsburg (Pa.), 75 Atl. 662.

19—See Sec. 75 ante. Wabash etc. Ry. Co. v. McCleave, 108 Ill. 368; People v. Bowman, 247 Ill. 276, 93 N. E. 244; Laycock v. Baton Rouge, 36 La. Ann. 328; Chicago, etc. Ry. Co. v. Klein, 52 Nebr. 258, 71 N. W. 1069, 75 N. W. 42.

20—Anthony v. County of Jasper, 101 U. S. 693; Davenport v. County of Dodge, 105 U. S. 237; State v. Missouri, etc. Ry. Co., 123 Mo. 72, 27 S. W. 367; State v. Kansas City, etc. Ry. Co., 145 Mo. 596; Van Cleve v. Passaic Valley Sewerage Com'rs (N. J.), 60 Atl. 214; Robertson v. Preston, 97 Va. 296; but see Macon County v. Huidekoper, 134 U. S. 332.

§ 145. Annexed or detached territory.

The principles relating to the annexation and division of public corporations have been considered in preceding sections,[21] and legislative authority for such action generally provides for the adjustment of the burdens of indebtedness and the payment of taxes by the respective corporations or portions of them added or divided. The adjustment of the burden of taxation or exemptions therefrom is to be determined by an inspection of particular laws.[22]

A law has been held constitutional which provided for the annexation of certain territory and for its exemption from taxation to pay the existing bonded indebtedness of the city to which it was attached.[23]

§ 146. Purpose of taxation.

Specific taxation may be illegal, and therefore void, although within the limitation as to rate or amount fixed by law because of the purpose for which levied. The very essence of the validity of a tax under our theory of government is a public use of the moneys derived. Private property, if taken for other than a public purpose without the payment of pecuniary compensation is confiscation and cannot be sustained or upheld under any attribute or theory of government as understood and practiced here. In common with a determination of all legal questions, there are certain purposes clearly recognized as public in their nature, others as clearly private in their character and still others which lie along the dividing line between the two.[24]

21—See Secs. 18, et seq., ante.

22—See Secs. 18, et seq., ante.

23—Hayes v. Walker (Fla.), 44 So. 747.

24—Cooley on Taxation, p. 103; People v. Parks, 58 Calif. 624; St. Louis, etc. R. R. Co. v. People, 225 Ill. 418, 80 N. E. 303; Brooks v. Incorporated Town of Brooklyn (Ia.), 124 N. W. 868.

State v. City of Lawrence (Kan.), 100 Pac. 485. A city may be au-

Government should never undertake the execution or management of, nor extend aid to, enterprises, the character of which as defined by the use of the term "private" is questionable. The fact that a government engages in an enterprise does not change its economic character from a purely private enterprise or business to a public one. Taxation for all questionable enterprises by the government is universally considered not only unwise but unconstitutional and invalid.[25]

The legislative body of a sovereign state much less a subordinate agency possessing the right only to exercise such powers as may be expressly granted or delegated to it is limited in its right to levy taxes to those imposed for public purposes or those in which the people of the

thorized upon vote of the qualified electors to issue bonds in aid of the State University and to levy and collect taxes to pay the same. In re Opinion of the Justices, 58 Me. 590; In re Opinion of the Justices (Mass.), 91 N. E. 405; Auditor of Lucas County v. State (Ohio), 78 N. E. 955.

Jordan v. City of Greenville (S. C.), 60 S. E. 973. Taxes may be levied and collected to pay bonds issued for the purpose of erecting school buildings.

City of Burlington v. Central Vt. Ry. Co. (Vt.), 71 Atl. 826. What is a public purpose within meaning of Bill of Rights, Art. 9, is question for the legislature as to which it has a large discretion and which courts can control only in very exceptional cases.

Curtiss Administrator v. Whipple, 24 Wis. 350. A sinking fund tax is raised to be applied to the payment of the principal and interest of a public obligation. See also many cases cited Sec. 304, Abbott Munic. Corps and Secs. 101 et seq. ante.

25—Talcott v. Township of Pine Grove, 19 Wall. 666; Citizens Savings & Loan Association v. City of Topeka, 20 Wall. 655; County of Mobile v. Kimball, 102 U. S. 691. Improvement of harbor, etc., a public purpose.

Weightman v. Clark, 103 U. S. 256. Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain kind of tax is within or without this limitation; but we think it may be safely said that, as a general rule, a corporate purpose must be some purpose which is germane to the general scope of the object for which the corporation was created. Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112; Eldridge v. Trezevant, 160 U. S. 452. Levees a public purpose. Hellman v. County of Los Angeles, 82 Pac. 313. A tax levied to pay void bonds is invalid. People v. Parks, 58 Calif. 624.

corporation have a general interest. If the purpose for which the obligation is contracted is not one of a public character, a tax cannot be constitutionally or legally imposed to pay the obligation.[26] This question has already been discussed at length in connection with the subject of the right of a public corporation to incur indebtedness and issue negotiable securities, the cases there cited sustain the principles above noted.[27]

§ 147. Local or special assessments.

In many instances, securities are issued by public corporations to be paid from the proceeds of special taxes or assessments and levied upon property especially and particularly benefited by the cost of some local improvement. The power of public corporations to construct local improvements, issue securities for their cost and levy special taxes for the payment of the obligations is well established.[28]

The limits of this book preclude more than a general reference to the subject. The word taxation used in its proper sense is a generic and includes both general taxes as they are ordinarily understood and also that species of taxation termed local or special assessments. There exists, however, a clear, well-defined and well-established difference in the basis for the levy of the two and since

26—Larabee v. Dolley, 175 Fed. 365; Manning v. City of Devils Lake (N. D.), 99 N. W. 51; see many cases cited under Secs. 101 et seq. ante.

27—See Secs. 101 et seq., ante.

28—French v. Barber Asphalt Paving Co., 181 U. S. 324; County of Mobile v. Kimball, 102 U. S. 691; Kelly v. City of Pittsburg, 104 U. S. 78; Goodrich v. City of Detroit, 184 U. S. 432; Parsons v. District of Columbia, 170 U. S. 45; City of Detroit v. Parker, 181 U. S. 399, reversing 103 Fed. 357; Nickerson v. City of Boston, 131 Mass. 306; Rogers v. City of St. Paul, 22 Minn. 494; New York Central & Hudson River R. R. Co. v. City of Rochester, 114 N. Y. S. 779.

Rolph v. City of Fargo, 7 N. D. 640. The proposition in the text is so well established that further citation of the authorities would be useless.

this difference goes to the validity of a local assessment, it will be stated here.

A levy of taxes as the word is commonly used is based upon a governmental necessity irrespective of the immediate or personal return or benefit to the individual paying the tax. So long as the taxes levied are uniform and equal and conform to other constitutional limitations, they will be held legal. The idea of uniformity and equality being based and dependent upon the amount of taxes levied as proportioned to the actual value of the various classes of property upon which levied. The idea of benefits received does not in theory enter into a determination of the legality of the tax.[29]

A special or local assessment, however, involves the idea of an immediate and special benefit as a basis for its levy and the doctrine is well established that there can be an imposition of a special assessment only in proportion to the benefits specially, actually and physically received by the property taxed.

The determination of the extent of the benefits received and the manner of ascertaining them whether based upon frontage, propinquity, relative area, value, or the reception of proven and special benefits, are questions of legislative expediency. The law making body of each state possesses the right to determine these questions subject only to pertinent restrictions or provisions found in organic law.[30]

29—Hagar v. Yolo County Sup'rs, 47 Calif. 222; Perkins v. Inhabitants of Milford, 59 Me. 315; see also cases cited under notes 1, 2, 3 and 4 of this chapter. The principle is so well established that multiplication of authorities is considered useless; the same is also true of the authorities to be cited in the following note.

30—Davidson v. New Orleans, 96 U. S. 97; Mattingly v. District of Columbia, 97 U. S. 687; City of Mobile v. Kimball, 102 U. S. 691; Spencer v. Merchant, 125 U. S. 335; Walston v. Nevin, 128 U. S. 578; Lent v. Tillson, 140 U. S. 316; Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112; Norwood v. Baker, 172 U. S. 269; French v. Barber Asphalt Paving Co., 181 U. S. 324; Tonawanda v. Lyons, 181 U. S.

§ 148. Purpose for which levied.

Since the principle is well established that general taxes cannot be levied or imposed to pay the cost of a specific local improvement, the converse of the principle is also true that local taxes or assessments cannot be levied or imposed to pay the cost of construction or of making an improvement of a general character or one which results in a general benefit and advantage not only to the individual whose property is adjacent to or near, but also to an equal extent to that individual whose property may be situated at the remotest distance from the improvement and within the jurisdiction of the state. A local assessment therefore is only valid when levied to pay the cost of a local improvement in its restricted sense.[31]

This principle is to be constantly applied in determining not only the validity of securities issued to pay the cost of constructing local improvements and the payment of which is dependent upon the local taxes levied but further in ascertaining whether such securities are to be considered as a general obligation of the corporation for the payment of which its general revenues can be

389; Webster v. City of Fargo, 181 U. S. 394; Detroit v. Parker, 181 U. S. 399; Job v. City of Alton, 189 Ill. 256; Ft. Dodge Electric, etc. Co. v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7; Brooks v. City of Baltimore, 48 Md. 265; Inhabitants of Leominster v. Conant, 139 Mass. 384; People v. Pitt, 169 N. Y. 521, 58 L. R. A. 372.

31—Nevada National Bank v. Board of Sup'rs of Kern County (Calif.), 91 Pac. 122.

Slutts v. Dana (Ia.), 115 N. W. 1115. A county board of sup'rs has no power to tax property in cities of the first class to pay bonds issued for the building of bridges in the county and without the city; see also McLeod v. Board of Com'rs of Town of Carthage, 61 S. E. 605, where it was held that a tax could not be levied, for the payment of bonds for the erection of a schoolhouse within a certain school district, on residents of the town outside of the school district who would not be benefited by the maintenance of the school.

For a detailed discussion of what is and what is not considered a local improvement, see Abbott Munic. Corps., pp. 792, et seq.

appropriated or a special obligation for the payment of which certain specific revenues or taxes are set aside.[32]

§ 149. Construction of tax limitations.

The language of constitutional limitations in respect to the exercise of the taxing power by public corporations naturally varies. "County purposes," "Municipal purposes," "City purposes," "School purposes," and others of like import are constantly used in some constitutions while in other the prohibition is phrased in the following language: "No county in this state," etc., "No city in this state," etc., and others similarly worded.[33]

In construing these provisions, the courts generally follow the rule of strict construction and hold further that there is no dissimilarity in the object sought to be accomplished although in the one case, the purpose is made the basis of limitation and in the other the authority levying the taxes.[34]

§ 150. Miscellaneous.

The effect of limiting legislation upon the power of public corporations to levy taxes for the payment of pre-existing debts as an impairment of a contract obligation

32—Nelson v. City of South Omaha (Nebr.), 121 N. W. 453; see Secs. 78 ante, and 363 et seq., post.

33—Ala., Art. 11, Secs. 214, 216; Ark., Art. 12, Sec. 4; Art. 16, Sec. 8; Colo., Art. 10, Sec. 11; Ida., Art. 7, Sec. 9; Ill., Art. 9, Sec. 8; La., Art. 232; Minn., Art. 9, Sec. 2; Mo., Art. 10, Secs. 8-11; Mont., Art. 12, Secs. 5, 9; Nebr., Art. 9, Sec. 5; N. Y., Art. 8, Sec. 10; N. C., Art. 5, Sec. 6; N. D., Art. 11, Sec. 174; S. D., Art. 11, Sec. 1; Tex., Art. 8, Sec. 9; Utah, Art. 13, Sec. 7; Va., Art. 13, Sec. 188, 189; W. Va., Art. 10, Sec. 7; Wyo., Art. 15, Secs. 4, 5; see also references under Sec. 358, post.

34—State v. Southern Ry. Co., 115 Ala. 250, 22 So. 589; People v. Scott, 9 Colo. 422, 12 Pac. 608; In re State Board of Equalization, 24 Colo. 446, 51 Pac. 493; Wright v. Wabash, etc. Ry., 120 Ill. 541, 12 N. E. 240; Davies v. Saginaw County, 89 Mich. 295, 50 N. W. 862; Brooks v. Schultz, 178 Mo. 222, 77 S. W. 861.

will be considered in a subsequent section,[35] also the grant of the power directly or impliedly to levy taxes upon the incurring of indebtedness for its payment;[36] and the power of the courts to compel by mandamus or other appropriate remedy the levy and the collection of taxes for the payment of the interest and principal of outstanding valid securities.[37]

The subject of constitutional provisions requiring provisions to be made through the levy of taxes for the payment of debts and the establishment of sinking funds at the time the obligation is assumed or the debt created has been discussed in a preceding section.[38]

35—See Sec. 358, et seq., post.
36—See Secs. 374, et seq., post. and 120, ante.
37—See Sec. 420, et seq., post.
38—See Sec. 120, ante.

CHAPTER VI

PROCEEDINGS TO RESTRAIN OR COMPEL THE ISSUE OF NEGOTIABLE SECURITIES

§ 151. In general; appropriate remedy.

A corporation is an artificial person having limited and restricted powers conferred by and through its charter which is the measure of them. A public corporation being a governmental agent exercising governmental functions and performing public duties is necessarily a body having less capacity to act as compared with a private corporation.

The doctrine of implied powers is strictly applied by the courts and many acts held valid when done by a private corporation are held ultra vires when done by a public corporation. The power to incur indebtedness and to issue negotiable securities, it will be remembered from the authorities already noted, must be in substantially all instances expressly conferred. The reasons for this rule are sound and the weight of authority in its favor overwhelming. The exercise of the powers just noted invariably lead to the placing of burdens upon the taxpayer and are matters in which he is directly interested. The cases universally hold therefore that where an attempted issue of negotiable securities or a proposed incurring of indebtedness is ultra vires, courts of equity will lend their aid to the taxpayer and the act will be restrained.[1]

1—Crampton v. Zabriskie, 101 U. S. 601; Jackson County Sup'rs v. Brush, 77 Ill. 59; Board of Comm'rs v. McClintock, 51 Ind. 325. Blood v. Beal (Me.), 60 Atl. 427. The supreme judicial court by virtue of its equity powers has authority to prevent a city from

In the use of remedies, the distinction between an injunction and mandamus should be observed. The reader is referred for a detailed discussion of the differences involved to text books treating exclusively of these subjects. It is sufficient here to state that a writ of injunction is an equitable remedy and as a rule is issued to prevent the doing of some specific act. Mandamus is a common law remedy and only available as a process in the enforcement of rights when jurisdiction has already been acquired for other purposes. A writ of mandamus ordinarily cannot be used as an independent remedy,—its purpose is to compel the performance by some public officer or public corporation of an official duty or act, the performance of which he is charged by law which is imperative in its nature and which does not involve the exercise of discretion. The cases further hold that the act or duty, the performance of which is sought to be compelled, must be one to which the relator has a clear legal right.[2]

§ 152. The rule in the state courts.

It is the common practice in all the courts where the question has arisen for a taxpayer to file in a court of equity a bill praying for an injunction to restrain an issue of bonds or the incurring of indebtedness when the grounds exist for an exercise of the powers of a court of equity.[3]

creating a debt in excess of its constitutional limit. Bates v. City of Hastings (Mich.), 108 N. W. 105.

Bailey v. City of Sioux Falls (S. D.), 103 N. W. 16. The taxpayer does not lose his remedy by reason of the courts denying a preliminary injunction.

2—Walkley v. City of Muscatine, 127 U. S. 105; Heine v. Board of Levee Com'rs, 19 Wall. 655; High Extraordinary Legal Remedies, Secs. 1, et seq. Spelling on Injunctions, 2nd. Ed., Secs. 1, et seq. and 1363.

3—City of Helena v. Helena Water Works Co., 173 Fed. 18. A preliminary injunction will be construed in accordance with the allegations of the bill and the purposes of the suit and where it restrains a city from making any

A multiplicity of actions and the working of an irreparable injury to the taxpayer, the fraud or misconduct of public officers in the performance of their duties are some of the reasons which courts of equity have deemed sufficient in respect to the subject in hand to take jurisdiction of a controversy and in case the facts warrant it, to grant the relief asked.[4]

contract or incurring any indebtedness for a water plant, it will enjoin the city from taking further steps for a new bond issue for the same purpose involved in the pending suit. Bowen v. Mayor, etc., 79 Ga. 709; Tate v. Parkland (Ky.), 13 S. W. 443; Mayor of Baltimore v. Gill, 31 Md. 375; Curtenius v. Hoyt, 37 Mich. 583.

Bates v. City of Hastings (Mich.), 108 N. W. 1005. The only question for the court is the sufficiency of the bill. People v. Haines, 44 N. Y. 772; Counterman v. Dublin Township, 38 Oh. St. 515; Spelling on Injunctions, Secs. 699, et seq.

4—Boyle v. New Orleans, 23 Fed. 843; Railway Company v. Dunn, 51 Ala. 178.

Jones v. Mayor, etc. of Little Rock, 25 Ark. 301, the complainant must show that injury to his private interests will result from the issue.

Sherlock v. Winnetka, 68 Ill. 530. Issuing and selling bonds may be restrained upon proof that the authorities intend a perversion of the fund to be raised to uses not authorized by law. Myers v. County of Jeffersonville (Ind.), 44 N. E. 452.

Tate v. Town of Parkland (Ky.), 13 S. W. 443. An unconstitutional attempt to subject agricultural lands to unauthorized taxation through an issue of bonds for the construction of streets will be restrained.

Bates v. City of Hastings (Mich.), 108 N. W. 1005. Where money to be raised from issuing bonds is to be used for an illegal purpose, i. e., bonuses to industries, the issue can be restrained.

Wullenwaber v. Dunigan (Nebr.), 47 N. W. 420. False representations inducing an affirmative vote will entitle taxpayers to an injunction restraining the issue of bonds.

Mead v. Turner, 119 N. Y. S. 526. The legality of a contract is the only question to be considered where no evidence is offered of the fraudulent and collusive character of the acts of village officials.

Henderson County Com'rs v. Williams (N. C.), 47 S. E. 672. The payment of interest may be restrained and relief sought is dependent upon the allegations and sufficiency of the bill.

Schonweiler v. Allin (N. D.), 117 N. W. 866. A collusive judgment restraining an issue of bonds on the ground of illegal votes cast will be set aside. Franklin v. Baird, 7 Oh. N. P. 571. Sale may be enjoined.

Territory v. Whitehall (Okla.), 76 Pac. 148. In an action to restrain on the ground that illegal votes were cast at the election sufficient to change the result, the

As an injunction is prospective in its operation where the bonds have been delivered, it will not be granted though some cases hold that where they are still in the hands of the original parties to whom delivered their surrender and cancellation may be asked in the injunction proceedings and the injunction include within its terms a prohibition against the disposal of them until the final determination of the case.[5]

The cases holding against the issue of an injunction where there has been a delivery of the bonds will be noted in a following section.[6]

§ 153. The rule in the Federal courts.

The Federal courts take the same position and in a leading case[7] where an issue of bonds was sought to be cancelled on the ground that no legal authority existed for their issue, the court said: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt

burden of proof is on the plaintiff. Richmond v. Crenshaw, 76 Va. 936.

5—Crampton v. Zabriskie, 101 U. S. 601; Holliday v. Hildebrandt, 97 Ia. 177, 66 N. W. 89; Town of Cherry Creek v. Becker, 2 N. Y. S. 514; Metzgar v. Attica & Arcade Ry. Co., 79 N. Y. 171.

Springport v. Teutonia Savings Bank, 84 N. Y. 403. Suit brought by the town to compel the cancellation of bonds issued without the requisite number of taxpayers' consent. Maudlin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434; Lynn v. Polk, 76 Tenn. 121; Nalle v. City of Austin (Tex.), 21 S. W. 375; McVichie v. Town of Knight, 82 Wis. 137, 51 N. W. 1094.

6—See Sec. 159, post.

7—Crampton v. Zabriskie, et al, 101 U. S. 601.

action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong, when officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of process in such cases."

§ 154. Parties, plaintiff and defendant.

There is no serious question of the right of tax payers to invoke the interposition of a court of equity to prevent an illegal disposition of public moneys or the illegal creation of a debt which they in common with other tax payers may otherwise be compelled to pay.[8]

The bill may be brought individually or in conjunction with others and it has been held that it was not necessary to file a bill on relation of the attorney general.[9] Gen-

8—Board of Com'rs v. McClintock, 51 Ind. 325; Town of Winnimac v. Huddleston (Ind.), 31 N. E. 561.

Advisory Board, etc. v. Levandowski (Ind.), 84 N. E. 346. The township advisory board has authority to enjoin the creation of a debt in a manner authorized by statute. City of Athens v. Hemerick, 89 Ga. 674, 16 S. E. 72; Rushe v. Town of Hyattsville (Md.), 81 Atl. 278; Hodgman v. St. Paul & Chicago Ry. Co., 20 Minn. 48; Davenport v. Kleinschmidt, 6 Mont. 502.

Lyons v. Cole, 3 Thomp & C (N. Y.), 431. A town supervisor cannot bring an action to restrain an issue of town bonds without authority from the town. Tukey v. City of Omaha (Nebr.), 73 N. W. 613; Ayers v. Lawrence, 59 N. Y. 192.

Marlowe v. School District No. 4, Murray County (Okla.), 116 Pac. 797. A resident tax payer though he shows no special private interest may sue to enjoin the issuance of bonds contrary to limitations of Const., Art. 10 Sec. 26.

9—Village of River Rouge v. Hosmer (Mich.), 110 N. W. 622.

erally in suits to restrain where the validity of the bonds is raised and they or some of them have passed into the hands of innocent purchasers, it is necessary to make all persons whose interests may be affected by the decree in the case, parties defendant,[10] and if this is not done, the court will not pass on the validity of the bonds.[11]

§ 155. Want of authority.

Where there is an absolute absence of statutory or constitutional authority bond issues are totally void and purchasers and holders of them are generally charged with a notice of their illegality. They are not therefore an obligation of the corporation issuing them and in some cases it has been held that no injunctive relief will be afforded in an action brought to restrain their issue but that the rights of the tax payers must be established in a suit brought subsequently to restrain the levy of a tax for the payment of either the interest or the principal.[12]

An unconstitutional law confers no authority and bonds issued under one are subject to proceedings to restrain their issue, sale and delivery.[13]

10—Tehama County v. Sisson (Calif.), 92 Pac. 64; Ramsay v. Town of Marble Rock (Ia.), 98 N. W. 134.

Tippett v. McGrath (N. J.), 56 Atl. 134. Those interested in the validity of bonds should be made parties defendant.

Walcott v. Dennes (Okla.), 116 Pac. 784. A suit by taxpayers to have bonds declared void held properly dismissed where the purchaser of them was not made a party. Boesch v. Byrom (Tex.), 83 S. W. 18; Bradford v. Westbrook (Tex.), 88 S. W. 382; Stratton v. Com'rs Court of Kinney County (Tex.), 137 S. W. 1170.

11—Sully v. Drennan, 113 U. S. 287; Ramsey v. Town of Marble Rock (Ia.), 98 N. W. 134; Slutts v. Dana (Ia.), 109 N. W. 794; Brockway v. Board of Sup'rs of Louisa County, 110 N. W. 844.

12—Board of Com'rs v. McClintock, 51 Ind. 325; Noesen v. Port Washington, 37 Wis. 168.

13—Campbell v. Paris etc. R. R. Co., 71 Ill. 611; Allen v. Inhabitants of Jay, 60 Me. 124; Harrington v. Plainview, 27 Minn. 224; Galloway v. Jenkins, 63 N. C. 147.

Graves v. Moore County (N. C.), 47 S. E. 134. The consideration paid by bona fide holders of bonds issued under an unconstitutional

It has been repeatedly stated that statutory provisions providing for and relative to preliminary proceedings and steps of public officials must be strictly complied with, that action had thereunder be considered legal and consequently binding. Where there has been a variance from the authority to issue bonds as thus conferred and established, tax payers may proceed to restrain the issue.[14]

§ 156. Non-compliance with conditions.

In many instances the power to issue bonds has been conferred only upon the compliance by the public corporation or some designated person with certain prescribed conditions stated in the grant of authority. Such conditions are frequent in cases where aid has been extended under legal authority to railroad corporations.[15]

statute, need not be restored in a suit brought to enjoin a tax levy to pay interest on them. Smith v. Appleton, 19 Wis. 468.

14—Middleton v. City of St. Augustine (Fla.), 29 So. 421. Where the statute authorizes the issue of city bonds and confines the place of payment of interest coupons to a certain place, their issue with interest payable at another place is a material variance and their issue can be restrained.

Reineman v. Covington, etc. R. R. Co., 7 Nebr. 310. A vote to issue bonds in a larger sum than fixed by a statute confers no authority at all. It will not operate to entitle the railroad company to bonds to the amount which might have been voted for. Althafer v. Nelsonn, 18 Oh. Cir. Ct. Reps., 145.

15—Union Pac. R. R. Co. v. Lincoln County, 3 Dill. 300. When conditions have not been complied with in matters of substance, an issue of negotiable bonds may be restrained—so held where the statute required bonds to be paid in ten years, but the vote authorized the bonds to run twenty years. Sup'rs of Jackson County v. Brush, 77 Ill. 59; Springfield v. Edwards, 84 Ill. 626; English v. Smack, 34 Ind. 115; Hodgman v. St. Paul & Chicago R. R. Co., 20 Minn. 48 Harrington v. Plainview, 27 Minn. 224; State v. Sahine County Court, 451 Mo. 350; Wagner v. Meety, 69 Mo. 150; Lane v. Schomp, 20 N. J. Eq. 82.

Lawton v. County of Racine (Wis.), 19 N. W. 331. In a suit to restrain an issue of special assessment bonds the property owner must show not only an irregularity in the exercise of the power but further that he has been damaged without his fault. Bound v. Wis. R. R. Co., 45 Wis. 543; but see

A sale and transfer of its property by a railroad company in aid of which bonds have been issued, to another corporation will be regarded such a non-compliance with conditions as to warrant the issue of an injunction restraining the issue of bonds voted for its benefit.[16] A clear case for relief occurs in an attempted issue of bonds upon either a complete failure of performance or in total disregard of statutory or constitutional provisions prescribing conditions.[17]

Of the equitable reasons for granting relief against the issue and delivery of bonds without a compliance with the conditions prescribed in the grant of authority one of the weightiest is that in the hands of innocent purchasers without notice of the non-compliance with the prescribed conditions, the public corporation would have no valid defense in an action upon the bonds.[18]

§ 157. Popular election.

A common condition prescribed in grants of authority is that requiring the assent of a prescribed percentage of the voters or the taxpayers of the corporation proposing

Phillips v. Town of Albany, 28 Wis. 340; Verbeck v. Scott, 71 Wis. 39, 36 N. W. 600.

16—Township of Midland v. County Board of Gage County, 56 N. W. 317, 37 Nebr. 582; Nash v. Baker, 56 N. W. 376, 37 Nebr. 713.

17—Blake v. City of Macon, 53 Ga. 172.

City of Athens v. Hemerick, 89 Ga. 674, 16 S. E. 72. So held in case of variance of notice of issue from form prescribed by statute. Dunbar v. Canyon County Com'rs, 5 Ida. 407, 49 Pac. 409; Tate v. Town of Parkland (Ky.), 13 S. W. 443; Metzgar v. Attica & Arcade Ry. Co., 79 N. Y. 171; Town of Duanesburgh v. Jenkins, 46 Barb. (N. Y.), 294; Elyria Gas & Water Co. v. Elyria, 57 Oh. St. 374; Avery v. Job, 25 Ore. 512, 36 Pac. 293; Cleveland v. City of Spartanburg, 54 S. C. 83, 31 S. E. 871; Caruthers v. Harnett, 67 Tex. 127, 2 S. W. 523; Polly v. Hopkins, 74 Tex. 145, 11 S. W. 1084; Smith v. City of Appleton, 19 Wis. 468; Lawson v. Schnellen, 33 Wis. 288; Spelling Injunctions, 2nd. Ed., Sec. 699, et seq.; but see Fellows v. Walker, 39 Fed. 651; Holton v. City of San Antonio (Tex.), 21 S. W. 64; Hanley v. Randolph County Court, 50 W. Va. 439, 40 S. E. 389.

18—Danville v. Montpelier R. R. Co., 43 Vt. 144.

to issue securities. A failure to comply with this condition clearly renders bonds invalid and their issue can be restrained,[19] and the same is true in case of partial submission of the questions required to be submitted to the voters.[20]

The legality of an election upon a proposition to issue public securities may be inquired into in proceedings brought to restrain,[21] though this rule is materially modified through the application of the doctrine of estoppel by recitals in the bonds. This subject will be considered in a later chapter.[22]

§ 158. In excess of legal limitation.

An attempted issue in excess of the limit allowed by law is illegal and can be restrained by injunction.[23]

19—Oregon v. Jennings, 119 U. S. 74; Chicago, etc. R. R. v. Marseilles, 84 Ill. 145.

Hutchinson v. Self, 153 Ill. 542, 39 N. E. 27. The burden of the proof is on the property owner to establish the illegality of the bonds. Dishon v. Smith, 10 Ia. 212; Wood v Millspaugh, 15 Kan. 14; Johnson v. Com'rs of Wilson County, 34 Kan. 670.

Allison v. Louisville, etc. R. R. Co., 9 Bush (Ky.) 247. An Act of the legislature validating the action of a county judge in casting the vote of the precinct in an election for directors of the railroad company is unconstitutional and will not prevent a taxpayer from filing a bill to restrain an illegal issue of bonds.

Crosby v. City of Mayfield (Ky.), 117 N. W. 316. An issue of bonds for school purposes cannot be enjoined because submitted only to the white voters of the city where separate schools are maintained for white and colored children. Harrington v. Plainview, 27 Minn. 224; State v. Saline County Court, 51 Mo. 350; Lane v. Schomp, 20 N. J. Eq. 82; State v. Hancock County, 11 Ohio State 183.

Redd v. Henry County Com'rs, 31 Gratt (Va.) 695. An irregular subscription may be subsequently confirmed by a special act of the legislature.

20—State v. Babcock, 21 Nebr. 299, 33 N. W. 244; Cook v. City of Beatrice (Nebr.), 48 N. W. 828.

21—Walton v. Develing, 61 Ill. 201; State v. Com'rs of Wabaunsee County, 36 Kan. 180; McDowell v. Massachusetts, etc. Co., 96 N. C. 914; Trimmer v. Bomar, 20 S. C. 354.

22—See Chapter XII post.

23—City of Springfield v. Edwards, 84 Ill. 626; Howell v. City of Peoria, 90 Ill. 104; Prince v. City of Quincy, 105 Ill. 138; Sackett v. City of New Albany, 88 Ind. 473; Board of Com'rs of Owen

Where an issue is in part illegal because in excess of a constitutional or statutory limitation, and part legal being within, the authorities differ as to the remedies to be pursued and the legality of the entire issue, some holding the entire issue valid pro rata while other cases do not apply the rule of scaling down, so-called, but hold the entire issue void.

This subject will be specially considered in a subsequent section.[24]

§ 159. Time of action.

Since injunction is an equitable remedy, the courts hold that if a party otherwise entitled to relief be guilty of laches it will be denied[25] and that he must attempt to secure the relief which he asks before the bonds have been sold and delivered to bona fide purchasers. If there has been such a delivery, the relief sought for will be

County v. Spangler (Ind.), 65 N. E. 543, 743; Dively v. City of Cedar Falls, 27 Ia. 227; Scott v. City of Davenport, 34 Ia. 208; French v. City of Burlington, 42 Ia. 614; Mosher v. Independent School District, 44 Ia. 122; City of Council Bluffs v. Stewart, 51 Ia. 385; Richardson v. Sup'rs of Lyon County, 69 Ia. 612; Wilkinson v. Van Norman, 70 Ia. 230; Reynolds v. City of Waterville, 92 Me. 292, 42 Atl. 553; Blood v. Beal (Me.), 60 Atl. 427; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249.

Morris v. Hoagland, 116 S. W. 684. Where there is nothing to show that the debt incurred would exceed the limitations fixed by Const., Arts. 157-159, an injunction will not issue. Marlowe v. School Dist. No. 4, Murray County (Okla.), 116 Pac. 797; Wormington v. Pierce, 22 Ore. 606, 30 Pac. 450; In re Borough of Millvale, 162 Pa. 374, 29 Atl. 641, 644.

Seymour v. City of Tacoma, 6 Wash. 427, 33 Pac. 1059. An issue will be enjoined as to the excess. Hunt v. Fawcett, 8 Wash. 396, 36 Pac. 318; Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. 279; Fowler v. City of Superior, 85 Wis. 411, 54 N. W. 800; see also Miles v. Ray, 100 Ind. 166, where it was held that a taxpayer might enjoin a tax in excess of the limit fixed by law for the paying of donations to railways.

24—See Sec. 304 et seq., post.

25—Menard v. Hood, 69 Ill. 121; Jones v. Hurlburt, 13 Nebr. 125; State v. Roggen, 22 Nebr. 118; North v. Platt County, 29 Nebr. 447, 45 N. W. 692; Collings v. County of Camden, 27 N. J. Eq. 293; see also City of Atchison v. State, 24 Kan. 379.

denied. Thus where there was an express finding by the trial court that local improvement bonds had been issued, sold and delivered before the service of a temporary restraining order, a writ of injunction was denied.[26]

This rule is also applied because an injunction is a prospective remedy and only operates to prevent the doing of the act set forth in the bill of complaint. If this act has been consummated clearly this particular remedy is without avail, the tax payer can receive no benefits from the granting of an injunction.

The further rule also obtains in such cases that even where the bonds though delivered are still within the control of the court that constitutional and statutory provisions relating to the issuance of public securities will be less strictly construed and applied than in actions brought to prevent their issue.[27]

The taxpayer may also be estopped to file a bill restraining an issue of bonds where he has participated in the election or otherwise so acted as to subject himself to the principle of estoppel.[28]

§ 160. Cases where relief was denied.

A taxpayer cannot restrain the issuance and sale of bonds because issued to pay past indebtedness where the conditions prescribed by statute are fully complied

26—City of Alma v. Loehr, 42 Kan. 368, 22 Pac. 424; see also Gray v. Jones, 178 Ill. 169, 52 N. E. 941; but see Muskingum County Com'rs v. State (Ohio), 85 N. E. 562.

27—Hamlin v. Meadville, 6 Nebr. 227; Cook v. City of Beatrice, 32 Nebr. 80; Stein v. City of Fargo (N. D.), 102 N. W. 403; Elyria Gas, etc. Co. v. City of Elyria (Ohio), 49 N. E. 335.

28—County of Ray v. Van Sycle, 96 U. S. 675; Goodson v. Dean (Ala.), 55 So. 1010; but see Howard v. School District No. 27 (Ky.), 102 S. W. 318. Where acts of school trustees in creating an indebtedness are void a taxpayer is not estopped by the fact that he has had notice of the creation of a debt and paid taxes for two years without complaint; but see Town of Plainview v. Winona & St. Peter R. R. Co. (Minn.), 32 N. W. 735.

with;[29] nor where in the recitals of the bonds certain revenues are pledged for their payment in addition to those which can be pledged under the statute;[30] nor where by payment of an assessment he may prevent the issue of a special assessment bond;[31] nor where there is an alleged irregularity in the appointment of bond trustees for the proposed issue;[32] nor on the ground of a variance in statutory provisions conferring authority to issue bonds after a judgment of validation has been rendered;[33] nor where bonds have been issued before prior bonds have been paid as provided by statute;[34] nor where city officials merely express an intention to expend moneys derived from an issue and sale of municipal bonds for a slightly different purpose from that authorized;[35] nor for bonds issued to provide equipment for a school building;[36] nor where the evidence shows that the expenditures were for necessary expenses;[37] nor for bonds issued for refunding purposes;[38] nor where the issue of bonds to the amount proposed involves the exercise of discretionary powers on the part of public officials;[39] nor where irregularities in the organization of a school district occurred which can only be complained of at the suit of the state itself in quo warranto proceedings;[40] nor where by the passage of an act creating a county there has been a legislative determination of the

29—Bradford v. City of Glasgow, 143 Ky. 401, 136 S. W. 647.

30—Schmitz v. Special School District of City of Little Rock (Ark.), 95 S. W. 438.

31—German Savings Loan Society v. Ramish (Calif.), 9 Pac. 89.

32—Givens v. Hillsborough County (Fla.), 35 So. 88.

33—Farmer v. Town of Thompson (Ga.), 65 S. E. 180.

34—Board of Education v. Phipps (Kan.), 73 Pac. 97.

35—State v. Clay Center (Kan.), 91 Pac. 91.

36—Young v. Roberts (Ky.), 136 N. W. 911.

37—Black v. Com'rs of Buncombe County (N. C.), 31 S. E. 818.

38—Snyder v. Kautner, 190 Pa. St. 440, 42 Atl. 887; Jones v. City of Camden (S. C.), 23 S. E. 141.

39—Nalle v. City of Austin (Tex.), 22 S. W. 668.

40—Snyder v. Baird Independent School District (Tex.), 109 S. W. 472.

sufficiency of its population, the claim being made that the county did not contain 2,000 inhabitants at the time of its creation as required by the constitution of Washington, art. 11, sec. 3.;[41] nor where a recital in an ordinance submitting a proposition to bond the city is mere surplusage;[42] nor will the fact that city bonds were sold and delivered before an ordinance provided for issuing them took effect, serve as a ground for enjoining their payment at the suit of a tax payer.[43]

§ 161. Injunction against illegal taxes.

It was stated in a preceding section that relief in respect to an issue of illegal bonds in certain instances could be obtained in proceedings brought by tax payers to restrain the collection of a tax levied or voted to pay the principal or the interest of the bonds involved. The tax payer instead of seeking relief by injunction to restrain the issue and delivery of securities may proceed at a later time by bill in equity to restrain the levy or the collection of a tax for the payment of the principal or the interest of the bonds in question.[44]

41—Farquharson v. Yeargin (Wash.), 64 Pac. 717.

42—Lewis v. City of Port Angeles, 7 Wash. 190, 913.

43—Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723; see also Hamilton Gas Light, etc. Co. v. City of Hamilton, 37 Fed. 832; Fellows v. Walker, 39 Fed. 651.

44—Sherlock v. Winnetka, 59 Ill. 389; Mail v. Maxwell, 107 Ill. 554; Brockway v. Board of Sup'rs of Louisa County, 110 N. W. 844. Bond holders should be made parties defendant. Howard v. School Trustees Dist. No. 27 (Ky.), 102 S. W. 318.

City of Tyler v. Tyler Bldg. & Loan Assoc'n, 82 S. W. 1066, 86 S. W. 750. The burden of proof is upon the complainant, to establish the invalidity of the bonds.

Polly v. Hopkins, 74 Tex. 145, 11 S. W. 1084. An injunction will not lie to restrain an issue of bonds totally void.

Boesch v. Byrom (Tex.), 83 S. W. 18. Bond holders are necessary parties to an action to restrain a school district from levying of a tax to pay the interest on the bonds.

Bradford v. Westbrook (Tex.), 88 S. W. 382; see also as holding the same; Stratton v. Com'rs Court of Kinney County (Tex.), 137 S. W. 1170.

No tax payer charged with an illegal tax is without a legal remedy and he can urge as grounds for relief any or all of the reasons suggested in the preceding sections involving injunction proceedings as applied to the issue and delivery of bonds.[45]

§ 161a. When relief denied.

The relief will be denied where the tax is levied to pay the interest on refunding bonds,[46] or where immaterial irregularities have occurred in the proceedings preliminary to the issue of bonds;[47] neither can a town itself contest the legality of an election held for voting a tax in aid of a railroad and especially after the tax has been earned by a full compliance with conditions prescribed;[48] nor where a statute requiring a division of the tax between several public corporations was not applicable;[49] nor where the injunction would interfere with a discretionary power vested in the voters of the village.[50]

45—McMillan v. Anderson, 95 U. S. 35.

Hughson v. Crane, 115 Calif. 404, 47 Pac. 120. This case also holds that where it is impossible to determine the amount of the bonds illegally issued the rule sustaining the validity of a portion of a tax levy will not apply.

Boskowitz v. Thompson (Calif.), 78 Pac. 290. In a suit by land owners to enjoin the collection of a tax levied to pay interest on bonds, the bond holders cannot on cross complaints obtain affirmative relief or an adjudication of the validity of their bonds; the irrigation district being a necessary party for this purpose. R. R. Co. v. Blanchard, 54 Ill. 240.

Hutchinson v. Self, 153 Ill. 542, 39 N. E. 27. The burden of proof is on the property owner to establish the illegality of the bonds. Wilkinson v. Peru, 61 Ind. 1; Noble v. Davison (Ind.), 96 N. E. 325; Martin v. Bennett (Mo.), 22 S. W. 779; State v. Bergen, 34 N. Y. S. 438.

Tippett v. McGrath (N. J.), 56 Atl. 134. Those interested in the validity of bonds should be made parties defendant. Graves v. Moore County Com'rs (N. C.), 47 S. E. 134; Richardson v. Marshall County (Tenn.), 45 S. W. 440.

46—Maish v. Territory of Arizona, 164 U. S. 599.

47—Chicago, Milwaukee, etc. Ry. Co. v. Shea, 67 Ia. 728.

48—Arkansas Southern R. R. Co. v. Wilson, 42 So. 976.

49—Mead v. Turner, 112 N. Y. S. 127.

50—Lucia v. Village of Montpelier (Vt.), 15 Atl. 321.

The tax levied may be illegal in part and the relief sought as to the invalid portion only.[51]

The courts, however, both in proceedings brought to restrain the collection of taxes and the issue and delivery of negotiable securities hold steadily to the maintenance of the validity of securities in the hands of bona fide holders.[52]

Irregularities and informalities not of the essence of the act to be done are disregarded in any of the proceedings either those upon which a legal issue of bonds is based or those relative to the levy and collection of taxes including all preliminary steps. While it is true that the courts follow the rule of strict construction in the exercise of powers granted public corporations and hold invalid acts ultra vires, yet they and the Federal courts especially, endeavor to compel the observance to the same degree and extent by public corporations of that commercial honesty and good faith which is expected and required of private persons and corporations.

§ 162. Estoppel.

The tax payer may be estopped from contesting the validity of a tax levy by his laches, acquiescence or other conduct which will bring him within the operation of the general principles under which the doctrine of estoppel is applied. The same rule obtains in respect to actions by the tax payer in respect to suits brought to restrain an issue of bonds.[53]

51—Hughson v. Crane, 115 Calif. 404. The rule will not apply where it is impossible to separate the illegal from the legal bonds. Culbertson v. City of Fulton, 127 Ill. 30; So. Ry. Co. v. Bd. of Com'rs of Mecklenberg County (N. C.), 61 S. E. 690.

52—Gray v. Board of School Inspectors of Peoria, 231 Ill. 63, 83 N. E. 95. Spelling on Injunctions, Sec. 213.

53—Lent v. Tilson (Calif.) 14 Pac. 71.

Kilbourne v. St. John, 59 N. Y. 21; but see Tax Payers of Webster Parish v. Police Jury, 52 La. Ann. 465, 27 So. 102. Tax payers who did not acquiesce or participate in election proceedings are not estopped

§ 163. The issue of securities when compelled.

In some instances public officials may refuse to issue and deliver bonds where the authority has been conferred and all the conditions required by constitutional or statutory provisions performed. Mandamus in such cases is the usual and appropriate remedy to compel the issuance of bonds or the performance of other duties by public officials in connection therewith.[54]

It is also an appropriate remedy to compel the payment of a subscription to the capital stock of a railroad

from raising questions in respect to its irregularity.

54—Riggs v. Johnson County Sup'rs, 6 Wall. 166; Rees v. City of Watertown, 19 Wall. 107; Board of Liquidation of City of New Orleans v. United States ex rel. Hart, 118 U. S. 136; Smith v. Bourbon County Com'rs, 127 U. S. 105; Board of Liquidation of City of New Orleans v. United States, 108 Fed. 689.

Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753, affirming 140 Fed. 89. In proceedings to compel the delivery of county railroad aid bonds a county has power to compromise such litigation. People v. Logan County, 63 Ill. 374; People v. Barnett, 91 Ill. 422; Chicago, Danville, etc. R. R. v. St. Anne., 101 Ill. 151; Chicago, etc. R. R. Co. v. Mallory, 101 Ill. 583; Mayor, etc. v. State, 57 Ind. 152; Chicago, Kansas & West. R. R. Co. v. Freeman (Kan.), 16 Pac. 828; Smalley v. Yates, 36 Kan. 519.

Board of Trustees of Augusta v. Maysville, etc. R. R. Co. (Ky.), 30 S. W. 1. A city ordinance duly passed and assented to by vote of the electors does not require a subsequent contract of subscription to authorize the city to issue bonds. Edward C. Jones Company v. Town of Gottenberg (N. J.), 51 Atl. 274; People v. Brennan, 39 Barb. (N. Y.), 522; People v. Sup'rs of Town of Gravesend, 39 N. Y. S. 983; Wilmington, etc. R. R. Co. v. Board of Com'rs of Onslow County (N. C.), 21 S. E. 205.

May v. Cass County (N. D.), 96 N. W. 292. Rights acquired and vested under contracts resting on statute for validity cannot be impaired by a repeal of the statute, so held in an action to cancel bonds.

Branch v. Sinking Fund Com'rs, 80 Va. 427. Coupon bonds issued by the state to the buyer were redeemed by the state and other bonds issued in their stead, the redeemed bonds were stolen and came into the hands of a bona fide holder for value without notice of the theft. It was here held that mandamus would issue to compel the state officials to fund these bonds.

corporation either through and by an issue of bonds or in some other legal and appropriate manner.[55]

The use of this remedy is controlled necessarily by the nature of the writ and it will issue only when the duty sought to be imposed is clearly imposed by law on the official or governmental agency sought to be coerced.[56] The duty must be mandatory and the act sought to be coerced ministerial in its nature. If the public officials are vested by law with discretionary powers in respect to the doing of the act or the manner of doing it the writ

55—Ex parte Selma, etc. R. R. Co., 45 Ala. 696, 724; Santa Cruz R. R. Co. v. Santa Cruz County Com'rs, 62 Calif. 239; Piatt v. People, 29 Ill. 54; Pfister v. State, 82 Ind. 382.

Chicago, Kans. & West. R. R. Co. v. Harris, 30 Pac. 456. A county is estopped in mandamus proceedings to compel the issue and delivery of bonds voted from asserting irregularities in election proceedings. See also as holding the same Hutchinson & So. R. R. Co. v. Fox, 48 Kan. 70, 28 Pac. 1078; Atchison, etc. R. R. Co. v. County Com'rs, 12 Kan. 127.

Lamoille Valley R. R. Co. v. Fairfield, 51 Vt. 257. Want of authority may be set up in answer to mandamus to compel the issue of bonds.

State v. Jennings, 48 Wis. 549. A delay of six years will not affect the relator's right to compel the issue of town bonds, in the absence of any evidence that the town had been injured thereby.

56—United States v. Board of Liquidation of City Debt of New Orleans, 60 Fed. 387 C. C. A.; Brazoria v. Youngtown Bridge Co., 80 Fed. 10 C. C. A.; McMahon v. Sup'rs of San Mateo County, 46 Calif. 214.

Bates v. Gregory (Calif.), 22 Pac. 683, 26 Pac. 891. An action for mandamus to compel the board of trustees to issue bonds in lieu of those barred by the statute of limitations cannot be maintained.

People v. Cline, 63 Ill. 394. Mandamus will not lie to compel the issue of bonds, the authority to issue which is based upon a fradulent and illegal election.

Lynchburg, etc. R. R. Co. v. Board of Com'rs of Person County, 109 N. C. 159, 13 S. E. 783. An issue of township bonds will not be compelled where plaintiff alleges that it was authorized by a "majority of the votes cast" the constitution requiring a majority of its qualified voters.

State v. Whiteside, 30 S. C. 579, 9 S. E. 661. An act to provide for the payment of bonds illegally issued, held not to validate the bonds issued.

Paulson v. Rogers, 32 Gratt (Va.) 654. The repeal of an act authorizing the funding of bonds destroys a right to compel the refunding authorized.

will not issue, nor generally it is held will it lie to review or rescind any action already taken which involves the exercise of discretionary powers.[57]

While the writ will not lie under the conditions above noted, yet it has been held that where it is the legal duty of an official to exercise his discretion with respect to a particular matter, the writ will be issued to compel the exercise of the discretion though not in any way to control it.[58]

The execution of bonds including the affixing of signatures and counter-signatures and their manual delivery to those entitled to receive them are acts ordinarily which can be compelled by mandamus in case of a wrongful refusal to act.[59]

57—Satterlee v. Strider, 31 W. Va. 781, 8 S. E. 522. See High Extraordinary Legal Limitation, Sec. 24; Spelling on Injunctions, Secs. 1433 and 1519.

58—Kimberlin v. Com'rs of Five Civilized Tribes, 104 Fed. 653; Taylor v. Kolb, 100 Ala. 603, 13 So. 779; State v. Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577; Irwin-Hudson Co. v. Kincaid, 31 Ore. 478, 49 Pac. 765; State v. Chittenden, 112 Wis. 569, 88 N. W. 587.

59—Chickaming v. Carpenter, 106 U. S. 663; Board of Liquidation of City of New Orleans v. United States ex rel. Hart, 118 U. S. 136.

People v. San Francisco, 27 Calif. 655. Mandamus will not issue where opportunity has been given for the performance of the duty required—in this case the countersigning of bonds.

Napa Valley R. R. Co. v. Napa County, 30 Calif. 435. Board of County Sup'rs may be compelled by mandamus to subscribe to the capital stock of a railroad company where the act conferring authority provides that it "shall be made" within a certain time.

City of Los Angeles v. Hans, 130 Calif. 278, 62 Pac. 484. City clerk.

Douglas v. Chatham, 41 Conn. 211. A duty which is required as a whole cannot by mandamus be required to be performed in part. People ex rel. Prettyman v. Board of Sup'rs, 45 Ill. 162; Houston v. People, 55 Ill. 398; People v. Holden, 91 Ill. 446; Smalley v. Yates, 36 Kan. 519, 13 Pac. 845; Pearson v. Ranlett, 110 Mass. 120; Daniel v. Long, 111 Mich. 562. City Treasurer. People v. White, 54 Barb. 622; People v. Parmeter, 158 N. Y. 385, 53 N. E. 40, reversing 19 App. Div. 632.

In re Attorney General, 58 Hun. 218, 12 N. Y. S. 754. City Comptroller.

State v. Whitesides, 30 S. C. 579, 9 S. E. 661. Mandamus will not lie to compel the execution of a

certificate of the completion of a railroad upon which is to be based an issue of bonds where the township had no power to extend the aid. Morris v. William, 23 Wash. 459, 63 Pac. 236.

But see State v. Com'rs of Anderson County, 28 Kan. 673. Mandamus will not lie to compel county com'rs to call an election when proceedings are pending for the division of the township, also Chalk v. White, 4 Wash. 156, 29 Pac. 979. Mandamus will not lie to compel the mayor to sign bonds in excess of the amount of indebtedness which the city can lawfully incur.

But see State v. Harris, 92 Mo. 29, following State v. City of Morristown, 24 S. W. 13; Echols v. City of Bristol, 17 S. E. 943.

CHAPTER VII

FORMALITIES REQUIRED FOR ISSUE OF NEGOTIABLE SECURITIES

§ 164. "Issue" explained and defined.

Constitutional or statutory authority conferring the power upon public corporations to issue negotiable securities may prescribe conditions and limitations, compliance with and observance of which will be necessary in order that the power conferred may be exercised. This may also provide certain formalities to be followed in connection with the manual and mechanical part of or connected with the actual execution and delivery of the securities when the power has been created by proceeding in conformity to the conditions required.

The various conditions and limitations have been or will be noted and discussed from time to time and in this chapter will be considered some of the mechanical or manual formalities required by law or to be observed under the general principles relating to an issue of negotiable securities.[1]

Securities cannot be issued in the technical sense of the word without the existence of authority conferred by law and the creation of that power in a particular instance by the performance of conditions required. The manual and mechanical execution of bonds in the absence of power to issue cannot make them valid.[2]

1—County of Ralls v. Douglas, 105 U. S. 728. County bonds and coupons issued in 1870-71 admissible as evidence in an action to recover on them although not stamped under the provisions of the internal revenue laws of the United States in force at that time.

2—Bergen County Freeholders v. Merchants Exchange Bank, 21

The conditions required by statutory or constitutional provisions may include the performance of official acts by certain designated public authorities and the rule follows that negotiable securities cannot be "issued" in case of a failure to perform the act required or where it is done by an officer of a public corporation not charged by law with the performance of that duty.[3]

Illustrating these principles it held that municipal bonds are not legally issued unless they have been duly registered under the laws of Missouri in the office of the State Auditor.[4]

They cannot be issued in excess of a constitutional limitation of indebtedness though no debt is created until the bonds are technically issued and where the debt at the time of the vote conferring the authority if the bonds had been issued would have been increased to beyond such a limitation but is subsequently reduced, bonds then

Blatchf. C. C. 13. Bonds issued by a county collector after his term of office had expired held to be forgeries and unenforcible. Risley v. Village of Howell, 57 Fed. 544.

Potter v. Lainhart (Fla.), 33 So. 251. Bonds cannot be issued for any other purpose than that authorized. See, also, as holding the same, the cases of Callaghan v. Town of Alexandria, 52 La. Ann. 1013, 27 So. 540 and Applegate v. Board of Education of Cranberry Township (N. J.), 33 Atl. 923.

Wilson v. City of Shreveport, 29 La. Ann. 673. A negotiable form does not impart validity in the absence of power to issue. Milan Taxpayers v. Tenn. R. R. Co., 11 Lea (Tenn.) 329.

Galbraith v. City of Knoxville (Tenn.), 58 S. W. 643. Plea of non est factum sustained. Clark v. City of Janesville, 13 Wis. 463.

Berliner v. Town of Waterloo, 14 Wis. 409. Bonds issued by municipality before the law authorizing them has gone into effect are null and void. But see Knox County v. Aspinwall, 21 How. 539.

3—Lehman v. City of San Diego, 73 Fed. 105; German Savings & Loan Association v. Ramish (Calif.), 69 Pac. 89; First National Bank v. City of Elgin, 136 Ill. App. 453.

Town of Eagle v. Kohn, 87 Ill. 292. If conditions are performed after issue, the bonds will be valid. Lewis v. County Com'rs, 12 Kan. 186; State v. Saline County Court, 45 Mo. 242; but, see, Henry v. Nicolay, 95 U. S. 619; Gardner v. Haney, 86 Ind. 17.

4—Douglas v. Lincoln County, 2 McCrary, Cir. Ct. 449; see, also, Sec. 173, post.

issued under the previous authority are not void because no debt is created until the bonds are issued.[5]

The word "issue" in its technical sense as used in this chapter has been variously defined. In one case the word, it was held, was confined to the delivery of the bonds and did not embrace the preliminary acts of signing and dating.[6]

In another, it was held that city bonds are not "issued" until actually or constructively delivered under a contract of sale.[7] In Corning v. Mead County Commissioners,[8] the Court in defining the word "issue" said: "The word 'issued' ordinarily means 'emitted' or 'sent forth' and in the absence of other definition, that must be taken to be the sense in which it was used in the legislation of Kansas." And it was further held: "Any other construction would have rendered the act impracticable and useless, because it was only in reliance upon a favorable vote already cast, and upon a subscription actually made that railroad companies could be induced to build their roads into many of the counties of Western Kansas. No reason occurs to us why the word 'issued' in the former limitation should be given a meaning so different, so unique and so broad as to make it cover the presentation of the petition and call for the election, while in the latter it retains its ordinary significance, moreover, if the meaning of this word was ambiguous, the practical construction given to it and to the proviso in which it occurs by the officers of the state and county and the purchasers of the bonds while they were acting and contracting under it is entitled to great consideration and ought not to be modified or avoided to the destruction of rights resting upon it, unless that construction was clearly and palpably erroneous."

5—Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723.

6—Perkins County v. Graff, 114 Fed. 441.

7—Black v. Fishburne (S. C.), 66 S. E. 681.

8—102 Fed. 57.

City bonds legally executed, certified by the attorney general and registered by the comptroller of state accounts are "issued" though they remain unsold,[9] and in another Texas case [10] it was held in construing article 11, section 5 of Texas constitution relative to the creation of debts by municipalities that the terms "created" as used in the constitution and "issued" as found in the charter would be construed as referring to the time of the sale of bonds.

In still another Texas case,[11] in construing laws of 1907, p. 78, providing for the creation of drainage districts and the issuance of bonds, the court held that the word "issued" as used in section 23, of the act meant bonds executed by signing and attesting them but the word "issue" as used in section 24 of the same act in the phrase "desiring to issue bonds" meant to put bonds into circulation by selling them while the phrase "the bonds to be issued" meant those to be offered for sale and not those to be prepared and executed.

It is not necessary to a legal issue of bonds that the authority conferred be immediately exercised and they have been held valid when issued in one instance as late as six years after the conference of authority. General financial conditions may at times make this course of action not only expedient but absolutely necessary.[12]

Neither is it essential to their validity that the entire

9—Moller v. City of Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116.

10—City of Austin v. Valle (Tex.), 71 S. W. 414.

11—Hidalgo County Drainage Dist. No. 1 v. Davidson, 120 S. W. 849.

12—Chickaming v. Carpenter, 106 U. S. 663; School Dist. No. 40 v. Cushing (Kan.), 54 Pac. 924; State v. Lake City, 25 Minn. 404. Woodbridge v. City of Duluth, 57 Minn 256, 59 N. W. 296. It is a question of fact whether bonds issued three years after the election authorizing them are issued within a reasonable time. Town of Lexington v. Union National Bank, 75 Miss. 1, 22 So. 291; Moller v. City of Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116. Two years. See, also, Tippett v. McGrath (N. J.), 59 Atl. 1118; Miller v. School Dist. No. 3, Carbon County (Wyo.), 39 Pac. 879.

amount authorized be issued at one time. Where authorized for the payment of some work of local improvement or of some public utility in order to save interest it may be desirable and advantageous as well to issue the bonds in installments as the work progresses.[13]

Where bonds are authorized at one election for a number of purposes, it is not necessary that separate issues be made for each of the various objects. A general issue may be made covering the entire amount authorized.[14]

Where authority has been conferred and the conditions requisite to its exercise have been complied with, the issue of negotiable securities becomes obligatory and if public officials refuse or neglect to issue and deliver the bonds to those entitled to them, the performance of this mandatory duty can be compelled.[15]

The cancellation of bonds before delivery and the issuance of others in their stead to the purchasers will not invalidate the bonds last issued.[16]

13—Wells v. Sioux Falls (S. D.), 94 N. W. 425; Aylmore v. City of Seattle (Wash.), 92 Pac. 932; see also Gage v. City of Chicago, 216 Ill. 107, 74 N. E. 726.

14—Town of Mill Valley v. House (Calif.), 76 Pac. 658.

15—See Sec. 163, ante.

Edward C. Jones Co. v. Town of Guttenberg (N. J.), 51 Atl. 274. A change in the membership of a body charged with a duty will not relieve it from the performance of that duty when the rights of others have intervened. Schonweiler v. Allen (N. D.), 117 N. W. 866; Welch v. Getzen (S. C.), 67 S. E. 294; see, also, Coler v. Dwight School Township of Richland County (N. D.), 55 N. W. 587.

16—Board of Lake County Com'rs v. Linn (Colo.), 68 Pac. 839. The fact that some of the bonds of the series were exchanged for invalid warrants is no defense when the bonds in suit are not any of those so exchanged. Town of Solon v. Williamsburg Savings Bank, 114 N. Y. 122, 21 N. E. 168.

Oswego City Savings Bank v. Board of Education, etc., 60 N. E. 1113. The substitution of printed bonds for typewritten ones, the originals being mutilated and surrendered will not invalidate those actually and finally issued. Kunz v. School District No. 28 of Hutchinson County (S. D.), 79 N. W. 844.

City of Radford v. Heth, 40 S. E. 99. Bonds not negotiated may be destroyed and others substituted bearing less rate of interest than as originally authorized.

§ 165. Form of bond.

Statutory provisions relating to the form of negotiable securities may have for their purpose the safe-guarding of the public corporation issuing them. Such provisions are commonly construed as mandatory and a substantial compliance at least with the statute is required for their validity.

Ordinarily, however, statutory provisions relative to the form of bonds serve no purpose in safe-guarding a public corporation but are inserted with the object of securing a better price for them in the open market or in making them more attractive to purchasers by offering a pledge of certain means of payment or including provisions affecting the place of payment and their negotiability. Such provisions are regarded universally as directory only and a failure to literally comply with them or in some cases to observe them will not invalidate the securities issued.[17]

To protect bona fide holders, the courts are inclined to extend this principle further and to hold that bonds where the form is prescribed by legislative authority for their issue although not complying technically with the form as thus required but yet which in their substantial features follow the law will not be invalid on account of such variation.[18]

17—Wood v. Alleghany County, 3 Wall. Jr., 267 Fed. Cas. 17, 937. D'Esterre v. City of New York, 104 Fed. 505. Special act authorizing the issue of municipal bonds supersedes general statutory provisions prescribing their form and the conditions to be inserted. Hadley v. Dagne (Calif.), 62 Pac. 500; Wiley v. Board of Education, 11 Minn. 371; Catron v. Lafayette County (Mo.), 17 S. W. 577, 106 Mo. 659; Ontario County v. Shepard, 91 N. Y. S. 611. Heffner v. City of Toledo, 80 N. E. 8. The statutory requirements that street improvement bonds shall have the name of the street written or printed upon them does not apply to bonds issued to pay the city's part of the cost of such improvement.

18—City of New Orleans v. Clark, 95 U. S. 644. The ordinance of a city authorizing the issue of bonds provided the company should "guarantee the said bonds and assume the payment of the principal

A failure to observe directory provisions in other respects as affecting the form of the bond,[19] the num-

thereof at maturity,'' the indorsement on the bonds by the president of the company, guaranteeing ''the payment of the principal and interest,'' was held a sufficient compliance.

Calhoun County Sup'rs v. Galbraith, 99 U. S. 214. Bonds issued payable to the railroad company or bearer was not held a sufficient variance to invalidate them where the act provided that they should be made payable to the president or the directors of the company, their successors or assigns. In Board of Education of Atchison v. De Kay, 148 U. S. 591, the validity of bonds issued under the general statute of Kansas, held not to be affected where in reciting the title of that act the word ''organize'' was substituted for the word ''incorporate.'' D'Esterre v. City of Brooklyn, 90 Fed. 586; Roberts & Co. v. City of Paducah, 95 Fed. 62; Village of Kent v. Dana (C. C. A.), 100 Fed. 56.

Murphy v. City of San Luis Obispo (Calif.), 48 Pac. 974. The statutory authority gave power to issue bonds payable ''in gold coin or lawful money of the United States.'' The bonds were issued payable in ''gold coin of the United States.'' Held a sufficient variance to invalidate them. This case was reversed, however, in Murphy v. City of San Luis Obispo, 119 Calif. 624, 51 Pac. 1085, where it was held that under such conditions the trustees of the city could, at their option, make the bonds payable in either gold coin of the United States or lawful money of the United States. Woodward v. Reynolds, 58 Conn. 486.

Middleton v. City of St. Augustine, 42 Fla. 387, 29 So. 421. Bonds and coupons providing for their payment at a place different from the one specified in legislative authority is a material variance and departure from such authority. State v. School Dist. No. 3, 34 Kan. 237; Oswego Twp. v. Anderson, 44 Kan. 214; Bogart v. Lamotte Twp., 79 Mich. 294.

State v. Roggen, 22 Nebr. 118, 34 N. W. 108. The absence of a required certificate by certain officials invalidates bonds. Starin v. Town of Genoa, 23 N. Y. 439.

Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. Misrecital of authority held immaterial.

State v. Village of Perrysburg, 14 Ohio St. 472. Bonds issued in the name of ''The town of Perrysburg'' instead of ''the incorporated village of Perrysburg'' held valid. State v. Anderson County, 67 Tenn. (8 Baxt.), 249; Shelby County v. Jarnagin (Tenn.), 16 S. W. 1040.

Bronson v. Smith, 93 Tex. 614. School district bonds not required to be certified by the Atty. General under Rev. St. Art. 918d; City of Memphis v. Memphis Sav. Bank, 99 Tenn. 104; see, also, cases cited in the immediately following notes.

19—Village of Kent v. Dana, 100 Fed. 56, 40 C. C. A. 281; Ontario County v. Shepard, 91 N. Y. S. 611; County of Jefferson v. Jenning Banking & Trust Co., 79 S. W. 876; Jones v. City of Seattle, 19 Wash. 669, 53 Pac. 1105.

ber,[20] the denomination,[21] the payee,[22] the mechanical make-up of the bond,[23] statements relative to the purpose

20—Commonwealth v. Emigrant Savings Bank, 98 Mass. 12; City of Elizabeth v. Force, 29 N. J. Eq. 587.

Birdsall v. Russell, 29 N. Y. 220. The number is not a material part of the bond and its alteration or erasure even with fraudulent intent has been held not to affect a bona fide holder for value and without notice. In case of an over-issue, however, the numbering may become material as determining the validity of particular bonds of an issue where a part of the issue is within the limit and part in excess. See Sec. 304, et seq., post; Davis County v. Dixon, 107 U. S. 607; McPherson v. Foster, 43 Ia. 48; Ball v. Presidio County (Tex.), 29 S. W. 1042.

21—County of Green v. Daniels, 102 U. S. 187. Bonds not void because not of the same denomination as specified in the proposition of the railroad company for aid voted on at the election. E. M. Darby v. City of Modesta (Calif.), 38 Pac. 900; Law v. City and County of San Francisco (Calif.), 77 Pac. 1014.

City of Santa Barbara v. Davis (Calif.), 793 Pac. 308. Where an option is given as to the denominations of bonds proposed to be issued, the city council need not exercise this until after the authority to issue has been conferred by the voters.

Town Council of Lexington v. Union National Bank (Miss.), 22 So. 291. That renewal bonds are issued in different denominations from the old will not invalidate them; and where required to be "executed to" a certain railroad company and delivered to the president of that company they are valid though made payable to bearer.

Milan Taxpayers v. Tenn. R. R. Co., 11 Lea (Tenn.) 329. If a city is authorized to issue bonds of a certain denomination and bearing a certain rate of interest they cannot be lawfully issued for a greater denomination and at an increased rate of interest. Bingham v. Board of Sup'rs of Milwaukee County, 106 N. W. 1071.

22—County of Leavenworth v. Barnes, 94 U. S. 70. Bonds not invalid because the name of the railroad company to which issued was not correctly given in them. Sup'rs v. Galbraith, 99 U. S. 214.

School Dist. No. 40 v. Cushing (Kan.), 54 Pac. 924. Bonds made payable "to ———— or bearer" sufficiently complies with the law which provides that they shall state on their face "to whom issued." See Sec. 350, post.

23—McKee v. Vernon County, 3 Dill. 210. Substitution of engraved county bonds bearing coupons, the signatures on which were lithographed, for ordinary bonds held not to invalidate them.

Town of Washington v. Coler, et al., 51 Fed. 362. It is not necessary that bonds should have attached coupons for installments of principal. Oswego City Savings Bank v. Board of Education, etc., 60 N. E. 1113.

for which issued and other provisions of a similar nature will not invalidate the securities.[24]

Where provisions relative to the facts and questions noted in the last preceding notes are mandatory in their character or have for their purpose the protection of the public corporation in respect to the issue of bonds, the contrary rule will prevail.

The objects to be attained determine, generally in cases where there is a variance from statutory provisions, the validity of bonds and the two principal ones have already been stated.[25]

Illustrative of the principles above stated, the court in a New York case,[26] where bonds were issued under an act of the legislature which authorized either coupon or registered bonds or coupon bonds registered as to the principal only, to be signed by the supervisors and countersigned by the treasurer of the town and if registered to be made payable to the persons to whom issued, the place of registration to be fixed in the bonds by the officials registering the same and to have a certificate entered thereon following the registration and when sold by the

24—Com'rs of Marion County v. Clark, 94 U. S. 278. An immaterial variation in time of maturity held not to invalidate bonds. Barnet v. Dennison, 145 U. S. 135.

Carpenter v. Buena Vista, 5 Dill. 556. Bonds legal in all other respects are prima facie valid although the particular purpose for which they are issued is not stated.

City of Cadillac v. Woonsocket Institute for Savings, 58 Fed. 935. The bonds in this case recited that they were issued "for the purpose of extending the time of payment of bonds formerly issued by the city." This statement was held to be a substantial compliance with the legal requirement that "each bond shall show upon its face the class of indebtedness to which it belongs and from what fund it is payable." Village of Kent v. Dana, 100 Fed. 56, 40 C. C. A. 281; City of Gladstone v. Throop, 71 Fed. 341; Clapp v. City of Marice, 111 Fed. 103; Barker v. Town of Oswegatchie, 10 N. Y. S. 834; Hoag v. Town of Greenwich, 15 N. Y. S. 743; Maxcy v. City of Oshkosh (Wis.), 128 N. W. 899. See, also, Sec. 352, et seq., on time of maturity; Sec. 180, on interest rate, and Sec. 357, on place of payment.

25—See note 17 this section.

26—D'Esterre v. City of New York, et al., 104 Fed. 605.

payee that they might be registered in the name of the new purchaser, it was held that when the bonds so issued purported to be registered bonds but were not dated and did not contain any designation of the place of registration and were payable in————————, that these departures from the prescribed form did not invalidate the bonds. The court in part said: "It was obviously the intention of the statute that the bonds to be created should be negotiable. As it authorized the creation of coupon bonds at the discretion of the supervisor, which were not to be registered, even as to the principal sum, it is manifest that the provisions in respect to registration, in respect to the name of the payee, and in respect to all matters merely of form and phraseology, were not designed as limitations of his authority, or to protect the town against his abuse of his functions. They were formalities which could not subserve any essential purpose, except to assure purchasers that they were buying bonds which were literally perfect. If purchasers were willing to accept registered bonds which were not, as to particulars, devised for their interests or convenience, in strict conformity with these provisions, the town could not be harmed. The provisions should, therefore, be considered as directory, and not mandatory, and, in the absence of any language in the act importing that noncompliance would invalidate the bonds, any departure in respect to them should not be deemed a defect of substance."

The insertion in bonds of statements not required by law and when not in conflict with the authority conferring the power to issue will not affect the validity.[27]

Miscellaneous references. The form of a bond as involving the time of maturity,[28] the payee,[29] the place and

27—Carlson v. City of Helena, 102 Pac. 39.

28—See Sec. 352, et seq., post.

29—See Sec. 350, post.

time of payment,[30] and the interest it bears,[31] will be considered in the sections referred to in the notes.

§166. Dating and ante-dating of securities.

Bonds which upon their face purport to have been issued in conformity with an act specified but which were not actually issued until after the repeal of the act being antedated so as to appear to have been issued prior to the repeal and which in addition were signed by persons not filling the official positions as represented on the date at which the bonds were dated are void in the hands of even bona fide holders,[32] although the common rule is that where the authority to issue exists the antedating of bonds will not render them invalid provided in other respects there has been a compliance with the conditions prescribed by law and with the authority conferring the power and where the officials executing them were such officers at the time the bonds are dated.[33]

Immaterial irregularities in dating will not affect the validity of securities in the hands of a bona fide holder,[34] and the presumption exists that a signature of a public

30—See Sec. 357, post.

31—See Sec. 180, post.

32—Lehman v. City of San Diego, 73 Fed. 105, 83 Fed. 669 C. C. A.; see. also, Anthony v. Jasper County, 101 U. S. 693; Coler v. Cleburne, 131 U. S. 162; Owensboro Water Works Co. v. City of Owensboro, 96 S. W. 867.

33—Village of Kent v. Dana, 100 Fed. 56, 40 C. C. A. 281. Prettyman v. Sup'rs, 19 Ill. 406. Railroad aid bonds should bear date and draw interest from the time when it was intended they should issue though their issue has been delayed by the neglect of the county officials. Morrell v. Smith County (Tex.), 33 S. W. 899; Moller v. City of Galveston (Tex.), 57 S. W. 1116; Yesler v. City of Seattle, 1 Wash. St. 308, 25 Pac. 1014.

34—Louisiana v. Wood, 102 U. S. 294; Gilchrist v. Town of Little Rock, 1 Dill. 261; Flagg v. Mayor of Elmyra, 33 Mo. 440.

State v. Moore, 46 Nebr. 590. Antedating of eight days held not to invalidate bonds where that act did not operate as an evasion of the law or a departure from the proposition ratified by the voters.

Yesler v. City of Seattle, 1 Wash. St. 308, 25 Pac. 1014. It is not a violation of a statute which requires bonds to "bear the date of their issue" that where they are negotiated some months after the

official was affixed when he had the right irrespective of the date, or stated in another way, the date of the signing and sealing as determined by an inspection of the face of the bond is conclusive and evidence showing or tending to show that signatures and seals were affixed on a day subsequent to that required by law or that which is shown by the face of the bonds is not admissible to establish their invalidity.[35]

Bonds dated on Sunday are regarded as void though it is no objection that they bear interest from a Sunday, their date, and it may be shown where bonds bear date of a Sunday that they were not in fact delivered upon that day.[36]

In a leading case in the Supreme Court of the United States,[37] involving the antedating of bonds and where, as in one of the cases already cited, the person officially executing the bonds was not that public official at the time of the date appearing upon the face of the bonds though being such official at the time the bonds were actually issued, the court said in part: "The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the

day of their date, the purchaser was allowed interest from that day.

State v. Madison, 7 Wis. 668. The writing out of bonds is a ministerial act as the authority has been conferred and a mistake in the date is not vital to their validity.

35—Town of Weyauwega v. Ayling, 99 U. S. 112; Village of Kent v Dana, C. C. A. 100 Fed. 56; Inhabitants of Stoughton v. St. Paul, 173 Mass. 148, 53 N. E. 272; School District v. First National Bank of Xenia, 19 Nebr. 89; State v. Moore, 46 Nebr. 590; Brown v. Bon Homme County, 1 S. D. 216.

36—King v. Fleming, 72 Ill. 1; Conrad v. Kinzie, 105 Ind. 281; Sayre v. Wheeler, 31 Ia. 112; Marshall v. Russell, 44 N. H. 509.

37—Anthony v. County of Jasper, 101 U. S. 693.

one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of a partnership. Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other."

§ 167. Signatures of officials.

It is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public corporation for their payment, if not so executed they create no liability. The due execution of securities includes necessarily the signing of them, and the countersigning if required, by those officials charged by law with the performance of this duty.[38]

The authorities generally hold that securities should be executed by the officials in office at the time they are originally issued and not those in office when the bonds are sold.[39]

38—Anthony v. County of Jasper, 101 U. S. 693; Bissell v. Spring Valley, 110 U. S. 162; Northern Bank, etc. v. Porter Township Trustees, 110 U. S. 608; Claiborne County v. Brooke, 111 U. S. 400; Merchants National Bank v. Bergen County, 115 U. S. 384. Alexander v. Commissioners of McDowell County, 70 N. C. 208. Where bonds have been executed by certain officials their action may be subsequently validated by the legislature. See Sec. 173, post, on registration.

39—Coler v. Cleburne, 131 U. S. 162; Halsey v. Gillette (Calif.), 103 Pac. 339; Town of Stoughton

The duty may be especially conferred,[40] or it may devolve upon them through their general power and authority to perform for the public corporation the act in question.[41]

It is not necessary, however, that those thus acting should be in all cases de jure officials. It is sufficient if at the time they were officers de facto and performing the duties of the office which they assumed. If this condition is established no objection can be made to the validity of securities because executed by de facto officials.[42]

The courts, however, hold that purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy and that this includes not only the genuineness of the signature itself but the official character of him who makes it.[43]

The presumption of law, however, exists that officials executing securities sustain the official character they assume that the signatures affixed are genuine and that they have been signed during the term of office.[44]

v. Paul (Mass.), 53 N. E. 272; but see Brown v. Bon Homme County (S. D.), 46 N. W. 173.

40—Town of Queensbury v. Culver, 19 Wall. 83; Brooklyn v. Ins. Co., 99 U. S. 362; Corporation v. County of Pontiac, 17 Can. S. C. R. 406; Currie v. Lewiston, 15 Fed. 377.

41—Lynde v. County of Winnebago, 16 Wall. 6; Walnut Township v. Wade, 103 U. S. 683; County of Ralls v. Douglas, 105 U. S. 728; County of Kankakee v. Aetna Life Ins. Co., 106 U. S. 668; Middleton v. Mullica Township, 112 U. S. 433; Town of Aroma v. Auditor of State, 15 Fed. 843; Rondot v. Rogers Township, 99 Fed. 202, 39 C. C. A. 462; Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753, affirming 140 Fed. 89; Lane v. Inhabitants of Embden, 72 Me. 354; Neely v. Yorkville Town Council, 10 S. C. 141.

42—Ralls County v. Douglas, 105 U. S. 728; Waite v. City of Santa Cruz, 184 U. S. 302, reversing 98 Fed. 387; National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778; Coler v. Dwight School Township, 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649. But there can be no officer de facto where no legal office exists. See Secs. 66 and 67, ante.

43—Anthony v. County of Jasper, 101 U. S. 693; Coler v. City of Cleburne, 131 U. S. 162.

44—Weyauwega v. Ayling, 99 U. S. 112.

The authority of officials of public corporations to bind their principal must be expressly given. The usual rule does not apply namely, that acts done within the apparent scope of the authority and power of an agent will bind his principal. The rule as stated in respect to public officials must of course be constantly observed in determining the validity of public securities as affected by the execution of them.[45]

It is not necessary in all cases that the public official act within the geographical limits of the public corporation he represents,[46] nor is it essential that he personally sign his name, if this is done under his direction and by his authority, it is sufficient.[47]

Securities executed by officials whose terms of office have expired are void.[48]

Where the official signatures of an administrative board are required it is usually sufficient if a majority of that board join in the execution of the securities as previously

45—See Secs. 52 and 65, et seq., ante. The Floyd Acceptances, 7 Wall. 666.

Anthony v. County of Jasper, 101 U. S. 693. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted. City of Louisville v. Bank of Louisville, 174 U. S. 439.

Hull v. Marshall County, 12 Ia. 142. A county judge is an officer of limited powers. His authority is defined by statute, which every one is bound to know and comprehend. No one need be deceived or injured by such a rule; if the act is legal and within the power of the county judge, it is easy to allege and show it.

Smith v. Town of Epping, 69 N. H. 558, 45 Atl. 415. McDonald v. City of New York, 68 N. Y. 23-27. It is fundamental that those seeking to deal with a municipal corporation through its officials must take great care to learn the nature and extent of their power and authority.

46—Lynde v. County of Winnebago, 16 Wall. 6. The fact that a county judge from Iowa while in New York for purposes connected with a sale of county bonds affixed his seal to them while there would not affect their validity.

47—Lynde v. County of Winnebago, 16 Wall. 6; Montgomery v. Township of St. Mary's, 43 Fed. 362; Neely v. Yorkville, 10 S. C. 141.

48—Anthony v. County of Jasper, 101 U. S. 693; Coler v. City of Cleburne, 131 U. S. 162; but see Weyauwega v. Ayling, 99 U. S. 118.

authorized and they may unless otherwise directed by statute authorize one of their members to execute the bonds for and on their behalf.[49]

The acts of public officials in executing bonds whether under an authority especially conferred or under their general powers are regarded as the acts of the public corporation which they represent.[50]

The countersigning of bonds is usually considered a ministerial act and an officer whose duty it is to countersign has no authority to determine whether the bonds have been issued in accordance with law or otherwise. He may be compelled by mandamus to affix his signature,[51] and if there has been a failure to countersign, this will not necessarily invalidate the securities.[52] Where, however, the statute makes the countersignature an essential part of the execution of the bonds, it is necessary that this should be done.[53]

§ 168. What a sufficient signature.

It is not necessary that in all cases the signature of the public officer should be affixed in his personal handwrit-

49—Curtis v. County of Butler, 24 How. 425; Blair v. Cuming County, 111 U. S. 363; Phelps v. Town of Lewiston, 15 Blatchf. 132. Fed. Cas. 11,076; First National Bank of North Bennington v. Arlington, 16 Blatchf. Cir. Ct. 57; Currie v. Lewiston, 15 Fed. 377; Rondot v. Rogers Township, 99 Fed. 202, 39 C. C. A. 462; Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753, affirming 140 Fed. 89; Potter v. Lainhart (Fla.), 33 So. 251; Clarke v. Sup'rs of Hancock County, 27 Ill. 305.

50—Morrison v. Inhabitants of Township of Benard's, 36 N. J. L. 219; Rahway Savings Institution v. City of Rahway (N. J.), 20 Atl. 756; Town of Queensbury v. Culver, 19 Wall. 83; German Insurance Co. v. City of Manning, 78 Fed. 900; Potter v. Lainhart (Fla.), 33 So. 251; Thompson v. Village of Mecosta (Mich.), 86 N. W. 1044; Brownell v. Town of Greenwich, 114 N. Y. 518.

51—Houston v. People, 55 Ill. 398; see, also, Bissell v. Spring Valley, 110 U. S. 162.

52—Melvin v. Lisenby, 72 Ill. 63.

Town Council of Lexington v. Union National Bank (Miss.), 22 So. 291. The same rule applies as to coupons.

53—Bissell v. Spring Valley, 110 U. S. 162.

ing. A lithographed or typewritten signature, and this is especially true in the case of coupons attached to the bond; if authorized and adopted by him as his official act is sufficient. Where there has been an irregularity or a defective execution of securities if in other respects they are valid, upon application of a bond holder, a court of equity will afford relief and direct a proper execution and the validity of bonds will not be affected thereby.[54]

It might be stated generally in respect to all the formalities attendant upon the execution of securities that irregularities will not affect the validity where the directions of the statute are not of the essence of the thing to be done, and where a failure to observe the rights of those interested will not be prejudiced. Such statutory directions are not regarded as mandatory but as merely directory only, and a change will not affect the validity of the bonds when in all other respects the power to issue exists and no greater burden is imposed upon the taxpayers. They cannot complain.[55]

§ 169. Weyauwega v. Ayling.

In this case,[56] the bonds of a town bore date June 1st, and were signed by A. as chairman of the board of supervisors, by B. as town clerk and were delivered by A. to a railroad company. When sued on coupons by a bona fide purchaser of the bonds for value before maturity, the town pleaded that the bonds were not in fact signed by

54—Melvin v. Lisenby, 72 Ill. 63; Town Council of Lexington v. Union National Bank (Miss.), 22 So. 291.

55—Curtis v. County of Butler, 24 How. 435; City of Gladstone v. Throop, 71 Fed. 341.

German Insurance Co. v. City of Manning, 78 Fed. 900. A municipality is estopped to deny the authority of city officials who have in fact signed municipal bonds. Sutherland Stat. Construction, Sec. 447; E. M. Darby & Co. v. City of Modesta (Calif.), 38 Pac. 900; Lane v. Inhabitants of Embden, 72 Me. 354; Coler v. Santa Fe County Com'rs, 6 New Mexico, 88, 27 Pac. 619; Statesville Bank v. Statesville, 84 N. C. 169; Carriger v. Morristown, 1 Lea (Tenn.) 243.

56—99 U. S. 112.

B. until July 13th at which date he had ceased to be a town clerk and his successor was in office. It was held, Chief Justice Waite, delivering the opinion of the court, that the town was estopped from denying the date of the bonds because in the absence of evidence to the contrary it must be assumed that the bonds were delivered to the company by A. with the assent of the then town clerk.

§ 170. Anthony v. County of Jasper.

In this case, also decided by the Supreme Court of the United States,[57] the court distinguished it from Weyauwega v. Ayling and said that in the latter case, it was held that the town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office because the clerk in office adopted the signature as his own when he united with the chairman in delivering the bonds to the railroad company. While in the case under consideration, the bonds were not complete in form when they were issued and it was only by a false date that they were apparently so.

§ 171. Coler v. Cleburne.

In a latter case in the same court,[58] it appeared that bonds were issued by the city of Cleburne under a statute which required that the bonds of the city "shall be signed by the mayor" and forwarded by him to the comptroller of public accounts of the state for registry. The bonds in question were dated January 1, 1884, and issued pursuant to a valid ordinance which provided that they be signed by the mayor and the city secretary. The term of the mayor in office January 1st, the date of the bonds, expired in April following and a new mayor was elected at that time, the city secretary remaining in office. The bonds were not signed until July, 1884, and were then

57—101 U. S. 693. 58—131 U. S. 162.

signed by the former mayor and the city secretary who had remained in office. Hodge, the former mayor, signed the bonds pursuant to a resolution of the city council adopted in July, 1884. The suit was brought by W. N. Coler, a bona fide holder, to recover on some of the coupons cut from the bonds and the city interposed a plea of non est factum. The bonds were issued for a lawful purpose, and the city received their full benefit. The plaintiff contended that the defendant was estopped to set up the defense stated because the bonds were signed by the then mayor and upon their face they were apparently regular and signed by the person who was mayor at their date and further that they had been forwarded by him for registration as required by statute; that he was not bound to look beyond the bonds themselves and the enabling acts authorizing their issue, and that if there was lawful authority to issue them and the city appeared to have acted upon that authority, he was not obliged to inquire further no matter what irregularity characterized the acts of the officers who issued them on behalf of the city. That an examination of the statute and the ordinance would show authority to issue the bonds; that the records of the city would show that the persons who signed the bonds were the mayor and the secretary of the city on the 1st of January, 1884, the date of the bonds; that the endorsement on each bond would show that they had been registered by the comptroller and that he had a right to assume that the bonds had been forwarded to the comptroller by the mayor as provided by the statute or otherwise the comptroller would not have registered them. The court said in part: "But we have always held that even bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September

13, 1883, until July 3, 1884; that W. N. Hodge was not mayor on that date; and that the person who then signed the bonds as mayor was a private citizen." The court then distinguished Anthony v. County of Jasper, 101 United States 693 and Weyauwega v. Ayling, 99 United States 112, and held that the case under consideration was to be decided according to the principles of Anthony v. County of Jasper. The decision held in substance that where a statute provides that the bonds of a city shall be signed by the mayor they must be signed by the person who is mayor of the city when they are signed and not by any other person and that the city council cannot authorize them to be signed by another person; that bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them and that a public agent cannot bind his principal under powers that have been taken away by simply antedating his contracts. That under such circumstances a false date is equivalent to a false signature and the public in the absence of any ratification of its own is no more estopped by the one than it would be by the other.

§ 172. Sealing.

The validity of securities as dependent upon the affixing of the corporate seal is determined largely by the character of statutory provisions in this respect whether mandatory or merely directory; if mandatory, it is essential that the seal be affixed.[59]

If no express statutory provision exists or if one is to be found but merely directory in character, the omission

59—Mercer County v. Hackett, 1 Wall. 83. The negotiability of bonds is not affected by the fact that they bear the corporate seal. Avery v. Springport, 14 Blatchf. 272. Coupon bonds not sealed but showing by their wording that sealing was intended are void. City of San Antonio v. Gould, 24 Tex. 42.

of a seal is immaterial if in other respects the bonds are proper both as to form and execution.[60]

It is also true that an irregularity in this respect can be cured by a court of equity and it is not necessary where a statute provides that bonds should be issued by township commissioners "under their hands and seals respectively" that the bonds be sealed with the corporate seal of the township.[61]

In the case of Bernard's Township v. Stebbins,[62] which was a suit in equity for the reformation of township bonds to which no seal had been affixed and to enjoin the township from setting up as a defense the want of such seal, it was contended with other objections that the bonds were void because they were not under the seal of the commissioners as required by the statute. The court held in part and a fairly full quotation is made from the opinion in the case because of its applicability to other irregularities and informalities;

"It has been settled, upon fundamental principles of equity jurisprudence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out his intention, will, at the suit of those who

60—San Antonio v. Mehaffy, 96 U. S. 312.

Draper v. Springport, 104 U. S. 501. The technical form of the obligation was a matter of form rather than substance. The issue of the bonds under seal as contra-distinguished from bonds or obligations without seal was merely a directory requirement. Rondot v. Rogers Township, 99 Fed. 202 C. C. A.; Stockton v. Powell (Fla.), 10 So. 688; Augusta Savings Bank v. City of Augusta, 56 Me. 176; Wiley v. Board of Education, 11 Minn. 371; Gould v. Venice, 29 Barb. (N. Y.) 442; People v. Mead, 24 N. Y. 114; Kelly v. McCormack, 28 N. Y. 318; Board of Education v. Fonda, 77 N. Y. 350; Thornburgh v. City of Tyler (Tex.), 43 S. W. 1054; Morton v. Carlin, 51 Nebr. 202.

61—Smythe v. Inhabitants of New Providence Township, 158 Fed. 213; Bernard's Township v. Stebbins, 109 U. S. 341; City of Defiance v. Schmidt, 123 Fed. 1 C. C. A., affirming 117 Fed. 702.

62—109 U. S. 341.

are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law.

"It was argued that the power conferred upon the commissioners to issue bonds was a statutory power, defects in the execution of which could not be supplied or relieved against in equity. There is much learning on this subject in the books. But, Mr. Chance, upon a full review of the older cases, has clearly demonstrated that the true ground upon which equity grants relief is 'the same as that on which it relieves against the want of livery, the want of enrolment, or any other ceremony required, either at common law or by statute, but considered as not meant to be positively essential. The main point to be ascertained, at least with reference to forms prescribed by act of Parliament, is whether the legislature has attached a decisive weight to the observance of the forms.'

"The bonds are in other respects in the form prescribed by the statute. The commissioners intended to issue them in behalf of the town, pursuant to the statute, and stated on the face of the bonds that they had done so, and that they had thereto set their hands and seals. The town received full consideration for the bonds, and the purchaser bought them in open market, in good faith and for value, and in ignorance of the want of seals. These facts present a strong case for the interposition of a court of equity, having jurisdiction of the cause and of the parties, to prevent the formal defect of the want of the seals of the commissioners from being set up to defeat an action at law upon the bonds or coupons. The mere fact that the purchasers, at the time of their purchase, did not observe the omission of seals upon securities having in all other respects the appearance of municipal bonds, is not such negligence as should prevent

them from applying to a court of equity to correct a mistake of this character."

The court held that the plaintiff could maintain the bill and was entitled to the relief prayed for.

The presumption exists that the seal attached is the corporate seal and not the private seal of the agent[62a] and in a New York case[63] where an action was brought by a town to compel a bank to surrender bonds because they were not sealed by the commissioners when they issued them as required by statute, it appeared from the evidence that at the time of their execution seals were not affixed but that subsequently and before their sale some persons unknown completed the formal execution by affixing wafer seals opposite the names of the officers signing them. The court refused to compel their surrender and held that the general rule in respect to a material alteration in a written instrument after its execution "is not necessarily applicable to a defendant in an action brought to have a security held by him cancelled upon that ground when it appears that such defendant is in no sense chargeable with mala fides in that respect. Our attention is called to no authority going to that extent and the proposition does not seem to commend itself to a court of equity which is opposed within recognized bounds to exercise discretionary powers in such cases." It was further held that a court of equity would afford the necessary relief and direct the affixing of the seal to the bonds.

§ 173. Registration.

In some states either by constitutional or statutory provision it is required that an issue of bonds be for-

62a—Miller v. Superior Machine Co., 79 Ill. 450; Memphis v. Adams, 9 Heisk (Tenn.) 553; Fidelity, etc. Co. v. Shenandoah, etc. Co., 32 W. Va. 244.

63—Town of Solon v. Williamsburg Savings Bank, 114 N. Y. 22, 21 N. E. 168, 35 Hun. 1; see also Armfield v. Town of Solon, 19 N. Y. S. 44.

warded to some designated official generally an officer of the state for registration or endorsement [64] and in some cases copies of the proceedings are also required to accompany the bonds and the officer to whom sent for registration or record is charged not only with the duty of registering them in his office but also of passing upon the legality of the proceedings and of issuing a certificate in respect to the validity of the bonds,[65] the effect of a compliance with the requirements noted is to make bonds unimpeachable in the hands of bona fide purchasers [66] and it also logically follows that the validity of bonds where there has been a failure to secure the certificate or registration as provided by statute is not unassailable.[67]

64—Kan., General Statutes, 1909, Secs. 579, et seq ; Mo., Revis. Stats., 1909, Secs. 1268, 1274-1279 and 9606; Neb., Const., Art. XII, Sec. 2; N. D., Const., Art. XII, Sec. 187; Okla., Const., Art. X, Sec. 29; see also Gen. Stats. 1908, pp. 301, et seq. and Laws of 1911, c. 80; S. Car., Const., Art. X, Sec. 11; Tex., Sayles' Tex. Civil Stats., 1898, Art. 469, et seq.; Wyo., Const., Art. XVI, Sec. 8; Ontario, Revised Stats. of Ontario, 1897, p. 2490, Secs. 396, et seq.; see also the following section.

Prickett v. Marceline, 65 Fed. 469. The dating of such record is not the time when the municipal indebtedness is incurred but the date of the execution and issue of the bonds.

65—Garden City, etc. R. R. Co. v. Nation, 82 Kan. 345, 108 Pac. 102. The auditor of the state under the act relative to registering railroad aid bonds cannot require a showing that the holder has expended money equal in amount to their face value for right of way and terminal facilities in the city which issued them. Pollock v. City of San Diego (Calif.), 50 Pac. 760.

66—Converse v. Fort Scott, 92 U. S. 503; Marcy v. Town of Oswego, 92 U. S. 637; Humboldt Township v. Long, 92 U. S. 642; Lewis v. County Com'rs, 105 U. S. 739; Harper County v. Rose, 140 U. S. 71; City of Cairo v. Zane, 149 U. S. 122; Flagg v. School Dist. No. 70 (N. D.), 50 N. W. 499.

Martin County v. Gillespie County (Tex.), 71 S. W. 421. Under the statute the attorney general's certificate cuts off all defenses except forgery and fraud; but see Bissell v. Spring Valley Township, 110 U. S. 162, distinguishing Lewis v. Com'rs, 105 U. S. 739.

67—Anthony v. County of Jasper, 101 U. S. 693; Young v. Clarendon Twp., 132 U. S. 340; Frank v. Butler County (Nebr.), 139 Fed. 119; State v. Roggen (Nebr.), 34 N. W. 108.

State v. Babcock, 19 Nebr. 223. The provisions of the Nebraska Constitution requiring the certificate of the state auditor and secretary on municipal internal improvement

The effect, however, of registration or certification will depend largely upon the purpose of the law requiring this to be done. If this is merely to afford a ministerial and clerical record of bonds issued, their validity can be attacked. The registration or certification is not conclusive upon this point. [68]

If, on the other hand, the language of the statute as well as its purpose indicates the proceedings to be of a quasi judicial character, a certification by the official with the act of registration will operate substantially as a judgment upon the questions within his jurisdiction and they will be regarded as a res adjudicata.[69]

bonds is imperative and self-enforcing. State v. McMillan (N. D.), 96 N. W. 310, construing Const., N. D., Sec. 187.

68—Dixon County v. Field, 111 U. S. 83. The fact that municipal bonds have been duly registered, and a certificate indorsed upon them stating that they are issued according to law, does not preclude the municipality from asserting their invalidity, the provision of law requiring registration and a certificate not having declared the effect thereof to be concluslve as to the validity of the bonds.

German Savings Bank v. Franklin County, 128 U. S. 526. The registration of the bonds by the state auditor has nothing to do with the nature of the terms and conditions on which the stock was voted and subscribed. Neither the registration nor the certificate of the registrar conveys or certifies any fact as to the compliance with the conditions prescribed in voting on which alone the bonds were to be issued.

69—Converse v. Ft. Scott, 92 U. S. 503; Marcy v. Town of Oswego, 92 U. S. 637; Humboldt Township v. Long, 92 U. S. 642; Menasha v. Hazzard, 102 U. S. 81.

Hoff v. Jasper County, 110 U. S. 53. The act providing for registration does not contravene the constitution of Missouri on the alleged ground that it delegated the exercise of judicial power to an executive officer of the state.

Crowe v. Oxford, 119 U. S. 215. The certificate of the state auditor is not conclusive when made in respect to bonds as to which he had no authority to register and certify. Garden City R. R. Co. v. Catron, 82 Kan. 345, 108 Pac. 102; but see German Savings Bank v. Franklin County, 128 U. S. 526.

State ex rel. Carrollton School District, etc. v. Gordon (Mo.), 133 S. W. 44. The term "obtain validity" means to become clothed with validity as a present and subsisting obligation and the term "negotiated" means that the bonds should have been sold and put into circulation by delivery in consummation of the sale; construing these words as used in the revised statutes of Missouri, 1909, Sec. 1275, which

Where bonds, as a matter of fact, have been presented and examined as required by law, the neglect or failure of officials charged with the duty either of registering them or of certifying that conditions required as precedent to their issue have been complied with does not necessarily invalidate the bonds.[70] The provisions for registration may not apply to all bonds authorized to be issued by subordinate public corporations.[71]

When statutes require the forwarding by certain designated officials of bonds for registration or certification, they are generally construed to mean that they must be forwarded by the person who occupied the official position specified at the time the securities were signed.[72] The form of the certificate required when given in the statute if substantially followed and executed by the officials designated is sufficient,[73] following the usual rule

provides that before any school bonds "shall obtain validity or be negotiated such bonds shall be first presented to the state auditor who shall register the same," etc. Flagg v. School Dist. No. 70 (N. D.), 50 N. W. 499.

70—Town of Rock Creek v. Strong, 96 U. S. 271. In an action on bonds where the defendant offered to show that no registration existed although the certificate of the state auditor appeared upon them, the court said: "We cannot think this evidence, if admitted, could in any degree avail the defendant. The certificate of that officer endorsed on the bond was all that was required for the holder of them. If the state auditor failed to make in his office an entry of his action, we do not perceive how his failure in this respect can invalidate bonds upon which he has certified a registration." Comanche County v. Lewis, 133 U. S. 198.

Com'rs. of St. Louis County v. Nettleton, 23 Minn. 256. Failure to register bonds with the auditor of the state will not prevent a board of commissioners from making provision for the payment of interest upon them.

Frank v. Butler County (Nebr.), 139 Fed. 119. A bond holder held barred by laches after a lapse of thirteen years from enforcing equitable rights involving registration of bonds.

71—Anthony v. County of Jasper, 101 U. S. 693. The act requiring the registration by the state auditor of bonds issued by counties, cities, etc., extends to township bonds issued by county courts. Brownson v. Smith, 93 Tex. 614, 57 S. W. 570.

72—Coler v. City of Cleburne, 131 U. S. 162; Martin County v. Gillespie County (Tex.), 71 S. W. 421.

73—In re Menefee (Okla.), 97

that informalities or irregularities not of the essence of the act to be done will not affect the validity of the securities.

§ 174. Official validation.

In several of the states, notably in Colorado,[74] Georgia,[75] Idaho,[76] Nebraska,[77] and New York,[78] laws have been passed which provide in effect that where an issue of bonds has been made, the public corporation issuing them or any party interested may by a petition or otherwise as provided by law addressed to the official or the court designated in the law have the issue or the proceedings connected therewith officially and judicially determined as valid. In some of the states named the provisions refer especially to irrigation districts and the securities issued by them. Upon the filing of a proper pe-

Pac. 1014. The certificates of the auditor and attorney general as required by Const., Art. 10, Sec. 29, need not be jointly executed but are equally valid when separately signed by such officers.

Hardeman County v. Foard County (Tex.), 47 S. W. 30. Bonds are not invalidated when payable "to bearer" but described in their registration as payable to the "State of Texas" since the statute does not prescribe what the registration shall contain.

74—Colorado Laws, 1901, p. 198 c. 87; Ahern v. Board of Directors of Highline Irrigation Dist., 89 Pac. 965.

75—Acts of 1897, p. 8; Van Epp's Code Supp., Secs. 6074-6081.

76—Rev. Codes, 1901, Secs. 2401, et seq.; Emmett Irrigation District v. Shane (Idaho), 113 Pac. 44, construing Revised Codes, 1905, Secs. 2401, et seq.

77—Laws of 1899, p. 59, c. 8, commonly known as the refunding bond act and Laws of 1895, c. 70, Secs. 59, et seq., Compiled Stats., 1897, c. 93a, Art. 3, Secs. 59, et seq., relating to irrigation districts.

Colburn v. McDonald (Nebr.), 100 N. W. 961. In proceedings to determine the validity of county bonds under the refunding bond act so-called, the supreme court will not on appeal determine the effect of the decision as to innocent purchasers of the bonds who are not parties to the record.

Wyman v. Searle (Nebr.), 128 N. W. 801. The exchange of irrigation district bonds for property is not authorized by laws of 1895, c. 70, Sec. 59, et seq.

78—Acts of 1911, p. 2044, Chap. 769, providing for the legalization of municipal bonds by the Supreme Court.

tion by the board of directors of an irrigation district in special proceedings not only may the validity of the bonds proposed to be issued be determined but also as preliminary question the validity of the organization of the district itself.[79]

§ 175. Georgia cases.

The Georgia statute providing for the official validation of negotiable securities issued by public corporations has been cited in a preceding note and a number of cases will now be referred to passing upon the validity of this law, the circumstances under which it becomes operative and its effect upon the validity of the bonds as final and conclusive. It must affirmatively appear that the issue was sanctioned by two-thirds of the qualified voters of the municipality issuing the bonds,[81] and if the conditions required for the legal issue of the bonds for instance, the publication of the notice of election for the required time have not been complied with, a judgment should be entered declaring the election invalid accompanied by refusal to validate the bonds.[82]

One interposing objections on facts which do not appear in the pleadings must prove their truth and unless this is done, the objection should be over-ruled.[83] Where in the validation proceedings the municipality is described in the caption as "the town of Louisville, Jefferson County," and there is no such municipality but there is one with the corporate name, "City of Louisville," the notice is sufficient. The misnomer will not vitiate the judgment of confirmation especially where the officers of

79—Ahern v. Board of Directors of Highline Irrigation District (Colo.), 89 Pac. 963. Emmett Irrigation District v. Shane (Ida.), 113 Pac. 444, construing Revised Codes, 1905, Secs. 2401, et seq.

81—Smith v. City of Dublin (Ga.), 39 S. E. 327.

82—Davis v. Dougherty County, 42 S. E. 764.

83—Epping v. City of Columbus, 43 S. E. 803; see also Spencer v. City of Clarkesville, 59 S. E. 274.

the city appeared and the judgment in the proceeding set forth the proper corporate name.[84]

A provision for an annual tax under Civil Code of 1895, Sec. 5894, must be made after validation and before the bonds can actually be negotiated and the debt incurred.[85]

An answer admitting all of the allegations set forth in the petition for validation is not subject to demurrer.[86]

The judgment of validation and confirmation pursuant to the Georgia statutes is conclusive and bonds cannot thereafter be declared invalid on the ground of irregularities in the performance of conditions required for the conferrance of authority. The method declared by this statute whereby the validity of bonds may be judicially investigated and determined before issue does not contravene Const. Art 1, Sec. 1, Par. 3 on the ground that it seeks to deprive citizens of a municipality of their property without due process of law by excluding future investigation as to the validity of bonds after a judgment of validation and confirmation authorized in such proceedings.[87]

After the judgment of validation, an objection by a taxpayer to the regularity of the notice of election comes too late; and the fact that no contest is made by the municipality to validation proceedings does not necessarily make the judgment void as being collusive.[88]

It is not necessary that the hearing in validation proceedings should be had in the county where the bonds are to be issued but by order of court it may be held in another county of the same judicial circuit.[89]

84—Rhodes v. City of Louisville, 49 S. E. 681.

85—Woodal v. Adel, 50 S. E. 102.

86—Spencer v. City of Clarksville, 59 S. E. 274.

87—Lippitt v. City of Albany, 63 S. E. 33. The form of the notice to be served upon the solicitor general was also passed upon in this case and the court further holds that it is not the purpose of the act to validate invalid or irregular bonds.

88—Farmer v. Town of Thompson, 65 S. E. 180.

89—Farmer v. Town of Thompson, 65 S. E. 180.

The endorsement of the Clerk of the Circuit Court of the county proposing to issue the bonds of "filed" on papers in the proceedings is not necessarily insufficient because made by him when he was out of his office and out of that county.[90]

§ 176. Delivery.

Delivery is the final step necessary to perfect the legal existence of any written contract and the rule therefore necessarily applies to negotiable securities as a particular form of written contract. The execution in the proper form of such issue is not alone sufficient even where there is no question of authority and the steps necessary for the issue have been not only substantially but technically taken. They must be delivered by the proper officials to those for whom they are intended and if not so obtained the holder can secure no title which can be enforced.[91] While this rule applies without question to the original holder or one with notice of a legal infirmity as to delivery, it will not be applied to a bona fide holder without notice of the defect as to delivery. The weight of authority as to the validity of a negotiable instrument which by fraud or inadvertence has passed into the hands of holders for value without notice of the manner in which it was put into circulation is that the makers are bound although they did not intend that the instrument should be put into circulation. The want of legal delivery is not a defect apparent upon its face and where the maker has given to it all the appearance of delivery, if one of two innocent parties is to suffer he who has put it

90—Hogan v. State, 67 S. E. 268.

91—Yonng v. Clarendon Township, 132 U. S. 340; Perkins County v. Graff, 114 Fed. 441; State v. Suwanee County, 21 Fla. 1; Portsmouth Savings Bank v. Village of Ashley (Mich.), 52 N. W. 74; Prairie School Township v. Haseleu, 3 N. D. 328, 55 N. W. 938.

into the power of the third party to produce this condition ought to bear the loss.[92]

In accordance with this rule, it has been held in a number of cases where through neglect or fraud negotiable securities have passed into the hands of innocent purchasers for value that they are valid and the principle has been extended to apply in instances where negotiable instruments before delivery have been stolen and eventually have passed into the hands of bona fide holders for value.[93]

Bonds with coupons payable to the bearer are negotiable securities and pass by delivery and the possession of them carries the title with it to the holder. The possession and title are one and inseparable.[94]

So long as the bonds remain undelivered it has been repeatedly held that equities between the parties who

92—D'Esterre v. City of New York, 104 Fed. 605.

Town of Prairie v. Lloyd, 97 Ill. 180. Where a town has ample authority for issuing its bonds to a certain railroad company as a donation or subscription, and the bonds are executed in proper form and made payable to the proper company, but are delivered to the secretary of a new company and there is nothing pertaining to them, or which could have been ascertained from the record, indicating their delivery to one not entitled to receive them, the bonds cannot be held invalid by reason of such alleged improper delivery after they have passed into the hand of innocent holders. Kinyon v. Wohlford, 17 Minn. 215 (Gill 239); Borough of Montvale v. Peoples Bank (N. J.), 67 Atl. 67.

City of Jefferson v. Marshall National Bank (Tex.), 46 N. W. 97. Delivery is sufficiently proved by the date on a receipt given for city bonds which coincides with the minutes of the city council. Jones v. City of Seattle, 19 Wash. 699; see also Barnard v. Campbell, 55 N. Y. 456.

93—Murray v. Lardner, 2 Wall. 110; Cooke v. United States, 12 Blatchf. 49, Fed. Cas. 3178; Worcester County Bank v. Dorchester, etc. Bank, 10 Cush. 448; Shipley v. Carroll, 45 Ill. 285; McCurdy v. School District No. 1 (Mich.), 86 N. W. 803; Cooper v. Jersey City, 44 N. J. L. 634; City of Jefferson v. Jennings Banking & Trust Co. (Tex.), 79 S. W. 876; but see Germania Savings Bank v. Village of Suspension Bridge, 73 Hun. (N. Y.), 590.

94—Murray v. Lardner, 2 Wall. 110, following Swift v. Tyson, 19 Pet. 1, and Bank of Pittsburg v. Neal, 22 How. 96; Thompson v. Lee County, 3 Wall. 327.

may be entitled to receive them and the public corporation issuing them can be investigated and determined by the courts which cannot be so considered or determined after delivery,[95] and the possession by a bona fide holder of negotiable paper carries the title with it to the holder. The character of bonds with coupons payable to bearer as negotiable securities has been unquestionably established subject to and protected by all of the principles applying to such instruments.[96]

It is to be noted, also, that delivery may be constructive, as well as actual, through the manual passing of the instrument, by direction to a third party who is in actual custody thereof to hold it subject to the order of the payee or the transferee and its delivery to a third person for the payee without condition is a sufficient delivery in legal contemplation.[97]

The authority of officials of public corporations is limited and ordinarily the rule applies that to perfect a technical delivery it should be made only by those authorized,[98] but the courts have held, as modifying this doctrine that where bonds have been delivered in violation of special conditions of which the purchaser had no notice or knowledge either from the statutes or otherwise or where the delivery is within the power and official authority of the public officials so acting either as especially or generally conferred that the remedy of the public corporation is not against the bona fide holders

95—Allesandro Irrigation District v. Savings & Trust Co., 88 Fed. 928.

96—Washington County v. David (Nebr.), 89 N. W. 737. See chapter X post.

97—Daniels Negotiable Instruments, 5th Ed., Sec. 63a.

98—Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753, affirming 140 Fed. 89. A provision that railroad aid bonds should be delivered by the Board of Trustees was directory merely and a delivery by the Board of Com'rs of the County would not invalidate them. Portsmouth Savings Bank v. Village of Ashley (Mich.), 52 N. W. 74; Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044; Satterlee v. Strider, 31 W. Va. 781, 8 S. E. 552.

or purchasers of the securities but against its own unfaithful or negligent officials.[99]

Irregularities in the delivery of securities not affecting the essence of the issue will not invalidate them,[1] and where the right to issue and deliver has accrued before the taking of effect of constitutional or statutory provisions of a prohibitory character such provisions will not destroy the right to make a subsequent delivery of the securities.[2]

The delivery of securities in some cases has been held to constitute a material and an essential part of their technical "issue" or "issuance" and this is not regarded as complete until the delivery is made though other authorities hold to the contrary and still others hold that the term "issue" applies only to the delivery.[3]

§ 177. Young v. Township of Clarendon.

As illustrative of the principle that the act of delivery is essential to the existence of a bond as an enforcible

99—Brooklyn v. Insurance Co., 99 U. S. 362; Menasha v. Hazzard, 102 U. S. 81.

Ledwich v. McKim, 53 N. Y. 314. The court in speaking of the implied authority of an agent to deliver or put in circulation a negotiable instrument said: "But this authority is not implied from the fact alone, that the paper is in hands other than those of him who is to be bound, but from that fact joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation;" but see Thomas v. Morgan County, 39 Ill. 496; Com'rs of Knox County v. Nichols, 14 Ohio 260.

1—Meyers v. City of Muscatine, 1 Wall. 384; Com'rs of Marion County v. Clark, 94 U. S. 278; Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753, affirming 140 Fed. 89.

Lake County Com'rs v. Linn, 29 Colo. 446, 68 Pac. 839. The exchange of invalid warrants for bonds duly authorized does not invalidate such bonds in the hands of bona fide purchasers. Town of Prairie v. Lloyd, 97 Ill. 180; Town Council of Lexington v. Union National Bank (Miss.), 22 So. 291; City of Marshall v. Marshall National Bank (Tex.), 46 S. W. 97.

2—Hackett v. Tyrrell (N. C.), 68 S. E. 202; Town of Cherry Creek v. Becker, 2 N. Y. S. 514.

3—See cases cited in Sec. 164.

demand, a case in the Supreme Court of the United States is frequently cited.[4] The legislature of Michigan by an Act of March 22, 1869, authorized the issue of bonds by a township in aid of a railroad company and which provided that the bonds should be "executed by the supervisor and clerk," and delivered to the state treasurer who would receipt therefor and hold the same as a trustee for the township and the company, to be disposed of upon the Governor's certificate that the company in aid of which they had been issued had complied with the provisions of the act and was entitled to the bonds or any of them. If the bonds were not demanded of the state treasurer within three years after their receipt by him, they were to be cancelled and returned to the proper township officers. Bonds were issued pursuant to this act and delivered to the state treasurer but no demand was made for them owing to the refusal of the Governor to give his certificate which refusal was based on a decision of the state Supreme Court that the act was unconstitutional. Within a few days of the expiration of the three years from the date of their delivery to the treasurer as stated above they were cancelled by him and returned to the township officers. Over twelve years after the date of their return the appellant obtained judgment against the railroad company and an execution was returned nulla bona. On the 24th of February, 1885, or nearly thirteen years after the date of the return of the bonds by the state treasurer to the township authorities the appellant filed a bill in equity against the township and the company claiming that the township was equitably indebted to the company to the amount of the bonds and coupons with interest and that he was entitled to recover the amount of the debt. The court held that whatever rights the company had in the premises were lost by laches in fail-

4—Young v. Township of Clarendon, 133 U. S. 340.

ing to assert them until nearly thirteen years after the surrender of the bonds. The Michigan statutes of limitations affecting the right to sue varying from six to ten years. It was also held that: "The bonds were to be 'executed;' that is to say, written or printed, signed and sealed, by the supervisor and clerk of the township. Here the powers of those persons ceased. They could not perfect the instruments by delivery. The word 'executed,' used in the statute in connection with the acts mentioned, manifestly does not impart the *final* delivery; for that is expressly directed to be done by the treasurer. Such delivery as they could make was clearly not the technical delivery needed to complete the bonds as negotiable instruments, because the power to hand over to the payee was not conceded to them in any event." And also that to the Governor, and the Governor alone, was given the power to determine whether the bonds should ever in fact issue, and if issued, when; that his certificate in this respect was to be conclusive upon the state treasurer and that finally, since the bonds were never endorsed and delivered by the treasurer as required by the statute, they never became operative. The act of delivery, the court held, was essential to the existence of any debt, bond or note, which although drawn and signed, so long as it is undelivered, is a nullity—not only does it take effect only by delivery but also, only on that delivery.

§ 178. Bonds in escrow.

Negotiable securities may be delivered in escrow, that is, delivered to a third party not the payee, to hold until a certain event happens or certain conditions are complied with, the liability of the maker to commence as soon as the event happens or the conditions are fulfilled either with or without an actual delivery by the depositary to the payee. A delivery of this character frequently occurs in an issue of railroad aid bonds which are

placed in the hands of some depositary to take effect upon the performance of certain conditions, generally the completion of the railroad to a specified extent.

The authorities are at variance as to the validity of the bonds when delivered by the depositary before the performance of the conditions required or the happening of the contingent event. Some hold that where by the statute the depositary holding them in escrow is charged with the duty of ascertaining and adjudging the performance of the condition or the happening of the contingent event, a delivery by him of the securities to a bona fide holder will be conclusive although the conditions have not been performed or the contingent event has not happened; that the depositary is under such conditions the agent of the public corporation and responsible to it for the manner in which his duty is discharged.[5]

On the other hand, there are cases which hold that a public corporation is not estopped from showing that conditions have not been complied with under the circumstances noted and especially will this rule obtain if the purchasers have notice by the statute that the lawful delivery of the bonds was subject to the performance of the conditions required.[6]

The latter rule unquestionably applies where the depositary is not charged by law with the duty of determining whether the conditions have been performed and the requirements of the law complied with.[7]

5—Lewis v. Barbour County Com'rs, 105 U. S. 739. The certificate of delivery to the proper official is conclusive as to this fact.

Provident Life & Trust Co. v. Mercer County, 170 U. S. 593. The trustee held in this case to be the agent of the county and responsible to it for the manner in which he discharged his duty. Pickens Township v. Post, 99 Fed. 659; Estill County, Kentucky v. Embry, 144 Fed. 913; Schmid v. Village of Frankfort (Mich.), 91 N. W. 131.

6—Mercer County v. Provident Life & Trust Co. of Philadelphia, 72 Fed. 623; W. Va. & P. R. R. Co. v. Harrison County Court (W. Va.), 34 S. E. 786.

7—Mercer County v. Provident

If certain conditions are required to be performed by those entitled to the bonds the delivery can be delayed until such conditions or obligations are performed and this delay unless otherwise provided by law does not render void such bonds upon the performance of the conditions. Delivery should then be made and can be demanded from the corporate officials.[8]

8—County of Henry v. Nicolay, 95 U. S. 619; Perkins County v. Graff, 114 Fed. 441; Thomas v. County of Morgan, 59 Ill. 479; Town of Eagle v. Kohn, 84 Ill. 292.

Life & Trust Co. of Philadelphia, 72 Fed. 623.

CHAPTER VIII.

COUPONS

§ 179. The payment of interest.

In common with others belonging to the unfortunate class of debtors, from public corporations is required the payment of interest, "that constant, distinguishing, most irksome and disagreeable feature of indebtedness."

Unless the authority to incur the indebtedness provides otherwise, it is immaterial whether this is paid annually or semi-annually. No objection can be made to the validity of bonds where a statute fixes the rate of interest per annum if provision is made for its payment at lesser intervals. The parties may lawfully contract for the payment of the interest at the rate fixed before the principal debt becomes due and at periods shorter than one year.[1]

1—Com'rs of Marion County v. Clarke, 94 U. S. 278; Wilson v. Neal, 23 Fed. 129; Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753, affirming 140 Fed. 89; California Bank v. Dunn, 66 Calif. 38; E. M. Derby & Co. v. City of Modesta, 104 Calif. 515, 38 Pac. 900; City of Bridgeport v. Housatonic R. R. Co., 15 Conn. 475.

State v. Hart, 46 La. Ann. 54, 14 So. 430. One who collects from the state interest on coupons clipped from void bonds with knowledge of their invalldity must make restitution to the state.

Com'rs of St. Louis County v. Nettleton, 22 Minn. 356. Interest may be provided for by county commissioners although the bonds have not been registered with the auditor of state as provided by law.

Coler v. Board of Com'rs of Santa Fe County (N. Mex.), 27 Pac. 619. Any rate of interest as fixed by vote of electors is valid in the absence of a usury statute.

Commonwealth v. Com'rs of Allegheny County, 32 Pa. 218. Although bonds were issued and sold for less than par in violation of the statute authorizing them, means for the payment of the accruing interest must be provided by the county issuing them.

Nelson v. Haywood County

There is usually no obligation resting upon a public corporation to pay interest upon securities before their issue.[2] From the date of issue until its maturity, this obligation does exist in the manner and upon the terms specified in the evidences of indebtedness.[3] After maturity the cases differ though the weight of authority is to the effect that in the absence of statutory provisions to the contrary the securities bear interest until paid at the rate specified or that determined by the general laws of the state.[4]

§ 180. Rate.

The rate of interest to be paid may be fixed at a stated maximum in the authority conferring the power to issue the securities or this may be left to the discretion of officials charged with the public duty of issuing the obligations; if the latter condition exists, arrangements made by the officials with creditors in respect to the rate to be paid cannot be interfered with by the courts and the

(Tenn.), 11 S. W. 885, 3 Pick 781. Bonds are not void for usury which bear interest at the legal rate where payable which is in another state and where the legal rate is greater than in Tennessee.

Morrell v. Smith County (Texas), 33 S. W. 899. The amount of coupons paid before railroad aid bonds were purchased cannot be deducted in a subsequent action to recover on the bonds from the amount of the principal due.

2—United States v. County of Clark, 95 U. S. 769; Com'rs of Sinking Fund of Louisville v. Zimmerman, 41 S. W. 428.

3—Yesler v. City of Seattle, 1 Wash. St. 308, 25 Pac. 1014. The citation of authorities on this proposition is unnecessary.

4—Kendall v. Porter (Calif.), 45 Pac. 333. The fact that interest coupons attached to bonds do not extend beyond their maturity, does not raise the presumption that the bonds were not intended to bear interest after maturity. Ellis v. Witmer (Calif.), 66 Pac. 301; People v. Getzendaner, 137 Ill. 234, 34 N. E. 297; but see United States v. State, 136 U. S. 211. A state cannot be compelled to pay interest on its bonds after the principal has become due unless its consent to do this has been manifested by an act of its legislature or by a lawful contract of its executive officers. Meyer v. City and County of San Francisco (Calif.), 88 Pac. 722; City of Chicago v. English, 80 Ill. App. 163; State v. Mayes, 28 Miss. 706.

fixing of a rate affords no ground for relief by taxpayers.[5]

Where, however, a maximum rate is fixed by the act conferring the authority, no discretionary power on the part of public officials as above suggested exists. If the bonds are issued bearing a greater rate than that provided although they will not be invalidated thereby yet the excess of interest is void and cannot be collected.[6]

If by skillful financiering or through opportune and favorable financial conditions the officials are enabled to

5—People v. Ford County, 63 Ill. 142. Rate of interest to be paid discretionary up to limit fixed by the authority to issue bonds.

Beattie v. Andrew County, 56 Mo. 42. Any rate of interest may be fixed that is not prohibited by law in the absence of a special provision in regard to interest so held as to railroad aid bonds. State ex rel. City of Carthage v. Gordon (Mo.), 116 S. W. 1099.

Barr v. City of Philadelphia, 191 Pa. St. 438, 43 Atl. 335. Where an ordinance for a loan provided that "interest on the said loan at a rate not exceeding 3½% per annum shall be paid by the city" and it further provided "that the mayor is hereby authorized to borrow in such proportions as in his judgment the best interests of the city demand," the rate of interest is fixed at 3½% and no discretionary power is vested in the mayor. See also Scott v. Hayes (Ind.), 70 N. E. 879, as to sufficiency of ordinance, fixing rate of interest.

6—Lewis v. Clarendon, 5 Dill. 329, Fed. Cas. No. 8,320.

Brook v. City of Oakland (Calif.), 117 Pac. 433. A provision limiting rate of interest on city obligations held not to apply to local improvement securities. Johnson County v. Stark, 24 Ill. 75.

City of Quincy v. Warfield, 25 Ill. 317. In this case the statute authorized but 8%, while bonds were issued bearing interest at 12%, the bonds were held valid but with interest at the rate of 8% only, the court said: "All acts performed in excess or beyond the power delegated must be regarded as unwarranted, but if after the revocation of such acts there has been enough done to show a proper execution of the power, the act will be sustained irrespective of the acts performed beyond the power delegated,—in other words, so much of the act done as is within the power granted shall be upheld, while all beyond the power shall be rejected as an excess of power." Sherlock v. Village of Winnetka, 68 Ill. 530; Parkinson v. City of Parker, 85 Pa. St. 313; see also Milan v. Tenn. Central R. R. Co., 79 Tenn. 329, holding that an issue of bonds of a denomination and a rate of interest greater than that authorized by statute is null and void; but see Yesler v. City of Seattle, 1 Wash. St. 308, 25 Pac. 1014.

issue securities bearing a less rate of interest than the maximum allowed by law, this cannot affect the validity of the bonds issued.[7]

The interest payments as they fall due from time to time are provided for by coupons, so-called attached to bonds and the principles of laws relating to which will be considered in the following sections.

§ 181. Coupons, definition.

The term "coupon" is derived from the French "couper" to cut, and it is defined by Worcester to signify one of the interest certificates attached to transferable bonds and of which there are usually as many as there are payments to be made, so-called because it is cut off when presented for payment. They are substantially a minute and concise repetition of what is contained in greater detail in the bond to which they are attached, and from which they are to be separated at the convenience of the holder and negotiated as money or the representative of money by simple delivery.[8]

Mr. Justice Nelson in a case in the Supreme Court of the United States,[9] in considering the nature of a coupon and defining it said:

"The coupon is not an independent instrument like a

7—Frantz v. Jacob (Ky.), 11 S. W. 54; Omaha National Bank v. Omaha, 15 Nebr. 333; Town of Lancaster v. First National Bank, 80 S. C. 547, 61 S. E. 1025; Red River Furnace Co. v. Tenn. Cent. R. R. Co. (Tenn.), 87 S. W. 1016.

8—Daniels Negotiable Instruments, 5th. Ed., Sec. 1489; Burroughs Public Securities, Sec. 48, et seq.; City of Kenosha v. Lamson, 9 Wall. 477; Moore v. Greenhow, 114 U. S. 338.

Vashon v. Greenhow, 135 U. S. 713, construing the coupon contract of the State of Virginia as authorized by the funding acts of March 30, 1871 and March 28, 1879. Strickler v. Yager, 29 Fed. 244; Evertsen v. National Bank of Newport, 4 Hun. 569, 66 N. Y. 14; Antoni v. Wright, 22 Gratt (Va.), 833; Poindexter v. Greenhow, 84 Va. 441, 4 S. E. 742, following Antoni v. Greenhow, 107 U. S. 769; see also cases cited generally under the following notes.

9—City of Kenosha v. Lamson, 9 Wall. 483.

promissory note for a sum of money but is given for interest, thereafter to become due upon the bond which coupon is a parcel of the bond and partakes of its nature; * * * The coupons are substantially but copies from the body of the bond in respect to the interest and as is well-known are given to the holder of the bond for the purpose: first, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and, second, to enable the holder to realize the interest due or to become due by negotiating the coupon to the bearer in business transactions to whom the duty of collecting them devolves."

Coupons are defined in another case in the same court [10] as "written contracts for the payment of a definite sum of money on a given day and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached."

A coupon is therefore a written promise by the maker of the security to which it may be or was originally attached to pay one of the installments of interest due upon the principal.[11]

§ 182. Power to issue.

It will be remembered that the right to issue negotiable securities is but seldom implied from the grant of authority to borrow money or incur indebtedness. Where the power exists to issue negotiable securities the right to issue them with coupons attached is implied without question and such right clearly exists where in direct

10—Aurora City v. West, 7 Wall. 82.

11—Abbott Munic. Corps., Sec. 214; Daniels Negotiable Instruments, 5th. Ed., Sec. 1490.

terms the lawful authority to issue negotiable bonds with coupons attached has been given. Illustrative of the principle that the power impliedly exists a case can be cited from the Supreme Court of the United States [12] where it was said by the court: "But it is further insisted that even if the bonds were valid, the coupons were not because coupons are not named in the section of the statute authorizing the issue of the bonds. But coupons are simply the instruments containing the promise to pay interest, and the express authority was to issue bonds bearing interest. While it is true that the power to borrow money granted to a municipal corporation does not carry with it by implication the power to issue negotiable bonds we are of the opinion that the express power to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons."

§ 183. The coupon; its form.

Coupons, as commonly issued, are in the form of an express promise to pay to the bearer the interest due at a fixed time and place. They are then considered as negotiable instruments complete in themselves and can be declared upon without reference to the bond from which they are detached.[13]

In other instances they are in the form of a check or draft upon some banking house in favor of the bearer, and again they may be in the form of a bill of exchange.[14]

12—Board of Education of the City of Atchison v. De Kay, 148 U. S. 591.

13—City of Lexington v. Butler, 14 Wall. 282; see cases cited Sec. 193 post; but see Woods v. Lawrence County, 1 Black 386, where it is held that if the coupon is a mere memorandum of the amount of interest due stating the time and place of payment but containing no promise to pay the interest the rule stated in the text will not apply.

14—Woods v. Lawrence, 1 Black 390; Moran v. Com'rs of Miami County, 2 Black 128; Arents v. Commonwealth, 18 Gratt (Va.), 750.

In whatever form they may be drawn or executed the legal character and intent of the coupon is the same. It is to furnish the holder with legal evidence of the amount of the interest due at a certain time or place upon valid obligations and theretofore issued and of his right to receive the same.[15]

§ 184. Illustrative forms of coupons.

"County of Lawrence.

"Warrant No. 37. For thirty dollars."

"Being for six months' interest on Bond No. payable on the first day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company in the city of Philadelphia.

"$30. ....., Clerk."[16]

"Auditor's Office, Miami County,
"Peru, Indiana.

"The treasurer of said county will pay the legal holder hereof, one hundred dollars on the first day of September, 1857, on presentation thereof, being for interest due on the obligation of said county, No. 16, given to the Peru and Indianapolis Railroad Company. By order of the commissioners.

"Ira Mendenhall,
"County Auditor."[17]

15—The City of Kenosha v. Lamson, 9 Wall. 477. Beside the coupons are given simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds. * * * It is issued for interest due at a certain day and place on a bond giving its number and date. Woods v. Lawrence County, 1 Black 386; Knox County v. Aspinwall, 21 How. 539. Daniel Negotiable Instruments, 5th Ed., Sec. 1493. "In all of the cases the coupon is furnished as evidence of a sum due on the bond or interest at a particular time and place and as authority to the holder to receive it." See also cases cited in section 181, ante.

16—Woods v. Lawrence, 1 Black 390.

17—Moran v. Com'rs of Miami County, 2 Black 128.

"No. 3521.

"Nashville, Dec. 23, 1868.

"Treasurer, Corporation of Nashville.

"Pay to A. J. Duncan, or bearer, One Thousand Dollars on account of waterwork.

"A. E. Alden. W. Mills,

"Mayor. Recorder.

"(Indorsed) Thos G. Magrane, T'r, Dec. 26, 1868." [18]

"Humboldt Township. $17.50."

"The Treasurer of Humboldt Township, Allen County, Kansas, will pay the bearer, the sum of seventeen and 50/100 dollars, at the Banking House of Gilman, Son & Co., in the City of New York, on the 31st day of December, A. D. 1873.

"Z. Wisner,

"Chairman County Commissioners.

"Attest: W. F. Waggoner, County Clerk." [19]

"Harrisonville, Cass County, July 11th, 1870.

"The County of Cass promises to pay the sum of $25 on the eleventh day of January, 1873, being interest on bond No. 53, for $500, payable at the banking-house of Northup and Chick, in the city of New York, State of New York.

"C. H. Dore,

"Clerk of the County Court of Cass County, Mo." [20]

"$100. $100."

"Butler, Bates County, Mo., January 18th, A. D. 1871.

"The county of Bates acknowledges to owe the sum of $100, payable to bearer, on the eighteenth day of Jan-

18—Mayor, etc. of Nashville v. Ray, 19 Wall. 468, 22 L. Ed. 167.

19—Humboldt Twp. v. Long, et al., 92 U. S. 642, 23 L. Ed. 752.

20—County of Cass v. Johnston, 95 U. S. 360, 24 L. Ed. 416.

uary, 1872, at the Bank of America, in the City and State of New York, for one year's interest on bond No. 56.

"W. I. Smith,
"Clerk of the County Court of Bates County, Mo." [21]

"Receivable at and after maturity for all taxes, debts and demands due the State.

"The Commonwealth of Virginia will pay the bearer thirty dollars, interest due 1st January, 1884, on bond No. 2731.

"Coupon No. 20.

"Geo. Rye,
"Treasurer." [22]

" '$35.00.

" 'The Town of Mentz, County of Cayuga, will pay the bearer hereof at the Fourth National Bank, in the City of New York, on the 15th day of July, 1876, the sum of thirty-five dollars, for six months' interest then due on bond No. 7.

" '$35.00. " 'W. A. Halsey,
" 'Commissioner.' " [23]

"$—. (Coupon) $—.

"The County of Chaffee, in the State of Colorado, will pay the bearer —— dollars, in the town of Buena Vista, or at the banking-house of Kountze Brothers, in the City of New York, on the first day of ———, being six months' interest on funding bond.

No.——, Series——. "E. B. Jones,
"County Treasurer." [24]

21—County of Bates v. Winters, 97 U. S. 85, 24 L. Ed. 933.

22—Poindexter v. Greenhow, 114 U. S. 270, 29 L. Ed. 185.

23—Rich v. Town of Mentz, 134 U. S. 632, 33 L. Ed. 1074.

24—Board of County Com'rs of the County of Chaffee v. Potter, 142 U. S. 355, 35 L. Ed. 1040.

"The levee board of the State of Mississippi, district No. 1, will pay to the bearer on the 1st day of January, 1879, at the National Park Bank of New York, twenty ($20) dollars in currency of the United States, being the semi-annual interest on bond No. 52.

"(Signed). "A. R. Howe,
"Treasurer."[25]

"Coupon, City of Wheeling, guaranteed by the State of Virginia.

"Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on Wheeling bond No. — on the ——— day of ———, 18—."[26]

§ 185. Execution.

In the absence of statutory provisions designating certain officials as authorized to execute the coupons, they are usually signed by an executive or administrative officer of the public corporation.[27]

Where additional signatures are required by statute or counter-signatures they may be necessary to their validity.[28]

A printed or lithographed signature upon the coupons is usually considered sufficient unless otherwise provided by law.[29]

The same questions in respect to the authority of an official to execute them and the delegation of authority by an administrative board to one of their number of this

25—Woodruff v. State of Mississippi, 162 U. S. 291, 40 L. Ed. 973.

26—Arents v. Commonwealth, 18 Gratt. (Va.), 773.

27—Town of East Lincoln v. Davenport, 94 U. S. 801; Thayer v. Montgomery County, 3 Dill. 389; Ring v. Johnson, 6 Ia. 265; but see Avery v. Springport, 14 Blatchf. 272. Where a town issued bonds with attached coupons not sealed as required by statute, held in a suit on the coupons that the bonds were void.

28—Bissell v. Spring Valley Twp., 110 U. S. 162, 28 L. Ed. 105.

29—Lynde v. The County, 16 Wall. 6; McKee v. Vernon County, 3 Dill. 210; Pennington v. Baehr, 48 Calif. 565.

power may arise as in the execution of the bond itself and the same principles apply in a determination of what is a sufficient execution of the coupons.[30]

The same principles also apply in respect to informalities and irregularities involving the time when coupons are formally executed and it will be remembered that these, unless of the essence of the act to be done, will not affect the validity of the instrument executed.[31]

§ 186. Payee.

It is not necessary to the validity of coupons that they name a payee for while they are separate instruments from the bond yet they are construed together with it and the obligation to pay is without question sufficiently evident from the general character of the coupon and its construction when taken in connection with the bond from which it has been detached. The purpose and intent of the coupon as a legal obligation in the hand of bearer is established not only by the great weight of authorities but by well established custom and usage.[32]

§ 187. Coupons; their legal character.

Coupons attached as interest warrants to bonds for the payment of money and lawfully issued by public corporations as well as the bonds to which they are attached, when they are made payable to order and endorsed in blank or made payable to bearer are transferable by delivery and subject to the same rules and regulations so far as the title and rights of the holder are concerned

30—Thayer v. Montgomery County, 3 Dill. 389; Phelps v. Town of Lewiston, 15 Blatchf. 131; see Secs. 167, et seq., ante.

31—Town of East Lincoln v. Davenport, 94 U. S. 801; see Secs. 166, et seq., ante.

32—Woods v. Lawrence County, 1 Black 386; Smith v. Clark County, 54 Mo. 58; Johnson v. County of Stark, 24 Ill. 75; but see Evertsen v. National Bank of Newport, 66 N. Y. 14.

as negotiable bills of exchange and promissory notes. The holders of them if endorsed in blank or payable to bearer are as effectively shielded from the defense of prior equities between the original parties if unknown to them at the time of the transfer as the holders of any other class of negotiable securities.[33]

They, though originally issued as appendant to bonds are transmutable into independent contracts for the payment of the interest they represent by severance and delivery pursuant to the intent of the obligors.[34] If the

33—Curtis v. County of Butler, 24 How. 436; Gelpcke v. Dubuque, 1 Wall. 175; Board of Com'rs of County of Knox v. Aspinwall, et al., 21 How. 539; Murray v. Lardner, 2 Wall. 110; Thompson v. Lee County, 3 Wall. 327; Aurora City v. West, 7 Wall. 82.

County of Lexington v. Butler, 14 Wall. 282. Holders of such instruments, if the same are endorsed in blank or are payable to bearer are as effectually shielded from the defense of prior equities between the original parties if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments. Clark v. Iowa City, 20 Wall. 583; New Orleans v. Clark, 95 U. S. 644; Ketchum v. Duncan, 96 U. S. 659; City of Ray v. Vansycle, 96 U. S. 675; Cooper v. Town of Thompson, 13 Blatchf. 434; Bank of Calif. v. Dunn, 66 Calif. 38; Dudley v. Board of Com'rs of Lake County (Colo.), 80 Fed. 672; Spooner v. Holmes, 102 Mass. 503.

Manhattan Savings Institute v. New York National Exchange Bank, 170 N. Y. 58, 62 N. E. 1079. Where the negotiability of coupons is not restricted they are payable to any subsequent owner in good faith although stolen. City of Memphis v. Bethel (Tenn.), 17 S. W. 191; but see Arents v. Commonwealth, 18 Gratt. (Va.), 750.

34—Board of Com'rs of County of Knox v. Aspinwall, et al., 21 How. 539. A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in the form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest, and at the same time furnish complete evidence of the payment of the interest to the makers of the obligation. Stewart v. Lansing, 104 U. S. 505; McCoy v. Washington County, 3 Wall. Jr. 381; Kinnard v. Cass County, 3 Dill. 147; Trustees of Internal Improvement Fund v. Lewis, 34 Fla. 424; Town of Cicero v. Clifford, 53 Ind. 191; Evertsen v. National Bank of Newport, 66 N. Y. 14; Burroughs v. Richmond County, 65 N. C. 234; County of Beaver v. Armstrong, 44 Pa. St. 63;

coupon however imperfectly states the contract between the parties in respect to the interest to be paid, it will be necessary to construe the bond and the coupon together and the latter will be controlled by the provisions in the bond and this is also the rule where there is a variance between the coupon and the bonds.[35]

As commonly drawn they are regarded as negotiable instruments, but if they do not contain words of negotiability this character will be denied them.[36] The difference between coupons negotiable in form and coupons in the form of interest warrants is well illustrated in the case of Evertsen v. National Bank of Newport [37] where coupons of the two classes were sent to New York by express, they were stolen and came into the hands of a bona fide holder for value. The court held that the holder could recover as to the negotiable coupons notwithstanding the fact that they were stolen from the true owner and in the case of the non-negotiable coupons in the form of interest warrants, he obtained no better title than the vendor.

In Burroughs on Public Securities [38] the author says: "If the parties desire their paper to be negotiable they must put it in the form of commercial paper; coupons are only negotiable when in the form which by the law-merchant makes them negotiable as representatives of money. It is doubted if it is within the power of parties

but see Clark v. Janesville, 1 Bissell 98.

35—City of Lexington v. Butler, 14 Wall. 282; McClure v. Township of Oxford, 94 U. S. 429.

36—City of Atchison v. Butcher, 3 Kan. 104. In this case the coupons were payable to bearer but attached to bonds containing no negotiable words, and the court held that the coupon owner was an innocent holder entitled to the protection of the law-merchant. Augusta Bank v. Augusta, 49 Me. 507.

Evertsen v. National bank of Newport, 66 N. Y. 14. The negotiability of coupons is not affected by a recital in them that they were for the interest upon bonds specified by numbers. Partridge v. Bank of England, 9 Q. B. 396; but see Town of Queensbury v. Culver, 19 Wall. 83.

37—66 N. Y. 14.

38—p. 576.

to give a negotiable character to an instrument not in the form known to the law as negotiable."

§ 188. Payment.

Coupons are in effect promissory notes due on the day fixed for the payment of the interest on bonds and like promissory notes due on a specified date payment need not be demanded of the maker on that day in order that the holder of them may maintain his right to enforce them at a subsequent time subject only to the statute of limitations which may run against such instruments.[39]

Neither is it necessary that they be presented for allowance and approval under statutory provisions requiring the presentation of claims to certain designated officials for their allowance and approval.[40]

Where, however, the coupons have been endorsed by another, the same strictness in regard to presentment and demand is essential to charge the endorser which applies to other commercial paper.[41]

The coupon should be presented at maturity and the endorser duly notified of a failure by the original maker to pay in accordance with the terms of his contract.[42]

39—Greene County v. Daniel, 102 U. S. 187.

Walnut v. Wade, 103 U. S. 683. The failure to present the coupons for payment does not prevent the running of interest. Smith v. Tallapoosa County, 2 Woods 574.

Hughes County v. Livingston, 104 Fed. 306. The fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before an action can be maintained upon them. State v. Bank of Washington, 18 Ark. 554; City of Jeffersonville v. Patterson, 26 Ind. 16; Mayor, etc. v. Nashville v. First National Bank, 57 Tenn. 402.

40—County of Greene v. Daniel, 102 U. S. 187. The claim was to all intents and purposes audited by the court when the bonds were issued, the validity and the amount of the liability were then definitely fixed. Lorsbach v. Lincoln County (Nev.), 94 Fed. 963; Shinbone v. Randolph County, 56 Ala. 183; State v. Lincoln County Com'rs, 23 Nev. 263, 45 Pac. 982; but see People v. Fogg, 11 Calif. 351.

41—Bonner v. City of New Orleans, 2 Woods 135; Evertsen v. National Bank of Newport, 66 N. Y. 14.

42—Bonner v. New Orleans, 2 Woods C. C. 135; Hodges v. Shuler,

The obligation of an endorser is direct. He insures the payment of the debt upon the failure of the original maker to do so. In the case of a guarantor, the ultimate solvency of the original maker only is assured. Where the payment of bonds and coupons have only been guaranteed the guarantor is responsible upon a final failure to realize from the assets of the obligor the payment of the securities issued.[43]

§ 189. Time, place and order of payment.

The fact that coupons are made payable at a certain place or a certain time does not necessarily require their presentment or a demand for their payment at that time and place. The promise to pay is not defeated by the failure of the holder to present the coupons or demand their payment at the very instant they become due.[44]

It is not necessary that they be made payable within the geographical limits of the corporation issuing them unless so directed by statute and even then some cases hold that the provision is a directory one merely.[45]

22 N. Y. 114; Lane v. East Tenn., etc. R. R. Co., 13 Lea (Tenn.) 547.

43—New Orleans v. Clark, 65 U. S. 644; Electric Plaster v. Blue Rapids City Township (Kan.), 96 Pac. 68.

State v. Clinton County, 6 Oh. St. 280. A railroad company by contract in writing agreed with the county to pay the interest on aid bonds issued by the county. The railroad company paid to the bond holders the interest as it became due for the first three years only, the county was held liable for the interest becoming due after that date.

State v. Spartanburg, etc. R. R. Co., 8 S. C. 129, construing liability of the state for bonds issued by a railroad company which afterwards became insolvent, the payment of which with the interest was guaranteed by the state. County of Lancaster v. Sheraw & C. R. R. Co. (S. C.), 5 S. E. 338; Arents v. Commonwealth, 18 Gratt. (Va.) 771.

44—See Sec. 188, ante.

45—The City of Kenosha v. Lamson, 9 Wall. 478; City of Lexington v. Butler, 14 Wall. 282; Town of Lancaster v. First National Bank, 80 S. C. 547, 61 S. E. 1025; see also Sec. 357, post, upon the place of payment of bonds; but see People v. City of Tazewell, 22 Ill. 147, and Johnson v. County of Stark, 24 Ill. 75, which hold that unless especially authorized by law a munic-

The order of payment is generally immaterial and only becomes so in case of a sale of property specifically pledged to pay them.[46]

If payable out of a special fund it is generally required in an action to enforce payment to allege and prove the existence of the fund and in case there are not moneys sufficient in this fund, a demand for payment is properly refused and the holder of such coupons will have no right to recover the amount due from the general revenues of the corporation.[47] If the obligation is one which is a proper charge both against a special fund and the general revenues of the corporation, it will only be necessary to prove the insufficiency of the special fund to establish the right of the coupon holder to recover from

ipal corporation cannot bind itself to pay indebtedness at any other place than its treasury.

46—Ketchum v. Duncan, 96 U. S. 659; Munson v. Mudgett, 15 Wash. 321, 46 Pac. 256. The payment of interest coupons cannot be postponed in favor of warrants subsequently issued but previously presented for payment under act of March 21st, 1890, Sec. 8 which provides that interest coupons on county bonds shall be considered for all purposes county warrants.

47—Corcoran v. Chesapeake & Ohio Canal Co., 1 MacArthur 358; Hall v. New Orleans, 19 Fed. 870.

Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753. Taxes levied and collected especially to pay the interest coupons of railroad aid bonds are impressed with a trust in the hands of the county treasurer for the benefit of the coupon owners. Bates v. Gerber, 82 Calif. 550, 22 Pac. 1115; Davis v. City of Sacramento, 82 Calif. 562, 22 Pac. 1118.

Owensboro Water Works v. City of Owensboro (Ky.), 96 N. W. 867. A sum received for accrued interest on bonds sold should be set apart and applied to the payment of the coupons attached when they become due. Brinkworth v. Grable (Nebr.), 63 N. W. 952; Ghiglione v. Marsh, 48 N. Y. S. 604.

Mall v. City of Portland (Ore.), 56 Pac. 654. The property of one paying a special assessment in full instead of by installments as permitted by the law cannot be charged with the interest on bonds issued for the construction of that special improvement. Seymour v. Frost, 25 Wash. 644, 66 Pac. 90; see also City of Boise City v. Union Bank & Trust Co. (Ida.), 63 Pac. 107, relative to compliance with Const., Art. 8, Sec. 3, requiring provision to be made for the collection of an annual tax to pay the interest on bonds issued. State v. Rathburn (Wash.), 2 Pac. 85; see also Secs. 363, et seq., post.

the general funds or revenues of the public corporation.[48]

§ 190. Medium of payment.

The medium of payment of interest due on outstanding negotiable securities may be determined either by the authority conferring the power to issue or in the absence of provisions in this respect by the terms of the contract itself. It may be gold coin of a specified weight and fineness, treasury notes or other forms of currency. The rights of a coupon holder to demand and receive payment in a prescribed medium may be waived by him and the acceptance of a check, draft or bill of exchange will be regarded as a sufficient payment.[49]

The question has been raised of the right of a public corporation to deduct from the amount due on coupons the taxes due from the holder to the public corporation. In a case in the Supreme Court of the United States[50] the city of Charleston by ordinance imposed a tax on all the real and personal property within the city of two cents on the dollar, and further directed that taxes due should be retained by the city treasurer out of interest obligations of the city when due and payable. Murray, a holder of the bonds of the city issued prior to the passage of the ordinance brought suit against the city for the amount retained out of the interest due him. The court held that he was entitled to recover for the city could not under the guise of taxation interfere in any manner with its promise to pay the creditor the amount agreed upon and any action by it which diminished the amount due the creditor, impaired the obligation of the contract between him and the city and was therefore void.[51]

48—Seymour v. Frost (Wash.), 66 Pac. 90.

49—See Sec. 348, post.

50—Murray v. Charleston, 96 U. S. 433; see also Hartman v. Greenhow, 102 U. S. 672.

51—See also Hartman v. Greenhow, 102 U. S. 672.

§ 191. Coupons receivable in payment of taxes.

Interest coupons attached to negotiable securities issued either by the state itself or by its subordinate civil subdivisions are often by the authority conferring the power to issue made receivable in payment of taxes or other dues to the state or the subordinate public corporation. It is customary in such cases that the coupons should show upon their face that they are so receivable. Provisions of the character noted increase the commercial value of both of the bonds and the coupons and afford the holder a means of payment which other creditors do not possess for, as has been said: "So long as the municipality or the state finds it necessary to levy and collect taxes, so long will there by a demand for the coupons."[52] The courts have held that the insertion of provisions of the character noted constitute a contract obligation between the corporation issuing the securities and the holder of the coupons which cannot be impaired either by a refusal of the corporation to accept them for the uses specified or by the passage of subsequent legislation which prohibits the issue of securities having coupons attached and containing the privilege noted. This rule applies to both coupons which are still attached to the bonds and those which have been severed.[53]

In a case decided in the Supreme Court of the United States,[54] the opinion was rendered by Mr. Justice Field

52—Hartman v. Greenhow, 102 U. S. 672; Moore v. Greenhow, 114 U. S. 338; Willis v. Miller, 29 Fed. 238; Strickler v. Yager, 29 Fed. 244.

Shell v. Carter Sounty (Tenn.), 42 S. W. 78. The acceptance in payment of taxes of coupons will not be held a ratification of the bonds from which they are cut. Antoni v. Wright, 22 Gratt. (Va.) 833; but see Wyman v. Searle (Nebr.), 128 N. W. 801. Coupons authorized to be received in satisfaction of certain specified taxes are so limited. Commonwealth v. McCullough (Va.), 19 S. E. 114; Poindexter v. Greenhow (Va.), 4 S. E. 742; see also Sec. 81, et seq., ante.

53—Hartman v. Greenhow, 102 U. S. 672; Poindexter v. Greenhow, 114 U. S 270.

54—Hartman v. Greenhow, 102 U. S. 672.

and on the following facts: In 1871, the state of Virginia issued bonds to its creditors payable to order or to bearer and the coupons which were attached were payable to bearer. The coupons were payable semi-annually and declared that they should be "receivable at and after maturity for all taxes, debts, dues and demands due the state." In 1872, the Legislature of Virginia passed an act which provided in effect that thereafter it should not be lawful for any of the officers charged with the collection of taxes or demands due the state to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of a National Bank of the United States. The plaintiff in the case tendered to the treasurer of the City of Richmond, Virginia, in 1878 for taxes due, coupons from bonds issued under the funding act of 1871. The tender was refused and he applied to the Circuit Court of Appeals of Virginia for a mandamus to compel the treasurer to receive the coupons. The case was ultimately taken to the Supreme Court of the United States and that court held that the writ of mandamus should issue to compel the treasurer to receive the coupons tendered to him in payment of taxes due the state for their full amount, and said in part after referring to the funding act and exchange of securities thereunder: "The contract was thus consummated between the state and the holders of the new bonds and the holders of the coupons from the obligation of which she could not without their consent release herself by any subsequent legislation. She thus bound herself, not only to pay the bonds when they became due but to receive the interest coupons from the bearer at and after their maturity to their full amount for any taxes or dues by him to the state. This responsibility of the coupons for such taxes and dues was written on their face and accompanied them into whatever hands they passed. It constituted their chief value and was the main consideration offered the holders of the old bonds to surrender

them and accept new bonds for two-thirds of their amount." The court also held in accordance with the rule stated in Murray v. Charleston, cited above, that the coupon holder was entitled to the full amount due him for interest and that a tax imposed on the bonds under authority of an act passed subsequent to their issue could not be deducted from the full amount due without impairing the obligation of the contract between the creditor and the state to pay that full amount.

In the later case of Poindexter v. Greenhow,[55] the court held that by the terms of the funding act of March 30, 1871, of the State of Virginia, and through the issue of bonds and coupons in virtue of the same, a contract was made between every coupon holder and the state that such coupons "should be receivable at and after maturity for all taxes, debts, dues and demands due the state;" the right of the coupon holder under which it was to have his coupon received for taxes when offered and that any act of the state which forbid the receipt of these coupons for taxes was a violation of the contract and void as against the coupon holder; that the faculty of being receivable in payment of taxes was of the essence of the right and constituted a self-executing remedy in the hands of the tax payer.

§ 192. Days of grace.

Whether coupons are entitled to days of grace like other commercial paper payable on a given date is at the present time largely an academic question,—days of grace having been abolished in nearly all of the states of the Union. If allowed, however, coupons will be entitled to them since regarded as commercial paper and circulating as negotiable instruments with all of their attributes.[56]

55—114 U. S. 270.

56—Burroughs on Public Securities, p. 578; Hainer Munic. Securities, Sec. 348; Evertsen v. National Bank of Newport, 66 N. Y. 14.

There are some authorities, however, which hold to the contrary.[57]

§ 193. Severed coupons.

A coupon as representing an installment of interest due upon the bond to which it is originally attached is universally regarded when couched in the terms of a negotiable instrument as a separate and independent promise to pay the installment of interest specified therein and may be detached or severed from the bond without destroying its character as a negotiable instrument or as a separate and independent promise to pay. In legal effect, it is equivalent to a separate bond for the different installments of interest and is a complete instrument capable of sustaining a separate action without reference to the maturity or the ownership of the bond from which it has been detached.[58]

It has been held, however, that where the coupons upon their face refer to the bonds from which they were detached that this puts the purchaser upon inquiry as to

57—Alabama, etc. R. R. Co. v. Robinson, 56 Fed. 690; Chaffee v. Middlesex R. R. Co., 146 Mass. 224; Daniels on Negotiable Instruments, Sec. 1490a; Arents v. Commonwealth, 18 Gratt. (Va) 750.

58—Thompson v. Lee County, 3 Wall. 327; Rogers v. Burlington, 3 Wall. 54; City of Kenosha v. Lamson, 9 Wall. 477; Clark v. Iowa City, 20 Wall. 523; Town of Coloma v. Eaves, 92 U. S. 484; Marcy v. Township of Oswego, 92 U. S. 634; County of Scotland v. Thomas, 94 U. S. 682; Koshkonong v. Burton, 104 U. S. 668; Thompson v. Perrine, 106 U. S. 589; Kennard v. Cass County, 3 Dill. 147; Dudley v. Lake County Com'rs, 80 Fed. 672 C. C. A.; Muhlenburg County v. Morehead (Ky.), 46 S. W. 216; Augusta Bank v. City of Augusta, 49 Me. 507; First National Bank of St. Paul v. Scott County Com'rs, 14 Minn. 77; Smith v. Clark County, 54 Mo. 58; Evertsen v. National Bank of Newport, 66 N. Y. 14; Burroughs v. Richmond County Com'rs, 65 N. C. 234; City of Memphis v. Bethel (Tenn.), 17 S. W. 191; Brown v. Town of Pt. Pleasant, 36 W. Va. 290, 15 S. E. 209; see also Brinkworth v. Grable (Nebr.), 63 N. W. 952 in respect to validity of coupons detached from bonds prior to registration as provided in compiled statutes of Nebraska, 1893, c. 9, Sec. 37; Beaver v. Armstrong, 46 Pa. St. 63.

the bonds and charges him with notice of all they contain.[59]

The first rule noted is well settled by an unquestioned line of authority. In a late case in the Supreme Court of the United States [60] it was said: "Each matured coupon is a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments, upon different paper."

§ 194. Overdue coupons.

The questions involved in a discussion of the subject of overdue coupons are principally two, namely:

First, the effect of the fact that a matured coupon is unpaid has upon the bond itself to which the coupon is attached or from which it has been severed; and

Second, the right of the coupon holder to collect interest upon the matured and unpaid coupon from and after the time it became due and payable and at what rate.[61]

59—McClure v. Township of Oxford, 94 U. S. 429; Bailey v. County of Buchanan, 110 N. Y. 469.

60—Nesbit v. Riverside Independent District, 144 U. S. 610.

61—Aurora City v. West, 7 Wall. 82; Town of Genoa v. Woodruff, 92 U. S. 502.

New Orleans Insurance Association v. City of New Orleans, 43 La. Ann. 130, 8 So. 83, construing rights of bond holder to have bonds extended without matured coupons attached under Louisiana Act. No. 58 of 1882. Commonwealth v. Chesapeake, etc. Canal Co., 32 Md. 501, 35 Md. 1.

Flagg v. Mayor, etc. of Palmyra, 33 Mo. 440. A municipality having issued bonds, they may be compelled to raise money to pay the interest. Burroughs v. Richmond, 65 N. C. 234.

Effect on the bond. In an early case in the Supreme Court of the United States,[62] it is held that the presence of past coupons on a bond was an evidence of itself of dishonor sufficient to put the purchaser on inquiry. The later cases, in that court, however, have qualified the doctrine as laid down above and the rule in the Supreme Court of the United States is substantially that overdue and unpaid interest coupons attached to bonds are not in themselves sufficient to put the purchaser on inquiry.

In Cromwell v. Sac County,[63] Mr. Justice Field said:

62—Parsons v. Jackson, 99 U. S. 434; German American Bank v. City of Brenham, 35 Fed. 185; Town of Lansing v. Lytle, 38 Fed. 205; see also First National Bank of St. Paul v. County Com'rs of Scott County, 14 Minn. 59 (Gill 77). The fact that it appeared upon the face of the bonds that the interest for several years was overdue and unpaid was, we think, a circumstance of suspicion sufficient to put the plaintiff on his guard, the bonds were thus dishonored on their face. The interest equally with the principal is a part of the debt which they are intended to secure and it does not seem to us material whether the whole or only a part of that debt was overdue. When due the plaintiff had a right of action for the recovery of the interest as for any other installment due on the bond. * * * The law is that a negotiable instrument payable at a time set is overdue as soon as that time has passed whether payable generally or at a specified place and the persons who takes it by endorsement or delivery after it is due gets no better title than the party had from whom he received it. The fact that the day of payment has passed before the transfer is of itself a ground of suspicion and sufficient to affect the title of the transferee.

63—96 U. S. 51; Rouede v. Jersey City, 18 Fed. Rep. 719.

Daniel on Negotiable Instruments, 5th. Ed. 1506a. "The simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a bona fide holder. To hold otherwise would throw discredit on a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every installment of interest as it is matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures, renders them, though they may have years to run, and

"The nonpayment of an installment of interest when due could not affect the negotiability of the bonds or the subsequent coupons. Until their maturity, the purchaser for value without notice of their validity as between antecedent parties would take them discharged from all infirmities."

Interest on overdue coupons. Detached interest coupons as a rule are negotiable instruments and passing from hand to hand as such are subject to the same rules that apply to other negotiable paper. On general principles, therefore, it is commonly conceded that they should draw interest after the payment of the principal of the coupon itself has been refused.[64]

The principal question in respect to which a controversy arises relates to the rate to be allowed where the legal rate of interest as provided by statute differs from that made by the parties in their contract when the bonds

all other coupons dishonored paper, subject to all defenses against the original holders, would greatly impair the currency and credit of such securities, and correspondingly diminish their value." See also Murray v. Lardner, 2 Wall. 110; Smith v. Sac County, 11 Wall. 139; Ind. & Ill. Central Ry. Co. v. Sprague, 103 U. S. 756; Miller v. Town of Berlin, 13 Blatchf. 245.

64—Aurora City v. West, 7 Wall. 82; Clark v. Iowa City, 20 Wall. 583; Town of Genoa v. Woodruff, 92 U. S. 502; Walnut v. Wade, 103 U. S. 683; City of Cripple Creek v. Adams (Colo.), 85 Pac. 184; Town Council of Lexington v. Union National Bank, 22 So. 291; Bailey v. County of Buchanan, 54 N. Y. Super. Ct. 237.

McLendon v. Com'rs of Anson, 71 N. C. 28. Coupons on county bonds bear interest from the date of maturity notwithstanding delay in demanding payment. Mills v. Town of Jefferson, 20 Wis. 50; see also cases cited in the two following notes; but see Graves v. Saline County, 104 Fed. 61. Where it was held that overdue interest coupons do not bear interest in the absence of an express agreement to pay the same following the rule as established by the decisions of the Supreme Court of Illinois that in that state interest is recoverable in no case except upon an express agreement to pay it and can be recovered only when the statute so authorizes. Bates v. Gerber, 82 Calif. 550, 22 Pac. 1115; Davis v. City of Sacramento, 82 Calif. 562, 22 Pac. 1118; Molineux v. State, 109 Calif. 378, 42 Pac. 34; Meyer v. City and County of San Francisco (Calif.), 88 Pac. 722; Town of Mt. Morris v. Williams, 38 Ill. App. 401.

were issued. This is largely a question of local law and the cases cited in the notes will be grouped on the following basis: First, those holding that interest is allowed at the same rate as named in the contract irrespective of statutory provisions;[65] and, second, those cases holding that interest will be allowed at the rate fixed by statute irrespective of the contract agreement.[66]

The rate to be allowed on overdue coupons as affected by the place of their payment where this differs from the locality of the public corporation issuing the bonds has also been a question for decision by the courts and the weight of authority is to the effect that the rate specified at the place of payment controls.[67]

§ 195. Demand when necessary to recover interest on unpaid coupons.

To enable the holder of a matured and unpaid coupon to recover interest on the amount due, is it necessary that demand should be made and the coupon presented for

65—Brewster v. Wakefield, 22 How. 118.

Cromwell v. County of Sac, 96 U. S. 51. When the rate of interest at the place of contract differs from the rate at the place of payment the parties may contract for either rate and the contract will govern, referring to interest on bonds. But the court further held in this case that "with reference to interest on the bonds as after their maturity, it can be allowed only at the rate of 6% under the law of Iowa," this rate being less than fixed in the contract. Ohio v. Frank, 103 U. S. 697; Commonwealth of Virginia v. Chesapeake & Ohio Canal Co., 32 Md. 501; Brannon v. Hursell, 112 Mass. 63; Pruyn v. Milwaukee, 18 Wis. 367.

66—Cromwell v. County of Sac, 96 U. S. 51; Holden v. Freedmen's Savings & Trust Co., 100 U. S. 72; Walnut v. Wade, 103 U. S. 683; Scotland County v. Hill, 132 U. S. 107; Hughes County, South Dakota v. Livingston, 104 Fed. 306.

67—Gelpcke v. Dubuque, 1 Wall. 175. Municipal bonds with coupons payable to bearer having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupons is entitled to the amount of them with interest and exchange at the place whereby their terms were made payable. Town of Genoa v. Woodruff, 92 U. S. 502; Walnut v. Wade, 103 U. S. 683; Pana v. Bowler, 107 U. S. 529; Cairo v. Zane, 149 U. S. 122.

payment at the time it is due? The authorities differ upon this point; some holding that no demand is necessary to enable the coupon holder to collect interest on the amount due and payable.[68] While others and notably the Illinois cases hold to the doctrine that since in any event they can only draw interest upon an express demand for payment, that public corporations are not bound to seek their creditors like individuals in order to make payment of their indebtedness and until demand is made there is no default which will authorize the collection of interest on the amount due.[69]

§ 196. Equities considered.

In Burroughs on Public Securities,[70] the author states in respect to the subject of this section: "What are the equities which attach to over-due or dishonored commercial paper? The authorities are not entirely agreed on this subject. In a leading English case it is said to be those equities growing out of the original note transactions, and that it does not include offset acquired before or after endorsement;[71] and the rule is confined to equities between the maker or obligor and the payee; it does not apply to equities between successive takers; as

68—Gelpcke v. Dubuque, 1 Wall. 206; Thompson v. Lee County, 3 Wall. 332; Town of Genoa v. Woodruff, 92 U. S. 504; but see Walnut v. Wade, 103 U. S. 683. The failure to present the coupon for payment does not prevent the running of interest if the town had shown that it had money ready to pay the coupons at the time and place where they were payable, this would have been a defense to the claim for interest but no such proof was offered nor was it claimed that the fact existed.

69—Johnson v. Stark County, 24 Ill. 75; City of Pekin v. Reynolds, 31 Ill. 531; Chicago v. People, 56 Ill. 327; Emlen v. Lehigh Coal & Nav. Co., 47 Pa. St. 76; North Pa. R. R. Co. v. Adams, 54 Pa. St. 97; Alexander v. Com'rs of McDowell County, 67 N. C. 330; McLendon v. Com'rs of Anson County, 71 N. C. 38.

70—p. 582.

71—Burrough v. Moss, 21 E. C. L. 558; Davis v. Miller, 14 Gratt. 1.

to them, there must be actual notice, as in the case of paper not dishonored.[72]

"So far as the rule is applicable to coupons, or coupon bonds negotiable, the difference in the views of the courts is immaterial; the equities that affect this class of securities are principally irregularities in the issue of the bonds. They grow out of the original transaction, and arise between the maker or obligor and the payee, and thus come within the stricter rulings of the courts, which exclude all equities growing out of collateral matters."

§ 197. Statute of limitations.

Interest coupons are universally considered when detached from bonds as negotiable instruments and constitute separate and independent demands or causes of actions which can be enforced without ownership of the bond from which detached and without presentation of or possession of that bond. The maturity of the bond from which detached is generally at a far distant day and the various installments of interest as represented by the coupons become due and payable during the intervening period at regular intervals. Although independent and separate instruments and capable of being detached without destroying their negotiability they are still to be construed with and held as forming a part of the bond itself. If a statute of limitations operates for a shorter period of time as against a negotiable instrument of a like character as a severed coupon, yet because of the reasons above stated the courts have held that that statute of limitations is to be applied which limits the right to bring an action for a longer period of time as involving the bond itself, or stated in more concise terms, the limitations of actions on interest coupons de-

72—National Bank of Washington v. Texas, 20 Wall. 89; Danl. on Negotiable Instruments, Sec. 725.

tached from bonds is the same as that which applies to the bonds and a suit is not barred except by the same lapse of time which would bar a suit on the bond.[73]

This period of limitation, however, commences to run as against the coupons when severed or attached from the date of their respective maturities independent of the maturity of the bond.[74]

Where by the statute of limitations the collection of the amount due on a matured coupon is barred, this same installment of interest cannot be afterwards collected in an action brought to recover the principal due on the bond.[75]

An offer made by a municipality for a compromise of its outstanding indebtedness and which was declined by the holders of certain coupons will not be regarded as such an acknowledgment of the debt or promise to pay as will interrupt the running of the statute,[76] and a promise to pay or an acknowledgment of the indebtedness sufficient to interrupt the running of the statute must be made by officers of the municipality duly authorized to act in this respect and to the holder of the coupons or one authorized to represent him.[77]

73—The City of Kenosha v. Lamson, 9 Wall. 477.

City of Lexington v. Butler, 14 Wall. 282. It is a well-settled law that a suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, is but a repetition of the contract in respect to the interest, for the period of time therein mentioned, which the bond makes upon the same subject, being given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature and is not barred by lapse of time except for the same period as would bar a suit on the bond to which it was attached. Clark v. Iowa City, 20 Wall. 583; Clarke v. Janesville, 1 Bissel 98; Kershaw v. Town of Hancock, 10 Fed. 541; Huey v. Macon County, 35 Fed. 481.

74—Clark v. Iowa City, 20 Wall. 583; Amy v. Dubuque, 98 U. S. 470; Koshkonong v. Burton, 104 U. S. 668.

75—City of Lexington v. Butler, 14 Wall. 282; Huey v. Macon County, 35 Fed. 481.

76—Edwards v. Bates County, 55 Fed. 436.

77—Lincoln County v. Lunning, 133 U. S. 529.

An act of the legislature providing for the registration of overdue interest coupons of county and requiring the county treasurer to pay them thereafter from designated funds will be regarded as a new provision for their payment which saves the right of action thereon from the statute of limitations.[78]

78—Lincoln County v. Lunning, 133 U. S. 529.

CHAPTER IX

REFUNDING RENEWAL AND COMPROMISE SECURITIES

§ 198. Power to issue.

Subordinate civil subdivisions of the state and the state itself may have incurred during corporate existence an authorized and legal indebtedness, evidenced by negotiable securities or other obligations to pay and originally based upon purchases made, contract obligations incurred, judgments rendered or moneys borrowed from time to time; these various obligations payable at different times and bearing interest at varying rates. To secure uniform and usually a less rate of interest with more favorable provisions for the partial payment of the principal of the debts thus outstanding, and at times optional with the maker, it is good business policy in the administration of the corporate finances, and therefore expedient and advisable to fund or refund as it is technically termed such indebtedness by the issue of negotiable securities in exchange for the old debts which thereupon become extinguished. It is also a common practice for public corporations when unable to meet their maturing indebtedness to issue renewal bonds and generally upon more favorable terms. In both instances the refunding upon more favorable conditions either as to time of payment or the rate of interest may be due to the improved financial credit of the corporation or a lowering of the prevailing rate of interest received by lenders on such investments. The issue of the new or refunding bonds have

for their purpose with the proceeds the payment of outstanding and floating corporate indebtedness.[1]

The legality of the refunding or renewal securities when issued by a subordinate public corporation is necessarily based upon a grant of authority from the state and if issued by the state upon some legislative act passed in due form in accordance with the provisions of its organic law. The legal authority to issue in all cases must first exist, all other questions connected with an issue of refunding or renewal securities are consequently subordinate to this essential.[2]

This authority may either be expressly given or impliedly possessed though the power to issue refunding or renewal bonds is not ordinarily impliedly possessed and especially where the original authority to contract the indebtedness was not sufficiently broad to authorize the issue of bonds. If, however, the original bonded debt was legally incurred some courts hold that the power to issue refunding or renewal bonds is fairly inferable or implied from the original grant of authority.[3]

There are also decisions to the effect that the power to borrow money carries with it the implied power to give

1—Board of Liquidation v. McComb, 92 U. S. 531, construing the various funding acts of the state of Louisiana passed on January 24, 1874, and March 2, 1875; as impairing the rights of various creditors affected by the legislation. Schuerman v. Territory, 60 Pac. 895; Veatch v. City of Moscow (Ida.), 109 Pac. 722.

Slayton v. Rogers (Ky.), 107 S. W. 696. The power to fund county indebtedness carries with it the right to employ the necessary agents and attorneys in executing it. Murray v. Fay (Wash.), 26 Pac. 533; Diefenderfer v. State (Wyo.), 80 Pac. 667.

2—Merrill v. Monticello, 138 U. S. 673; New Orleans v. Southern Bank, 31 La. Ann. 560; Opinion of Justices, 81 Me. 602, 18 Atl. 291.

3—Whitewell v. Pulaski County, 2 Dill. 249.

Johnson v. County of Stark, 24 Ill. 75. The power may be created by ratification of the acts of county officials.

Galena v. Corwith, 48 Ill. 423. The power to pay debts or provide for their payment to fund them and issue the necessary evidences thereof exists in every corporation without any express authority in its charter. State v. Babcock (Nebr.), 37 N. W. 645.

as security or as evidence of such indebtedness the usual and necessary certificates or commercial instruments which enable the corporation to exercise the power expressly granted to borrow money. An application of the principle, that the grant of a power carries with it the right to use all necessary, usual and appropriate means in its execution, to the issue of negotiable bonds and which consequently stamps them with validity. It will be remembered, however, that the great weight of authority is against the existence of an implied power to issue negotiable securities.[4]

It must not be understood, however, from the statements above made that the right to issue refunding or renewal bonds exists independent of an original grant of power or that they can be issued without regard to the formalities required by law in the issue of negotiable bonds by public corporations. The power to issue must have been given either directly in a specific instance or indirectly when derived from a prior general grant of authority, limited in the manner and extent of its exercise by constitutional or statutory provisions if they exist. The conditions precedent must be performed and agencies designated by law used to the same extent and in the same manner as an issue of bonds not characterized by the term renewal, funding or refunding.[5]

4—See Sec. 84, et seq., ante.

Portland Savings Bank v. City of Evansville, 25 Fed. 389. In this case the Common Council of the City was authorized "to borrow money for the use of the city," and under this authority it issued its renewal bonds which were held valid.

City of Galena v. Corwith, 48 Ill. 423. A city being in debt which is evidenced by script or by promissory notes may surely change the form of indebtedness to interest bearing bonds and this without express authority in its charter. It is an inherent power and vital, without which such organizations could not live; see, however, the later case of Hardin v. McFarlan, 82 Ill. 140, modifying the rule stated in the City of Galena case. City of East St. Louis v. Maxwell, 99 Ill. 439; Rogan v. Watertown, 30 Wis. 259.

5—Atchison Board of Education v. De Kay, 148 U. S. 591.

Coffin v. Board of Com'rs of

§ 199. Refunding bonds excluded from debt limitations.

In many states where limitations as to amount or manner of issue have been placed upon the incurrence of debts or the issue of bonds by public corporations, special constitutional provisions are to be found excluding from the operation and prohibitive effect of such limitations the issue of refunding bonds for the purposes indicated or there may be found special provisions relating particularly to the funding of existing indebtedness. The states having such provisions are given in the note below.[6]

Kearney County, 57 Fed. 137 C. C. A. An act which provided "that no bonds of any kind shall be issued by any county," within one year after organization was amended to provide that no bonds except for school purposes should be voted for and issued by any county within that time, the proviso in respect to popular vote was held to apply to refunding bonds which might under general laws be issued without a popular vote.

Hinckley v. City of Arkansas City, 69 Fed. 768. Purchasers of refunding bonds must ascertain whether the statutory requirements in respect to the passage of an ordinance have been performed.

Brown v. Ingalls Township, 81 Fed. 485. An unauthorized board has no authority to issue refunding bonds. Roberts v. City of Paducah, 95 Fed. 62.

Coffin v. Richards, 6 Ida. 741, 59 Pac. 562. An ordinance providing for the "funding of outstanding indebtedness other than municipal bonds" was held invalid where the statute authorizing such action provided that the indebtedness to be refunded must be described in the ordinance.

Edminson v. City of Abilene, 7 Kans. App. 305, 54 Pac. 568. A resolution not sufficient where the charter requires the enactment of an ordinance as necessary to the issue of refunding bonds. City of Cincinnati v. Guckenberger, 60 Oh. St. 252.

6—Ala., Art. 11, Sec. 213; Art. 12, Secs. 222, 224, 225; Ark., Art. 16, Sec. 1; Calif., Art. 11, Sec. 18; Art. 16, Sec. 1; Colo., Art. 11, Sec. 6; Del., Art. 8, Sec. 3; Fla., Art. 9, Sec. 6; Ga., Art. 7, Sec. 3; Idaho, Art. 8, Sec. 1; Ind., Art. 10, Sec. 5; Ky., Secs. 50, 158; Me., Art. 9, Secs. 15, 22; Md., Art. 12, Sec. 7; Mich., Art. 12, Sec. 7; Mo., Art. 4, Sec. 44; Art. 9, Sec. 19; N. D., Art. 12, Sec. 182; Ohio, Art. 8, Sec. 2; Pa., Art. 9, Sec. 4; S. C., Art. 10, Sec. 7; Art. 8, Sec. 7; S. D., Art. 13, Sec. 2; Tex. Art. 3, Sec. 49; Utah, Art. 14, Sec. 1; Va., Art. 13, Sec. 184; Wash., Art. 8, Sec. 1; Wyo., Art. 16, Sec. 3; U. S. Act of Cong. 1886, 24 Stat. at L. 170 Secs. 3, 4.

Sisk v. Cargile (Ala.), 35 So. 114,

In respect to the necessity for the existence of authority to issue, it may be stated again subject to the charge perhaps of unnecessary repetition that the weight of authority holds to the rule that if any doubt exists as to the power to issue negotiable securities of the character considered in this chapter, the power will be denied. The issue of negotiable bonds payable in the distant future which places a burden upon the tax payers, in many instances of the coming generation, and frequently incurred for the construction of unnecessary or extravagant public improvements is not regarded by the courts with favor. The power to issue refunding bonds for the purpose of funding the bonded indebtedness of a public corporation must be derived from clear and undoubted legislative or constitutional authority, and this is true although such transactions usually result in a benefit or an advantage to the community and do not, as uniformly held, increase or add to the debt of the corporation but merely change its form.[7]

§ 200. Authority where expressly given.

Where the authority to issue refunding bonds is expressly given and in detail but few questions can arise as to the validity of bonds issued pursuant to the authority conferred. The questions that do arise involve principally the execution of the authority including the elements of time, place and manner. In these respects, the rules and principles of law applying are the same which apply to the issue of bonds or securities generally and will be found in the various sections of this book to which

construing Const., Art. 12, Sec. 224.

City of Los Angeles v. Teed (Calif.), 44 Pac. 580. Political Code, 1880; Secs. 4445-4449 as amended in 1881 authorizing the refunding of outstanding debt applies to all cities whether organized before or after the adoption of the code. Gaulbert v. City of Louisville, 97 S. W. 342; see authorities fully cited in Sec. 209 post.

7—See authorities fully cited in Sec. 209 post.

reference may be made under the appropriate subject or title.[8]

§ 201. Construction of statutory authority.

In Kansas under a law which provided for the compromising and refunding of bonded indebtedness but which directed that no indebtedness should be refunded except that actually existing or afterwards legally created, it was held[9] that power conferred upon municipalities to issue refunding bonds was limited to the amount of the

8—Valley County v. McLain, 79 Fed. 728, affirming 74 Fed. 389. The amount of refunding bonds to be issued under Nebraska Laws of 1877-1879 is confined to the bonds to be issued under the provisions of this act without regard to bonds previously issued.

Waite v. City of Santa Cruz, 89 Fed. 619. A statute authorizing the issue of refunding bonds must be construed as giving authority to issue negotiable securities in the usual form.

Yavapai County v. McCord (Ariz.), 59 Pac. 99, construing act of Congress of June 6, 1896, and holding that the power of a county to sell refunding bonds after that date is not terminated, but only obligations outstanding prior to that time can be refunded. Sharp v. Contra Costa County, 34 Calif. 284. In re Contracting of State Debt by Loan (Colo.), 41 Pac. 1110.

Coquard v. Village of Oquawka (Ill.), 61 N. E. 660. The authority to refund as conferred by Act of February 13, 1865, does not apply to cities organized after its passage. Carpenter v. Town of Central Covington (Ky.), 81 S. W. 919.

State v. Board of Liquidation, 27 La. Ann. 660, construing the Louisiana legislation authorizing the funding of the state indebtedness by Board of Liquidators. Bogart v. Lamotte Township, 19 Mich. 249; Com'rs of Jefferson County v. People, 5 Nebr. 127.

People v. Parmerter, 158 N. Y. 385, 53 N. E. 40. Laws of 1874, c. 188, relating to the issue of renewal bonds by the village of Plattsburg is not impliedly repealed by laws of 1892, c. 685, containing general provisions for the issue, etc. of municipal bonds. Bradshaw v. City of High Point (N. C.), 66 S. E. 601.

In re Menefee (Okla.), 97 Pac. 1014. Laws of 1907-08, c. 7, providing for the refunding of the state debt is not invalid as not expressing the subject of the act in the title contrary to the Constitution, Art. 5, Sec. 57. Conklin v. City of El Paso (Tex.), 44 S. W. 879. Power conferred by charter provision. Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462.

9—Kelly v. Cole (Kan.), 65 Pac. 672.

bonded indebtedness of the municipality actually existing at the time the act of refunding took place.

In Kentucky,[10] under Kentucky statutes, secs. 3228, which provided that all indebtedness of school boards existing at the time the statute took effect should continue unimpaired and that any debt of the board might be refunded by the issuance of bonds, it was held that a school board might refund a debt created since the statute was enacted and that since it was a remedial one that construction must be given which would cause it to operate beneficially.

The express authority may be found either in general grants of power, constitutional, statutory and charter provisions or in some special law. Where the authority to issue is based upon a special law, an examination must be had in respect to its constitutionality to determine the validity of bonds issued pursuant to its terms. If unconstitutional, the authority necessarily fails and the bonds issued thereunder cannot be regarded otherwise than as illegal.[11] If constitutional, the reverse is necessarily true.[12]

10—Woods v. Board of Education of City of Covington, 53 S. W. 517.

11—Travellers Insurance Company v. Township of Oswego, 55 Fed. 361; People v. Woods, 7 Calif. 579; Babcock v. Middleton, 20 Calif. 643.

Anderson v. City of Trenton, 42 N. J. L. 486. A statute authorizing the refunding of indebtedness by cities having a population of not less than 25,000 held a violation of that constitutional provision which forbids the passage of special laws to regulate the internal affairs of a town.

12—Board of Com'rs of Seward v. Aetna Life Ins. Co., 90 Fed. 222 C. C. A.

Brattleboro Savings Bank v. Trustees of Hardy Twp., 98 Fed. 524, citing among other cases Loeb v. Trustees, 91 Fed. 37 and disapproving State v. Davis, 55 Oh. St. 15, 44 N. E. 511. The court held that an act of the Ohio Legislature authorizing a township to issue bonds for the purpose of refunding its indebtedness was not void, not being contrary to Ohio Const., Art. 2, Sec. 26, requiring that all laws of a general nature shall have a uniform operation throughout the state. The decision on this point was considered from

§ 202. Authority, when implied.

The claim of an implied authority to issue refunding or renewal bonds generally rests, not upon the grant of a general power to incur indebtedness but upon the existence of a general grant of power to issue bonds or other forms of negotiable instruments.[13]

It cannot rest merely upon the fact that the public corporation may be indebted and that it may be expedient, advisable, or even necessary as in the case of maturing indebtedness to issue the refunding or renewal bonds.[14]

In a case[15] from the Eighth Circuit in the United States Court of Appeals, it was said by Judge Sanborn: "Another objection to these bonds is that the city of Huron was without power to issue them. The position is not entitled to extended consideration, because the power granted by the charter of the city of Huron is plenary. It was general, not special. It was not limited to specified purposes, but was 'to borrow money, and for

the legal status of a bona fide purchaser for value of negotiable securities issued under authority of the refunding act. Hobart v. Sup'rs, 17 Calif. 23; California University v. Bernard, 57 Calif. 611; State v. Flanders, 24 La. Ann. 57; Odd Fellows' Savings, etc. Bank v. Quillen, 11 Nev. 109.

Herman v. Town of Gottenberg, 63 N. J. L. 616, 44 Atl. 758. Laws of 1898, c. 40, providing for the funding of existing debts for street improvements in incorporated towns is a general law and therefore constitutional. Buist v. City Council of Charleston, 77 S. C. 260, 57 S. E. 862.

13—Second Ward Savings Bank v. City of Huron, 80 Fed. 660, affirmed 86 Fed. 272; City of Pierre v. Dunscombe et al., 106 Fed. 611; City of Quincy v. Warfield, 25 Ill. 317; Morris & Whitehead v. Taylor (Ore.), 49 Pac. 660; but see Coffin v. City of Indianapolis, 59 Fed. 221.

14—Village of Oquawka v. Graves, 82 Fed. 568 C. C. A., "nor does the power to issue renewal or refunding negotiable bonds exist as of course, and merely because a municipal corporation is indebted."

Coquard v. Village of Oquawka (Ill.), 61 N. E. 660. The power to refund outstanding bonds cannot be implied merely from the power originally conferred authorizing the former issue.

15—City of Huron v. Second Ward Savings Bank, 86 Fed. 272 C. C. A.

that purpose to issue bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed seven per cent. per annum, as the city council may deem best.' The whole is greater than any of its parts, and includes them all. The power is to borrow money and issue bonds for all municipal purposes and includes the power to do so to pay or refund the indebtedness of the municipality." [16]

§ 203. Conditions required for issue.

In a preceding section, it was said that the right to issue refunding or renewal bonds could not exist, even

16—The court cited in support of its conclusions on this proposition the following cases: Portland Savings Bank v. City of Evansville, 25 Fed. 389; Simonton Mun. Bonds, Sec. 126; City of Quincy v. Warfield, 25 Ill. 217; Morris v. Taylor, 31 Or. 62, 49 Pac. 660; City of Galena v. Corwith, 48 Ill. 423; Village of Hyde Park v. Ingalls, 87 Ill. 13. Rogan v. City of Watertown, 30 Wis. 259, 268, and further held: There is nothing in the cases of Police Jury v. Britton, 82 U. S. (15 Wall.), 366; Merrill v. Monticello, 138 U. S. 673, 684; Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189, 191; City of New Orleans v. Clark, 95 U. S. 644; City of Waxahachie v. Brown, 67 Tex. 519; State v. Board of Liquidation of City Debt, 40 La. Ann. 398; Middleport v. Aetna Life Ins. Co., 82 Ill. 565; Bogart v. Lamotte Twp., 79 Mich. 294, 44 N. W. 612; Brenham v. German American Bank, 144 U. S. 173, 182; Coffin v. Kearney County Com'rs, 57 Fed. 137; or Shannon v. City of Huron, 9 S. D. 356, 60 N. W. 598, in conflict with this conclusion. No court has held in any of these cases that the unlimited power to borrow money and issue bonds for all municipal purposes excludes the power to do so to fund or pay municipal debts. In Police Jury v. Britton, 82 U. S. (15 Wall.) 566, no power to issue bonds was granted to the parish, and the court simply held that this power was not to be inferred from the grant of general powers of administration. In Merrill v. Monticello, 138 U. S. 673, a power was given to issue bonds for specified purposes, and the court held that this was not a grant of power to issue them for purposes not specified, on the familiar principle, "Expressio unius est exclusio alterius." In Brenham v. German American Bank, 144 U. S. 173, and Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189, it was held that a mere power to borrow money without authority to issue bonds did not include the power to emit negotiable securities to evidence the debt. In Coffin v. Kearney County Com'rs, 57 Fed. 137, the statute expressly

where the authority express or implied was to be found, without compliance with the formalities and conditions required by law for an issue of negotiable bonds by public corporations. The conditions precedent must be performed and the agencies designated by law used to the same extent and in the same manner as for an issue of bonds not characterized as funding, renewal or refunding.[17]

The original grant of authority for an issue of negotiable bonds may make their validity contingent upon an affirmative vote of the electors of the taxing districts issuing them; the affirmative action of a municipal council or administrative body; a provision through the levy of taxes for the payment of the accruing interest and the ultimate payment of the principal or other conditions noted in preceding sections.[18] The performance of similar conditions may be required for the legal issue of refunding or renewal bonds.[19]

That an issue of refunding or renewal bonds be valid when an election was necessary to the validity of the

forbade the issue of bonds at the time when they were put forth; and in Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598, the power to issue bonds was not under discussion at all. The other cases cited are as wide of the mark.

17—National Bank of Commerce v. Town of Granada, 54 Fed. 100; Swan v. City of Arkansas City, 61 Fed. 478; City of Santa Cruz v. Waite, 98 Fed. 387.

Edminson v. City of Abilene (Kans.), 64 Pac. 568. The authority of cities of the second class to issue funding bonds must be exercised by the passage of an ordinance as required by statute not by resolution.

Montpelier Savings Bank & Trust Co. v. School Dist. No. 5 (Wis.), 92 N. W. 439. A tax must be voted at the meeting authorizing the indebtedness to pay it.

18—See Secs. 120, et seq., and 140, ante.

19—Swan v. City of Arkansas City, 61 Fed. 478. Statutory requirements as to execution of bonds held mandatory.

Robertson Co. v. City of Paducah, 95 Fed. 62. A city council in making provisions for refunding may act by resolution rather than ordinance in the absence of a requirement to proceed by ordinance.

Manley v. Board of Com'rs of Pueblo County (Colo.), 104 Pac. 1045. A proposition to refund two previous county bond issues made in separate years was not double, within the rule requiring two schemes of public improvements to be submitted separately.

original bonds, the cases quite uniformly hold this action unnecessary where the proper authorities refund the corporate indebtedness, there is no legal necessity for referring the question of issue again to the people unless specifically required by the authority under which the issue of refunding bonds is made; and further in many state constitutions an issue of refunding or renewal bonds is especially excepted from the operation of provisions requiring a vote of the electors upon the question of incurring an indebtedness.[20] This is especially true where by constitutional, statutory or charter provisions public corporations are authorized to refund all matured and maturing indebtedness.[21]

20—Hill v. City of Memphis, 134 U. S. 198. An act which provides for no vote as a prerequisite to an issue of refunding bonds contravenes Missouri Constitution of 1865, Art. 11, Sec. 14.

Brown v. Ingalls Twp., 81 Fed. 481. Notice of election held insufficient. City of Pierre v. Dunscomb, et al., 106 Fed. 611; Hobart v. Sup'rs, 17 Calif. 23; Manley v. Board of Com'rs of Pueblo County (Colo.), 104 Pac. 1045.

Coffin v. Richards (Ida.), 59 Pac. 562. The indebtedness to be refunded must be described in the ordinance calling the election. Bannock County v. C. Bunting & Co. (Ida.), 77 Pac. 277; Locke v. Davison, 111 Ill. 19.

State v. Cornell (Nebr.), 74 N. W. 432. Under Sec. 134 Compiled Statutes, a majority is sufficient to carry a proposition to fund outstanding indebtedness at a lower interest rate. Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462; see State Constitution as noted in Chapter XVIII, post.

21—Howard v. Kiowa County, 73 Fed. 406.

Society for Savings v. Board of Com'rs of Pratt County, 82 Fed. 573. A vote of the people is not necessary to the issue of refunding bonds under the Kansas Stats. authorizing counties to refund all their matured and maturing indebtedness. Board of Com'rs of Haskell County, Kan. v. Nat. Life Ins. Co., 90 Fed. 228 C. C. A.; Board of Com'rs of Pratt County, Kan. v. Society for Savings, 90 Fed. 233.

Geer v. Ouray County (Colo.), 97 Fed. 435, C. C. A. The Const. of Colo., Art. 11, Sec. 6, which prohibits the creation of indebtedness by municipalities without a favorable vote of the electors does not limit the power of the Legislature to authorize public corporations to refund their debts without a vote of the people—the refunding creates no indebtedness.

City of Los Angeles v. Teed (Calif.), 44 Pac. 580. To fund an existing debt is not to incur an indebtedness. No election is there-

Many of the cases cited in the preceding note involve the question of whether when a constitutional provision requires a vote of the electors to authorize the incurring of indebtedness an issue of refunding bonds requires such a vote. The authorities hold without exception that since an issue of refunding bonds does not create a debt or indebtedness within the meaning of such statutory or constitutional provisions no election is necessary.

§ 204. What can be refunded.

The obligations to be refunded vary with the authority for the issue of the refunding securities. Generally, the

fore necessary as required by Const., Art. 11, Sec. 18.

Veatch v. City of Moscow (Ida.), 109 Pac. 722, Sec. 2316 of the Revised Codes of Idaho does not apply to the issue of refunding bonds when by their issue an additional debt or liability of the city is not created. An election in such case is not required. Riley v. Township of Garfield (Kan.), 49 Pac. 85; Gaulbert v. City of Louisville, 97 S. W. 342.

Culbertson v. City of Louisville (Ky.), 128 S. W. 292. Existing debt may be renewed without a vote of the electors as required under Const., Sec. 157; Smith v. Stephan, 66 Md. 381, 7 Atl. 561; Boyce v. Auditor General (Mich.), 51 N. W. 457, 52 N. W. 754; Hotchkiss v. Marion (Mont.), 29 Pac. 821.

Blanton v. Board of County Com'rs, 101 N. C. 532, 85 S. E. 162. It is not necessary to submit the question of issuing refunding bonds to the voters of a county as required by Constitution, Art. 7, Sec. 7. This section having reference only to the contraction of debts.

See, also, as holding the same: McCless v. Meekins, 107 N. C. 34, 23 S. E. 99; City of Asheville v. Webb, 46 S. E. 19. Though this case holds that if a city chooses to submit the question to a popular vote it must follow the methods prescribed by statutes for holding the election. And Horton v. City of Greensboro, 59 S. E. 1043.

In re Menefee (Okla.), 97 Pac. 1014. Jordan v. City of Greenville (S. C.), 60 S. E. 973. A city may issue bonds to refund a bonded indebtedness without submitting the question to a popular vote. Murray v. Fay (Wash.), 26 Pac. 533.

Hunt v. Fawcett, 8 Wash. 396, 36 Pac. 318. The fact that a vote was taken on the question of an issue of refunding bonds when unnecessary and not required by statute will not invalidate the bonds authorized at the election.

Miller v. School District No. 3 of Carbon County (Wyo.), 39 Pac. 879. Under Const. Art. 16, Sec. 4, since the refunding of a bonded indebtedness is not the creation of a debt no vote of the people is necessary.

right is given to refund the maturing and matured indebtedness of every kind, or description.[22] Or again, the authority may provide for the refunding of certain designated indebtedness.[23]

Where the right to refund applies to a particular debt or forms of indebtedness, obligations not of the class or form specified cannot be taken up and refunded.[24]

22—West Plains Twp. of Meade County v. Sage, 69 Fed. 943, C. C. A. The authority for refunding under laws of Kansas, 1879, c. 50, does not restrict the issuance to bonds payable to the holders of the indebtedness to be refunded. Board of Com'rs of Haskell County v. Nat. Life Ins. Co., 90 Fed. 228, C. C. A.

Board of Com'rs of Seward County v. Aetna Life Ins. Co., 90 Fed. 222, C. C. A. A Kansas Statute which provided that "Every county * * * is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever upon such terms as can be agreed upon and to issue new bonds with semi-annual interest coupons attached in payment of any sums so compromised" authorizes the refunding of their matured or maturing debts of every kind and description whether evidenced by bonds, judgments, warrants or simple contracts. Powell v. Com'rs Court of Madison County (Ala.), 51 So. 946.

Heins v. Lincoln (Ia.), 71 N. W. 189. Refunding bonds can in turn be refunded. Slutts v. Dana (Ia.), 115 N. W. 1115; Territory v. Hopkins, 9 Okla. 133, 59 Pac. 976; Thackston v. Goodwin (S. C.), 60 S. E. 969.

Kane v. City of Charleston, 161 Ill. 179, 43 N. E. 611. Where bonds are issued and provision made for their payment as required by the constitution, if the annual tax levied fails to produce sufficient revenue to retire them at maturity, the amount remaining unpaid can be refunded.

Smith v. Mercer County (Kan.), 47 S. W. 596. With the consent of the owners unmatured bonds may be exchanged for new refunding bonds.

State v. Benton (Nebr.), 51 N. W. 140. Refunding bonds may when they in turn become payable, be refunded. City of Baltimore v. Bond (Md.), 65 Atl. 318.

Lloyd v. City of Altoona, 134 Pa. 545, 19 Atl. 427. Where bonds are refunded the holder cannot be compelled to take the new bonds at a premium.

Branch v. Sinking Fund Com'rs, 80 Va. 427. Stolen, redeemed state bonds coming into the hands of a bona fide holder for value without notice of the fact, should be replaced by refunding bonds as authorized by law.

23—Coffin v. City of Indianapolis, 59 Fed. 221; Darke v. Board of Com'rs of Salt Lake County (Utah), 49 Pac. 257.

24—Whitewell v. Pulaski County, 2 Dill. 249; Fisher v. Board of

If the liability is special, local improvement warrants for instance, it has been held that they cannot be refunded by an issue of bonds so as to convert the liability from that of a special indebtedness to a general one and enforcible against all tax payers,[25] and it is too clear for argument that refunding bonds cannot include securities issued by a private corporation or other invalid indebtedness unless the public corporation is estopped by the doctrine of recitals or otherwise.[26]

Where the authority to refund is sufficiently broad, judgments, [27] outstanding warrants, county warrants or

Liquidation of New Orleans, 56 Fed. 49.

Muskingum County Com'rs v. State (Ohio), 85 N. E. 562. County commissioners have no authority to issue refunding bonds in exchange for notes or other evidences of debt of the county.

State v. City of Blaine (Wash.), 87 Pac. 124. Street improvement warrants having the character of a special indebtedness cannot be converted by the issue of funding bonds into a general liability enforcible against all of the tax payers.

25—State v. City of Blaine (Wash.), 87 Pac. 124.

26—Waite v. City of Santa Cruz, 89 Fed. 619. A city has no power to refund bonds issued by a Water Company and secured by a mortgage on its plant which the city subsequently bought subject to the mortgage. City of Santa Cruz v. Waite, 98 Fed. 387. But see case of Waite v. City of Santa Cruz, 184 U. S. 302, where the court reversed the decisions above noted and held the bonds good in the hands of bona fide purchasers on the doctrine of estoppel by recitals.

Leavitt v. Town of Somerville (Me.), 75 Atl. 54. If a town originally indebted to the constitutional limit illegally creates an additional debt and then borrows money to pay both classes indiscriminately, the whole loan becomes invalid and uncollectible. Althaffer v. Nelsonn, 18 Oh. Cir. Ct. Reps. 145; Montpelier Savings & Trust Co. v. School District No. 5 (Wis.), 92 N. W. 439.

But see Utter v. Franklin, 172 U. S. 416. Outstanding legal indebtedness includes bonds issued under authority of the legislature and purporting on their face to be legal obligations of a public corporation irrespective of their true character.

Also, Meyers v. City of Jeffersonville, 145 Ind. 431, 44 N. E. 452. Funding bonds which have passed into the hands of a bona fide holder can be enforced without regard to the legal character of the indebtedness which they refunded.

27—Aetna Life Ins. Co. v. Lyon County, 44 Fed. 329; Board of Com'rs of Pratt County (Kans.) v. Society for Savings, 90 Fed. 233; Stone v. City of Chicago, 207 Ill.

orders,[28] unsecured and floating indebtedness,[29] can be paid, taken up and discharged by the issue of funding bonds.

492, 69 N. E. 970; Port Huron v. McCall, 46 Mich. 565.

See, also, State v. Board of Liquidation of City Debt, 51 La. Ann. 1142, 26 So. 55, where it is held that a judgment is not a "floating debt" within the act relative to the funding of the city's indebtedness.

28—Howard v. Kiowa County, 73 Fed. 406, 83 Fed. 296, C. C. A.; McLain v. Valley County, 74 Fed. 389; Board of Com'rs of Seward County v. Aetna Life Ins. Co., 90 Fed. 222, C. C. A.; Chapman v. Morris, 28 Calif. 393; Boyce v. Auditor General (Mich.), 51 N. W. 457, 52 N. W. 754.

Hotchkiss v. Marion County (Mont.), 29 Pac. 821. Non-interest bearing warrants may be refunded by the issue of coupon bonds.

State v. Rose (Wash.), 86 Pac. 575. Refunding bonds cannot be issued to pay warrants where the bonds in addition to the indebtedness of the county at the time of their issuance raise the county debt above the constitutional limit.

But see Whitewell v. Pulaski County, 2 Dill. 249. Meath v. Phillips County, 108 U. S. 553. Drafts drawn by levee inspectors cannot be exchanged for county bonds. Hope v. Board of Liquidation, 9 So. 754.

Richards v. Klickitat County, 13 Wash. 509, 43 Pac. 647. Indebtedness incurred prior to the adoption of the constitution may be funded by warrants issued on *that* day.

29—Board of Com'rs of Haskell County v. Nat. Life Ins. Co., 90 Fed. 228, C. C. A.

Riley v. Twp. of Garfield, 54 Kans. 463, 38 Pac. 560. County indebtedness of every kind and description whether created before or after the passage of the act can be refunded under the laws of 1879, c. 50. City of Goodland v. Nation, 82 Kans. 200, 107 Pac. 502.

Jardet v. Board of Liquidation of Public Debt, 40 La. Ann. 379, 3 So. 893. An obligation must be a legal and enforcible one in order to be included within "floating indebtedness" as affected by legislation providing for the issue of refunding bonds.

State v. Board of Liquidation of City Debt, 51 La. Ann. 1142, 26 So. 55. A judgment is not a "floating debt" within the act relative to the funding of the city's indebtedness.

State v. Moore, 45 Nebr. 12, 63 N. W. 130. Acts of 1887, c. 9, held not to include within the term indebtedness school district warrants or bonds. Ontario County v. Shepard, 91 N. Y. S. 611.

City of Cincinnati v. Guckenberger, 60 Oh. St. 53, 54 N. E. 376. A contract by which the interest of the funded debt was added to the principal and the whole amount refunded is unauthorized. Morris & Whitehead v. Taylor (Or.), 49 Pac. 660.

But see McCless v. Meekins, 117 N. C. 34, 23 S. E. 99. An act authorizing the refunding of county indebtedness may violate Const. Art. 7, Sec. 7, which provides that

§ 205. Formalities of issue.

The formalities required for a legal issue of refunding securities including the formal execution and delivery are controlled by precisely the same principles of law which apply to an issue of securities not thus designated and these have been sufficiently discussed and referred to in the preceding sections.[30]

The refunding bonds may be placed in the hands of trustees with power to deliver the new bonds when the old bonds have been delivered to the trustee and cancelled.[31]

The form as refunding bonds and the manner of their issue and sale,[32] with the time and place of payment[33]

municipal corporations shall not contract any debt "except for the necessary expenses thereof."

30—See Chapter VII, ante.

31—Heins v. Lincoln (Iowa), 71 N. W. 189.

32—Waite v. City of Santa Cruz, 89 Fed. 619. A statute authorizing the issue of refunding bonds must be construed as giving authority to issue negotiable securities in the usual form. City of Quincy v. Warfield, 25 Ill. 317.

Rathbone v. Hopper (Kan.), 45 Pac. 610. An act authorizing the refunding of township indebtedness permits the issue of negotiable bonds. State v. Pickett, 46 La. Ann. 7, 14 So. 340.

School District No. 44 of Caddo County v. Baxter (Okla.), 78 Pac. 386. The statutory authority for refunding outstanding legal warrant indebtedness does not provide a means by which a warrant indebtedness of a school district of $800 may be funded in bonds of $80 each.

City of Tyler v. L. L. Jester & Co. (Tex.), 78 S. W. 1058. Refunding securities construed as notes and not bonds within the meaning of the statutes regulating the issuance of bonds.

33—Board of Com'rs of Kiowa County v. Howard, 83 Fed. 296. County com'rs have the power to fix the time and terms of payment of refunding bonds.

City of Los Angeles v. Teed (Calif.), 44 Pac. 580. Refunding bonds cannot be made payable elsewhere than at the city treasury.

Kane v. City of Charleston, 161 Ill. 179, 43 N. W. 611. Where bonds are issued and provision made for their payment as required by the constitution, if the annual tax levy fails to produce sufficient revenue to retire them at maturity, the amount remaining unpaid can be refunded.

State ex rel. Proctor v. Walker (Mo.), 92 S. W. 69. Where by inadvertence no tax is levied at the time of issuing refunding bonds as required by statute, the effect of which is to defer payment for more

may be especially designated by law and the rules involving such conditions and formalities are those applying to the issue of negotiable securities in general.[34]

§ 206. Invalidity of old debt as affecting the new.

The authority to issue refunding or renewal bonds may exist and all of the conditions required for a legal exercise of the power conferred performed, the validity of the bonds thus issued considered from the viewpoint of an original issue independent of its purpose being therefore unimpeachable. The question has been raised, however, in many cases of the validity of such securities because of the fact that the obligations in renewal of which or in exchange for which they are issued are invalid for one or more of the many reasons which may be urged as against the validity of negotiable securities. Some of these reasons may be suggested, namely, an issue in excess of the constitutional limitation, the absolute lack of power to issue in other respects and the existence of irregularities or informalities in the exercise of a power conferred. The validity of negotiable securities may be attacked upon two basic grounds, namely: the absolute

than twenty years from that time, the bonds will not be invalidated.

34—City of Cadillac v. Woonsocket Institute for Savings, 58 Fed. 935. Securities which purport to be refunding bonds and issued to take up former bonds falling due sufficiently comply with the Michigan statutes requiring each municipal bond to show upon its face the class of indebtedness to which it belongs.

Farmers National Bank v. Jones, 105 Fed. 459. The state debt board have no authority to issue new bonds in lieu of old ones which have been lost or destroyed even though they are erroneously destroyed by officers of the state.

Richmond Cemetery Co. v. Sullivan (Ky.), 47 S. W. 1079. Refunding bonds may be issued to the full amount of the old bonds called in though the new bonds bear a premium. Smith v. Mercer County (Ky.), 47 S. W. 596.

Cass County v. Wilbarger County (Tex.), 60 S. W. 988. A substantial compliance with the statute in respect to denomination and maturity of refunding bonds is sufficient.

Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462. A proposition submitted to the voters to issue refunding bonds will as to amount be limited by the statutory authority.

want of authority to issue and the irregular or informal exercise of an existant power.[35]

The cases quite generally hold that the invalidity of the old debt will not affect the legal status of the new obligations as legal and enforcible demands, both on the grounds of estoppel which will be considered in a subsequent chapter and also on the ground of collateral attack,[36] and this principle especially applies to the old securities, the invalidity of which is urged because of informalities or irregularities in their issue. The courts uniformly hold that where a public corporation has for its own benefit destroyed old bonds and issued new securities in their place, it will not be permitted to urge the defenses which it might have asserted against the surrendered and

35—Steines v. Franklin County, 48 Mo. 167. The defense of an absolute want of power is available against a bona fide holder although there be a recital of compliance with statutory provisions but the legislature may validate in effect such bonds by authorizing an issue in lieu of them. See cases cited in the immediately following notes.

36—See Chapter XII, post.

County of Cass v. Shores, 95 U. S. 375. A county is bound by its assumption of indebtedness.

Utter v. Franklin, 172 U. S. 416. Act of Congress of June 6, 1896 authorizing the funding of outstanding bonds of the territory of Arizona and its municipalities was intended to apply to bonds issued under the authority of the legislature and purporting on their face to be legal obligations whether in fact legal or not. Merchants National Bank v. Little Rock, 5 Dill. 299; Cummins v. District Township, 42 Fed. 644, reversed in Doon Twp. v. Cummins, 142 U. S. 366; City of Huron v. Second Ward Savings Bank, 86 Fed. 272; Board of Com'rs of Seward County, Kansas v. Aetna Life Ins. Company, 90 Fed. 222; Lyon County, Iowa v. Keene 5-Cent Savings Bank, 100 Fed. 337, affirming 97 Fed. 159; City of Pierre v. Dunscomb, 106 Fed. 611; Village of Bradford v. Cameron, 145 Fed. 21.

Board of Com'rs of Lake County v. Standley (Colo.), 49 Pac. 23. The validity of a refunding bond as exchanged for an outstanding and valid warrant will not be affected by the fact that other bonds of the same series were exchanged for invalid warrants. Meyers v. City of Jeffersonville, 145 Ind. 431; City of Catlettsburg v. Self (Ky.), 74 S. W. 1064.

Smith v. Stephan, 6 Md. 381. Where a city is authorized to fund its debts by issuing bonds, if the debt was contracted without legal authority such legislative approval will give it validity.

cancelled obligations. These defenses it will be assumed have been waived through the surrender and cancellation of the old securities and the issue of new bonds in their place.[37]

The question of invalidity based upon a want of power, as in the case of an issue in excess of a constitutional or statutory limitation will be again considered in a subsequent section; independent of the cases there cited the authorities following the rule stated in this section generally support the validity of an issue of refunding bonds in connection with which may be involved a violation of a statutory or constitutional provision fixing a maximum amount of bonds which can be legally issued. These rulings are sustained upon the ground of bona fide holding,[38] and also the doctrine of estoppel.[39]

37—County of Jasper v. Ballou, 103 U. S. 745; Rich v. Town of Mentz, 18 Fed. 52; City of Cadillac v. Woonsocket Institution for Savings, 58 Fed. 935; Ashley v. Board of Sup'rs, 60 Fed. 55; Brown v. Ingalls Twp. 81 Fed. 485; Thaxton v. Goodwin (S. C.), 60 S. E. 969.

38—Amey v. Allegheny County, 24 How. 364; Board of Com'rs of Gunnison County (Colo.), v. E. H. Rollins & Sons, 173 U. S. 255; Potter v. Chaffee County, 33 Fed. 614; Aetna Life Ins. Co. v. Lyon County, 44 Fed. 329; Jamison v. Independent School District of Rock Rapids, 90 Fed. 387; Board of Com'rs of Lake County v. Keene 5-Cent Savings Bank, 108 Fed. 505 C. C. A.; Powell v. City of Madison, 107 Ind. 106, 8 N. E. 31; Sioux City & St. Paul Ry. Co. v. Osceola County, 52 Ia. 26; Opinion of Justices, 81 Me. 602, 18 Atl. 291; State v. Wilkinson, 20 Nebr. 610.

Erskine v. Nelson County (N. D.), 58 N. W. 348. Legislative authority to issue refunding bonds validates county warrants theretofore issued in excess of authority. In re State Warrants, 6 S. D. 518, 62 N. W. 101; National Life Insurance Co. of Montpelier v. Mead (S. D.), 82 N. W. 78, re-hearing denied, 83 N. W. 335; Walling v. Lummis (S. D.), 92 N. W. 1063; Darke v. Board of Com'rs of Salt Lake County (Utah), 49 Pac. 257; but see Shaw v. Independent District of Riverside, 77 Fed. 277; Brown v. City of Atchison (Kan.), 17 Pac. 465.

Leavitt v. Town of Somerville (Me.), 75 Atl. 54. The burden of proof rests upon the holder of a refunding bond to show that the charge which his bond represents in part was not in excess of the constitutional limitation of 5 per cent. Birkholz v. Dinnie, 6 N. D. 511, 72 N. W. 931; see Chapters XII and XIII, post.

39—See Secs. 274, et seq., post.

Some cases, however, hold to the theory that a debt cannot change its character through a mere change in its form and hold consequently that the validity of the refunding or renewal securities will be based upon the legal character of the old debt.[40]

§ 207. Invalidity of new debt as affecting the old.

The refunding securities issued may be invalid for lack of authority or because of irregularities in their issue and after an exchange of the old securities for them the question presents itself of the status of the owner. He has exchanged a valid obligation for an invalid one. The courts are uniform in their holding that a valid debt cannot be paid or extinguished by its exchange for a form of obligation the invalidity of which is afterwards successfully maintained.[41]

The holder of the new securities is either subrogated to the rights of the holders of the old and valid ones,[42] or

40—Reynolds v. Lyon County, 97 Fed. 155; Graham v. City of Tuscumbia (Ala.), 42 So. 400; Swanson v. City of Ottumwa (Ia.), 106 N. W. 9; Brown v. City of Atchison (Kan.), 17 Pac. 465.

Mutual Benefit Life Ins. Co. v. Elizabeth, 42 N. J. L. 235. Where the refunded bonds are invalid the substitutes are made valid by the legislative act from which they proceed. City of Tyler v. Tyler Bldg. & Loan Association (Texas), 82 S. W. 1066, reversed, however, in 86 S. W. 750.

De Mattos v. City of New Whatcom, 4 Wash. 127, 29 Pac. 933. Refunding bonds to a certain excess held invalid.

41—Merchants National Bank v. County of Pulaski, 2 Fed. 545; Deyo v. Otoe County, 37 Fed. 246; County of Jefferson v. Hawkins (Fla.), 2 So. 362; Morris v. Taylor, 31 Or. 62, 49 Pac. 660; Martin County v. Gillespie County (Texas), 71 S. W. 421; Gause v. Clarksville, 1 McCrary Cir. Ct. 78.

See also Merrill v Town of Monticello, 138 U. S. 673. Negotiable paper issued by a city without express authority is not rendered valid because issued to take up previous securities lawfully issued.

42—Irvine v. Board of Com'rs of Kearney County, 75 Fed. 765; Brown v. City of Atchison (Kan.), 17 Pac. 465; see, also Aetna Life Ins. Co. v. Lyon County, 82 Fed. 929; but see Coquard v. Village of Oquawka (Ill.), 61 N. E. 660.

the return of the securities exchanged if not destroyed can be compelled.[43]

§ 208. Estoppel.

Public negotiable securities usually contain upon their face a recital of the authority under which issued, the purpose of issue and the performance of the conditions required by the grant of authority, if and when required; refunding bonds constitute no exception to this usual custom. The doctrine of recitals as affecting the validity of negotiable securities will be fully considered in a subsequent chapter.[44]

In this place without attempting to explain or discuss the doctrine, some cases will be referred to because involving an issue of refunding or renewal bonds and which fall within the application of general principles relating to recitals.

The doctrine of estoppel arising through recitals is applied to the same extent to refunding and renewal securities as to others not coming within these terms, and the courts uniformly hold that where refunding bonds contain the customary recitals of fact; that they are issued for the purpose of funding and retiring certain legal obligations of the public corporations outstanding and unpaid; that all the requirements of the refunding act have been fully complied with in the issue and that they are issued in due conformity to law, that the public corporation is estopped from repudiating and falsifying its own representations of fact contained in the recitals as against a bona fide holder for value.[45] The corpora-

43—See in general but not exactly in point, O'Connor v. East Baton Rouge Parish, 31 La. Ann. 221; Plattsmouth v. Fitzgerald, 10 Nebr. 401.

44—See Chapter XII, post.

45—Waite v. City of Santa Cruz, 184 U. S. 302, reversing 98 Fed. 387. City of Cadillac v. Woonsocket Institute for Savings, 58 Fed. 935, distinguishing Barnett v. Denison, 145 U. S. 135.

Ashley v. Presque Isle County Sup'rs, 60 Fed. 55 C. C. A. The

tion is estopped to set up as against the validity of the refunding bond the existence of certain conditions which if allowed as a defense might make it invalid.[46]

The doctrine of estoppel by recitals, it has been held in some cases, will apply to a issue of bonds in excess of a constitutional or statutory limitation.[47] The recitals, however, must be made by those officials charged by law with the duty of ascertaining the performance of and determining the existence of the conditions in respect to which they certify. This question will be found considered at length in subsequent sections.[48]

court in this case as well as the one last cited from the Fed. Rep. held that a purchaser is not bound to investigate the matter of the refunded indebtedness where refunding bonds recite upon their face that they are issued in conformity to law. Brown v. Ingalls Twp., 81 Fed. 485; Board of Com'rs of Kiowa County v. Howard, 27 C. C. A. 531; City of Huron v. Second Ward Savings Bank, 86 Fed. 272; Wesson v. Town of Mt. Vernon, 98 Fed. 804; Board of Com'rs of Barber County (Kan.) v. Society for Savings, 101 Fed. 767; Hughes County v. Livingston, 104 Fed. 306; Board of Trustees v. Brattleboro Savings Bank, 106 Fed. 986 C. C. A.; Meyer v. Brown, 65 Calif. 583, 26 Pac. 281; City of Tyler v. Tyler Bldg. & Loan Association (Tex.), 86 S. W. 750, reversing 82 S. W. 1066.

46—Graves v. Saline County, 116 U. S. 359; Ashley v. Board of Sup'rs of Presque Isle County, 60 Fed. 55.

City of Cadillac v. Woonsocket Institution for Savings, 58 Fed. 935. The court here said: "The recitals in the bonds as to the fact of old bonds falling due and that the new bonds were issued to take up the old debt would well lull an intending purchaser into security. The defense it might have made against its old bonds it elected not to make. It should not now be permitted to set it up as against a bona fide holder of its refunding bonds."

47—City of Pierre v. Dunscomb, 106 Fed. 611.

Salmon v. Rural Independent School District of Allison, 125 Fed. 235. In the absence of a recital, a school district is not estopped to deny the validity of bonds. But see Hamilton County v. Montpelier Savings Bank & Trust Co., 157 Fed. 19.

48—City of Huron v. Second Ward Savings Bank, 86 Fed. 272.

City of Pierre v. Dunscomb, 106 Fed. 611. The recitals of officers of a municipality who are invested with authority to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed, that the bonds have been isued "in pursuance of," or "in conformity with," or "by virtue of;" or "by authority

§ 209. Creation of new debt.

In previous sections,[49] has been considered the existence and the application of constitutional and statutory provisions relative to the incurrence of debts by public corporations; these provisions almost uniformly fix a maximum limit of legal indebtedness. The objection has been raised that through or by the issue of refunding or renewal bonds, an "indebtedness" or a "debt" within the meaning of these constitutional or statutory limitations has been created and if in excess of the maximum limit fixed is therefore void. The purpose of the issue of renewal or refunding bonds is to pay with their proceeds outstanding and floating corporate indebtedness, the intention being to effect this through either a sale of the refunding securities and with the moneys so derived pay the outstanding obligations, or by exchange of the old securities for the new, effect their payment and cancellation.[50] The objection that through the issue of renewal or refunding bonds a new debt is created has been repeatedly decided by the courts as not well taken, for the reason that the proceeds of such bonds are used not for the purpose of adding to the indebtedness or the obligations of the corporation but of paying outstanding ones, which immediately upon the exchange or payment become cancelled and extinguished and incapable of enforcement as corporate obligations, the only legal in-

of," the statute precludes inquiry, as against an innocent purchaser for value, as to whether or not the precedent conditions had been performed when the bonds were delivered. Such recitals estop the municipal body from denying the performance of every act and the discharge of every duty which under the law its officers were required to do or discharge before and at the time when they delivered the bonds. See Sec. 274, et seq., post.

49—See Secs. 92, et seq., and 199, ante.

50—Board of Com'rs of Seward County, Kansas v. Aetna Life Ins. Co., 90 Fed. 222. The refunding of indebtedness by the issue of bonds is not the creation of a new debt but a matter of fiscal administration.

debtedness existing against the public corporation as a result of the process being the new refunding or renewal bonds.[51] Bonds issued to fund a valid indebtedness neither create any debt nor increase the debt but merely change the form of the indebtedness.[52]

51—Maish v. Territory of Arizona, 164 U. S. 599; Gorman v. Sinking Fund Com'rs, 25 Fed. 647; Cummins v. Doon Twp., 42 Fed. 644, reversed in 142 U. S. 366; Board of Com'rs of Lake County v. Platt, 79 Fed. 567; Com'rs of Ouray County v. Geer, 97 Fed. 435.

Lyon County v. Keene 5-Cent Savings Bank, 100 Fed. 337. Refunding bonds in the hands of bona fide purchasers will be presumed to have been issued in exchange for valid outstanding indebtedness and not to have increased the county debt. City of Los Angeles v. Teed (Calif.), 44 Pac. 580, disapproving Doon Twp. v. Cummins, 142 U. S. 366; Board of Com'rs of Lake County v. Standley (Colo.), 49 Pac. 23; Manly v. Board of Com'rs of Pueblo County (Colo.), 104 Pac. 1045; Heins v. Lincoln, 102 Ia. 69.

Brown v. Milliken, 42 Kan. 769, 23 Pac. 167. A city formed from a part of a township is liable for its proportional share of refunding bonds issued to take up railroad aid bonds issued by the township and before the organization of the city. The refunding bonds are merely new evidences of the original debt. And, see, also, Montgomery County v. Taylor, 142 Ky. 547, 134 S. W. 894, holding to the same principle where a county has been divided.

Farson, Leach & Co. v. Board of Com'rs, etc. (Ky.), 30 S. W. 17; Richmond Cemetery Co. v. Sullivan (Ky.), 47 S. W. 1079; Hotchkiss v. Marion (Mont.), 28 Pac. 821; Palmer v. City of Helena (Mont.), 47 Pac. 209; Town of Solon v. Williamsburgh Savings Bank, 114 N. Y. 122; City of Poughkeepsie v. Quintard, 136 N. Y. 275, 33 N. E. 764, affirming 19 N. Y. S. 944; Blanton v. Board of County Com'rs, 101 N. C. 532, 8 S. E. 162; State v. West (Okla.), 118 Pac. 146; Morris v. Whitehead & Taylor (Ore.), 49 Pac. 660; Snyder v. Kantner, 190 Pa. 440; Hirt v. City of Erie, 200 Pa. 223, 49 Atl. 796; City of Mitchell v. Smith (S. D.), 80 N. W. 1077; City of Tyler v. L. L. Jester & Co. (Tex.), 78 S. W. 1058; Miller v. School Dist. No. 3, Carbon County, 5 Wyo. 217, 39 Pac. 879; but, see, Bickerdike v. State (Calif.), 78 Pac. 270.

52—City of Huron v. Secoud Ward Savings Bank, 86 Fed. 272; Board of Com'rs of Lake County v. Keene 5-Cent Savings Bank, 108 Fed. 505, C. C. A.

Independent School District of Sioux City v. Rew, 111 Fed. 1; Opinion of Justices, 81 Me. 602, 18 Atl. 291. The issue of renewal bonds is merely a substitution for and in a payment of the old bonds exchanged. In re Menefee (Okla.), 97 Pac. 1014; Jones v. City of Camden, 44 S. C. 319, 23 S. E. 141; see, also, cases cited in preceding note.

§ 210. Doon Township v. Cummins.

This case in the Supreme Court of the United States [53] involved the question of the validity of an issue of refunding bonds where the total indebtedness of the corporation including such refunding bonds exceeded the constitutional limitation as fixed in Iowa, constitution, art. 11, sec. 3, which forbids municipal corporations, including townships, from becoming "indebted in any manner or for any purpose" in excess of the designated amount. The Iowa legislature passed an act that a district township might issue "bonds to fund its outstanding indebtedness, the bonds to be issued upon a vote of the district electors. This act expressly provided that the bonds thereby authorized should be issued for no other purpose than the funding of outstanding bonded indebtedness. Under this act the Township of Doon which was already in debt to the constitutional limit issued its refunding bonds and in a suit on the bonds by the holders the township defended on the ground that the bonds were invalid as being issued in excess of the constitutional limitation. The court held that the refunding bonds issued under authority of law for the purpose of funding the outstanding bonded indebtedness of the corporation but which were devoted in a large measure to the payment of miscellaneous obligations not the payment of outstanding bonds as designated were not enforcible even in the hands of a bona fide holder where the total indebtedness of the corporation including such refunding bonds exceeded the constitutional limit. Justices Brown, Harlan and Brewer dissented from the majority opinion of the court.

The Supreme Court in holding the bonds invalid in

53—142 U. S. 366. See, also, Lake County v. Graham, 130 U. S. 662; Shaw v. Independent School District of Riverside, 77 Fed. 277; Holliday v. Hildebrandt, 97 Ia. 177, 66 N. W. 89; Reynolds v. Lyon County (Iowa), 96 N. W. 1096.

part said: "The prohibition (of the Constitution) extending to debts contracted "in any manner, or for any purpose," it matters not whether they are in every sense new debts contracted for the purpose of paying old ones, so long as the aggregate of all debts, old and new, outstanding at one time, and on which the corporation is liable to be sued, exceeds the constitutional limit. The power of the Legislature in this respect being restricted and controlled by the constitution, any statute which purports to authorize a municipal corporation to contract debts in any manner or for any purpose whatever in excess of that limit is to that extent unconstitutional and void."

The legislative act provided either for a sale of the refunding bonds and the application of their proceeds to the payment of outstanding indebtedness or the exchange of such bonds for outstanding bonds, par for par. On this point, the court said: "There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative of exchanging bonds issued under the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebted ness of the corporation would not be increased, might be consistent with the constitution. But under the first alternative by which the treasurer is authorized to sell the new bonds and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if the new bonds equal in amount to the old ones are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are

applied to the payment of the old ones, or until some of the obligations are otherwise discharged.

It is true that if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will be ultimately reduced to the former limit. But it is none the less true, that it has been increased in the interval; and that unless those officers do their duty, the increase will be permanent. It would be inconsistent alike with the words, and with the object of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers."

In the opinion by the dissenting justices is to be found the following language: "Had the proceeds of these bonds been properly applied, no question could have arisen as to the indebtedness of the township having been increased by their issue. If the district township had the right to issue the bonds, which it certainly had, if the statute under which they were issued be constitutional, the purchaser of such bonds was under no obligations to see that the money he paid for them was applied to extinguishing the existing indebtedness. He was entitled to act upon the presumption that the officers charged with the execution of the law would not betray their trust, and would deal fairly with the people who had put them forward to represent them. In my view this is simply an attempt to saddle the holders of these bonds with the derelictions of the officials chosen by the electors of this township to act for them in this transaction, and who were alone entitled to receive the money."

This case, however, has been so distinguished and criticized in respect to the question under discussion that its value as authority has been much modified, if not entirely

destroyed.[54] Judge Sanborn in a case already cited[55] referred to the Doon case and said: "In Doon Tp. v. Cummins, 142 U. S. 367, 372, 378, 12 Sup. Ct. 220, the plaintiff did not buy the bonds for value, in good faith, and without notice of any defect from one to whom they had been issued by the corporation, as the bank did in this case; but he was himself the person to whom they were originally issued, and he knew when he took the first ten bonds that the district exceeded the constitutional limit of its indebtedness in issuing them, and that it intended to exceed that limit still more. The opinion of the majority of the court in that case was that, where the debt of a municipal corporation already exceeded the constitutional limitation, the exchange of new bonds for the old, bond for bond, would not increase the debt of the corporation, and would not be inconsistent with the con-

54—City of Huron v. Second Ward Savings Bank, 86 Fed. 278 C. C. A., 49 L. R. A. 534; City of Los Angeles v. Teed, 112 Calif. 319, 44 Pac. 582.

City of Poughkeepsie v. Quintard, 136 N. Y. 275, 32 N. E. 764. This was a case where the validity of refunding bonds was questioned as being contrary to a charter provision prohibiting the contracting of debts not to be paid in the current year. The court of appeals held that the issue of refunding bonds did not constitute the creation of or an increase of debt forbidden by the charter and said in part: "It must be conceded that the transaction in form may be a borrowing of money but in substance it is the very different case of refunding an existing debt. There is a new creditor and a reduced rate of interest but the same old debt." In passing upon the charter provision, the court said that it "had an obvious purpose and meaning, it was to restrain the creation of a debt not the extension of one already existing; to prevent a new liability not to postpone the payment of an old one; to shield the taxpayer from the waste and danger of extravagant and needless appropriations and not to obstruct the convenient and beneficial extension of a proper debt lawfully incurred."

National Life Ins. Co. v. Mead, 13 S. D. 37, 82 N. W. 78. The court in this case said: "Doubtless, the constitutional provision under discussion was designed to confine municipal indebtedness within prescribed limits but it could hardly have been intended or expected to prevent embezzlement or misappropriation of public funds."

55—City of Huron v. Second Ward Savings Bank, 86 Fed. 272 C. C. A., 49 L. R. A. 534.

stitutional limitation, but that if the new bonds were sold, and their proceeds were subsequently used to pay the old bonds, there would be a temporary increase of the debt, which would violate the limitation and invalidate the new securities. The distinction seems to be more nice than real, and, in view of the vigorous dissent which is recorded with the opinion, we may be permitted to doubt whether it will ever be made again."

§ 211. Compromise bonds.

The authority may be conferred by the legislature, subject to constitutional limitations, upon public corporations to issue not only refunding and renewal bonds but also to compromise and adjust their outstanding obligations and to issue in payment of the indebtedness thus adjusted and compromised what may be characterized by the term of compromise bonds. It is generally held necessary to the legality of these securities that the debts compromised or adjusted should at least bear the character of a colorable validity. Where the legality of the old debt is not denied the right to compromise if conferred by statute clearly exists.[56] There are cases hold-

56—Desha County v. State (Ark.), 84 S. W. 625. Compromise bonds together with just proportion of expenses resulting from litigation may be apportioned by the legislature among the several counties formed from one subsequent to the issue of the bonds compromised.

People v. Morse, 43 Calif. 534. The creditors of a county cannot be compelled to surrender their evidences of indebtedness and accept new ones different in terms from the old. Sullivan v. Walton, 20 Fla. 522; Railroad Company v. Com'rs of Paola Twp., 16 Kan. 302.

Carpenter v. Hindman, 32 Kan. 601. A substantial compliance with statutory authority for issue of compromise bonds is sufficient.

Falkenstein Twp. v. Fitch (Kan.), 43 Pac. 276. New bonds cannot be issued in lieu of indebtedness represented by bonds where both warrants and compromise bonds representing them have been cancelled and destroyed. Brown v. Tinsley (Ky.), 21 S. W. 535; Sparks v. Bohannan (Ky.), 61 S. W. 260.

Dugas v. Donaldsonville, 33 La. Ann. 668. Where compromise bonds have beeu issued as against out-

ing that in the absence of an original power to issue the bonds compromised or so to be adjusted defects in that issue or the bonds outstanding cannot be cured or the bonds rendered valid by the consent of the officers of the corporation to a compromise judgment, even though for a smaller amount, the question of the power of the corporation not being involved in or determined by the judgment,[57] but there are cases holding that if the power has been conferred to compromise, outstanding debts of a questionable validity may be adjusted and new bonds issued therefor which will be valid and in respect to which the corporation issuing them will be estopped to set up as against their legality the invalidity of the old securities for the payment of which they are issued,[58] and it has further been held that when the power to compromise exists that where the old securities have been in part adjudicated but others have never been involved, in an action brought to determine their validity that the corporate officials are given discretionary powers to include within the issue of compromise bonds all of the outstanding securities, whether adjudicated and in the form of judgments or otherwise, and where they have the power to make the compromise and to determine on behalf of the corporation that the unadjudicated bonds were valid and subsisting obligations that their recital of such fact in the compromise bonds will estop the corporation as against a bona fide holder of the new securi-

standing claims their validity cannot be afterwards raised in a suit on the bonds.

State v. Moore (Nebr.), 63 N. W. 130. The issue of compromise bonds must be limited to the indebtedness, the authority to compromise and adjust which exists. See, also Com'rs of Leavenworth County v. Hamlin, 31 Kan. 105.

57—Board of Com'rs of Oxford, North Carolina v. Union Bank of Richmond, 96 Fed. 293 C. C. A., citing Norton v. Shelby County, 118 U. S. 425; Kelly v. Milan, 127 U. S. 139; and Doon Twp. v. Cummins, 142 U. S. 366.

58—Dugas v. Donaldsonville, 33 La. Ann. 668; State v. Holladay, 72 Mo. 499; State v. Hannibal & St. Jo. R. R. Co. (Mo.), 11 S. W. 746.

ties to deny their validity on the ground that any or all of the obligations refunded were invalid either on constitutional or statutory grounds.[59]

59—Hamilton County v. Montpelier Savings Bank & Trust Co., 157 Fed. 19.

CHAPTER X

NEGOTIABILITY OF PUBLIC SECURITIES AND BONA FIDE HOLDING

§ 212. Definition of negotiable instrument.

"An instrument is called negotiable when the legal title to the instrument itself and to the whole amount of money expressed upon its face may be transferred from one to another by endorsement and delivery by the holder, or by delivery only. The peculiar equities which attach to negotiable paper are the growth of time and were acceded for the benefit of trade."

"The term 'negotiable,' in its enlarged signification, is used to describe any written security, which may be transferred by indorsement and delivery, or by delivery merely, so as to invest in the indorsee the legal title, and thus enable him to bring a suit thereon in his own name. But in strictly commercial classification, and as the term is technically used, it applies only to those instruments, which, like bills of exchange, not only carry the legal title with them by indorsement, or delivery, but carry as well, when transferred before maturity, the right of the transferee to demand the full amounts which their faces call for."[1]

"By negotiability is meant the right of a holder of a written instrument for the payment of money to transfer it by either endorsement and delivery, or delivery, so as to vest in the transferee a legal title therein unaffected by equities, and when necessary, to bring suit thereon in his

1—Daniel on Neg. Instruments, 5th Ed., Sec. 1, 1a.

own name to enforce payment. And the very object of making bonds negotiable is that they may pass from hand to hand like money, and the holder thereof may acquire a perfect title thereto.'' [2]

The peculiar rights of negotiable paper and the holder thereof as stated by Daniel [3] are:

First, In respect to title. ''If a negotiable instrument be stolen and transferred by the thief to a third person in the usual course of business before maturity and for a valuable consideration, the person so acquiring it may hold it against the world.''

Second, In respect to the amount. ''But negotiable paper carries the right to the whole amount it secures on its face, and is subject to none of the defenses which might have been made between the original and intervening parties, against any one who acquired it in the usual course of business before maturity. It is a circulating credit like the currency of the country, and, before maturity, the genuineness and solvency of the parties are alone to be considered in determining its value. It has been fitly termed 'a courier without luggage,' '' and,

Third, In respect to the consideration. ''But when a bill of exchange or negotiable note has passed to a bona fide holder for value, and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosoever hands it may go.''

As distinguished from negotiable paper these rights and rules do not accrue in favor of or apply to the holder of non-negotiable instruments.[4]

2—Simonton's Munic. Bonds, Sec. 111.

3—Daniel Neg. Instruments, 5th Ed., Sec. 1.

4—Police Jury of Texas v. Britton, 15 Wall. 566. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferable from hand to hand. Such instruments transferred before maturity to a bona fide purchaser leave

§ 213. Public securities regarded as negotiable instruments.

If securities as issued by public corporations comply in their form and issue to the requirements of a negotiable instrument, they are universally regarded as such under the law-merchant and subject to all the principles of law regulating, controlling and protecting the rights of bona fide holders. This doctrine is so fully established that it will not be necessary to cite more than a few of the leading cases.[5]

behind them all equities and inquiries into consideration and the conduct of parties; and become, in the hands of an innocent holder, clean obligations to pay, without any power on the part of the municipality to command any inquiry as to the justice or legality of the original claim, or to plead any corrupt practice of the parties in obtaining the security. City of Nashville v. Ray, 19 Wall. 468.

5—Amey v. Mayor, etc. of Alleghany City, 24 How. 364. "Certificates of Loan" so-called, circulated for ten years and acknowledged by the city as its bonds for the purpose for which they were issued, held valid in the hands of bona fide transferees. Moran et al. v. Com'rs of Miami County, 2 Black, 722; Gelpcke v. City of Dubuque, 1 Wall. 175; Humboldt Twp. v. Long, 92 U. S. 642; Cromwell v. County of Sac, 96 U. S. 51; Koshkonong v. Burton, 104 U. S. 668; New Providence v. Halsey, 117 U. S. 336; Carter County v. Sinton, 120 U. S. 517.

City of Cripple Creek v. Adams (Colo.), 85 Pac. 184. Municipal bonds possess the attributes of commercial paper and pass by delivery or endorsement and are not subject to equities in the hands of a holder for valne before maturity and without notice. Gardner v. Haney, 86 Ind. 17; Bloomington v. Smith, 123 Ind. 41.

Maddox v. Graham, 2 Metc. (Ky.), 56. Bonds although not commercial paper in the sense of a law-merchant yet are negotiable by endorsement or delivery and the person who takes them bona fide in the course of business can enforce their payment though they be not valid as between the original parties. Smith v. New Orleans, 27 La. Ann. 286; Savings Bank v. National Bank, 19 Vroom. (N. J.) 513; Boyd v. Kennedy, 38 N. Y. L. 146; Borough of Montvale v. Peoples Bank (N. J.), 67 Atl. 67; Commonwealth v. Com'rs, etc., 37 Pa. St. 237; Ehrlich v. Jennings (S. C.), 58 S. E. 922.

Winston v. City of Ft. Worth (Tex.), 47 S. W. 740. Bonds are not invalid because made negotiable when issued under Ft. Worth city charter, Secs. 87-87a. Stratton v. Com'rs Court of Kinney County (Tex.), 137 S. W. 1170.

But see Garvin v. Wiswell, 83 Ill. 215, which holds that a county

As illustrating the doctrine, a reference may be had in the text to a case from the Supreme Court of the United States.[6]

"This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper, and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton and Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable

bond payable to a person therein named or bearer cannot be transferred so as to vest the legal title except by endorsement of the payee; the equitable title, however, may pass by sale and mere delivery; and also Diamond v. Lawrence County, 37 Pa. 353, as an early case holding that a county bond is subject, even in the hands of innocent holders, to equities existing against them in favor of the maker. Such bonds not having, however, at that time the quality of commercial paper in Pennsylvania. "We will not treat bonds like these as negotiable securities; on this ground we stand alone. All the courts, American and English, are against us." This holding has since been reversed. See Mason v. Frick, 105 Pa. 162.

6—Mercer County v. Hackett, 1 Wall. 83.

by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition, not only in this court but of nearly every state in the Union, is well known and admitted."

In another case in the same court[7] it was said: "Bonds of the kind executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, and, if purchased for value in the usual course of business before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in the case of bills of exchange and promissory notes." "Possession, even without explanation, is prima facie evidence that the holder is the proper owner or lawful possessor of the instrument."

In an Iowa case,[8] it was said in accordance with the universal rule: "Coupon bonds of municipal and business corporations were at first regarded by the courts as non-negotiable, because they were sealed instruments; but subsequently, they came to be acknowledged as negotiable instruments, and the holders of them were protected to the same extent as the holders of negotiable notes and bills under the law-merchant. Still later, they came to be recognized as negotiable in as full and complete a manner as bank bills or the national currency of the country; and now they stand not only equal before the law to the negotiable paper and to our circulating medium, but they are also regarded as chattels, in so far as to relieve them from defenses and burdens incident to choses in action merely, and give to them a merchantable and vendible quality. Thus the modern rule holds such bonds salable, free of equities between the original parties; also, exempt from the defense of usury founded

7—Com'rs of Marion County v. Clark, 94 U. S. 278.

8—Griffith v. Burden, 35 Iowa 138.

on the fact that they may have been issued and sold below par value; also, subject to the rule of damages in an action for conversion, which applies to chattels, rather than to that which applies to private evidences of debt."[9]

The absence of a recital in public securities that the conditions precedent to their issue have been complied with does not deprive them of the character of negotiable instruments nor of the benefit of the ordinary presumptions which follow such instruments,[10] and it has also been held that even though they do not contain the words required by a statute relative to negotiable instruments to render commercial paper negotiable, yet if they import a consideration and possess the ordinary elements of negotiable instruments, they cannot be subjected in the hands of an innocent purchaser for a valuable consideration to equities between the original maker and the original payee.[11]

§ 214. Essentials of negotiable paper.

That public securities fall within the class of commercial paper known as negotiable instruments it is necessary that they contain or bear in form the essentials of such instruments as established by a long line of decisions. These essentials are:

First, that the instruments should be open, that is, un-

9—Woods v. Lawrence County, 1 Black (U. S.) 386; Richardson v. Lawrence County, 154 U. S. 536; Meixwell v. Kirkpatrick, 33 Kan. 282; Murray v. Stanton, 99 Mass. 345.

10—Quinlan v. Greene County, 157 Fed. 33.

11—Barrett v. County Court of Schuyler County, 44 Mo. 197; see, also, Texas v. White, 7 Wall. 700; Texas v. Hardenburgh, 10 Wall. 68; Huntington v. Texas, 16 Wall. 402.

National Bank of Washington v. Texas, 20 Wall. 72, passing upon the validity as affected by different phases of legislation of the so-called Texas indemnity bonds, and especially the doctrine of whether the state as owner of negotiable paper payable to it or bearer might by a legislative enactment restrict or destroy the negotiability of such paper.

sealed; however, in respect to the bonds of public corporations the courts now hold after some varying decisions upon the question that although they, the bonds, are generally under the seal of the corporation, they are to be placed on an equality with promissory notes and bills of exchange and controlled and governed by the law-merchant—in other words,—that the affixing of the corporate seal does not destroy their character as negotiable instruments.[12]

Second, the promise to pay must be certain. As illustrating this principle the case of Humboldt Township v. Long,[13] can be cited, involving the validity of railroad aid bonds. The bonds in question contained upon their face the following statement: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott & Allen Railroad and for the construction of the same through said township in pursuance and in accordance with" the act of the legislature there named. The objection was raised against the character of the bonds as negotiable instruments that they were lacking in one of the essentials of such instruments, namely, that the engagement to pay must be certain. It was claimed that by the express terms of the bonds, it was made payable with the accruing interest on the performance of the condition that the railroad in question should be constructed through Humboldt Township, a condition that might never happen. The court on this point said: "Relying upon this clause of the certificate, the Township contends that the construction of the railroad through the township was a condition upon which the payment was

12—Mercer v. Hackett, 1 Wall. 83; Koshkonong v. Burton, 104 U. S. 668; Rondot v. Rogers Twp., 99 Fed. 202, 92 U. S. 642.

13—See also Merriwether v. Saline County, 5 Dill. 565, holding that a township bond which recited that "it is to be converted and exchanged for bonds of the county of Saline whenever the injunction * * * shall be finally dissolved and bonds issued under said order" is not negotiable and where the consideration for it has failed no action will lie upon it.

agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road, as well as the subscription for stock, were mentioned in the recital as the reasons why the township entered into this contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing and to aid in the construction of the road, that the bond was given. The words, 'upon the performance of the said condition,' cannot then refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is, that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's 'on the presentation and surrender of the respective interest coupons.' Such presentation and surrender, is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is for that reason destitute of negotiability.''

Third, the fact of payment must be certain, that is, the instrument must be payable unconditionally and at all events.[14] This essential eliminates under some of the authorities those securities payable only from a special fund and which never become under any conditions a charge upon the general revenues of the corporation or a general charge or obligation of the corporation issuing them, if the special fund or source of revenue which is

14—Parsons v. Jackson, 99 U. S. 434; National Bank of La Crosse v. Petterson, 200 Ill. 215, 65 N. E. 687; Daniel Neg. Instruments, 5th Ed. Sec. 41 et seq., 50.

the sole means of payment becomes insufficient and inadequate.

A recent case in the United States Circuit Court of Appeals for the Eighth Circuit is illustrative of this line of authorities.[15] Railroad aid bonds were issued by Washington county, Nebraska, which acknowledged an indebtedness in a certain sum and which contained the promise to pay the same to the payee or bearer from a special fund to be raised by the annual levy of a specified rate of tax on the taxable property of the county—such funds to be applied pro rata on such bonds: first, to the payment of the interest and then to the payment of the principal. The court held in its opinion by Judge Thayer: "Yet we are of opinion that the obligations in suit are not negotiable bonds, within the rules of the law-merchant, and that a purchaser of the same for value in the open market cannot invoke for his protection the doctrine of estoppel by recitals, as it is generally applied upon actions upon negotiable municipal bonds. To render a written promise to pay money negotiable in the sense of the law-merchant, it is essential that it should be an unconditional promise to pay a certain sum of money at some future time, which must be 'certainty as to the fact of the payment.' If by the terms of the contract the sum promised to be paid, or a portion thereof, may never become payable, as where the sum promised is not to be paid unconditionally and at all events, but only out of a special fund derived from certain sources, which may not prove adequate to meet the demand in full, the instrument, according to the great weight of authority, cannot be deemed negotiable, and entitled, in the hands of a third party, to the immunities which belong to that class of instruments.* * * We have no reason to suppose and it has never been decided,

15—Washington County, Nebraska v. Williams, 111 Fed. 801.

that section 2968 of the Consolidated Statutes of Nebraska, which defines negotiable instruments, was designed to modify the doctrine aforesaid in any respect, or to declare that an instrument might be negotiable even though it was uncertain as to the fact of payment. The statute, like many other statutes of a similar character, was designed to place bonds and promissory notes on the same plane of negotiability as foreign bills of exchange, provided they possess the requisite words of negotiability and contain an unconditional promise to pay a certain sum of money at some future time, which is sure to arrive. Now, while the obligations in suit acknowledge an indebtedness is on the part of the county of Washington to a certain amount, yet the promise made to pay this indebtedness is not a promise to pay it unconditionally and at all events, but is a promise to pay it only out of a fund to be raised by a levy of one mill per dollar on the taxable property of the county, which fund is to be apportioned pro rata among all of the obligations, and applied first to the interest, and next to the indebtedness."

Fourth, the amount to be paid must be certain, the contract must be only for the payment of money and the medium of payment must be money. The reason for these essentials clearly appears without the citation of authority. In respect to a medium of payment other than money, the cases hold that if any agreement of a different character be engrafted upon the instrument, it then becomes a special contract, involved with other matters, and thereby loses its character as a commercial or negotiable instrument.[16]

16—Parsons v. Jackson, 99 U. S. 434; Hopper v. Town of Covington, 8 Fed. 777, Id. 118 U. S. 148.

Flagg v. School Dist. No. 70 (Minn.), 58 N. W. 499. Where bonds provided that they should be paid at a certain place with New York Exchange, it was held that the amount to be paid was rendered uncertain and the instrument therefore made non-negotiable. City of Memphis v. Brown, 11 Am. Law Reg. (U. S.), 629; Daniel on Neg. Inst., 5th Ed., Sec. 53, et seq., 59.

Fifth, the last essential to establish the character of a public security as a negotiable instrument is that delivery must be made; this subject has been previously considered.[17]

§ 215. The time of payment; payee.

In order to make a promissory note or other obligation for the absolute payment of a sum certain on a certain day negotiable it is not essential that it should be in terms payable to bearer or order. Any other equivalent expression demonstrating the intention to make it negotiable will be of equal force and validity; if the purpose of the maker is clear that it should be negotiable, this result is accomplished.[18]

§ 216. Time of payment as affecting negotiability.

The time of payment of public securities considered generally will be discussed in a later section and one principle only stated here applying to the payment of the securities as affecting their negotiability. While one of the essentials of a negotiable instrument is that it must contain a promise to pay on a certain date, its negotiability is not destroyed by the insertion of provisions to

17—See Sec. 176, ante.

18—White v. Vermont & Mass. R. R. Co., 21 How. 575; Roberts v. Bolles, 101 U. S. 119.

County of Wilson v. Nat. Bank, 103 U. S. 770. In order to make a promissory note or other obligation for the absolute payment of a sum certain on a certain day negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity. The purpose of the plaintiff in error that the bonds on which the suit is brought should be negotiable is perfectly clear. Ottawa v. National Bank, 105 U. S. 342; Farr v. Town of Lyons, 13 Fed. 377; Lyon County, Iowa v. Keene 5-Cent Savings Bank of Keene, N. H., 100 Fed. 337; Gamble v. Rural Independent School District of Allison, 132 Fed. 514.

But see Cronin v. Patrick County, 4 Hughes 524. Where a bond payable to a person named and his assigns was held non-negotiable.

the effect that it is made payable at the pleasure of the maker at any time before due. The negotiability of public securities is not affected by provisions for optional payment.[19]

§ 217. Registration; effect of.

It is customary in connection with the issue of public securities to insert provisions for the registration of the principal of the bond in the name of the then holder by a designated official and at a specified place. The purpose of such registration being to protect the holder of the bond, for upon registration, the payment of the principal and interest as it accrues from time to time can only be made to the person whose name appears as the registered holder upon the official records of the corporation. Registration of the character indicated is dissimilar from that required by law in many cases as a step in the validation of bonds and which has been considered in a preceding section to which reference must be made.[20]

The later decisions are uniform in their holding that the registration of public securities for the purpose indicated in this section does not deprive them of their character as negotiable instruments. It affects the manner of transfer only as between vendor and vendee, not the right of a bona fide holder in enforcing payment.[21]

19—Ackley v. Hall, 113 U. S. 135; Hughes County v. Livingston, 104 Fed. 306; see, Sec. 352 et seq., post.

20—See Sec. 173, ante.

21—West Plains Twp., Meade County v. Sage et al., 69 Fed. 942 C. C. A. The record required by the statute of bonds issued does not affect their negotiability. This case does not involve the registration of bonds in the technical sense of the text above. D'Esterre v. City of Brooklyn, 90 Fed. 586; Benwell v. City of Newark, 55 N. J. Eq. 260, 36 Atl. 668; Whann v. Coler, 159 N. Y. 535, 53 N. E. 1133, affirming 58 N. Y. S. 5; Manhattan Savings Institute v. New York National Bank, 59 N. Y. 51.

But see Oelrich v. Pittsburg, 1 Pittsburg 522; Bunch's Executors v. Fluvanna County (Va.), 10 S. E. 532 and Simonton's Munic. Bonds, Sec. 115. This authority states that "registered bonds are not negotiable, in fact, the object in registering them is to render

Registered bonds may ordinarily upon the performance of certain conditions be changed into those transferable by delivery at the option of the holder. The effect of registration is to prevent a transfer without the written consent of the owner directly or by power of attorney.[22]

§ 218. Bona fide holding.

The question of who is a bona fide holder of negotiable securities issued by public corporations is an important one, for upon the existence of such a condition depends the application not only of the doctrine of estoppel by recitals and otherwise but other principles suggested and to be suggested throughout the text of this work. It is a general principle of the law-merchant relating to negotiable instruments that as between the immediate and original parties to the transaction, that is, those between whom there is a privity, all of the facts relative to their issue including the question of consideration, the purpose for which issued though not apparent upon the face of the instrument, irregularities and informalities in the issue and all other defects affecting the validity of the instrument of which the purchaser or payee had notice, actual or constructive, may be inquired into. All equities existing between the parties and affecting the character of the instrument as a legal and enforcible claim may be urged by the maker as a defense in an action upon the instrument.[23]

them non-negotiable and after they are registered, they are transferable only upon the books of the corporation,'' citing no cases, however; and Burrough's Public Securities, pp. 250, et seq.

22—People v. Parmerter, 158 N. Y. 385, 53 N. E. 40, reversing 46 N. Y. S. 1098. Where the statute authorizes a village clerk to collect a fee for registering village bonds mandamus will not issue to compel registration where it is shown the fee was not paid or tendered.

23—Doon Twp. v. Cummins, 142 U. S. 366. Nor did the plaintiff buy the bonds for value, in good faith, and without notice of any defect, from one to whom they had been issued by the district. He was himself the person to whom they were originally issued by the

The original purchaser of the securities is held not to occupy the position of the bona fide holder because he takes them subject to all irregularities or defects in the transactions to which he is a party, but a greater degree of care is not required of him than any subsequent purchaser.[24]

The doctrine of estoppel through recitals in the bonds or in the records of the public corporation will apply in his favor as against the public corporation issuing them equally and to the same extent as if held by a second or subsequent purchaser, except those defenses which are held available as between the immediate parties to all negotiable paper.

§ 219. Definition of a bona fide holder.

Chief Justice Waite in a case in the Supreme Court of the United States[25] defines a bona fide holder as "a purchaser for value without notice or the successor of such purchaser."

In another case in the same court,[26] it was said: "One who purchases railroad bonds in the open market supposing them to be valid and having no notice to the contrary will be deemed a bona fide holder."

In a text book upon this subject[27] it was said: "To constitute a bona fide holder, it is necessary that one

district, and knew, when he took the first ten bonds, that the district, in issuing them, exceeded the constitutional limit, as appearing by public records of which he was bound to take notice, and that it intended still further to exceed that limit. Under such circumstances, he had no right to rely on the recitals in the bonds, even if these could otherwise have any effect as against the plain provision of the Constitution of the State. Carter v. Ottawa, 24 Fed. 546; Gamble v. Rural Independent School District of Allison, 132 Fed. 514; Madison County v. Paxton, 57 Miss. 701.

24—Griffith v. Burden, 35 Ia. 143.

25—McClure v. Township of Oxford, 94 U. S. 429.

26—Galveston, etc. R. R. Co. v. Cowdry, 11 Wall. 459.

27—Abbott's Munic. Corps., Sec. 213.

should have purchased the bond before maturity, have given value for it and have no legally competent knowledge of defects or irregularities in the manner of issue which as against one having such knowledge does not preclude the municipality from setting them up." And in another text book upon the subject of municipal securities, a bona fide holder is defined as:[28] "A bona fide holder of a negotiable bond or other negotiable paper is a second or other subsequent holder of it who takes it for value in good faith and such a holder obtains a perfect title and may hold it against the world. It becomes his absolutely with the right to demand payment of it for himself and, if necessary, to enforce its collection in his own name and his privys for the same rights."

§ 220. Presumption in favor of bona fide holder.

The presumption of bona fide holding operating as a protection against prior equities is universally held to exist. When there is legal authority for the issue of public securities and they have been issued pursuant to authority there is prima facie presumption that the holder acquired them before they were due, that he paid a valuable consideration for same and that he took them without notice of any defect which would render the instruments invalid.[29]

28—Simonton Munic. Bonds, Sec. 116.

29—City of Lexington v. Butler, 14 Wall. 282. When there is legal authority for the issuance of municipal bonds, and such bonds have been issued purporting to have been issued by authority of such law, there is a prima facie presumption that the holder acquired them before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instruments invalid. Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments. Com'rs of Douglas v. Bolles, 94 U. S. 104; San Antonio v. Mahaffy, 96 U. S. 312.

Montclair v. Ramsdell, 107 U. S.

The docrine as stated above has been recently stated in a case in the Supreme Court of the United States,[30] where the court said: "Our conclusion on this branch of the case is that the county of Presidio is estopped by the recitals in its bonds to deny, as against a legal holder of the bonds, that they were issued conformably, in all respects, with the acts of legislation referred to. It is, however, contended that this principle only affords protection to bona fide purchasers for value. But clearly the plaintiff is to be taken, upon the present record, as belonging to that class; for there was no evidence that he had knowledge or notice of any facts impeaching the validity of the bonds, or that were inconsistent with their recitals, nor was there any evidence showing that the plaintiff was not a bona fide purchaser for value of these bonds. In the absence of such proof the presumption was that the plaintiff obtained the bonds underdue, or before maturity, in good faith, for a valuable consideration, without notice of any circumstances impeaching their validity. The production of a negotiable instrument sued on, with proof of its genuineness, if its genuineness be not denied, makes a prima facie case for the holder. In other words, the possession of the bonds in this case, their genuineness not being disputed, made a prima facie case for the plaintiff. These views are in ac-

147. A holder of negotiable municipal bonds is presumed to have acquired them in good faith and for value. It was not necessary that he should in the first instance prove either that he paid value or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were in fact performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of bonds and by proof of the due appointment of commissioners and their execution of the bonds with recitals of compliance with the statute. County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58; Pickens Twp. v. Post, 99 Fed. 659; Walker v. State, 12 S. C. 200; Martin County v. Gillespie County (Tex.), 71 S. W. 421.

30—County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58.

cordance with accepted doctrines of the law relating to negotiable securities."

§ 221. Rights of bona fide purchaser.

Negotiable bonds issued by public corporations pursuant to authority legally conferred are valid commercial instruments, and if purchased for value in the usual course of business before they are due give the holder a good title free from all prior equities between the original parties to the same extent as in the case of bills of exchange and promissory notes.[31]

The attitude of the Federal courts in sustaining the validity of negotiable bonds in spite of irregularities and informalities in their issue and even in some cases a questionable authority to issue has been persistent and continuous. As illustrating this position a quotation from one of the leading cases,[32] is pertinent here: "Although we doubt not the fact stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad 'speculators' are pleas which might have just weight in an application to restrain the issue or negotiation of these

31—Com'rs of Marion County v. Clark, 94 U. S. 278; McClure v. Twp. of Oxford, 94 U. S. 429; Wood v. Alleghany County, 3 Wall. Jr. 367; State v. Montgomery, 74 Ala. 226; School Dist. No. 47 of Finney County v. Cushing (Kan.), 54 Pac. 924; State v. Clinton, 28 La. Ann. 219; Lane v. Schomp, 2 N. J. Eq. 82.

See, also, 29 Am. Law Reg. (N. S.) 380, with note by C. H. Childs on the rights of bona fide holders. Daniel Neg. Instruments, 5th Ed., Sec. 769, et seq.

But see Com'rs of Madison County v. Brown, 28 Ind. 161. The fact that county bonds not transferable by delivery have passed into the hands of an innocent purchaser will not deprive the county of any defense which was available against the first holder.

32—Mercer County v. Hackett, 1 Wall. 83.

bonds but cannot prevail to authorize their repudiation, after they have been negotiated and have come into the possession of bona fide holders."

If the essentials of bona fide holding exist as subsequently stated, the purchaser or holder of negotiable securities has a title unaffected by antecedent facts and may recover on the instrument although it may be without any validity as between the original parties. By a holder or purchaser as the words are used above is intended to include anyone who has acquired it in good faith for a valuable consideration from one capable of transferring it.[33]

The title of a bona fide holder may be defeated by a want of authority as well as other reasons to be noted in a subsequent section.[34]

§ 222. Conditions necessary to constitute a bona fide holder.

The authorities are agreed that to constitute a bona fide holder one must be a purchaser or holder who has acquired the negotiable instrument in good faith and for a valuable consideration in the ordinary course of business; before maturity or without notice of its dishonor; and finally without notice of facts which would impeach its validity as between the original parties to the transaction.[35]

33—Murray v. Lardner, 2 Wall. 110.

City of Gladstone v. Throop, 71 Fed. 341. It is no defense as against a bona fide holder of bonds that the original purchaser from the city agreed to pay a commission to the city treasurer.

34—See Chapters XII and XIII, post.

35—Town of Venice v. Murdock, 92 U. S. 494; Com'rs of Douglas v. Bolles, 94 U. S. 104; Town of Orleans v. Platt, 99 U. S. 676; Montclair Twp. v. Ramsdell, 107 U. S. 147; Sayles v. Garrett, 110 U. S. 288; Sioux City, etc. R. R. Co. v. City of Osceola, 45 Ia. 168, 52 Ia. 26; Taylor v. Daviess County (Ky.), 32 S. W. 416; Pugh v. Moore, 44 La. Ann. 209; State v. Hart, 46 La. Ann. 40; City of Elizabeth v. Force, 29 N. J. Eq. 587; Cooper v. Jersey City, 44 N.

In a leading case,[36] in the Supreme Court of the United States in passing upon the question of whether the plaintiffs below in that case were, on the facts presented, bona fide holders, the court said: "Do, then, the plaintiffs below stand in the position of bona fide holders for value paid, and without notice of any defect or irregularity in the proceedings anterior to the issue of the bonds? In view of the findings of the Circuit Court, very plainly they do. They are the holders of the coupons in suit taken from those bonds, some of which they purchased without notice of any defense. The residue of those held by them are owned by other persons, who deposited them with the plaintiffs for collection, taking a receipt. There is no evidence when or for what consideration those other persons purchased, and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds. The findings of the court exhibit no fraud in the inception of the contracts, nor anything that casts upon the holders of the bonds or coupons the burden of showing that they are bona fide holders for value. The legal presumption therefore is that they are. But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded."

Questions of good faith, consideration and manner in which acquired rarely arise in connection with litigation concerning public securities. These as well as the other essential conditions to bona fide holding, are questions

J. L. 634; Borough of Montvale v. Peoples Bank (N. J.), 67 Atl. 67; see, also, cases cited generally under the immediately preceding and following notes. Daniel Neg. Instruments, Sec. 769a.

36—Com'rs of Douglas County v. Bolles, 94 U. S. 104.

of fact to be determined from the evidence presented in a particular case.[37]

37—Mobile Savings Bank v. Oktibbeha County Sup'rs, 22 Fed. 580. One is not the less a bona fide holder for value of municipal bonds because he took them for antecedent debts.

Tracy v. Phelps, 32 Fed. 634. In a suit on municipal bonds fraudulently issued, the plaintiff must show himself a bona fide holder for value. Briggs v. Town of Phelps, 70 Fed. 29.

Gamble v. Rural Independent School District of Allison, 132 Fed. 514. Applying Iowa Code 1897, Sec. 3070, relative to failure of consideration and excepting negotiable paper in the hands of innocent purchasers with the proviso that "if such paper has been procured by fraud upon the maker, no holder thereof shall recover thereon of the maker a greater sum than he paid therefor with interest and costs," and holding that this section with the proviso applies to negotiable bonds issued by an Iowa school district. This decision, however, was reversed by the United States Circuit Court of Appeals for the Eighth Circuit in 146 Fed. 113, which held that the statute could not affect the right of an innocent purchaser for value who although the bond was fraudulently issued was protected by the recitals therein and both by the law-merchant and the state statute was entitled to recover the full face value and these rights of the bona fide purchaser would be transferred to one who acquired the bond for less than its face.

Town of Greenburg v. International Trust Co., 94 Fed. 755 C. C. A. The rights of a subsequent bona fide purchaser are not defeated by the fact that the municipal authorities gave a credit to the original purchaser of bonds instead of selling them for cash as required by statute.

City of Cripple Creek v. Adams (Colo.), 85 Pac. 184. Failure of consideration for bonds will not affect the rights of a purchaser for value without notice and before maturity.

Adams v. Lawrence County, 2 Pitts. 60. Bonds in the hands of bona fide holders who have obtained them at their market value are not affected by that provision of the act authorizing their issue which prohibits their sale at less than par.

Kennicott v. Sup'rs of Wayne, 6 Biss, 138. The fact that the railroad company to whom the bonds were issued delivered them in payment for goods in good faith and for value will not deprive the holders of their rights as bona fide purchasers.

Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044. Where plaintiffs received a village bond in payment of a debt owed them by the previous holder, they were purchasers for value.

Schmidt v. Village of Frankfort (Mich.), 91 N. W. 131. The question of good faith is for the jury and where bonds are fraudulently issued it is incumbent on the plaintiff to show that he was a bona fide purchaser for value; see, also, the same case, Village of Frankfort v. Schmidt, 118 N. W. 961 where

Cases involving the time of purchase whether before or after maturity and that of acquirement without notice of its dishonor are more frequently found and these are also largely matters of fact, the rights of the parties to be determined upon a determination of whether on the facts as presented in the case fall within the application of the general and controlling principles.[38]

The greater number of cases decided involve the question of notice of facts which impeach or tend to impeach the validity of the negotiable instrument as between the original parties.

§ 223. Rights of the transferee of a bona fide holder.

A holder of negotiable securities is entitled to and succeeds to the rights of any prior bona fide holder. As said by the Supreme Court of the United States:[39] "The rule has been too long settled to be questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if restrictions were placed upon his power of the disposition. 'This doc-

it was held that the evidence in the case was sufficient to establish bona fides.

38—Texas v. White, 7 Wall. 700; Town of Grand Chute v. Winegar, 15 Wall. 355; Cromwell v. Sac County, 96 U. S. 51; First National Bank v. Scott County, 14 Minn. 77.

Belo v. Com'rs, 76 N. C. 489. Municipal bonds unpaid at maturity are dishonored like other commercial paper and the purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original purchaser.

39—County of Sac v. Cromwell, 96 U. S. 51; see, also, Comm'rs of Douglas County v. Bolles, 94 U. S. 104; Com'rs of Marion County v. Clark, 94 U. S. 278; Twp. of New Buffalo v. Cambria Iron Co., 105 U. S. 73; Montclair v. Ramsdell, 107 U. S. 147; Scotland County v. Hill, 132 U. S. 107; Town of Fletcher v. Hickman, 165 Fed. 403; Jefferson County v. Burlington & Missouri River R. R. Co., 66 Ia. 385; City of Jefferson v. Jennings Banking & Trust Co. (Tex.), 79 S. W. 876.

trine, as well as the one which protects the purchaser without notice,' says Story, 'is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy.' Story Prom. Notes, sec. 191. The only exception to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract; or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction.''

The bona fide holder of negotiable securities is entitled to transfer to others all of the rights with which he is vested and the title so acquired by his transferee cannot be affected by proof that the transferee was acquainted with defenses existing as against the paper, or as said by the Supreme Court of the United States in a recent case,[40] ''A purchaser of negotiable bonds from a bona fide holder takes all of the rights and title of such holder without regard to any knowledge which the purchaser may himself have affecting the validity of the bonds.'' [41]

40—Board of Com'rs of Gunnison County, Colo. v. E. H. Rollins & Sons, 173 U. S. 255.

41—Com'rs of Douglas County v. Bolles, 94 U. S. 104; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; E. H. Rollins & Sons v. Board of Com'rs of Gunnison County, 80 Fed. 692; Rathbone v. County Com'rs of Kiowa County, 83 Fed. 125.

Board of Com'rs of Lake County, Colorado v. Sutliff, 97 Fed. 270. The indorsee who takes from a bona fide purchaser of negotiable paper stands in the shoes of his indorser, and may invoke every presumption and estoppel which buttressed the claim of the latter, notwithstanding the fact that he received the paper as a gift, after its maturity, and with notice of alleged defenses to its collection. Pickens v. Post, 99 Fed. 659, citing Goodman v. Simonds, 20 Howard, 343; Brown v. Spofford, 96 U. S. 474; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; Hughes County, South Dakota v. Livingston, 104 Fed. 306; Gamble v. Rural Independent District of Allison, 146 Fed. 113, reversing 132 Fed. 514.

Town of Grant v. Twp. of Reno (Mich.), 72 N. W. 18. The burden of proof held, in this case on the facts, to rest upon the complainant to show a bona fide holding. Lynchburg v. Slaughter, 75 Va. 57.

These rights of a subsequent purchaser are not affected by the fact that he may have acquired them from his vendor after maturity if his vendor was a bona fide holder having purchased them before maturity. On this point the United States Circuit Court of Appeals for the Sixth Circuit held in a recent case:[42]

"But it is pressed upon the court that the plaintiff does not occupy the position of bona fide purchaser, because he became their owner after their maturity. It is conceded that the People's Savings Bank purchased these bonds before their maturity, and paid full value for them, without knowledge of any defect in the proceedings resulting in their issue, but the contention is that one who acquires negotiable paper after its maturity from one who bought it in good faith before its maturity may not enjoy the same immunity from equitable and other defenses as his transferor. The contention cannot be sustained. The assignee of a bona fide purchaser before maturity takes the same rights as his assignor had, no matter when the assignment was made."

In brief, the doctrine relating to the rights of the transferee is that the transferee of a bona fide purchaser of negotiable securities acquires the rights of the transferor and may invoke every presumption and estoppel arising from their negotiability and from their recitals in support of their validity which the transferor might have relied upon, even though the transferee takes them after maturity with notice of all of the alleged defenses. The bona fide holder of negotiable securities is entitled as an incident to his ownership to transfer his title to another with all the rights with which he is vested and this right once acquired is one of contract which cannot be destroyed or impaired by subsequent legislation.[43]

42—Rondot v. Rogers Twp. 99 Fed. 202; see, also Hughes County, South Dakota v. Livingston, 104 Fed. 306.

43—Gamble v. Rural Independent School District of Allison, 146 Fed. 113 and many cases there cited.

§ 224. Bona fides; consideration; manner of acquirement.

As already stated, the cases are few involving the three essentials named above of a bona fide holding of negotiable securities. The holder must have acquired the securities in good faith from his vendor, the element of fraud vitiates all transactions.[44]

The question of consideration rarely affects the validity of public securities. The presumption exists that the transfer has been made for a valuable consideration and the particular amount is one which as involving this element is a matter for agreement between the immediate parties to the transaction. It is possible, however, that the securities may be offered at a price so low as to raise a suspicion, actual or constructive, in the mind of the purchaser in respect to the actual character of the bonds from the standpoint of their validity or to create a presumption of bad faith in the purchaser.[45]

44—Simon v. Independent School District of Allison, 125 Fed. 235. The burden of proof is upon the holder of bonds illegally issued by a school district and without consideration that he acquired the same for value and without notice of their invalidity. See also as holding the same Gamble v. Rural Independent School District of Allison, 132 Fed. 514, reversed on other points in 146 Fed. 113.

Madison County v. Paxton, 57 Miss. 701. The president of a railroad company is not an innocent purchaser for value of bonds issued in aid of his railroad, even though he as president sold them to a creditor and as a private individual bought them back.

45—Lytle v. Lansing, 147 U. S. 59. One who holds negotiable municipal bonds as collateral securities for a loan of money to the owner is entitled to protection as a bona fide holder only to the extent of his claim so secured.

D'Esterre v. City of Brooklyn, 90 Fed. 586. One who receives municipal bonds as collateral security for an antecedent debt is a bona fide purchaser.

Board of Com'rs of Lake County, Colo. v. Sutliff, 97 Fed. 270. In this case although the plaintiff below received the coupons as a gift, some of them past due when he obtained them and he knew that the county was defending an action upon other coupons of the same issue on the grounds relied upon in the pending action yet he was held a bona fide purchaser having obtained them from one who sustained that relation to the county issuing the bonds. Borough of

That negotiable securities be acquired in the ordinary or usual course of business is understood a transfer according to the ordinary usages and customs of commercial transactions.[46]

§ 225. Purchase before maturity and without notice of dishonor.

Other essentials to a bona fide holding are that the holder or purchaser must have acquired the negotiable securities before maturity and without notice of their dishonor. The ordinary rule,[47] however, applies that if the purchaser has acquired the securities after their maturity from his vendor who purchased before maturity, he will not by the fact of his purchase after maturity be deprived of his position as a bona fide holder for value. The cases on this point have been cited in the immediately preceding sections.[48]

§ 226. Notice.

The last essential to a bona fide holding is that the holder or purchaser of negotiable securities must have acquired them without notice of antecedent facts which might make them invalid. A large number of cases involving public securities will be found upon investigation

Montvale v. Peoples Bank (N. J.), 67 Atl. 67.

Walker v. State, 12 S. C. 200. However entire may have been the failure of consideration promised by parties receiving bonds, this will not affect the title of subsequent bona fide purchasers for value before maturity or the liability of the state issuing the bonds.

Martin County v. Gillespie County (Tex.), 71 S. W. 421. It is presumed that county bonds rest upon a valuable consideration.

46—Borough of Montvale v. Peoples Bank (N. J.), 67 Atl. 67. In this case the bonds were deposited with the bank as collateral to a loan made to the depositor before maturity and for value, it was held that the bank was a holder, in due course, of the bonds.

47—Borough of Montvale v. Peoples Bank (N. J.), 67 Atl. 67.

48—See Sec. 224, ante.

to involve this essential. The notice which is deemed the equivalent of knowledge may be either constructive or actual. Constructive notice or knowledge is that which is imputed to a person of matters which he necessarily ought to know or which by the exercise of ordinary diligence he might know.[49]

The notice to affect the holder must exist at the time he acquires the negotiable securities, for it is at that time that his relation as a bona fide holder or otherwise, is fixed and established. The knowledge may be acquired subsequent to this time without in any way affecting his rights as a bona fide holder and he may transfer his securities to a subsequent holder who will acquire them without any knowledge of the defects or informalities which may be attached to them or, in other words, his rights as a bona fide holder may be subsequently transferred without regard to the knowledge which he may have acquired in the interim.[50]

§ 227. Constructive notice.

Notice to a trustee named in a mortgage executed by a railroad company, of irregularities in issuing bonds by a county to aid in the construction of the road when such aid bonds are included in the lien of that mortgage, will not affect the bona fides of the holders of such bonds.[51] The recital of facts placed in the corporate records of the township which are not properly a part of the official records do not charge the purchaser with constructive

49—See as involving negotiable paper, Murray v. Lardner, 2 Wall. 110.

50—Dresser v. Missouri & Iowa Ry. Construction Co., 93 U. S. 92. It is a settled rule in equity that a purchaser without notice to be entitled to protection must not only be so at the time of a contract or conveyance but at the time of the payment of the purchase money. See also Daniel on Neg. Instruments, Secs. 789, et seq.

51—Com'rs of Johnson County v. Thayer, 94 U. S. 631.

notice of their contents.[52] The purchaser of negotiable bonds in the open market before any question as to their validity had been raised is not chargeable with constructive notice of their invalidity so as to deprive him of the right in equity to a payment from the county issuing them, all of the parties concerned acting in good faith and in belief that the statute under which the authority to issue was claimed was valid.[53] Where the authority to issue fixed the amount at $86,000, the fact that some of the bond numbers ran beyond 86 will not operate as constructive notice of the invalidity of such bonds, there being nothing in the statute to show that the bonds should have been numbered from one to eighty-six.[54] But there were other facts which appeared in connection with the issue of the bonds in this case which the court held would operate as constructive notice.

On the contrary, where facts existed which raised a legal presumption of notice, negligence and bad faith, the third holders of negotiable bonds of a parish issued by the police jury in exchange for illegal parish warrants it was held would have no better right than the original holders,[55] and it has also been held that want of notice as to the validity of a bond which though valid on its face was invalid because issued and delivered for a private purpose should not be presumed from mere evidence of a purchase for value,[56] and where the minutes of a school district affirmatively showed that the bonds were not refunding bonds as they appeared to be and it could have been ascertained from them that the bonds were illegally issued, the purchaser was held not a bona fide

52—West Plains Township of Meade County v. Sage, 69 Fed. 943.

53—New York Life Ins. Co. v. Board of Com'rs of Cuyahoga County, 106 Fed. 123.

54—Ball v. Presidio County (Tex.), 27 S. W. 702.

55—Johnson v. Butler, 31 La. Ann. 770.

56—Thompson v. Village of Mecosta (Mich.), 86 N. W. 1044.

holder and therefore not protected by the recitals in the bonds.[57]

§ 228. Constructive notice; lis pendens; judgments.

As a general rule the holder of a negotiable security before maturity is not affected by any pending litigation to which he is not a party and in which the securities that he holds or the issue of which he is the owner in part is involved. In one of the leading cases on this point in the Supreme Court of the United States,[58] the court said: "Was the commencement and pendency of the suit for having the proceedings of the supervisors declared void, and preventing the issue of the bonds, such notice to all persons of their invalidity, as to defeat the title of a purchaser for value before maturity, having no actual notice of the suit, or to the objection to the bonds?" "It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions." * * *

"Whilst the doctrine of constructive notice arising from lis pendens, though often severe in its application,

57—Montpelier Savings Bank & Trust Co. v. School District No. 5 (Wis.), 92 N. W. 439.

58—County of Warren v. Marcy, 97 U. S. 96. See also Warren County v. Marcy, 97 U. S. 96; Nauvoo v. Retter, 97 U. S. 389; City of Lexington v. Butler, 14 Wall. 282; Orleans v. Platt, 99 U. S. 676; Durand v. Iowa County, 1 Woolw. 69; Thompson v. Perrine, 103 U. S. 806; Phelps v. Lewiston, 15 Blatchf. 131; Pickens Twp. v. Post, 99 Fed. 659; School Dist. No. 11, Dakota County, Nebr. v. Chapman, 152 Fed. 887; State v. Wichita County, 59 Kan. 512; Murray v. Ballou (N. Y.), 1 Johns. Chanc. 566.

is, on the whole, a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice, the exception to its application is demanded by other considerations equally important, as affecting the free operations of commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community."

The application of this principle has been extended to non-resident bond holders [59] where the court said: "It could not affect the rights of non-resident holders of bonds and coupons proceeded against by constructive service, such service as to them was ineffective for any purpose whatever." The principle has also been applied to injunction proceedings,[60] and to constructive service. In an action brought to determine the validity of bonds issued by the town of Pana, Illinois,[61] it appeared that the plaintiffs in the case were citizens of the state of

59—Brooklyn v. Insurance Company, 99 U. S. 362; see also Enfield v. Jordan, 119 U. S. 680. The subject of notice by lis pendens in relation to negotiable securities was considered by this court in the cases of Warren County v. Marcy, 97 U. S. 96, and Carroll County v. Smith, 111 U. S. 556, and needs no further discussion. The general rule announced in those cases is, that the pendency of a suit relating to the validity of negotiable paper not yet due is not constructive notice to subsequent holders thereof before maturity. This general rule cannot be changed by state laws or decisions so as to affect the rights of persons not residing and not being within the state, any more than publication of suit can be made constructive service of process upon such persons. Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by lis pendens, but not those acquired by the transfer of negotiable securities, or by the sale of articles in market overt in the usual course of trade.

60—County of Cass v. Gillett, 100 U. S. 585. The question of lis pendens as applicable to negotiable securities was fully considered by us in the case of County of Warren v. Marcy (97 U. S. 107), and we there held that a bona fide purchaser before maturity is not affected with constructive notice of a suit respecting such paper. That decision applied to the present case, and the objection cannot prevail to invalidate the plaintiff's title. Thompson v. Perrine, 103 U. S. 806; Carroll County v. Smith, 111 U. S. 556.

61—Pana v. Bowler, 107 U. S. 529; see also Brooklyn v. Insurance Co., 99 U. S. 362; Enfield v. Jordan, 119 U. S. 680.

Maine and it was sought to bind them by a decree of the Circuit Court of Christian county, Illinois, in which the bonds in question were declared void. It was contended that that decree was binding on the plaintiffs in the case in the Federal Court and a bar to an action brought by them upon coupons cut from the bonds in question, the court said: "It is sought to bind them (the coupon-holders) by a decree rendered in a proceeding purely in personam in a case in which they were not named as parties, when there was no personal service upon or appearance by them, and when the only pretense of notice to them of the pendency of the suit was a publication addressed to the 'unknown holders and owners of bonds and coupons issued by the town of Pana.'" "It is contended that, under the statutes of Illinois, parties may be thus brought in and a valid personal decree rendered against them. Whatever may be the effect of such a decree upon the citizens of the State of Illinois, this court has held that as to non-residents, it is absolutely void."

The rule as to pending litigation in operating as constructive notice of defects and infirmities in the bonds is necessarily modified and operates as such when the bonds or coupons involved in that litigation and the questions raised are the identical ones involved in subsequent litigation. The cases hold that under such circumstances a previous judgment will operate as a bar to recovery.[62]

62—Block v. Com'rs, 99 U. S. 686. In an action in the state courts involving the validity of the bonds judgment was rendered in favor of the county and thereafter the interest coupons involved in that proceeding were transferred to another person to be collected for the benefit of the transferrer. In an action by him to recover on such coupons, it was held in the case in the federal court that the judgment in the state court operated as a bar to recovery. Lewis v. Brown, 109 U. S. 162; see also County of Mobile v. Kimball, 102 U. S. 691. A dismissal of a cause without prejudice will not operate as a bar. The court held that the two suits though seeking the same relief rested upon a different state of facts and that the adjudications in the one constituted, therefore, no bar to a recovery in the other.

§ 229. Constructive notice; overdue coupons.

The subject of overdue coupons as affecting the validity of negotiable bonds to which they are or have been attached has already been discussed in a preceding section,[63] and the rule was there stated that the presence of overdue coupons on the bond or the existence of them when detached was insufficient to excite suspicion of any illegality or irregularity in the issue of the bonds.[64] The authorities are uniform in holding that this condition cannot operate as constructive notice except where the facts are of such a character that the presumption of bad faith will arise. The general rule in respect to constructive notice as applied generally when taken in connection with the subject of negotiable bonds must be modified to follow the rule laid down in an early case in the Supreme Court of the United States and followed without dissent from that time. The case referred to is that of Murray v. Lardner,[65] where in discussing the rights of a holder of negotiable paper acquiring title thereto by endorsement before maturity and for value, the court said: "Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.* * * Such is the settled law of this court, and we feel no disposition to depart therefrom. The rule may perhaps

63—See Sec. 194 ante.

64—Morgan v. United States, 113 U. S. 476.

Pickens Twp. v. Post, 99 Fed. 659. But if they were (past due) failure to pay interest alone is not sufficient in law to throw discredit upon negotiable paper upon which it is due to subject the holder to the full extent of his security to antecedent equities. Burnham v. Brown, 23 Me. 400; National Bank of North America v. Kirby, 108 Mass. 497; Grafton Bank v. Doe, 19 Vt. 463; Boss v. Hewitt, 15 Wis. 260

65—2 Wall. 110; see also First National Bank v. Moore, 148 Fed. 953.

be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is fraud there can be no question."

And the rule was again stated in the following language in Cromwell v. Sac county,[66] where the precise question involved in this section was before the court: "Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent bona fide purchasers for value before maturity, or the liability of the municipalities. As with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part. Such is the decision of this court, and substantially its language, in the case of Murray v. Lardner, reported in the second of Wallace, where the leading authorities on the subject are considered."

§ 230. Actual notice or knowledge.

The doctrine of bona fide holding, it will be remembered, does not apply to one purchasing bonds direct from the corporate body issuing them, and the courts further hold that one cannot be a bona fide holder if at the time the bonds were first acquired he had actual notice or knowledge of defects and irregularities affecting their validity. One acquiring negotiable securities under such circumstances has no right to rely upon the doctrine of estoppel through recitals in the bonds or otherwise.[67]

66—96 U. S. 51.

67—Mobile Savings Bank v. Oktibbeha County Sup'rs, 22 Fed. 580. Briggs v. Town of Phelps, 70 Fed.

This rule as to actual notice or knowledge is modified by and subject to the general principle applying to all negotiable instruments upon the question involved, namely: that the test of whether a purchaser of a negotiable instrument is deprived of his character of a purchaser in good faith is not by proof that at the time he purchased he had notice of facts and circumstances such as to put an ordinary prudent man on inquiry, but whether he had at the time of the transfer knowledge of such facts that would impeach the title as between the antecedent parties to the instrument or knowledge of such facts that his failure to make further inquiry would be presumptive evidence of bad faith on his part.[68]

29. Evidence held sufficient to establish the character of the bona fide holding.

Sage v. Fargo Twp., 107 Fed. 383. Kansas laws, 1886, p. 123, provide that a new county shall not issue bonds of any kind within one year after the organization and it was held that where a township issues bonds in aid of a railroad within the year and the date of the election appears on the face of the bonds, the purchasers are charged with actual notice of their invalidity.

D'Esterre v. City of Brooklyn, 90 Fed. 586. Where bonds are issued with the name of the payee left blank the omission is not sufficient to charge a subsequent purchaser with notice of defenses but is merely an irregularity which would at most only put him on inquiry as to whether they had in fact been issued to the person through whom he acquired them. Hancock v. Chicot County, 32 Ark. 575; Lindsey v. Rottaker, 32 Ark. 619; Leeman v. Perris Irrigation District (Calif.), 74 Pac. 24; Bissell v. Kankakee, 64 Ill. 249; Ryan v. Lynch, 68 Ill. 160; Hewitt v. School District, 94 Ill. 528; Henshaw v. Christian, 143 Ill. App. 558.

Schmid v. Town of Genoa, 23 N. Y. 439. One who purchases bonds from a railroad company at a discount with knowledge that they were illegally issued by a municipal corporation in exchange for stock of the company, instead of being issued for money borrowed to be used in building the company's road as prescribed by the statute authorizing them, is not a bona fide holder.

Coler v. Board of Com'rs of Santa Fe County (New Mex.), 27 Pac. 619. Facts were held not sufficient to charge purchaser with actual notice under the controlling rules. Montpelier Savings Bank & Trust Co. v. School District No. 5, Town of Ludington (Wis.), 92 N. W. 439; see also Secs. 255, et seq., post.

68—Murray v. Lardner, 2 Wall. 110. The leading case on this point and which has been followed without dissent. First National Bank v. Moore, 147 Fed. 953; Clark v. Evans, et al., 66 Fed. 263 C. C. A.;

There is no question as to the principles to be applied, the cases found involve a determination of the facts or of facts alleged sufficient or otherwise to bring them within their application.

In regard to the existence of pending litigation as affecting the status of a bona fide holding, it was stated in the preceding section that the mere pendency of litigation would not operate as constructive notice. An actual knowledge of the existence of litigation or of a judgment rendered raises a different question and there are authorities which hold that while purchasers of negotiable securities are not chargeable with constructive notice of the pendency of an action affecting the title or the validity of the securities, it has never been doubted that those who buy such securities from litigating parties with actual notice of a suit do so at their peril and must abide the result the same as the parties from whom they got their title. No rule of law, it has been held, protects a purchaser who willfully closes his ears to information or refuses to make inquiry when circumstances of great suspicion imperatively demand it.[69]

Murray v. Beckwith, 81 Ill. 42; Thompson v. Village of Mecosta (Mich.), 104 N. W. 694; Borough of Montvale v. Peoples Bank (N. J.), 67 Atl. 67.

69—Lytle v. Lansing, 147 U. S. 59; see also Carroll County v. Smith, 111 U. S. 556. In this case the court although it held that the pendency of a suit to enjoin the issue of bonds did not affect the title of a bona fide holder of such bonds, said: "It is not alleged in the plea that the defendant in error had actual notice of the litigation or on the grounds on which it proceeded or that any injunction was served upon the Board of Sup'rs; and if he had that notice would have been merely a question of law of which we have seen he is bound to take notice at all events and which is now for adjudication in this case."

Scotland County v. Hill, 112 U. S. 183. A decree in the suit brought by the tax payers of a county to enjoin an issue of bonds is binding upon those who bny the bonds from the litigating parties with actual notice of the suit.

School District No. 11, Dakota County, Nebr. v. Chapman, 152 Fed. 887. Under the facts in this case a finding was sustained that the purchaser was not chargeable with actual notice of the pendency of the suit.

§ 231. Title of bona fide holder; how defeated.

As against a bona fide holder of negotiable bonds for value and without notice there are some defenses which are available to the corporation issuing the bonds. These defenses are those which go to establish the character of the instrument as absolutely void, and not merely voidable; because of an absolute want of power or by reason of some positive prohibition of law.

This principle was well stated in a case in the Supreme Court of the United States [70] where the court said: "We have held that there can be no bona fide holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud or excess of authority in an authorized agent. Where there is total want of authority to issue the bonds, there can be no such thing as a bona fide holding" and the authorities are unanimous in holding that negotiable bonds issued by public corporations without legislative or constitutional authority are void even in the hands of bona fide purchasers. If issued without authority although in the form of negotiable securities the holder acquires no right to enforce the payment of the securities. There cannot be a bona fide holder of public securities issued by the corporation without power.[71] And the

70—Township of East Oakland v. Skinner, 94 U. S. 255.

71—Mayor of Nashville v. Ray, 19 Wall. 468; Town of So. Ottawa v. Perkins, 94 U. S. 260; County of Dallas v. MacKenzie, 94 U. S. 660; Farmers Loan & Trust Co. v. City of Galesburg, 133 U. S. 156; Brenham v. German American Bank, 144 U. S. 173, 144 U. S. 549; Lewis v. Shreveport, 3 Woods 205; Smith v. Ontario, 15 Blatchf. 267; Francis v. Howard County, 50 Fed. 44; Edminson v. City of Abilene (Kan.), 54 Pac. 568.

Cagwin v. Town of Hancock, 84 N. Y. 532. There can be no bona fide holder of bonds within the meaning of the law applicable to negotiable paper which have been issued without authority. A town has no general authority to issue such bonds. It can issue them only by virtue of special authority con-

courts further hold that a negotiable form will not impart validity even in the hands of a bona fide holder for value to an obligation of a corporation which it had not the power to incur.[72]

§ 232. Knowledge with which a holder of bonds is charged.

In the preceding section, it has been stated that total absence of authority to issue is sufficient to defeat the title of even a bona fide holder of municipal securities, or as has been stated by some authorities, there cannot be a bona fide holding where there is a complete want of authority to issue the securities in question.[73]

As bearing on the question of knowledge therefore in a bona fide holding, the courts hold that a purchaser for value of public securities is charged with notice of the power or authority to issue. He is conclusively presumed to know the law of the state, both constitutional and statutory, bearing upon the power of a public corporation to issue bonds and the public corporation cannot be estopped even by recitals in the bonds to deny as against bona fide purchasers the power of the corporation to issue them.[74]

ferred by some statute. Unless issued in the way pointed out by statute they cannot bind the town. The statute specifies the powers of the agents of the town and the precise conditions upon which the bonds could be issued; and all persons taking the bonds are chargeable with knowledge of the statute and they must see to it that the statute has been complied with before they can with absolute safety take the bonds. Such is the law as laid down in this state. Oswego County Savings Bank v. Town of Genoa (N. Y.), 65 N. E. 1120, affirming 72 N. Y. S. 786; Duke v. Brown (N. C.), 1 S. E. 873; but see San Antonio v. Lane, 32 Tex. 405.

72—Wilson v. Shreveport, 29 La. Ann. 673.

73—Mercer County v. Provident Life & Trust Co., 72 Fed. 623; Noel-Young Bond & Stock Co. v. County of Mitchell, 21 Tex. Civ. App. 638, 54 S. W. 284. But see same case, 212 U. S. 58.

74—Travellers Insurance Co. v. Township of Oswego, 55 Fed. 361; see also Mygatt v. City of Green Bay, 8 Am. L. Reg. 271. Dealers in municipal bonds are chargeable with notice of public statute as affecting their right to recover exchange; National Bank of Com-

Every man is chargeable with notice of that which the law requires him to know and of that which after being put upon inquiry he might have ascertained by the exercise of reasonable diligence. Every purchaser or holder of public securities which upon their face refer to the statute under which they are issued is bound to take notice of that statute and of all its requirements.[75]

He is bound to take notice, for example, that the original bonds, where the issue which he holds are refunding securities, exceeded the constitutional limitation as shown by the listed value of the property of the district,[76] and this rule also applies as to original securities.[77]

The purchaser is also charged with knowledge that public corporations are organizations of express and limited powers and that the officers representing them are agents having equally limited and restricted capacity to act for their principal;[78] he is bound further to note that the purpose for which the issue was made is a public and a valid one especially if the bonds recite upon their face the purpose for which issued.[79]

In view of the cases and principles stated above, the importance of the preliminary discussion in this book of the character and nature of public corporations and the powers of officers and agents representing them cannot be overestimated.[80]

merce v. Town of Granada, 48 Fed. 278; Francis v. Howard County, 50 Fed. 44; Travellers Insurance Co. v. Town of Oswego, 55 Fed. 361; and Sec. 248, et seq., post.

75—McClure v. Township of Oxford, 94 U. S. 420.

76—Shaw v. Independent School District of Riverside, 62 Fed. 911; see Sec. 252, et seq., post.

77—Nesbit v. Riverside School District, 25 Fed. 635; Geer v. School District No. 11, 97 Fed. 732; Borough of Millerstown v. Frederick (Pa.), 7 Atl. 156; see also Sec. 252 post.

78—Travellers Ins. Co. v. Town of Oswego, 55 Fed. 361; McPherson v. Foster, 43 Ia. 48; Halstead v. Mayor, etc. of New York, 5 Barb. 218; Noel-Young Bond & Stock Co. v. Mitchell County, 21 Tex. Civ. App. 638, 54 S. W. 284; see also Secs. 248 and 249 post.

79—Slifer v. Howell, 9 W. Va. 391; see also Sec. 261 post.

80—See Secs. 52 and 65, et seq., ante.

§ 233. What a purchaser is not bound to ascertain.

On the contrary, however, a bona fide purchaser for value of public securities is only required to ascertain that there was power to issue such bonds, and where the constitution or the act under which they are issued prescribes the public record which furnishes the test of compliance with the constitutional or statutory limitation, the purchaser is charged only with notice of its contents, he is not required to look beyond it; and if that record fails to show a violation of the limitation he may rely upon the presumption that the officers faithfully discharged their duty when they issued the bonds and upon the recitals which appear therein when made by officials charged by law with such authority and duty.[81]

The recitals, however, if made by officials in excess of their authority or not charged with the duty of making them will not operate as an estoppel. This subject will be fully considered in a later section under the chapter on validity of public securities.[82]

Where the legal authority of the corporation to issue the securities is sufficiently comprehensive and where the recitals made by those having authority and within that authority show upon their face that they have been issued in pursuance of law and under the contingencies and conditions required by law, the bona fide holder of the bond or coupons is not required to go back and examine all the intermediate steps taken to determine whether there has been any flaw or irregularity in their issue. The only question for him is one of power. If this has been given and might be exercised under certain circumstances and the bonds have been issued and bought

81—Board of Com'rs of Lake County v. Sutliff, 97 Fed. 270 C. C. A.; see Secs. 276, et seq., post and generally the subject of recitals.

82—See Sec. 312, et seq., post.

in good faith, the courts must assume in aid of the holder that the facts exist as recited in the securities.[83]

This rule applies to all intermediate irregularities including the use to which the proceeds of the bonds were put,[84] failure to comply with required conditions,[85] or acts of public authorities in excess of their authority in connection with the issue of the bonds.[86]

§ 234. Stolen and lost bonds or coupons.

The rule universally obtains that if negotiable instruments issued by public corporations are stolen or lost by their owner before maturity and find their way into the hands of an innocent purchaser for value, such purchaser obtains good title as against all the world and can enforce their collection.[87]

83—Pollard v. Pleasant Hill, 3 Dill. 195; Pickens Twp. v. Post, 99 Fed. 659; Davis v. Kendallville, 5 Bissel 280; Nicolay v. St. Clair County, 3 Dill. 163; Miller v. Town of Berlin, 13 Blatchf. 245; City of Pierre v. Dunscomb, 106 Fed. 611; Independent School District of Sioux City v. Rew, 111 Fed. 1; Salmon v. Rural Independent School District of Allison, 125 Fed. 235; School District No. 11 v. Chapman, 152 Fed. 887.

Leeman v. Perris Irrigation District (Calif.), 74 Pac. 24. Knowledge of facts, however, sufficient to make bonds invalid by purchaser will defeat his claim to bona fide holding. Sioux City, etc. R. R. Co. v. County of Osceola, 45 Ia. 168; Coler v. Board of County Comm'rs of Santa Fe County (N. Mex.), 27 Pac. 619; City of Jefferson v. Jennings Banking & Trust Co., 79 S. W. 876; First National Bank v. Town of Concord, 50 Vt. 257; see also Sec. 255, et seq., post.

84—City of Uvalde v. Spier, 91 Fed. 594; Cook v. Lyon County, 6 Ky. L. Reps. 360; see Secs. 262 and 263 post.

85—Grand Chute v. Winegar, 15 Wall. 255; Town of Coloma v. Eaves, 92 U. S. 484; Warren County v. Marcy, 97 U. S. 96; Flagg v. Palmyra, 33 Mo. 440; Nelson v. Haywood County, 3 Pickle, 781, 11 S. W. 885; see generally the subject of recitals, Sec. 276, et seq., post.

86—County of Macon v. Shores, 97 U. S. 272; Dana v. Bowler, 107 U. S. 529; Town of Clifton Forge v. Brush Electric Co. (Va.), 23 S. E. 288.

87—Gilbough v. Norfolk, etc. Co., 1 Hugh 410; State v. Wells, 15 Calif. 336; Consolidated Association of Planters v. Avegno, 28 La. Ann. 552; Spooner v. Holmes, 102 Mass. 503; Boyd v. Kennedy, 38 N. J. L. 146; Force v. Elizabeth, 27 N. J.

It is generally held that the owner of lost bonds or coupons is entitled to recover upon them from the public corporation where an offer is made of indemnification in favor of the corporation issuing the bond against any future liability upon the same and this offer is supported by giving approved security.[88] The rule as given in a preceding paragraph was stated in a Pennsylvania case as follows:[89] "The latest decisions both in England and in this country have set strongly in favor of the principle that nothing but clear evidence of knowledge or notice, fraud or mala fides, can impeach the prima facie title of a holder of negotiable paper taken before maturity."

This rule, however, it has been held will not apply where the securities have been purchased or acquired after maturity; thus in a Minnesota case involving lost bonds where it appeared from their face that the interest for several years was overdue and unpaid, this was held a suspicious circumstance sufficient to put the plaintiff on his guard. The bonds, the court said, were thus dishonored on their face. The interest equally with the principal was a part of the debt which they were intended to secure and it was not material whether the whole or only a part of that debt was overdue. An instrument payable at a certain time is overdue as soon as that time has passed whether payable generally or at a speci-

Eq. 403, 29 N. J. Eq. 408; People v. Otis, 90 N. Y. 48; Evertsen v. National Bank of Newport, 4 Hun. 692, 66 N. Y. 14.

Manhattan Savings Institution v. East Chester, 44 Hun. (N. Y.) 537. A town may be required to pay lost negotiable bonds on receiving a proper bond of indemnity. Dutchess County Ins. Co. v. Hachfield, 73 N. Y. 226; Ehrlich v. Jennings (S. C.), 58 S. E. 922; see also Com'rs of Marion County v. Clark, 94 U. S. 278, and Metropolitan Savings Bank v. Baltimore, 63 Md. 6. The latter case passing upon rights of parties where a loan had been made with a certificate of city stock as collateral, the endorsement of the transfer on which had been forged.

88—City of Bloomington v. Smith, 123 Ind. 41; Fales v. Russell, 16 Pick. 315; Thayer v. King, 15 Ohio 242; Manhattan Savings Institution v. East Chester, 44 Hun. (N. Y.) 537.

89—Battles & Webster v. Laudenslager, 84 Pa. St. 446.

fied place, and he who takes it by endorsement or delivery when overdue has no better title than the one from whom he received it.[90]

§ 235. Non-negotiable instruments.

The rule has also been held not to apply in the case of non-negotiable instruments or where the instrument is incomplete in an essential part and is afterward filled in by the thief or a subsequent holder. In the case of Ledwick v. McKim,[91] where a corporation executed its bonds conditioned for the payment in either of two specified kinds and amounts of national currency to be determined by the place to be fixed for their payment and containing a clause authorizing the president of the corporation to fix by his endorsement such place. They were endorsed in blank without inserting the place and stolen while still in the possession of the corporation, it was held that a bona fide holder was not authorized to fill the blank, and that thus he acquired and could convey no title to the bonds; that upon a sale there was an implied warranty as to the issue and upon failure of title he was liable. The court further held that the rule that the bona fide holder of an incomplete instrument, negotiable but for something capable of being supplied, has an implied authority to supply the omission and to hold the maker thereon only applies where the latter has by his own act or the act of another duly authorized put the instrument in circulation as negotiable paper. As to the character of bonds in question, it was held that the uncertainty as to the amount payable and as to the place of payment

90—First National Bank v. Scott County, 14 Minn. 77; see also Gilbough v. Norfolk, etc. Co., 1 Hugh. 410; Wylie v. Speyer, 62 How. 107; see also Sec. 194 ante on overdue coupons.

91—53 N. Y. 307; see also Jackson v. Vicksburg, etc. R. R. Co., 2 Woods 141.

deprived the bonds of the character of negotiable instruments.

But in a New Jersey case,[92] the court held that a bond issued with a blank for the name of the payee has the same quality of negotiability as a bond complete when issued, and that the authority for a subsequent bona fide holder to write his own name in the blank space, thus making the instrument complete was implied from the act of the obligors in putting it in circulation in that condition. Under these circumstances where such a bond was stolen from the owner, in an action of replevin by the true owner it was held that he could not recover the bond from one who had subsequently bought it in the market bona fide and for a valuable consideration.

§ 236. Illustrative miscellaneous cases.

The time of the theft or who was the thief is generally immaterial, thus the fact that negotiable municipal bonds were issued by one with whom they had been deposited in escrow by the municipality without authority cannot affect their validity in the hands of a purchaser who had no knowledge of the conditions under which they were held,[93] and it is no defense to municipal bonds in the hands of a bona fide purchaser that the corporation treasurer charged with the duty of negotiating them absconded with them and fraudulently put them into circulation,[94] but it has been held that a village is not liable on bonds stolen and put on the market before they are issued by the village officers even in the hands of a bona fide purchaser for value.[95]

92—Boyd v. Kennedy, 38 N. J. L. 146.

93—Pickens Twp. v. Post, 99 Fed. 659, C. C. A.

94—Cooper v. Jersey City, 15 Vroom. 634.

95—Germania Savings Bank v. Village of Suspension Bridge, 26 N. Y. S. 98.

A purchaser of bonds payable to bearer is not bound to make inquiries of one offering to sell as to his right or title thereto or to take special precautionary measures to ascertain or protect the interest of others. One who has bought stolen bonds does not lose the protection afforded a bona fide purchaser upon proof merely of a failure on his part to examine notices of theft left at his place of business, there being no fraudulent collusion and he having no actual notice or knowledge of the theft.[96]

In a Tennessee case,[97] it was held that the payment and cancellation of county railroad aid bonds effected an absolute extinguishment of them, and that they could not be vitalized by theft and fraudulent re-circulation. An advertisement of the theft will not affect the title of a purchaser in good faith,[98] but the liability of a city to the true owner continues where he has notified the city that his bonds have been stolen even though it pays the coupons attached to the bonds after maturity to a bona fide purchaser.[99]

The fact that the number of a stolen bond was changed by a thief will not affect the bond in the hands of a subsequent bona fide holder.[1] The question of delivery as affecting the title of the bona fide holder of stolen negotiable instruments involved in some of the cases noted here has already been considered in a preceding section.[2]

96—Seybel v. National Currency Bank, 54 N. Y. 288; see also Murray v. Lardner, 2 Wall. 110. Where negotiable bonds payable to bearer were stolen from the owner and purchased by a broker doing business in New York in the usual course of his business, the court held that actual mala fides was necessary to overthrow the title of the purchaser and that gross negligence did not constitute mala fides.

97—Richardson v. Marshall County, 45 S. W. 440.

98—Consolidated Association of Planters v. Avegno, 28 La. Ann. 552.

99—Bainbridge v. City of Louisville, 83 Ky. 285.

1—City of Elizabeth v. Force, 27 N. J. Eq. 403, 29 N. J. Eq. 408.

2—See Sec. 176 ante.

CHAPTER XI

SALE OF NEGOTIABLE SECURITIES

§ 237. General statements.

The manner or time of a sale of securities issued by public corporations may be irregular or in violation of some express statutory provision, which condition is considered of so grave a character as not only to invalidate the sale but also to raise a serious question of the validity of the bonds, even though in all other respects they are legal. Circumstances to be considered involved in a sale may be the medium of the purchase price whether cash, securities or credit; the mode of sale, whether after public advertisement and to the best bidder or through private negotiations; disposal at a price less than par when prohibited by law in this respect; or the time of their sale considered with reference to their formal and legal issue or delivery. These questions together with the rights of the buyer as affected by their validity or otherwise; the right of the corporation to act directly through its own officers or through financial agents; the payment of commissions; the knowledge with which the buyer is charged both as to the issue of the bonds and the use of their proceeds by the public corporation will be considered in the following sections.

It might be said that after securities have passed into the hands of bona fide purchasers that they become so far as their sale and delivery is concerned choses in action, and so far as consideration and delivery is concerned subject to private negotiation and neither their validity

or negotiability will be affected by acts of subsequent owners in connection with their disposal.

§ 238. Authority to sell.

The authority to sell bonds in the market is an incident attendant upon and growing out of the power to issue. The objects sought to be effected would clearly remain unaccomplished if when acting under a grant of authority the public corporation had proceeded in the performance of all conditions precedent to the point of sale without being able to go further.[3]

Although the authority to sell is implied from a grant of power to issue; statutory or charter provisions may direct the manner of the sale and one made contrary to such requirements if they exist will be void.[4]

§ 239. Medium of payment.

It has been held by the Supreme Court of the United States [5] that when a statute provided that railroad bonds should be sold and the stock of the railroad company which had been subscribed and for which the proceeds of the bonds were intended to pay, where the town ex-

3—Griffith v. Burden, 35 Ia. 143; see also City of St. Petersburg v. English (Fla.), 35 So. 483. In the absence of intervening rights of third parties the legislature can prohibit the sale of bonds by a municipality unless ratified by vote of the electors though at the time of the provision, the bonds may have been physically issued under valid legislative authority previously granted and authorizing a sale without such ratification; Powell v. Heisler, 45 Minn. 549, 48 N. W. 411. The agents of a town who sell bonds issued under a void statute are not personally liable to the purchaser who acquired them with notice of the act under which they were issued; Butler v. Boatmen's Bank (Mo.), 44 S. W. 1047. One dealing with a financial agent appointed by the county court pursuant to law is not charged with limitations on his authority imposed by the court in the exercise of its discretion.

4—Elyria Gas & Water Co. v. City of Elyria, 53 Oh. St. 374, 49 N. E. 335.

5—Scipio v. Wright, 101 U. S. 665; see also Roberts & Co. v. Taft, 109 Fed. 825, 48 C. C. A. 681.

changed its bonds directly for the stock, contrary to the statute, the exchange was a material departure from the requirements of the law and a holder of the bonds did not stand in a relation of a bona fide owner and was not entitled to recover.

There are decisions, however, which hold to the contrary. A Georgia decision holds to the effect that the one mode was substantially the equivalent of the other.[6]

Sale on credit. The fact that the municipal authorities gave a credit to the purchaser instead of selling them for cash as required by the statute has been held not to operate as a defense against a subsequent bona fide purchaser in an action on the bonds,[7] and this is true even where the municipality never received payment therefor.[8] A bid of a stated amount of dollars for county bonds is to be construed as meaning that if the bid is accepted, it is to be paid in current money and not in evidences of indebtedness against the county.[9]

The purchase by a municipal corporation of its own bonds, it has been held, although in appearance a sale amounts merely to a loan to the corporation of the purchase price of the bonds.[10] Where stock of a railroad company is to be paid for by bonds of a county, the railroad company to receive them at par as cash, the stock is a full equivalent for the bonds and the county issuing them does not occupy any better position than other stockholders.[11]

6—Mayor, etc. of Griffin v. Inman, 57 Ga. 370; see also Commonwealth v. Town of Williamstown (Mass.), 30 N. E. 472; St. Paul Gas Light Co. v. Village of Sandstone (Minn.), 75 N. W. 1050; Germania Savings Bank v. Town of Darlington, 50 S. C. 337, 27 S. E. 846.

7—Town of Greenburg v. International Trust Co., 94 Fed. 755, 36 C. C. A. 471.

8—D'Esterre v. City of New York, et al., 104 Fed. 605, 44 C. C. A. 75.

9—Potter v. Lainhart (Fla.), 33 So. 251.

10—Hoag v. Town of Greenwich, 133 N. Y. 152, 30 N. E. 842.

11—Pittsburg, etc. R. R. Co. v. Allegheny County, 29 Pa. St. 210.

§ 240. Time of issue.

The fact that bonds are dated July 1st, 1890, and are not negotiated until several months after will not invalidate them, there being nothing in the statute which requires the bonds to be actually sold and negotiated on the date of their issue.[12]

§ 241. The manner of sale: by public advertisement.

It is customary to provide in the grant of power that the bonds authorized thereunder shall be sold to the highest and best bidder at not less than par after a certain designated notice of advertisement to be published for the time and in the manner prescribed. Or stated differently, the correct rule as based upon a sound public policy requires a public sale of securities rather than their disposal in private. Where statutory provisions of the character noted exist it is necessary to the legality of the sale that its provisions be strictly followed. Such statutes are regarded as mandatory though the validity of the bonds necessarily is not affected by an illegal sale in this respect[13] and may apply to refunding bonds equally with other securities.[14]

12—Gaddis v. Richmond County, 92 Ill. 119; Attorney General v. City of Salem, 103 Mass. 138; Attorney General v. Burrell, 31 Mich. 25.

Carlson v. City of Helena (Mont.), 102 Pac. 39. If a municipality proceeds to sell the bonds with reasonable diligence, it is sufficient. People v. Booth, 32 N. Y. 397; Yesler v. Seattle, 1 Wash. 308; see also Sec. 176 ante, on "Delivery."

13—Roberts & Co. v. Taft, 109 Fed. 825; Williams v. Board of Revenue of Butler County (Ala.), 26 So. 346; Hughson v. Crane, 113 Calif. 404, 47 Pac. 120; Cox v. Borough of Connelsville, 22 Pa. County Court Rep. 657; Duryea v. Friars, 18 Wash. 55, 50 Pac. 583.

A bill was passed by the legislature of Massachusetts in 1904, directing the treasurer of the state to advertise all future sales of state bonds instead of disposing of them at private sale as had been the practice for several previous years. Acts of 1904, Chap. 263, Sec. 1.

14—Guckenberger v. Dexter, 17 Oh. St. Cir. Ct. Reps. 115.

Prospective bidders in response to proposals for the sale of bonds are usually required to accompany their bids with a certified check or security in some other form as evidence of their good faith in making the bid and to afford a means of reimbursement to the public corporation for expenses it may have incurred in the proceeding should the bidder fail to perform his contract upon an acceptance of his bid. In the latter case the deposit is generally forfeited to the public corporation as liquidated damages.[15] Irregularities committed in the performance of this condition or in requiring its performance do not affect as a general rule the legality of a sale, the performance of the conditions required being generally optional with the officers in charge of the sale if this be within their discretionary powers.[16]

The form of the advertisement and the time and manner of publication are necessarily controlled by the specific charter or statutory provisions and these vary.[17]

If there are irregularities in connection with the manner or time of sale, the agreement or contract for such sale may be held void without affecting the validity of the bonds.[18]

15—City of San Antonio v. E. H. Rollins & Sons (Tex.), 127 S. W. 1166, second hearing denied, Id. 1199. Action to recover a deposit on a city's failure to furnish proceedings convincing the bidders' attorneys of the legality of the bonds.

16—Potter v. Lainhart (Fla.), 33 So. 251.

17—Mills v. Bellmer, 48 Calif. 124.

Gibbons v. Hillsborough County (Fla.), 45 So. 88. A notice of sale need not state the medium of payment required by the bidders.

Franklin v. Baird, 7 Oh. N. P. 571. An immaterial variation from the terms of sale as advertised will not render a sale void.

Farmer v. City of Cincinnati, 11 Oh. S. & C. Decisions, 58. Sale invalid when advertisement not published for the time required by statute. Lamprecht Bros. & Co. v. Williamsport, 22 Pa. Cir. Ct. Reps. 603.

Richards v. Klickitat County, 13 Wash. 509, 43 Pac. 647. A mistake in the notice as to the total amount of bonds is harmless.

18—Roberts & Co. v. Taft, 109 Fed. 825; Village of Ft. Edward v. Fish, 156 N. Y. 353; Elyria Gas & Water Co. v. City of Elyria, 57 Oh. St. 374.

§ 242. At private sale.

By statutory or charter provisions the authority to dispose of bonds may be placed in the hands of certain representative bodies or officials and the familiar doctrine applies that authority thus delegated cannot in turn be delegated to others; as illustrating this rule a case from Texas is pertinent, which held that where the charter of the municipality committed to the city council the exclusive control of the city's finances, it could not delegate authority to the mayor to sell the bonds of the city in his discretion as to the price and thereby bind the city.[19] In the absence of statutory or charter provisions requiring a sale after public advertisement, public officials may in their discretion dispose of bonds on the best terms.[20]

A sale of them, however, to the members of a municipal council or to other public officials connected with the issue and sale is void irrespective of the principles of equity as applying to persons acting in a fiduciary or trust capacity and independent of the fact that the sale may be the part of a scheme to divert the property of the corporation from its legitimate municipal purposes to private ends.[21]

§ 243. The rights of the buyer.

Where a bid duly made as required by law has been accepted and if the sale is in other respects legal, the bidder is not obliged to receive the bonds unless in the form prescribed by the statute even though in all other re-

19—Blair, et al. v. City of Waco, 75 Fed. 800.

20—Smalley v. Yates, 41 Kans. 550.

Vadakin v. Crilly, 73 Oh. St. 380, 78 N. E. 1140. A private sale will not be disturbed by the court on the mere showing that it was consummated with haste but at a price not so low as to indicate moral turpitude in the officials making the sale.

21—Sherlock v. Winnetka, 59 Ill. 389.

pects they may be valid.[23] Where bids for bonds have been advertised and received and the bonds have been awarded to the highest bidder, the proceedings not being fraudulent or irregular or illegal in any respect, it is not within the power of the public officials so advertising to rescind their action in making the award even though a higher price might have been obtained. The bidder can enforce his rights and compel a delivery of the bonds.[24] If they have been delivered to other parties he can recover the damages which he can prove he has sustained.[25] There are authorities, however, which hold that the contract involved in proceeding by advertisement and the making of bids is incomplete until the proposal is accepted, and the corporation inviting the proposal is not liable for damages in refusing to accept an offer even though it be the highest regular offer made,[26] and the same rule will apply if the public authorities are vested with the power of selling the bonds in such a manner and upon such terms as they deem best for the interests of the corporation for which they are acting.[27]

§ 244. Validity of bonds as affecting sale.

It is customary for bidders, especially when they are regular dealers in municipal securities, to make their

23—Merced v. California University, 66 Calif. 25.

City of Ironwood v. Wickes, 87 N. Y. S. 554. One purchasing bonds from a city is not entitled to a rescission of the contract of purchase unless he restores all the bonds delivered to him.

24—May v. Cass County (N. D.), 96 N. W. 292. A contract for the sale of bonds made pursuant to the terms of the statute then in force cannot be impaired by subsequent legislation, even though passed before the bonds were actually signed and delivered under the original contract. State v. Allison, 8 Oh. N. P. 170; Diefenderfer v. State (Wyo.), 80 Pac. 667.

25—Robinson-Humphrey v. Wilcox County (Ga.), 58 S. E. 644. There is no liability where the county has no authority to enter into an executory contract for the sale of bonds.

26—Coquard v. School District of Joplin, 46 Mo. App. 6; see also Moses v. City of Key West, 157 N. Y. 689, 51 N. E. 1092; Austin v. Valle (Tex.), 71 S. W. 414.

27—Hansard v. Green (Wash.), 103 Pac. 40.

bids conditional upon the validity of the issue and the respective rights of the parties then will depend upon the character of the securities in this respect.[28] Where, however, no such condition is made it is questionable if a bidder can be compelled to accept bonds in respect to the legality of which there is a doubt. Where the marketable value of public securities is impaired or destroyed by questions affecting their legality in connection with the authority to issue or the manner of its exercise, a prospective buyer or bidder cannot be compelled to take such bonds or in case of refusal he is not liable for damages which the corporation may sustain by reason of his action. This rule holds true even where there is a subsequent decision passing upon the questions raised and establishing the validity of the bonds.[29]

In a recent case in the Federal Court in Montana,[30] the court, after discussing the business customs of brokers in bonds, said in passing upon the principle stated above: "In view of these well-known facts and in accordance with the usages of the country in such transactions, it is necessary in order to give effect to the intentions of the parties, to read into the contract an implied condition that the buyers should not be bound to take the bonds unless the proceedings of the city government had been conducted in substantial conformity with the laws, and proper records had been made so that competent lawyers of good reputation would be able to certify to the

28—Finn v. Board of Sup'rs of Bay County (Mich.), 32 N. W. 558. A contract in this case held not conditioned upon the approval of the issue by the plaintiff's attorney.

Trowbridge v. City of New York, 53 N. Y. S. 616. A bid for bonds containing the clause "our bid is to be subject to the legality of the issues by our counsel" is a conditional bid. City of San Antonio v. E. H. Rollins & Sons (Tex.), 127 S. W. 1166; second re-hearing denied, Id. 1199; Diefenderfer v. State (Wyo.), 80 Pac. 667.

29—City of Great Falls v. Theis, 79 Fed. 943; see also Alessandro Irrigation District v. Savings & Trust Co. of Cleveland, 88 Fed. 928.

30—City of Great Falls v. Theis, 79 Fed. 943.

validity of the bonds. In every contract to sell land and give a good and sufficient warranty for a marketable title the vendor cannot enforce the contract against his vendee when there is an apparent flaw in his title, for in such a case the court will not hazard an opinion as to whether or not the title can be sustained if it should become the subject of litigation. For the same reasons the courts must, in such cases as the one under consideration, refuse to adjudge a party liable to pay damages for refusing to accept municipal bonds without marketable value where the value is destroyed or impaired by questions of legality arising from facts shown by or omissions in the plaintiff's own records."

The validity of the organization of the corporation issuing the bonds cannot be attacked if it had at the time of issue a de facto existence,[31] and where a county issuing bonds is subsequently divided, such segregation does not relieve either portion from a liability on the bonds and one who has already contracted for them cannot repudiate his contract on the ground that the security has been impaired.[32] Since the general validity of bonds from the standpoint of the buyer is not affected by the use to which the proceeds are put by the corporation, a bidder is not justified in refusing to accept them on this ground.[33] Where authority is given to issue refunding bonds to redeem certain designated outstanding indebtedness, a bidder cannot set up as a defense in an action against him for a breach of contract to purchase the refunding bonds

31—Metcalfe & Merrit (Calif.), 111 Pac. 505. One who bids for bonds on condition that they are legal and valid can question any proceeding connected with their issue but cannot attack the validity of the organization of the district if it had a de facto existence when it issued the bonds; see also In re Central Irrigation District (Calif.), 49 Pac. 354, and Sec. 266 post.

32—Finn v. Board of Sup'rs of Bay County (Mich.), 132 N. W. 558.

33—Moses v. City of Key West, 157 N. Y. 689, 51 N. E. 1092; see also Secs. 262 and 263 post.

a want of power on the part of the public corporation to issue the original bonds.[34]

§ 245. Bonds sold at less than par.

As already stated, it is customary for the statutory authority conferring the power to issue securities to require them to be sold at a price not less than the par value. This term is frequently used in the commercial world and means value for value. In connection with a sale of bonds, it conveys the idea that the corporation issuing the bonds shall receive in lawful currency a dollar in money for every dollar of obligations issued.[35]

The cases involving the legality of the sale or the validity of bonds consider in arriving at their decision the effect of the prohibitive character of such a statute or charter provision. The purpose of such prohibitive provisions is clear and the reasons sound.

Contracts for the sale of securities at less than par when this is prohibited are usually held void.[36] And the same principle necessarily follows where nominally the bonds are sold for par but where there has been a viola-

34—Board of Com'rs of Carbon County v. Rollins (Wyo.), 62 Pac. 251.

35—Williams v. Board of Revenue of Butler, 123 Ala. 432, 26 So. 346; Duval County v. Knight (Fla.), 29 So. 408; Frantz v. Jacob, 88 Ky. 525, 11 S. W. 654; State v. City of Elizabeth, 37 N. J. L. 142; Delafield v. Illinois, 2 Hill (N. Y.) 158.

36—National Life Insurance Co. v. Board of Education of Huron, 62 Fed. 778 C. C. A. A sale in this case under the conditions held not to amount to a sale at less than the prescribed amount.

Atlantic Trust Co. of New York v. Town of Darlington, 63 Fed. 76. A payment for railroad stock subscribed by a town with its bonds at par for par is not a sale for less than par although the stock it receives in return has no negotiable value. Hughson v. Crane, 15 Calif. 404, 47 Pac. 120; Jones v. Macon, etc. R. R. Co., 39 Ga. 138. A citizen may restrain an illegal sale of bonds below a lawful price. Porter v. City of Tipton (Ind.), 40 N. E. 802; City of Atchison v. Butcher, 3 Kan. 104. No implied authority to sell below par.

Bell v. City of Shreveport (La.), 53 So. 928. An ordinance provision that bonds should not be sold for less than par for cash would not affect the validity of the issue but related merely to their disposition.

tion of the law through an agreement to pay a commission to the purchaser or otherwise evade its provision.[37]

Where the statutes do not prohibit the sale of public securities at less than par, it is generally held that they may be sold at such prices as they may bring in the

Village of Ft. Edward v. Fish, 156 N. Y. 363, 50 N. E. 973, affirming 33 N. Y. S. 784; Neuse River Navigation Co. v. Com'rs of Newbern, 7 Jones, Law, 275; Jones v. Madison County Com'rs (N. C.), 50 S. E. 291, reversing 47 S. E. 753; Nalle v. City of Austin (Tex.), 21 S. W. 375; City of Lynchburg v. Norvell, 20 Gratt. 601; but see Epping v. City of Columbus (Ga.), 43 S. E. 803. That bonds have been contracted to be sold at much less than they are worth is no reason for refusing to enter judgment validating the issue; see also Sec. 224 ante on "Consideration."

37—Village of Ft. Edward v. Fish, 33 N. Y. S. 784, 86 Hun. 548, affirmed 156 N. Y. 363, 50 N. E. 973. A sale at face value plus several months accrued interest is in effect a sale at less than par and therefore void. Edward C. Jones Co. v. Board of Education, 51 N. Y. S. 950.

Whelan's App. 108 Pa. St. 162. A commission cannot be allowed to a purchaser of bonds from the city at par.

Hunt v. Fawcett, 8 Wash. 396, 36 Pac. 318. A contract to sell bonds nominally at par but to pay commission to the purchaser is void violating act of March 21, 1890, Sec. 5, providing that county bonds shall not be sold at less than par.

But see Town of Manitou v. First National Bank (Colo.), 86 Pac. 75. A commission can be paid to a broker making a sale of bonds where sold at their face value without violating Mills Annotated Stats. Sec. 4548b, which provides that refunding bonds issued by a town shall not be sold at less than their face value. In re Taxes Delinquent of St. Louis County (Minn.), 78 N. W. 115. A contract by which it was stipulated that a broker should receive 10% of the face value of an issue of bonds for printing them and for all services incident to their sale including legal advice does not violate Laws of 1895, c. 289, Sec. 4, forbidding a sale at less than par.

Citizens' Savings Bank v. Town of Greenburg, 173 N. Y. 215, 65 N. E. 978, reversing 65 N. Y. S. 554. A sale of bonds without taking into account the accrued interest which in effect is a sale for less than par and forbidden by statute though an illegal exercise of the power to dispose of the bonds would not affect their validity in the hands of innocent holders for value.

Evans v. Tillman (S. C.), 17 S. E. 49. A contract for sale of bonds by which they are to be paid for after their issue and at the amount expressed on their face only and without including the accrued interest is not a violation of a statutory provision that the bonds in question should be sold "at not less than par or face value."

market.[38] And it is also generally held that a donation of bonds to a railroad corporation when so authorized by statute will not conflict with provisions relative to a sale at less than par.[39]

Recitals. There are cases, however, which hold that where bonds contain recitals to the effect that all conditions precedent have been complied with including those relating to a sale of bonds at not less than par and have passed into the hands of bona fide holders that the corporation issuing them is estopped to set up as a defense the fact that they have been sold for less than par.[40]

On the point of a sale less than par in a case in the Supreme Court of the United States,[41] it appeared that

38—Griffith v. Burden, 35 Oh. 143; Orchard v. School District No. 70, 14 Nebr. 378; City of Memphis v. Bethel (Tenn.), 17 S. W. 191.

39—Town of Queensbury v. Culver, 19 Wall. 83; Foote v. Town of Hancock, 15 Blatchf. 343.

40—Mercer County v. Hackett, 1 Wall. 83; Sherlock v. Winnetka, 68 Ill. 530.

Atchison v. Butcher, 3 Kans. 104. As between the parties the validity of bonds will be affected by a sale below par but after they have passed into the hands of an innocent holder, the defense cannot be made. St. Paul Gas Light Co. v. Sandstone, 73 Minn. 225.

Delafield v. Illinois, 29 Wendell 192. Bonds sold at less than par contrary to the statute when in the hands of a bona fide holder are unaffected by such sale whatever may be the original equities between the immediate parties to the transaction. State v. Perrysburg, 27 Oh. St. 96.

Whelan v. City of Pittsburg, 108 Pa. St. 162. Bonds sold at less than par but subsequently passing into the hands of bona fide purchasers held valid.

41—Richardson v. Lawrence County, 154 U. S. 536; Bk. 17 L. Ed. p. 558; Woods v. Lawrence County, 1 Black 386, affirmed and applied; see also Mercer County v. Hackett, 1 Wall. 83. The bonds in question in this case were sold at about two-thirds their par value contrary to the statute which provided that under no pretense should they be sold or transferred by those to whom they were issued at less than the par value thereof, the court held the bonds good in the hands of a bona fide holder. Woods v. Lawrence County, 1 Black 386; National Life Insurance Co. v. Board of Education of City of Huron, 62 Fed. 778 C. C. A.; Knapp v. Newtown, 3 Thompson & C. 751, 1 Hun. 268. A sale by the original holder to subsequent ones at the rate of 90% will not prevent a judgment in their favor at the par value of the bonds although the law requires that the bonds shall not be sold for less than par.

the bonds were issued by the County of Lawrence under statutory authority to the effect that the corporation to which they were to be given in payment of a subscription to its stock should not sell the same at less than par value. The bonds in fact were sold by the railroad company at the rate of sixty-four cents on the dollar to the contractors constructing the railroad. The court held that the right of the holder of the bonds and coupons to recover principal and interest at par was not affected by the sale as above noted.

§ 246. Usury, when involved in a sale less than par.

Not only has the prohibitive effect of a statute providing for a sale of public securities at less than par been considered in determining the legality of the transaction and possibly the validity of the bonds but also the question of the effect of such a sale as involving the subject of usury; whether a sale by a public corporation of their securities at such a price below par as will make the rate of interest to be received upon the actual investment usurious and render the securities consequently void. There has been in some of the cases a suggestion that if the price at which sold would make the rate usurious, the bonds might be rendered invalid or make them at least subject to the penalties for usury imposed by the laws of the different states which in most cases is simply a forfeiture of the excess of the interest or of the whole interest.[42]

But see to the contrary Lawrence County v. N. W. R. R. Co., 32 Pa. St. 144 and Armstrong v. Brinton, 47 Pa. St. 267. In the latter case it was held that where bonds were sold below par in violation of a statute authorizing their issue, the county court could by proceeding in equity compel the holder to receive in satisfaction of the bonds the sum paid by the first purchaser with interest thereon. Lawrence County's Appeal, 67 Pa. St. 87; see, however, the Lawrence County cases in the U. S. Supreme Court cited above.

42—Sherlock v. Winnetka, 68 Ill. 530. Bonds held valid though sold at a price making them usurious.

Clark v. Des Moines, 19 Ia. 199.

§ 247. Commissions.

The mode of sale and delivery is usually fixed by the law conferring the authority to issue the bonds and public officials are generally required to make the negotiations and effect a sale without the intervention of a financial agent or other representative of the corporation to whom under a contract of employment compensation must be made commonly in the form of a commission on the sale.[43]

Where such statutory requirements are not to be found, the employment by the proper public officials of financial representatives or brokers will not invalidate the sale, the bonds or the proceedings in any way,[44] and

See however, the case of City of Memphis v. Bethel, 17 S. W. 191, where the bonds bearing interest at the rate of 6% were sold at the rate of 85 cents on the dollar, the court said in part: "Assuming that these authorities establish the entire negotiability of the city bonds and the right of the city officers to sell them in the market as chattels, it is clear that under the authority to sell them at their value although that might be a greater discount than legal interest, the transaction would be neither usurious nor illegal and therefore, the city can neither raise a question of usury or scaling."

Nalle v. City of Austin (Tex.), 21 S. W. 875. Bonds are not invalid because sold below par if the discount added to the rate expressed does not make the rate usurious. Lynchburg v. Norvell (Va.), 20 Gratt. 601.

43—Smith v. Los Angeles County, 99 Calif. 628, 34 Pac. 439.

Sidway v. South Park Com'rs (Ill.), 11 N. E. 852. One of the officials charged by law with negotiating a sale of bonds cannot recover any commission for negotiating such a loan. Butterfield v. Melrose, 6 Allen (Mass.), 187; Suffolk Savings Bank v. City of Boston, 149 Mass. 364.

Citizens Savings Bank v. Town of Greenburgh, 173 N. Y. 215, 65 N. E. 978. An innocent purchaser is not chargeable with any fraud or irregularities in the conduct of officers or agents of the town in the negotiations for the sale of municipal bonds. Street v. Craven County Com'rs, 70 N. C. 644; Theis v. Board of County Com'rs of Beaver County (Okla.), 97 Pac. 973; see also City of Gladstone v. Throop, 71 Fed. 341 C. C. A. It is no defense to an action on bonds of the city by an innocent holder that when they are sold by the city an agreement in violation of law was made with the treasurer of the city to pay him a commission for making such sale.

44—Town of Manitou v. First National Bank (Colo.), 86 Pac. 75;

the compensation to be received by them will be determined by the contract of employment.[45]

§ 248. Purchaser to ascertain authority for issue.

In a preceding section,[46] attention has been directed to a number of cases holding that there cannot be a bona fide holding of negotiable securities in the absence of the authority to issue them. In this and the following sections, the attention of the reader will be called to cases which involve the same principle but which further consider the questions of what legal authority and records a purchaser is bound to examine and to what extent he is charged with a knowledge of them in the absence of such

Reed v. Town of Orleans (Ind.), 27 N. E. 109.

Owensboro Water Works Co. v. City of Owensboro (Ky.), 96 S. W. 867. But commissions paid cannot be deducted from proceeds of the bonds.

State ex rel. Board of Liquidation of City Debt v. Briede (La.), 41 So. 487. Members of a Board of Liquidation interested in a business way in a bank are not qualified to act in selecting that bank as the board's fiscal agent. Cushman v. Comm'rs of Carver County, 19 Minn. 295; Lyons v. Chamberlain, 89 N. Y. 578; City of New York v. Sands (N. Y.), 11 N. E. 820; Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24.

Armstrong v. Village of Ft. Edward, 129 N. Y. 315, 53 N. E. 1116, reversing 32 N. Y. S. 433. The implied authority to employ persons to procure a purchaser for bonds follows from the grant of an express power to issue them.

Whelan's App., 108 Pa. St. 162. A commission cannot be allowed to a purchaser of bonds from the city at par.

45—City of Syracuse v. Reed, 46 Kans. 520. Public officials can not withhold a part of the proceeds as compensation for their services. Any claim by them must be made in writing and allowed in the manner prescribed by statute.

Theis v. Board of Com'rs of Beaver County (Okla.), 97 Pac. 973. Where county commissioners have no power to contract with a broker to sell bonds, a contract made by them is void and no liability is created against the county, however beneficial the broker's services may have been.

State v. Buchanan (Tenn.), 62 S. W. 287. A reasonable compensation although not expressly authorized will be allowed. See also Town of Sheridan v. Stahl (Wyo.), 102 Pac. 660, on the question of a percentage allowed on moneys passing through the hands of a town treasurer where involving a sale of bonds by the town.

46—See Sec. 231 ante.

an examination. The questions to be considered involve the subject of estoppel by recitals which will be discussed in the following chapter where these and the principles applying to them will be considered in detail.

In brief, a purchaser should ascertain and with few exceptions he is required to know that the public corporation issuing the securities has had this power expressly conferred upon it, that the power as conferred is not contrary to the constitution of the state or of the United States; that the purpose for which the bonds have been issued when the same appears upon their face is a public one; that the securities on their face are regular in form and that the recitals therein, if such exist, import a full compliance with the conditions imposed by the grant of authority and, finally, that the officers executing and issuing these securities have this power.

§ 249. Legal authority to issue.

Every purchaser of public securities is bound to take notice of the statute under which they are issued, if it gives no power the corporation is not bound and the securities are void even in the hands of innocent purchasers regardless of the other recitals contained therein.[47] The power to issue must be expressly, or as has been held in

47—McClure v. Township of Oxford, 94 U. S. 429; Merchants Bank v. Burgan County, 115 U. S. 384; Katzenberger v. City of Aberdeen, 121 U. S. 172; Lake County v. Graham, 130 U. S. 674; Citizens Savings & Loan Association v. Perry County, 156 U. S. 692; Mygatt v. Green Bay, 1 Bissell 292; National Bank of the Republic v. City of St. Joseph, 31 Fed. 216; National Bank of Commerce v. Town of Granada, 54 Fed. 100; Coffin v. Board of Com'rs of Kearney County, 57 Fed. 137; Dunbar v. Board of Com'rs of Canyon County (Ida.), 49 Pac. 409.

Bissell v. City of Kankakee, 64 Ill. 249. The authority of a municipal corporation is derived from public laws, and the avenues to such information in regard to the law and ordinances of such corporations being open to public inspection, the holder of such securities will be presumed to have examined them, and to have known whether the corporation had the requisite power to issue the bonds. He has no such opportunity in regard to private

some few and exceptional cases, indirectly conferred. This subject has been already considered in preceding sections.[48]

If the authority to issue appears and if the securities contain recitals of the compliance by the public corporation duly and properly made by the public officials charged with that power and duty the purchaser is not bound to examine further, for as to the irregularities or defects in the execution of a granted power, the corpora-

corporations. Their by-laws are not open to inspection by those who deal in securities issued by them, and hence the reason for the distinction that has been taken. The holder of the bonds involved in this action had every opportunity to know whether the city had any lawful right to issue them for the reason that its authority, if any existed, was to be found in the public statutes, and if he did not in fact examine them, as it was his privilege to do, before buying them, he will be presumed to have done so, and to have known they were issued without authority of law and therefore void in the hands of any holder, either with or without notice. Aurora v. West, 22 Ind. 89; McPherson v. Foster, 43 Ia. 48; Swanson v. City of Ottumwa (Ia.), 106 N. W. 9; Mitchell County v. City National Bank (Tex.), 43 S. W. 880, reversing 39 S. W. 628; Lewis v. Com'rs, 12 Kans. 186; Union Pac. Ry. Co. v. Smith, 23 Kan. 745; Commonwealth v. Chesapeake, etc. Canal Co., 32 Md. 501.

Woodruff v. Okolona, 57 Miss. 806. Where a statute authorizes a municipal corporation to issue bonds payable not later than ten years thereafter, an issue payable in twenty years is void even though there is a recital of compliance with the statute. Claybrooke v. Board of Com'rs of Rockingham County (N. C.), 19 S. E. 593; Union Bank of Richmond v. Com'rs of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; Peoples Bank v. School District No. 52 (N. D.), 57 N. W. 787; State v. School District No. 50 (N. D.), 120 N. W. 555; City of Tyler v. Tyler Bldg. & Loan Association (Tex.), 82 S. W. 1066; City of Austin v. Cahill (Tex.), 88 S. W. 542; Gray Limitatious of Taxing Power, Sec. 2177.

Cooley Constitutional Limitations, p. 215. Where it is said: "While mere irregularities of action, not going to the essentials of power, would prevent parties who had acted in reliance upon the securities enforcing them, yet as the doings of these corporations are matters of public record, and they have no general power to issue securities, any one who becomes a holder of such securities, even though they be negotiable in form, will take them with constructive notice of any want of power in the corporation to issue them, and cannot enforce them when their issue was unauthorized." See also Chap. XIII post.

48—See Secs. 84 and 85 ante.

tion will be estopped to set them up as defenses in the hands of a bona fide holder.[49]

§ 250. Constitutionality of act granting authority.

Not only is the purchaser bound to ascertain the existence of a grant of authority but he is further required to determine its constitutionality, and this whether the act is referred to in the bonds or where there are no recitals of lawful authority. The act so far as its form is concerned and its mode of passage must comply with the provisions of organic law. The purchaser cannot rely upon the doctrine of estoppel founded upon recitals in the bonds of the law in respect to its passage.[50]

As illustrating one phase of this principle, the cases of the town of South Ottawa v. Perkins, and Post v. Board of Supervisors of Kendall County,[51] can be read with profit. In the case first cited the question of the validity of certain railroad aid bonds was at issue and the objection was made that the law relied on for the authority to issue the bonds was never passed; no entry of its pas-

49—Meyer v. Muscatine, 1 Wall. 384; Nugent v. Sup'rs, 19 Wall. 241; County of Moultrie v. Rockingham, Ten Cent Savings Bank, 92 U. S. 331; Marcy v. Oswego Twp., 92 U. S. 637; Town of Coloma v. Eaves, 92 U. S. 579.

Com'rs of Douglas County v. Bolles, 94 U. S. 104. Behind such a recital a bona fide holder for value paid is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies, he is not required to examine whether the conditions upon which such authority may be exercised have been fulfilled. He may rely upon the decision made by tribunals erected by the legislature. Brooklyn v. Insurance Co., 99 U. S. 362; Montclair v. Ramsdell, 107 U. S. 144; Rathbone v. Board of Com'rs of Kiowa County, 73 Fed. 395; Independent School District of Sioux City v. Rew, 111 Fed. 1; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; but see Cagwin v. Hancock, 84 N. Y. 532; Veeder v. Lima, 19 Wis. 298, holding contrary to the doctrine of recitals as stated in Knox County v. Aspinwall, 21 How. 539, and the cases following.

50—Board of Com'rs of Stanley County v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 437; Wittkowsky v. Board of Com'rs of Jackson County (N. C.), 63 S. E. 275.

51—94 U. S. 260, 105 U. S. 667.

sage appearing upon the journal of the Senate of Illinois as required by the Constitution. The court held that a municipal corporation could not issue bonds without legislative authority and that all persons dealing with such corporation must take notice of a want of power at their peril; that the decisions of the state courts on questions as to what are the laws of the state are binding upon those of the United States and further that a town cannot be estopped to deny the existence of a law under which its bonds purport to have been issued. On the question of estoppel, the court in the majority opinion by Mr. Justice Bradley, said: "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an Act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law tomorrow; a law in one place, and not a law in another in the same State. And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissable in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having not been constitutionally passed, for the Courts of the United States, with the same evidence before them, to hold otherwise."

Four judges, including the Chief Justice, dissented from the majority opinion. In the minority opinion written by Chief Justice Waite, the following language appears: "The question then is, whether, under the circumstances of this case, the defendant can be permitted to make proof of the failure to make entry of the passage of

the law as required by the constitution. This does not depend upon the construction of the constitution, but upon the general principles of commercial law applicable to the constitution as construed. The issue is made upon the fact of the passage of the law. *Prima facie* it was passed, and it was apparently in force. Both parties acting upon this prima facie case, and supposing it to be true in fact, have become bound; one has borrowed and the other lent. The lender has performed his part of the contract and delivered the money, and the simple question to be determined now is, whether, under such circumstances, the borrower can refuse to pay, because, upon further investigation, he has ascertained that the legislative journals do not contain the necessary evidence to establish the fact of the due enactment of the law. * * * It must be remembered that this is not a case of construction. The question is not whether a law admitted to be in force confers the necessary power, but whether a law which does confer the power, and is apparently in force, can be shown to have been in fact passed according to the requirements of the Constitution, after parties have acted upon the faith of it and changed their condition. When the question is one of construction alone, all parties stand upon an equal footing, and each can judge for himself. If a mistake occurs, it is one of law and not of fact. Here it is one of fact. The bonds on which this suit is brought are *prima facie* valid; and, as between these parties, I think the law will not admit the testimony offered to show that they are void. In the absence of proof they stand. The question is one of evidence. It is not whether the law was passed, but whether testimony can be introduced to show that it was not. I think it cannot. To admit it would ignore a principle of commercial honor upon which we have a long line of decisions. I am not prepared to do so."

The grant of authority must not contravene consti-

tutional provision relative to the passage of special legislation.[52]

§ 251. Organization of corporation and manner of acting.

The purchaser is also bound to ascertain the validity of the organization of the public corporation issuing the securities but it is not necessary that there should be established a de jure existence. Bonds issued by de facto corporations are invariably regarded as valid if in other respects they are legal. This subject will be further considered in a subsequent section.[53]

If the bond refers on its face to an ordinance or resolution pursuant to which the securities were issued, it is essential that the purchaser ascertain the legality of this mode of action by the corporation issuing the securities for if it is necessary that they act by ordinance a mere resolution is insufficient to confer authority.[54]

The legality of the mode of action must not only be determined but many authorities go further and hold that where an ordinance or resolution is recited as authority for an issue of securities the purchasers are bound at their peril to ascertain the terms of the ordinance.[55]

52—See Sec. 439 post and 33 ante.

Young v. Board of Com'rs of Tipton County (Ind.), 36 N. E. 1118. Law involved held not contrary to the constitutional provision relative to special legislation.

53—See Sec. 266 post.

54—Roberts & Co. v. City of Paducah, 95 Fed. 62.

55—Hinkley v. City of Arkansas City, 69 Fed. 768 C. C. A.; Town of Brewton v. Spira, 106 Ala. 229, 17 So. 606; Illinois Trust & Savings Bank v. City of Pontiac, 112 Ill. App. 545; Portsmouth Savings Bank v. Ashley, 91 Mich. 670, 52 N. W. 74; Town of Klamath Falls v. Sachs (Ore.), 57 Pac. 329.

City of Tyler v. Tyler Bldg. & Loan Ass'n (Tex.), 86 S. W. 750, reversing 82 S. W. 1066. But a purchaser is not charged with notice of other parts of the record not connected with the issue of bonds; but see Wygatt v. Green Bay, 1 Bissell 292, where it is held that a holder of a city bond is not bound to examine the record of a city to ascertain whether the resolution of the council for issuing the bonds corresponds with the resolution recited in the bonds.

There are cases, however, and the better authority which hold to the doctrine that a recital on the face of bonds that they were issued in pursuance of certain ordinances of the corporation issuing them will not put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued.[56]

§ 252. Issue in excess of constitutional limitation.

Some authorities also hold that where the bonds recite on their face that they are issued under the provisions of a certain statute the purchaser is chargeable with notice that their issue is or may be in excess of the constitutional limitation on indebtedness.[57] And this is especially true where upon the facts as they appear on the face of the bonds and from the public records, a knowledge of which the purchaser may be charged, this fact clearly appears.[58]

The bond may contain a recital to the effect that the issue of which it is a part does not exceed the constitutional or statutory limitation or there may be an absence of a recital to this effect. There are cases which hold that in view of the absolute limitation placed upon the incur-

56—Hackett v. Ottawa, 99 U. S. 86; Evansville v. Dennett, 161 U. S. 434.

Waite v. City of Santa Cruz, 184 U. S. 302. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds. Risley v. Village of Howell, 64 Fed. 453, reversing 57 Fed. 544, and following Hackett v. Ottawa, 99 U. S. 86.

57—City of Kearney v. Woodruff, 115 Fed. 90. A bona fide purchaser is only bound to ascertain when the issue is in excess of the ten per cent limit authorized. Beyond this, he is entitled to rely upon the recitals in the bonds that all antecedent steps necessary to the validity of the bonds have been taken.

58—Burlington Savings Bank v. City of Cliuton, 111 Fed. 439; see Sec. 255, et seq., post.

ring of indebtedness by public corporations through constitutional provisions that the legislature has no power to defeat or avoid it by authorizing public officials to make findings or recitals in securities which shall be conclusive that they are within the limit and that a purchaser is not entitled to rely upon them in that the debt thereby created does not exceed the constitutional limit. This rule is clearly the sound one to apply where there is an absence of a recital to that effect.[59] There are cases holding contrary to the rule stated above and which maintain the doctrine that a recital that the debt does not exceed the constitutional limit operates as an estoppel under certain conditions. The cases on this question will be discussed in a subsequent section.[60]

In the absence of recitals relative to the fact that the debt represented by the bonds does or does not exceed the constitutional limit, and that other conditions imposed by statutory or constitutional provisions have been complied with, the authorities are uniform in maintaining that a purchaser of securities is charged with the duty of ascertaining the facts relative to the issue of the bonds which might affect their validity. This question will be further considered in a subsequent section under the subject of recitals.[61]

§ 253. Recitals of fact.

The purchaser is further charged with an examination of recitals of fact appearing upon the face of the bonds

59—Dixon County v. Field, 111 U. S. 83; Hedges v. Dixon County, 150 U. S. 182; Fairfield v. Rural Independent School District of Allison, 111 Fed. 453.

60—See Sec. 295, et seq., post; Chaffee County v. Potter, 142 U. S. 355; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255.

61—See Sec. 296 post; Buchanan v. Litchfield, 102 U. S. 278; Citizens' Savings Ass'n v. Perry County, 156 U. S. 692; First National Bank v. Doon Township, 86 Ia. 330, 53 N. W. 301; Doon Twp. v. Cummins, 142 U. S. 366.

to ascertain whether they are regular in form and import a full compliance with precedent conditions required by the statute authorizing their issue in order that they may operate in his favor as an estoppel against the corporation issuing them where irregularities or defects exist in the performance of the required conditions or where there may have been a total failure to comply with them.

Such an examination is necessary because of the resultant effect of the existence of a recital as to a particular fact upon the character of the holder as one bona fide or upon the validity of the bonds.

The definition of a recital will be given in a subsequent section and also the principles of law relating to the effect of a statement of facts contained therein and the authority of public officials to make one.[62]

§ 254. Authority of officers to act.

The purchaser is also bound to determine whether the public authorities issuing and executing public securities are acting within the actual scope and limits of their authority as conferred either by a special law or as coming within the terms of their authority generally conferred.[63] No public corporation can be estopped by the declarations or acts of public officials involving or in respect to either the character or the extent of their authority. This principle is well-stated in a case decided by Mr. Justice Bradley in the Circuit Court of the United States,[64] where he said: "Public officers cannot acquire authority by declaring that they have it. They can not thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and

62—See Sec. 276, et seq., post.

63—Bissell v. Spring Valley Twp., 110 U. S. 162; Lewis v. Com'rs, 12 Kans. 186; Portsmouth Savings Bank v. Village of Ashley, 91 Mich. 670; Goodnow v. Com'rs of Ramsey County, 11 Minn. 31; Ledwich v. McKim, 53 N. Y. 315.

64—Chisholm v. Montgomery, 2 Woods, 584.

property may estop their principals, and subject them to the consequences of their unauthorized acts. But the body politic can not be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it.''

The discussion relative to the power and authority of public officials to bind the corporation for which they purport to act and which they assume to represent will be remembered.[65]

Genuineness of official signatures. The purchasers of public securities are charged as already stated with notice of the official capacity and power of the officials issuing and executing public securities and they also always take the risk of the genuineness of the official signature of those who execute the paper they buy. This rule includes not only the genuiness of the signature itself, but the official character of the one who makes it.[66]

§ 255. Examination of records.

The purchaser may not only be charged with a knowledge of constitutional, statutory and charter provisions apparently conferring the power to issue securities but he is often by law charged with the duty of examining certain designated public records. This duty may be imposed by a specific requirement of the law granting the authority to issue or it may follow from the adoption and application of general rules or principles of law by the courts.[67]

65—See Secs. 52 and 65, et seq., ante.

66—Anthony v. Jasper County, 101 U. S. 693; Merchants Bank v. Bergen County, 115 U. S. 384.

67—The Floyd Acceptances, 7 Wall. 674; Marsh v. Fulton County, 10 Wall. 683; Coffin v. Board of Com'rs of Kearney County, 57 Fed. 137; Quaker City National Bank v.

While the constitution or the act under which municipal bonds are issued may prescribe a public record, which furnishes the test of compliance with a constitutional limitation for illustration, the purchaser of bonds while charged with notice of its contents is not required to look beyond it and if that record fails to show a violation of the limitation he may rely upon the presumption that the officers satisfactorily discharged their duty when they issued the bonds and upon the recitals which they contain and the corporation will be estopped from proving other records or facts to overthrow them.[68]

The validity of securities will depend in these instances not only upon the terms of the law granting the authority but upon the facts found in the records which may relate

Nolan, 59 Fed. 660, affirmed 66 Fed. 883 C. C. A.; City of Santa Cruz v. Waite, 98 Fed. 387 C. C. A., reversed in part in Waite v. City of Santa Cruz, 184 U. S. 302.

Board of Education of City of Pierre v. McLean, 106 Fed. 817. If the laws are such that there might, under any state of facts or circumstances, be legal authority in a municipality or quasi municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, and that it had lawful power to send them forth, unless the constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances. Independent School District of Sioux City v. Rew, 111 Fed. 1.

Faulkenstein Twp. v. Fitch, 2 Kans. App. 193, 43 Pac. 276. Purchasers must take notice of public records and are bound to inquire into the legality of an election.

Citizens Bank v. City of Terrell, 78 Tex. 456, 14 S. W. 1003. Where the authority to create the debt at all, or beyond a given amount, is made to depend upon evidence furnished by official records, the same rule in regard to recitals contained in bonds given for the debt should not be applied. Every holder of such bonds is charged with a knowledge of the provisions of the law relating to their issuance, and if the law points to the records as evidence of the existence of the facts required to authorize their issuance, or to limit the amount of the debt the city may create, such records and not the recitals in the bonds must be looked to by every one who proposes to deal in the bonds.

68—Board of Com'rs of Lake County, Colo. v. Sutliff, 97 Fed. C. C. A.; Suffolk Savings Bank v. Boston, 149 Mass. 364; Claybrooke v. Com'rs of Rockingham County, 117 N. C. 456, 23 S. E. 360; State v. Fayette County Com'rs, 37 Ohio St. 526; De Vos v. City of Richmond, 98 Am. Decisions, 646.

to the conditions imposed by statutory or constitutional provisions. The rule obtains that public records open for inspection to the public are conclusive and that evidence cannot be admitted of their falsity or lack of accuracy in an action upon securities the validity of which is dependent upon the facts as established by them.[69]

The further rules also obtain that if duly certified copies of the records are exhibited to the purchasers of the bonds at the time they receive them showing to a demonstration that a further examination upon the subject would have been useless and where there is nothing to indicate any irregularity or even to create a suspicion that the bonds had not been issued pursuant to lawful authority, that the holders have a right to assume that the certified transcript was true.[70]

A recital in public securities that they are issued

69—Bissell, et al. v. City of Jeffersonville, 24 How. 288.

Mathis v. Runnells, 66 Fed. 494 C. C. A. The plaintiff's proposition is that the records of the proceedings of a municipal corporation when they are required by law to be kept by such corporation import absolute verity and in a collateral proceeding after the rights of the third parties have accrued cannot be impeached by parol. The court held that as against an innocent purchaser, it would be error to permit parol testimony to prove that certain jurisdictional facts which appeared in the record did not occur until after the date as set forth in the record.

McLean v. Valley County, Nebr., 74 Fed. 389, affirmed 79 Fed. 728 C. C. A. The abstract of assessment of property in Valley County for the year 1879, made by the county clerk, and by him certified and transmitted to the auditor of the state, was a public record of the assessment which the statute required to be so made and transmitted, after the assessment-books had been equalized and corrected by the county board. A purchaser of bonds, in determining whether the aggregate issue exceeded the statutory limit of 10 per cent. of the assessed valuation, had the right to rely upon this abstract as a public record, authorized by statute to be made, as showing the amount of the assessment as finally corrected and established by the board of equalization, and was not required to look through the books of the precinct assessors, and minutes of the board of equalization, if such minutes were kept, to verify such public record. Belo v. Comm'rs, 76 N. C. 481; First National Bank v. Concord, 50 Vt. 257.

70—Bissell, et al., v. City of Jeffersonville, 24 How. 287.

"pursuant to an order of the county court" puts all principals dealing in the bonds, even purchasers, for value, in the open market, upon inquiry as to the terms of the order.[71]

§ 256. Assessment rolls and other records.

In determining the validity of an issue of securities the question involved being its issue in excess of a constitutional or statutory limitation, the courts hold that where by law statements of public indebtedness and expenditures are required to be published and entered on public records open to the inspection of the public at all times that an owner of although a purchaser for value and before maturity is charged with the duty of examining this record of indebtedness in order to ascertain whether the bonds increased the indebtedness beyond the constitutional limit and that recitals in them do not estop the public corporation to prove by the records of assessment and indebtedness that the bonds were issued in violation of the constitutional debt limit.[72]

Official assessment rolls. The purchaser of bonds is also charged with the facts as they may be disclosed by official and public assessment rolls or records of the assessed valuation of the taxable property in the corporation as disclosed by the public records open to all and the contents of which all are bound to take notice.[73]

71—Rich v. Mentz Twp., 134 U. S. 632; Post v. Pulaski County, 49 Fed. 629; Ball v. Presidio County (Tex.), 29 S. W. 1042; Mitchell County v. City National Bank (Tex.), 43 S. W. 880, reversing 39 S. W. 628; but see Wesson v. Saline County, 20 C. C. A. 227.

72—Sutliff v. Lake County Com'rs, 147 U. S. 230, following Dixon County v. Field, 111 U. S. 83; and Lake County v. Graham, 130 U. S. 674, but distinguishing Chaffee County v. Potter, 142 U. S. 355; Thornburgh v. School District, 175 Mo. 12, 75 S. W. 81.

73—Buchanan v. Litchfield, 102 U. S. 278; Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674; Doon Twp. v. Cummins, 142 U. S. 366.

Nesbitt v. Riverside Independent District, 144 U. S. 610, affirming 25 Fed. 635. If not charged with the

This rule is modified in those cases where the duty was imposed upon the officials issuing the bonds to determine from the records whether the constitutional limit had been exceeded and to make recitals to such effect,[74] or where there were no statutes requiring the assessment rolls or statements of public indebtedness to be made a matter of public record.[75]

The rule further does not apply in those cases where there has been neglect or failure of public officials to make in the precise form required by statute the records, an examination of which the purchaser is charged by law or where they are insufficient so far as the facts are disclosed by them to furnish the necessary information.[76]

knowledge of prior indebtedness she was with the fact that, independent of such indebtedness, these bonds alone were an over-issue and beyond the power of the district for she was bound to take notice of the value of taxable property within the district as shown by the tax list. Francis v. Howard County, 54 Fed. 487 C. C. A. Springfield Safe Deposit & Trust Co. v. City of Attica, 85 Fed. 387 C. C. A.; St. Lawrence Twp. v. Furman, 171 Fed. 400; Miller v. Hixson (Ohio), 59 S. E. 749; National Life Insurance Co. of Montpelier, Vt. v. Mead (S. D.), 82 N. W. 78, re-hearing denied 83 N. W. 225; Nolan County v. State (Tex.), 17 S. W. 823; Merrill v. Smith County (Tex.), 33 S. W. 899.

74—Marcy v. Town of Oswego, 92 U. S. 637; Humboldt Twp. v. Long, 92 U. S. 642; Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674.

Gunnison County Com'rs v. E. H. Rollins & Sons, 173 U. S. 255. Here, by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the Constitution of the state and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue.

75—City of Huron v. Second Ward Savings Bank, 86 Fed. 272 C. C. A.; Ball v. Presidio County (Tex.), 27 S. W. 702.

76—Dudley County v. Board of

The rule is also modified to the extent that even if a purchaser is bound to ascertain from the public records the amount of the public indebtedness that where the records show or would show, if examined, no over-issue, he is not bound to examine further as to the verity or sufficiency of such records.[77]

It has been held that where the limit of an issue of bonds is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the public corporation or where they have better access to the information than other persons and can ascertain the amount with more certainty than strangers then the bonds will be held valid in the hands of bona fide holders.[78]

§ 257. Extent of search required of purchaser.

A buyer of public securities is not required to search the proceedings of the county commissioners and through all of the books of the clerk of their board to ascertain the indebtedness of a county when the statute points him to a specific record for his guidance and the officials of the county have failed to make that record and have certified upon the face of their bonds that the limitation has not been violated, the minutes of the meetings of commissioners, the register of the bonds and the warrants of

Com'rs of Lake County, Colo., 80 Fed. 672 C. C. A.

Board of Com'rs of Lake County, Colo. v. Sutliff, 97 Fed. 270 C. C. A. Where the record of indebtedness required by statute was not kept as required by statute and the bonds contained recitals that they were issued in conformity to law, a purchaser is authorized to rely on such recitals and the county is estopped to contradict them by other records. Citizens Savings Bank v. City of Newburyport, 169 Fed. 766; Coler v. Board of Com'rs of Santa Fe County (N. Mex.), 27 Pac. 619.

77—Sherman County v. Simons, 109 U. S. 735, 27 L. Ed. 1093. In this case it appears that an express record though false was made of public indebtedness in order to allow the issue of the bonds in question.

78—Chilton v. Town of Grattan, 82 Fed. 873.

the county constitute no notice of the county indebtedness to a bona fide purchaser. He is not required to look beyond the public record which furnishes the test of compliance with a constitutional limitation and if that record fails to show a violation of the limitation he may rely upon the presumption that the officers faithfully discharged their duty when they issued the bonds.[79]

§ 258. Dixon County v. Field; Chaffee County v. Potter.

One of the leading cases upon the duty of a purchaser of bonds to examine the public records and upon the question that he is charged by law with a knowledge of the facts which such record discloses is that of Dixon County v. Field,[80] where it was held that an assessment roll required by law to be kept by the public officials as a matter of public record takes precedence over any recital as to the same.

In a later case in the same court,[81] the court held that as against a bona fide holder the maker of bonds which in themselves afford no data by which the total of the amount could be determined and which contained recitals that all the requirements of the act authorizing their issue have been fully complied with and that the whole amount of the issue did not exceed the limit of the indebtedness as prescribed by the constitution, is estopped by the recitals from questioning their validity on the ground that the percentage of the indebtedness fixed by the constitution was exceeded. The court distinguished the case of Dixon County v. Field cited above and said in part: "We held in that case (Lake County v. Graham, 130 U. S. 674), that the county was not estopped from pleading the constitutional limitation, because there was

79—Board of Com'rs of Lake County v. Sutliff, 97 Fed. 270 C. C. A.

80—111 U. S. 83.

81—Chaffee County Com'rs v. Potter, 142 U. S. 355; see also Gunnison County v. Rollins, 173 U. S. 255.

no recital in the bonds in regard to it and because, also, the bonds showing upon their face that they were issued to the amount of $500,000. The purchaser having that data before him was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds, having been issued in violation of that provision of the constitution, were not valid obligations of the county. Our decision was based largely upon the ruling of this court in Dixon County v. Field, 111 U. S. 83. To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: Do the additional recitals in these bonds, above set out, and the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation? In our opinion these two features are of vital importance in distinguishing this case from Lake County v. Graham and Dixon County v. Field, and are sufficient to operate as an estoppel against the county. Of course, the purchaser of bonds in open market was bound to take notice of the constitutional limitation on the county with respect to indebtedness which it might incur. But when, upon the face of the bonds there was an express recital that that limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the Lake County case, and in Dixon County v. Field, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll, whether the county had

exceeded its power, under the constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of the indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is—What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in Lake County v. Graham and Dixon County v. Field. But that is not this case. Here, by virtue of the statute under which the bonds were issued the County Commissioners were to determine the amount to be issued which was not to exceed the total amount of the indebtedness as the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the state and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue."

§ 259. Purchaser charged with knowledge of public records only.

That a purchaser be charged with the facts contained in a record whether it relates to the amount of indebtedness, the assessed valuation of the public corporation, or otherwise, it is necessary that the record be one which is prescribed by the constitution or the act under which the bonds were issued as a test of the limitation or condition;[82] and further that it be kept by those officers charged by law with that duty.[83] A personal account book kept by a public official not pursuant to the requirements of any statute is not competent evidence in favor of the public corporation on the question involved in this section.[84]

§ 260. Performance of conditions.

A purchaser of public securities is not bound according to the great weight of authority to make examination in respect to the performance of conditions required by law as pertinent to the authority to issue the bonds, where they contain recitals to that effect and when the authority to issue exists. The public corporation is estopped against a bona fide purchaser to deny the facts therein set forth.[85] It does not follow that because a legislative

82—Town of Darlington v. Atlanta Trust Co., 68 Fed. 849 C. C. A.; Chilton v. Town of Grattan, 82 Fed. 873; Board of Education of City of Pierre v. McLean, 106 Fed. 817.

83—Board of Com'rs v. Keene Five-Cent Savings Bank, 108 Fed. C. C. A.; Board of Com'rs of Lake County, Colo. v. Sutliff, 97 Fed. 270.

84—Board of Com'rs v. Keene Five-Cent Savings Bank, 108 Fed. 505 C. C. A.; Town of Darlington v. Atlantic Trust Co., 78 Fed. 849 C. C. A.

85—See Sec. 289, et seq., post. Brooklyn v. Insurance Co., 99 U. S. 362; Evansville v. Dennett, 161 U. S. 435; Marion County v. Coler, 14 C. C. A. 301; Chilton v. Town of Grattan, 82 Fed. 873; Danielly v. Cabaniss, 52 Ga. 211; Town of Cherry Creek v. Becker, 123 N. Y. 161; but see Mercer v. Provident Life & Trust Co., 72 Fed. 623 C. C. A. Where railroad aid bonds

body has required certain steps to be taken before bonds can be issued that they can be avoided in the hands of an innocent purchaser by proof that the conditions prescribed have not been done or have been insufficiently performed. He may assume that the conditions have been performed as set forth in the recitals.[86]

§ 261. Purchaser bound by what the bonds disclose on their face.

The purchaser of public securities is clearly charged with the knowledge of all the facts which the bonds disclose upon their face in respect to acts or conditions that affect their validity and if the facts as thus appearing are sufficient to make the securities invalid, they are void even in the hands of an otherwise bona fide purchaser for value.[87]

are deposited in escrow the purchaser is not absolved from the necessity of ascertaining whether the road has been constructed as required, even though there be recitals in them that they are issued pursuant to authority. Cagwin v. Hancock, 84 N. Y. 532; Oswego County Savings Bank v. Town of Genoa, 59 N. Y. S. 829; Town of Eagle v. Kohn, 84 Ill. 292.

86—See Sec. 276, et seq., post. Pendleton County v. Amy, 13 Wall. 297; Town of Coloma v. Bolles, 94 U. S. 104; County of Henry v. Nicolay, 95 U. S. 619; Moultrie County v. Fairfield, 105 U. S. 370; see also Wade v. Travis County, 174 U. S. 499, as to compliance with constitutional provision requiring a tax levy before issue of bonds.

87—Harshman v. Bates County, 92 U. S. 569. Where statutory authority provided for the issue of railroad aid bonds to a corporation designated by name and before their issue this road was consolidated with another under another name, bonds issued reciting on their face all these facts, were held void in the hands of a bona fide purchaser. Bates County v. Winter, 97 U. S. 83; Scipio v. Wright, 101 U. S. 665; Anderson County Com'rs v. Beal, 113 U. S. 227; Gilson v. Dayton, 123 U. S. 59.

Peoples Bank v. School District No. 52, 57 Fed. 787. Bonds held void when made payable eleven days less than ten years where the statute required them to be made payable in less than ten years from date. Springfield Safe Deposit & Trust Co. v. City of Attica, 85 Fed. 387, C. C. A.; Wright v. East Riverside Irrigation District, 138 Fed. 313 C. C. A.

Clagett v. Duluth Twp., 143 Fed. 824. Where the act authorizing bonds shows on its face that it is

This principle applies to all those cases, for illustration, where it appears that certain conditions were performed pursuant to the authority conferring the power to issue and from that authority it further appears that it is impossible that the steps required could have been legally taken within the dates as given upon the face of the bonds.[88]

Illustrative of this principle and line of authorities, a case in the Supreme Court of the United States may be referred to.[89] The statute granting the power to issue was not to go into effect until after being published in a certain designated newspaper of date March 21st, 1872. Bonds were issued and bore date April 15, 1872, and recited that they were "issued pursuant to the above statutory act and by reason of a vote of election taken April 8th." By statute a notice of election was required to be given for thirty days, the bonds therefore on their face, it was held, gave notice of their invalidity with which a bona fide holder was chargeable. The court said: "Every man is chargeable with a notice of that which the law requires him to know and of that which upon being put upon inquiry he might have ascertained by

in violation of the constitutional provision relative to the title of acts as passed by the legislature, the bonds issued thereunder are invalid. Louisiana State Bank v. Orleans Navigation Co., 3 La. Ann. 297; Woodruff v. Okolona, 57 Miss. 806; Horton v. Town of Thompson, 71 N. Y. 513; George v. Oxford Twp., 16 Kan. 72; Wilbur v. Wyatt (Nebr.), 88 N. W. 499.

Livingston v. School District No. 7 (S. D.), 69 N. W. 15. A school district bond for more than $500 is void when it recites that it is issued pursuant to authority which authorizes bonds to the amount of $2,000 in denominations of not less than $50 or more than $500. Montpelier Savings Bank & Trust Co. v.. School District No. 5 (Wis.), 92 N. W. 493.

88—Anderson County Com'rs v. Beal, 113 U. S. 227; Crow v. Oxford, 119 U. S. 215; Gilson v. Dayton, 123 U. S. 59; Coffin v. Board of Com'rs of Kearney County, 57 Fed. 137; Rathbone v. Board of Com'rs of Kiowa County, 73 Fed. 395; Manhattan Co. v. City of Ironwood, C. C. A., 74 Fed. 535, following McClure v. Township of Oxford, 94 U. S. 429.

89—McClure v. Township of Oxford, 94 U. S. 429.

the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the statute under which they are issued is bound to take notice of the statute and of all its requirements."

In another case in the United States Court of Appeals from the Eighth Circuit,[90] the bonds were held invalid in the hands of a bona fide purchaser upon the following facts: A statute of Kansas provided that "no bonds except for the erection and furnishing of school houses shall be voted for and issued for any county and township within one year after the organization of such new county under the provisions of this act." Bonds were voted for by a township in the county within a year after the organization of the county but were actually issued after the expiration of the year in satisfaction of a subscription by the township to the capital stock of a railroad company. The court held that the bonds were issued without legal authority and were therefore void and further that, the date of election appearing upon their face, purchasers were charged with notice of this invalidity.

The principle further applies to the purpose for which the bonds were issued when the same appears upon their face, if this is one which under the law is either considered not public or as one not coming within the special authority conferring the power to issue the bonds, they will be held invalid even in the hands of a bona fide purchaser and he is charged with notice that the purpose of the issuance is unauthorized by statute.[91]

90—Sage v. Fargo Twp., 107 Fed. 483.

91—Lewis v. City of Shreveport, 108 U. S. 282.

United States Trust Co. v. Village of Mineral Ridge, 104 Fed. 851, C. C. A. A recital that the bonds were issued to take up former bonds of a certain date "as provided in the ordinance of said village" does not comply with Revised Statutes of Ohio, Sec. 2703, which requires that "all bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued and under what ordinance." State v. School District, 16 Nebr. 182; Johnson

The principle also applies to one who buys public securities of one issue in such a number as to exceed in amount the limit of the issue as authorized by law either a general statutory or constitutional limitation or one appearing in the act especially conferring authority. The purchaser under these circumstances is chargeable with notice of the violation of law and the public corporation is not estopped by its recitals or otherwise to plead the excessive issue.[92]

And even where the purchaser has but a part of a series if they contain recitals from which it can be imported that other bonds were outstanding of the same issue and for the same amount the purchaser will be charged with notice of this fact, and also that from the numbers upon the bonds there has been an aggregate amount issued far exceeding the limit placed upon the indebtedness of the corporation by the state constitution.[93]

§ 262. Use of proceeds by the public corporation.

The proceeds of securities lawfully issued belong to the public corporation issuing the same and cannot be lawfully diverted or appropriated for other purposes than those designated in the grant of authority.[94] A taxpayer

City v. Charleston, etc. R. R. Co., 44 S. W. 670.

92—Francis v. Howard County, 54 Fed. 487, C. C. A., affirming 50 Fed. 44; Burlington Savings Bank v. City of Clinton, 111 Fed. 439.

93—Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674; Geer v. School District, 97 Fed. 732 C. C. A.; Fairfield v. Independent School Dist. of Allison, 111 Fed. 453; St. Lawrence Twp. v. Furman, 171 Fed. 400; but see County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58.

94—Cunningham v. City of Cleveland (Tenn.), 152 Fed. 907 C. C. A.

Leeman v. Perris Irr. Dist. (Calif.), 74 Pac. 24. Where the authority is to issue bonds for the purpose of acquiring property for and constructing an irrigation system, those issued in payments of warrants drawn for salaries of officers are void. Jenkins v. Williams (Calif.), 111 Pac. 116; People v. Hummel (Ill.), 74 N. E. 68; Rogers v. Independent School District of Colfax (Ia.), 69 N. W. 544.

McArthur v. City of Cheboygan

may maintain a suit to enjoin the public officials from using the moneys for any other purpose,[95] although it has been held that where a reasonable discretion is vested in the public authorities the incidental use of such moneys or a portion of them as may not be inconsistent with the main purpose for which acquired will not be disturbed.[96] If through error or inadvertence a larger sum of money is raised than required for the purpose calling for the issue of securities, such excess of funds belongs to the corporation issuing the bonds and not to the state.[97]

(Mich.), 120 N. W. 575. Funds raised by the sale of bonds for park purposes cannot be transferred to the general fund.

Horsefall v. School District (Mo.), 128 S. W. 33. The proceeds of bonds issued to erect a high school building cannot be used to purchase a site or pay an existing indebtedness. Keith County v. Ogalalla Power & Irrigation Co. (Nebr.), 89 N. W. 375; People v. Ingersoll, 58 N. Y. 1; Mayor v. Aldan Borough, 209 Pa. 247, 58 Atl. 490; Ecroyd v. Coggeshall (R. I.), 41 Atl. 260.

State v. Young, 66 S. C. 115, 44 S. E. 586. A committee of public works selected by the town council have no right to the possession and control of sewerage bonds or the proceeds thereof as against a town council, construing act of March 2, 1896, and Feb. 27, 1902. City of Bluefield v. Johnson (W. Va.), 69 S. E. 848; see also City of Geneseo v. General, etc. Mineral Co. (Kan.), 40 Pac. 655. A city may recover the proceeds of bonds issued by it to a corporation in payment for an unauthorized subscription by it to the capital stock of the corporation, and City of Akron v. Dobson (Ohio), 90 N. E. 123, relative to certificate of corporate auditor required under Revised Statutes, Sec. 1536-205; but see Board of Sup'rs of Queens County v. Phipps, 51 N. Y. S. 203. Under statutory authority, a surplus from one highway fund may be transferred to meet a deficiency in another.

95—Fazende v. City of Houston, 34 Fed. 95; Chamberlain v. City of Tampa (Fla.), 43 So. 572; Tukey v. City of Omaha, 54 Nebr. 370.

Hope v. Dykes (Tenn.), 93 S. W. 85. Ultimate relief, however, will depend upon the evidence adduced upon the hearing; see also Missouri River, etc. R. R. Co. v. Miami County, 12 Kan. 230.

96—Baker v. City of Cartersville (Ga.), 56 S. E. 249; Sugar v. City of Monroe (La.), 32 So. 961; Ham v. Board of Levee Com'rs for Yazoo Mississippi Delta (Miss.), 35 So. 943; Audrey v. Zang (Tex.), 127 S. W. 1114.

97—Paye v. Grosse Pointe Twp. (Mich.), 96 N. W. 1077; People v. Ingersoll, 58 N. Y. 1; People v. Dakin, 43 Hun. (N. Y.), 382.

§ 263. Use of proceeds as affecting validity of bonds.

An interesting question is suggested by the title of this section. Where authority has been granted to issue securities for a particular purpose and the proceeds thereof are used by public officials for another and different one or for perhaps illegal purposes, does this fact affect in any way the validity of the bonds in the hands of bona fide purchasers, and especially where there has been a false recital of compliance with conditions? The great weight of authority sustains the validity of the securities.[98]

The principle universally obtains that the corporation is estopped to deny that the bonds were issued for an-

98—Anderson County Com'rs v. Beal, 113 U. S. 227; West Plains Twp. v. Sage, 69 Fed. 943; City of Gladstone v. Throop, 71 Fed. 341 C. C. A.; City of Huron v. Second Ward Savings Bank, 86 Fed. 272.

Lyon County v. Keene Five-Cent Savings Bank, 100 Fed. 337, affirming 97 Fed. 159. The validity of bonds in the hands of a bona fide purchaser cannot be impeached by showing that the county officers used the proceeds in the payment of warrants which were invalid and not enforcible. Northwestern Savings Bank v. Town of Centreville Station, 143 Fed. 81 C. C. A.; Platt v. City and County of San Francisco (Calif.) 110 Pac. 304; Maxey v. County Court of Williamson County, 72 Ill. 207; Blanchard v. Village of Benton, 109 Ill. App. 569.

Gardner v. Haney, 86 Ind. 17. Bonds issued for money to build a schoolhouse are not necessarily void because it was not built within the corporate limits. Aberdeen v. Sykes, 59 Miss. 236; Town of Orleans v. Union Bank, 47 N. Y. S. 927; Hightower v. City of Raleigh (N. C.), 65 S. E. 279; Jones v. Camden, 44 S. C. 319, 23 S. E. 141.

Town of Clifton Forge v. Alleghany Bank (Va.), 23 S. E. 284. The rule applies although the purchaser was aware of such intended and unauthorized use of the proceeds.

Lynchburg v. Slaughter, 75 Va. 57. Bonds held valid in the hands of a bona fide purchaser although the holder had knowledge of the unlawful use of the proceeds, he having purchased them from a bona fide holder for value without such knowledge; but see Noel-Young Bond & Stock Co. v. Mitchell, 21 Tex. Cir. App. 638, 54 S. W. 284; Doon Twp. v. Cummins, 142 U. S. 366. In this case, however, the bond holder was an original purchaser of the bonds and had knowledge of the use to which the proceeds were put; see also Sec. 289 post on recitals as to proceeds.

other purpose than that which appears in the recitals of fact upon the face of the bonds and in the grant of authority for their issue, and that the bonds are valid in the hands of bona fide purchasers.[99]

Though, unquestionably the public corporation would have a right of action against the public officers for diverting to unlawful or unauthorized purposes the proceeds of the securities.[1]

The purchasers of public securities are only bound to inquire whether the power to issue them has been conferred, they are not required to see that the proceeds are properly applied.[2]

One of the leading cases on this question is from the United States Court of Appeals in the Eighth Circuit.[3] The board of education of the city of Huron in South Dakota, in pursuance of legal authority issued $60,000 of its negotiable bonds containing a recital that they were issued for a lawful purpose, namely, to raise funds

99—See cases cited in preceding note and also the following: Francis v. Howard County, 50 Fed. 44.

National Life Insurance Co. of Montpelier v. Board of Education of City of Huron, 62 Fed. 778. The defendant was estopped to assert the falsity of recitals to defeat the bonds; that, having authority to pass an ordinance or resolution to provide for the collection of the necessary taxes, their recital was conclusive that the necessary provision had been made; and, further, the bonds having been issued ostensibly for a legal purpose, it was no defense to urge that they had been in fact issued for an illegal purpose, in an action brought by a bona fide holder of the bonds.

City of Pierre v. Dunscomb, 106 Fed. 611. A municipal corporation is estopped from defeating an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purposes of funding the bonds, warrants, or floating debt of the corporation either on the ground that the warrants or bonds which they were issued to satisfy were void or that the apparent debt which they were issued to pay was fictitious. Independent School District of Sioux City v. Rew, 111 Fed. 1 C. C. A.; Nolan County v. State (Tex.), 175 S. W. 823.

1—Hightower v. City of Raleigh (N. C.), 65 S. E. 279.

2—Citizens Savings Bank v. City of Newburyport, 169 Fed. 766 C. C. A.; Smith v. Town of Belhaven (N. C.), 63 S. C. 610; Mills v. Gleason, 11 Wis. 470; but see Rozier v. St. Francois, 34 Mo. 395.

3—National Life Insurance Co.

for the purchase of a school site and for the erection of a school building thereon. It appeared from the record in the case that the proceeds of these bonds were used not for the purpose as recited but for the unlawful purpose of conducting a campaign in the state legislature for securing the selection of the city of Huron as the state capital of South Dakota. The opinion by Judge Sanborn is replete with sound reasoning on the questions involved. On the question of the unlawful use of the proceeds the court said: "It is no defense to these bonds, against innocent purchasers for value, before maturity, that the defendant (the board of education) loaned $59,500 of the proceeds of the sale of them to the city of Huron for city warrants that were never paid, and that cannot be legally enforced, so that it has actually realized but $500 from the sale of its bonds. That a municipal corporation has given away or squandered the proceeds of negotiable securities which it placed upon the market cannot affect the rights of bona fide purchasers, who had no knowledge of, nor part in, the gift or waste. They are in no way responsible for the wise and economical use by the corporation of the funds it borrows."

"Nor is it any defense to such bonds, as against bona fide purchasers, that the citizens and officers of a municipal corporation, with the intention to use the proceeds of the bonds for an unlawful purpose, took the necessary steps to issue them for a lawful purpose, certified on the face of the bonds that they were issued for such lawful purpose, and then appropriated the proceeds to the unlawful purpose. Corporations are as strongly bound to an adherence to truth in their dealings with mankind as are individuals, and they cannot, by their representations or silence, induce others to part with their money or property, and then repudiate the obligations for which the money was expended, and which their statements represented to be valid."

And on the general doctrine of recitals, though the quo-

tation from the opinion is anticipating somewhat the treatment of this subject, the court said: "Upon reason and authority, therefore, our conclusion is that an estoppel may arise in a proper case upon a recital that an act has been performed which was required by a constitution, as well as upon a recital of the performance of an act required by statute.

"From the decisions to which we have referred, we think the following rules are fairly deducible:

"Recitals in municipal bonds, by the representative body that issues them, to the effect that all the requirements of the laws with reference to their issue have been complied with, will not estop the municipality from proving, as against a bona fide purchaser, that the representative body had no power to issue them, where no act of the representative or constituent body could make the issue lawful at the time it was made, and this fact appears from the constitution and statute under which the bonds were issued, the public records referred to therein, and the bonds the purchaser buys. Dixon County v. Fields, supra, and cases cited thereunder.

"Such a recital may constitute an estoppel in favor of a bona fide purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of bonds, if that fact does not appear from the bonds the purchaser buys, the constitution and statutes under which they were issued, and the public records referred to therein. Chaffee County v. Potter, supra.

"Another rule that is established by a long line of decisions of the Supreme Court is that: Where the municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by that body to which the law intrusts the power, and upon which it imposes the duty, to ascertain,

determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them."

§264. Warrants of transferrer.

The transferrer of a negotiable bond by its delivery warrants that the paper is what it purports to be; that the signatures are genuine and that the instrument is not tainted with usury,[4] although there are authorities which hold to the contrary on this last proposition.[5] If the securities are the genuine paper of the public corporation issuing them and what they purport to be but are void for want of the power to issue, there is no warranty of their validity unless by express stipulation. The transferee cannot recover from the transferor the consideration paid on the sole ground of invalidity.[6]

The leading cases on the points involved in this section are those of Otis v. Cullum, 92 U. S. 447 and Meyer v. Richards, 163 U. S. 358. In the former case, an action was commenced in the court below by the plaintiffs in error for moneys had and received. The facts presented were as follows: Under authority of an act of the legislature of Kansas, the city of Topeka issued certain bonds payable to the parties named or bearer. They became the property of the First National Bank of Topeka, which put them upon the market and disposed of them. Eighteen were sold to the plaintiffs in error and the residue

of Montpelier v. Board of Education of Huron, 62 Fed. 778.

4—Daniel on Neg. Instruments, 5th Ed. Sec. 730, et seq. This author also states that the vendor warrants the validity and legal operation of the negotiable instruments sold.

Smith v. McNair, 19 Kan. 330. If one buys bread, he does not expect a stone, if he bargains for fish, he is not satisfied with a serpent. Parmelee v. Knox, 24 Kans. 113.

5—Daniel on Negotiable Inst. 5th Ed. Sec. 533, et seq.

6—Otis v. Cullum, 92 U. S. 447; see also Meyer v. Richards, 163 U. S. 358; Rogers v. Walsh, 12 Nebr. 28.

to another party. There was a default in the payment of interest and the other party brought suit. The court in that case held that the legislature had no power to pass the acts and that the bonds were therefore void.[7] The present suit was brought by the plaintiffs in error to recover from the receiver of the bank the amount paid to the bank for the bonds and the ground relied upon was a failure of consideration. It was not alleged that there was any fraud on the part of the bank in selling the bonds in question but on the contrary its good faith was expressly admitted. No recovery was therefore sought upon the theory of bad faith. The representations made by the bank through its agents as to the bonds were made in good faith and were not understood by either party to constitute a warranty. The points of fraud and warranty were therefore eliminated from the case; the court held that as the bank gave no warranty it could not be charged with a liability it did not assume and that the vendor of such securities is only liable on proof of bad faith and the implied warranty that the bonds belonged to him and were not forgeries, and further where there was no express stipulation, there was no liability beyond this. The court in its opinion by Mr. Justice Swayne, said: "Here also the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume.

"Such securities throng the channels of commerce which they are made to seek and where they find their market. They pass from hand to hand like bank notes.

7—Loan Association v. Topeka, 20 Wall. 655.

The seller is liable *ex delicto* for bad faith; and *ex contractu,* here is an implied warranty on his part that they belong to him and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him.

"It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principle which the plaintiffs in error insist shall be applied in this case."

In the latter case, i. e. Meyer v. Richards, the court held that an implied warranty of state bonds as existing obligations arose on a sale of such bonds having the genuine signatures of state officers and the seal of the state thereon, and appearing on their face to be valid but which had been stricken with nullity through the operation of the constitution of the state. The vendor, however, as alleged in his answer, admitted that at the time of delivery of the bonds to his vendee, he represented the same to be good and legal obligations and bonds of the state of Louisiana. The court also held that the implied warranty of the existence of the things sold on the sale of a credit or incorporeal right created by Louisiana civil code, section 2646, applied on a sale of bonds negotiable in form and included the warranty that they were existing obligations. There existed therefore in this case both the representation of the vendor that the bonds were valid and also a provision of the Louisiana Code on the question of warranties which the court held applicable to a sale of negotiable bonds.

The court in its opinion by Mr. Justice White, now Chief Justice, referred to the case of Otis v. Cullum and distinguished it from the case at bar in the following

language: "This is Otis v. Cullum. But it is not the case at bar since it is here admitted that both parties, in entering into the contract of sale, contemplated valid securities, of which there were many outstanding, and those delivered were void, not because of a want of power to enact the law under which they were issued, or because they were ultra vires for some other legal cause, but because they were stricken with nullity, by a constitutional provision adopted after the act authorizing the issue of the securities, and where nothing on the face of the bonds indicated that they were illegal. The distinction pointed out by the foregoing statement not only illustrates the correctness of the decision in Otis v. Cullum, but also demonstrates the error of attempting to extend it to a state of facts presented in the case under consideration," and further said: "The foregoing analysis of the principles and review of the authorities governing the law of sale of negotiable paper, transferred without recourse, as between vendor and vendee, clearly demonstrates the unsoundness of the position upon which the defendant in error relies, since it affirmatively establishes that there is no peculiar warranty in a sale of commercial paper, and that the reasoning by which it is attempted to prove its existence is a mere misconception of the principles of the common law relating to the sale of goods and chattels."

CHAPTER XII

THE VALIDITY OF PUBLIC SECURITIES

§ 265. Presumption of validity.

The presumption of law exists in favor of the validity of negotiable securities, both as to the sufficiency of the power to issue and the existence of all conditions and requirements necessary to and attendant upon their formal issue and delivery.[1]

1—Gelpcke, et al., v. City of Dubuque, 1 Wall. 175. The court here said "when a corporation has power under any circumstances to issue negotiable securities" and followed by stating the rule.

San Antonio v. Mehaffy, 96 U. S. 312. The rule in such cases is that if the municipality could have had the power under any circumstances to issue the securities, the bona fide holder has a right to presume they were issued under the circumstances which give the authority.

County of Macon v. Shores, 97 U. S. 272. This court has repeatedly held that where a corporation has power under any circumstances to issue such securities, the bona fide taker has a right to presume, etc. National Life Ins. Co. of Montpelier v. City of Huron, 62 Fed. 778.

E. H. Rollins & Sons v. Com'rs of Gunnison County, 80 Fed. 692. If upon any theory the bonds might have been valid a purchaser was entitled to presume that such was the fact, that the recitals were true and that the constitution had not been violated.

City of Pierre v. Dunscomb et al., 106 Fed. 611. If upon any theory the bonds of a municipality can be valid, an innocent purchaser has the right to presume that they are so.

Board of Com'rs of Lake County v. Keene Five-Cent Savings Bank, 108 Fed. 505. Where the facts and conditions might have been such under the law that any part of the excessive debt funded might have been valid, the legal presumption is in an action on the bond that these facts and conditions existed and that the bond in action was issued to fund a valid portion of the debt. Washington County v. Williams, 111 Fed. 801. German Savings & Loan Society v. Ramish, 138 Calif. 120, 69 Pac. 89, 70 Pac. 1067; Lake County Com'rs v. Standley, 24 Colo. 1, 49 Pac. 23; Brand v. Town of Lawrenceville, 104 Ga. 486, 30 S. E. 954; City of Rome v. Whites-

The doctrine of a presumption of power to issue is necessarily modified where the securities show upon their face an absolute want of such power and also where there is a total absence of recitals as to the power to issue, otherwise, the rule as repeatedly stated by the Supreme Court of the United States and followed invariably by other courts is that when a corporation has the power under any circumstances to issue negotiable securities the bona fide holder has the right to presume that they are issued under the circumstances which give the necessary authority and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.[2]

town Water Works Co., 100 N. Y. S. 357, affirmed 80 N. E. 1106; Cox v. Com'rs of Pitt County (N. C.), 60 S. E. 516.

2—Gelpcke, et al. v. City of Dubuque, 1 Wall. 175; Seybert v. City of Pittsburg, 1 Wall. 272; Meyer v. City of Muscatine, 1 Wall. 384; Rogers v. Burlington, 3 Wall. 654; Marshall County Sup'rs. v. Schenck, 5 Wall. 772; Pendleton County v. Amy, 13 Wall. 297; City of Lexington v. Butler, 14 Wall. 282; Com'rs of Marion County v. Clark, 94 U. S. 278; San Antonio v. Mehaffy, 96 U. S. 312; County of Macon v. Shores, 97 U. S. 272; Orleans v. Platt, 99 U. S. 676; Pompton v. Cooper Union, 101 U. S. 196; County of Dallas v. McKenzie, 110 U. S. 686; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; Hughes County v. Livingston, 181 U. S. 623, 45 L. E. 1053, 104 Fed. 306; Waite v. City of Santa Cruz, 184 U. S. 302; Presidio County v. Noel-Young Bond & Stock Co., 212 U. S. 58; National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 62 Fed. 778 C. C. A.; E. H. Rollins & Sons v. Com'rs of Gunnison County, 80 Fed. 692.

Keene Five-Cent Savings Bank v. Lyon County, 90 Fed. 523. The presumption is in favor of the validity of negotiable bonds and the facts necessary to prove that they are issued in excess of the constitutional limitation of indebtedness must be clearly proven. Clapp v. Otoe County, 104 Fed. 473 C. C. A.; Pierre v. Dunscomb et al., 106 Fed. 611; City of San Antonio v. Lane, 32 Tex. 405.

But see Board of Com'rs of Stanly County v. W. N. Coler & Co., 190 U. S. 437, 23 Sup. Ct. Rep. 811. Bond holders are not entitled to assume for the purpose of sustaining the validity of county aid bonds, that a railroad had been begun before the adoption of the North Carolina Constitution of 1868 which antedated the charter of the railroad company.

The presumption also exists that the holder of public securities acquired them before maturity for a valuable consideration, in other words, his holding is presumed to be a bona fide one with all the facts existing necessary to constitute and establish that relation as between himself and the corporation issuing the securities. The subject of bona fide holding has already been considered in a previous chapter.[3]

The presumption of validity especially applies to the performance, in conjunction with recitals, of the required statutory or constitutional conditions and which give the necessary authority under the law conferring the power. Such conditions commonly relate to a vote of the electors upon the question of an issue, the levying of a tax to meet payments required on account of accruing interest, and eventually the liquidation of principal and others which have been noted from time to time in preceding sections to which a reference must be made under the appropriate subject head. The doctrine has been repeatedly and emphatically stated by the Supreme Court of the United States that where a corporation has lawful power to issue negotiable securities and does so, the bona fide holder has a right to presume the power was properly exercised and is not bound to look beyond the question of its existence, and that where the bonds recite on their face the circumstances which give the requisite authority or bring them within a power to issue, the corporation is estopped to deny the truth of the recitals. If the legal authority is sufficiently comprehensive, the bona fide purchaser has a right to presume that those having the power to act and acting under it had complied with all its requirements.[4]

3—See Chap. X, ante.

4—Pendleton County v. Amy, 13 Wall. 297; City of Gladstone v. Throop, 71 Fed. 341; City of South St. Paul v. Lamprecht Bros., 88 Fed. 449 C. C. A.; Union Bank of Richmond v. Oxford County Com'rs, 90 Fed. 7; Burlington Savings Bank v. City of Clinton, 106 Fed. 269; Lake County Com'rs v. Keene

The presumption of validity also applies to the authority of officers or agents of the public corporation in acting under authority granted and the proper performance of the duties required of them. As said by the Circuit Court of the United States,[5] "It is a rule of very general application that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act. The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each afford presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty. And there is no distinction in this respect as to the authority of officers and agents between officers of a corporation having general powers to represent it in its fiscal trans-

Five-Cent Savings Bank, 108 Fed. 505; Akin v. Ordinary of Barto County, 54 Ga. 59; City of Tyler v. Tyler Bldg. & Loan Association (Tex.), 81 S. W. 2.

See, also, Sec. 276, et seq., post, on the subject of recitals and cases cited under notes 1 and 2 of this section.

5—Knox County v. Ninth National Bank, 147 U. S. 91; ses, also, Dallas v. McKenzie, 110 U. S. 686; Town of Andes v. Ely, 158 U. S. 646; Board of Com'rs of Lake County Colo. v. Sutliff, 97 Fed. 270; Board of Com'rs of Lake County v. Keene Five-Cent Savings Bank, 108 Fed. 505; Schneck v. City of Jeffersonville, 52 N. E. 212; Slutts v. Dana (Ia.), 109 N. W. 794.

action and those acting under a special power in a particular transaction."[6]

Under these circumstances the securities in the hands of a bona fide holder are prima facie evidence of a legal debt and possession with ostensible title makes a prima facie case in an action to enforce the payment of the obligation. The existence of the presumption stated above throws upon the party attacking the validity of the negotiable securities the burden of proof as to all the questions raised. If conditions and circumstances might have existed under which the bonds might have been lawful under the law, the presumption is that they are so. The presumption of validity goes with the bond to the end and must prevail unless overcome by a preponderance of competent evidence that it is an unauthorized obligation.[7]

In Illinois in 1870, a constitutional provision was adopted which prohibited the issue of railroad aid bonds except where they had been authorized before such adoption by a vote of the people under existing laws. The Illinois cases hold that where railroad aid bonds were issued after the adoption of this constitutional provision, the burden of proof was upon those asserting their validity to show that they came within the proviso noted.[8] The

6—See, also, Miller v. Berlin, 13 Blatchf. 245.

7—National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778 C. C. A.; Board of Com'rs v. Keene Five-Cent Savings Bank, 108 Fed. 505; Independent School District v. Rew, 111 Fed. 1; see, also, Seybert v. City of Pittsburg, 1 Wall. 272; Nealy v. Yorkville, 10 S. C. 141; Walker v. State, 12 S. C. 200; City of Memphis v. Bethel (Tenn.), 73 S. W. 191; Galbraith v. City of Knoxville, 105 Tenn. 453, 58 S. W. 643.

The cases cited under notes 1 and 2 of this section hold also generally to the rule stated which follows necessarily from the existence of a presumption in favor of the validity of bonds.

But see Hannibal v. Fauntleroy, 105 U. S. 408. Where it is held in the absence of recitals the burden of proof is upon the holder of the bonds.

8—Williams v. People (Ill.), 24 N. E. 647; Choisser v. People, 140 Ill. 466, 29 N. E. 546.

See, however, the later case of Hutchinson v. Self, 153 Ill. 542, holding contrary to the cases cited above.

principles applying have been stated in Daniel on Negotiable Instruments as follows:[9] "The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports prima facie that he acquired it bona fide for full value, in the usual course of business, before maturity, and without notice of any circumstances impeaching its validity; and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument, and proof that it is genuine (where indeed such proof is necessary), prima facie establishes his case; and he may there rest it. Bills and notes payable to bearer do not differ in this respect from others, and the bearer is entitled to all the presumptions that apply to an indorsee in his favor. But the presumption of bona fide ownership does not apply where the instrument is not payable to bearer, unless it be indorsed specially to the holder, or in blank."

The subject of burden of proof will be considered later in the chapter on actions on negotiable securities and also the circumstances and conditions under which there may arise a shifting and a reshifting of the burden of proof.[10]

§ 266. De facto corporations.

The validity of public securities is not affected by the fact that the corporation issuing them may have had only a de facto existence at the time the power was exercised.[11]

9—Daniel on Neg. Inst., 5th Ed., Sec. 812.

10—See Sec. 400 et seq., post.

11—Board of Com'rs of Comanche County v. Lewis, 133 U. S. 198, affirming 35 Fed. 343. Where a de facto organization after having issued bonds is subsequently abandoned and treated as unorganized, it is not released from a liability on the bonds when afterwards reorganized by the legislature since no change of political organization nor change of form is sufficient to release a county from its just debts theretofore contracted. Andes v. Ely, 158 U. S. 312; Shapleigh v. City of San Angelo, 167 U. S. 646; Judson v. City of Plattsburg, 3 Dill. 181; Aller v.

This rule is based upon two principles relating to the existence of de facto corporations and the respective rights of parties dealing with them. A corporation, whether public or private, is a distinct artificial person created by the state or under its authority, exercising

Town of Cameron, 3 Dill. 198; City of Lampasas v. Talcott, 36 C. C. A. 318, 94 Fed. 457.

National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778 C. C. A. The same rule applies to a de facto board of education "when a municipal body has assumed under color of authority and exercised for any considerable period of time with the consent of the state, the powers of a public corporation of a kind recognized by the organic law neither the corporation nor any private party can in private litigation question the legality of its existence." Cornell University v. City of Maumee, 68 Fed. 418.

Miller v. Perris Irrigation Dist., 99 Fed. 143. A de facto corporation may legally do and perform every act which it could do were it a de jure corporation. Its acts are valid as to third persons except where challenged by the state in direct proceedings; bonds issued, therefore, by a de facto corporation, are valid even where the state subsequently in a direct proceeding attacking the validity of the organization of such corporation secures a judgment declaring it void; citing with other cases in this note, Havemeyer v. Iowa Co., 3 Wall. 294, 18 L. Ed. 38; Ashley v. Board, 8 C. C. A. 455, 60 Fed. 55; Perun v. Cleveland, 43 Oh. St. 481, 3 N. E. 357.

Clapp v. Otoe County, 104 Fed. 473 C. C. A. There is another reason why the defense which we have been considering cannot be sustained. It is that the general acquiescence by the inhabitants of a political subdivision organized under compliance of law and by the departments and officers of the state and county having official relations with it gives to the acts and contracts of those officers on its behalf as a subdivision de facto all the force and validity of their acts in its behalf as a subdivision de jure. Hamilton v. San Diego County, 108 Calif. 273, 41 Pac. 305; School District v. State, 29 Kan. 57; Riley v. Township of Garfield, 54 Kan. 463, 38 Pac. 560; State v. School Dist. No. 7 (Nebr.), 33 N. W. 266; Morton v. Carlin, 51 Nebr. 802, 70 N. W. 966; State v. Bacon (S. C.), 9 S. E. 765; Bradford v. Westbrook (Tex.), 88 S. W. 382; see, also, Oswego v. Anderson, 44 Kan. 214, 24 Pac. 486; St. Paul Gas Light, etc. Co. v. Village of Sandstone (Minn.), 75 N. W. 1050.

But see Geo. D. Barnard v. Board of Com'rs of Polk County (Minn.), 108 N. W. 294; Ruohs v. Town of Athens, 91 Tenn. 20, 18 S. W. 400. In this case the court held that where the attempted organization of a municipality was absolutely void, this fact may be pleaded as a defense to a suit brought on its bonds since it had no power to issue them.

powers and possessing capacities not belonging to natural persons or a group of persons other than a corporation. The state alone has the authority to create a corporation and by statutory enactment prescribes the conditions and manner in which it may be organized. When these conditions have been substantially complied with there results a corporation de jure which can successfully defend its right to exist in a corporate capacity even against the state unless it has done acts sufficient under the law to warrant a forfeiture of its charter. Those organizing a corporation on the other hand may fail to comply with statutory conditions to such an extent as to defeat its legal existence, not against a third person raising the question but against the state in a proper proceeding brought by it for that purpose. Such a corporation is known as one de facto. In respect to the legality of corporate organization, the courts almost universally hold that where a body of men act as a corporation and in the ostensible possession of corporate powers, it will be conclusively presumed that they are a corporation in all cases except in a direct proceeding against them by the state to vacate their charter. The question of their right to corporate existence cannot be raised except by the state. The other reason which sustains the validity of securities issued by public corporations is an application of the doctrine of estoppel. This principle so far as the subject in hand is concerned may be briefly stated as: that persons who transact business or assume contractual relations with what purports to be a corporation are equally with the corporation estopped to deny the validity of the incorporation in actions brought to enforce liabilities growing out of such transactions. This rule applies to those holding themselves out as a corporation, the corporation itself, and third persons dealing with the corporation.[12] The reasons noted

12—See Chap. 3, Abbott's Elliott on Private Corporations, 4th Ed.

above as well as the rule itself in respect to the validity of securities issued by de facto corporations have been stated in a number of cases notably those in the Federal courts. In one, from Kansas, Speer v. Board of County Com'rs of Kearney County, Kansas,[13] the court held that a county though not legally organized if it acts in a corporate capacity as such with the acquiescence of the state authorities and of the people of such county, is bound by its contracts the same as though it had been legally organized. The court said: "And may this county retain the benefits and improvements it has thus obtained, and yet deprive those who furnished them, or those who subsequently purchased its warrants, of all right to a return of the money which they invested in them? We think not. In our opinion, there is an established rule of jurisprudence which prevents results so unjust and deplorable. That principle is that the acts of ordinary municipal bodies into which the people have organized themselves under color of law depend far more upon general acquiescence than upon the legality of their action or the existence of every condition precedent prescribed by the statutes under which they organize and act. It is that general acquiescence by the inhabitants of the political sub-division so organized, and by the departments and officers of the State having official relations with it, gives to the acts and contracts of a municipal or quasi-municipal corporation de facto, all the force and vitality of the acts of a corporation de jure. The interests of the public which depend upon such municipalities, the rights and the relations of private citizens which become vested and fixed in reliance upon their existence, the intolerable injustice and confusion which must result from an ex post facto avoidance of their acts, commend the justice, and demand the enforcement, of the rule, that 'when a municipal body has assumed, under color of authority, and

13—88 Fed. 749 C. C. A.

exercised, for any considerable period of time, with the consent of the State, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence.'" And in this same case, the question of whether there could be a de facto organization under an unconstitutional law was also raised, the court on this point said: "We are unable to yield our assent to the broad proposition that there can be no de facto corporation under an unconstitutional law. Such a law passes the scrutiny and receives the approval of the attorney-general, of the lawyers who compose the judiciary committee of the State legislative bodies, of the legislature, and of the governor, before it reaches the statute book. When it is spread upon that book, it comes to the people of a State with the presumption of validity. Courts declare its invalidity with hesitation and after long deliberation and much consideration, even when its violation of the organic law is clear, and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts have affected public interests or private rights, they must be treated as valid and lawful. The acts of a de facto corporation or officer under an unconstitutional law before its invalidity is challenged in or declared by the judicial department of the government, cannot be avoided, as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity, by any ex post facto declaration or decision that the law under which they acted was void. This proposition is not without the support of eminent authority. Indeed, we believe it is founded in reason, and sustained by the general current of the decisions of the courts that have considered it."

And in another case also in the Federal Courts from

Michigan,[14] in discussing the powers of a de facto corporation, the court said: "Assuming that, under the doctrine of People v. Maynard, above referred to, the courts of the United States would be bound to hold that such organization was unlawful and void in its inception, it does not, in our opinion, follow that if the county, assuming it to be valid, went on as such, acquired the capacity to be a county, and exercised for years, with the acquiescence of the State government, the functions and privileges of a county, its status and the validity of its acts are to be tested by such rules as would have been applicable in a direct and prompt challenge by the State when those powers and privileges were assumed. In the latter case the public interests are best subserved by speedy reformation, and no private interest is harmed. In the former, the public interests have been adjusted to the actual condition of things, and private interests have become settled upon the foundations which local authority has laid, with the consent of the State, whose business it was to interfere and prevent the mischief, if any such were feared. It is a matter peculiarly within the province and duty of the State to watch over and prevent the development of political growths which are likely to be prejudicial to the public interests. When it does not interfere private individuals are justified in assuming that there is nothing obnoxious in the organization, and that they may treat with it in the character it has assumed. In the case of a county, after it has gone on for years as such, taxes have been levied and collected under its authority; deeds and mortgages have been registered in its records, and titles have been gained or lost by such registration; the estates of deceased persons have been settled and distributed by its courts of probate; the rights of parties have been adjudicated and

14—Ashley v. Board of Sup'rs of Presque Isle County, 8 C. C. A. 455, 60 Fed. 55.

remedies awarded, by the Circuit Court, in session at its county seat, and accused persons have been tried, convicted, and sentenced to imprisonment by that court. We do not know that, in this instance, all these particular incidents have happened, but it is reasonable to suppose all may have occurred, and many others of kindred character. May the foundation on which all these things rest for their security or authority be repudiated and denied by the municipality which assumed the character, has been allowed to act in it, and, agreeably to the law governing it in that character, has pledged its faith to repay what it has received and applied to its advantage, and thus disappoint the expectations of those who have trusted in its representations?

"But it is needless to multiply authorities. They are substantially, if not altogether, agreed upon the proposition that when a municipal body has assumed, under color of authority, and exercised for any considerable period of time, with the consent of the State, the powers of a public corporation of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence.

"But counsel for the defendant lays principal stress upon the doctrine that there cannot be a county de facto where there can be none de jure; and it is argued that because the law of 1871 was void when enacted, and gave no authority for organization, there was no law under which Presque Isle county could become de jure a county, and therefore it could not become de facto such. The general proposition is no doubt correct as a statement of a doctrine of law. But we do not think that proposition, as applied to the case before us, is sound. We doubt whether the premise of the proposition founded on it is true. We have already given some reasons for thinking it is not. But we also think the premise is insufficient. The supreme law of the State recognizes counties as poli-

tical bodies corporate. Their existence is not only permitted, but is essential to the government which is organized. Their corporate character is not given by the legislature. That body, if it deems the organization consistent with public policy, prescribes a method of organization in form. This law, whether operative or not, signified the approval of the legislature of the formation of the new county, and in so far was in execution of its authority under the Constitution; and we apprehend the rule to be that an unconstitutional and void law may yet be color of authority to support, as against anybody but the State, a public or private corporation de facto, where such corporation is of a kind which is recognized by, and its existence is consistent with, the paramount law, and the general system of law in the State."

Independent of the principles stated above, it is clear that the defense of de facto corporation cannot be interposed against the validity of an issue of bonds where there has been a subsequent recognition by the state of the corporation in its corporate capacity. The courts hold universally that original defects are cured by the subsequent action and this recognition relates back to the original inception of the corporation and legalizes all acts done by it.[15]

This principle was stated in a case in the Supreme Court of the United States,[16] where a county having a de facto organization was afterwards abandoned but subsequently organized by the legislature as such. The court held that the validity of the organization of a county could not be collaterally attacked in an action on its bonds issued under its de facto organization, and said:

15—Board of Com'rs of Comanche County v. Lewis, 133 U. S. 198; Lewis v. Comanche County, 35 Fed. 343, affirmed 133 U. S. 198; Riley v. Township of Garfield, 54 Kan. 463, 38 Pac. 560.

16—Board of Com'rs of Comanche County v. Lewis, 133 U. S. 198.

"It is universally affirmed that when a legislature has full power to create corporations, its act recognizing as valid a de facto corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a de jure out of what was before only a de facto corporation.

"And this is no mere technical ruling. It rests on foundations of substantial justice. It is true that the present inhabitants have been wronged by the fraudulent acts of these conspirators in 1873-74, and it is a hardship for them to be bound for debts they did not contract, and from which they received no benefit; but, on the other hand, it would be an equal hardship to the plaintiff to lose the money he has invested in securities placed on the market, whose validity was attested to the fullest extent by both the executive and legislative departments of the State. When both of those departments give notice to the world that a county within the territorial limits of the State has been duly organized and exists with full power of contracting, can it be that a purchaser cannot in open market safely purchase the securities of that county? Does the duty rest on him to traverse the limits of the county and make personal inspection of the number of inhabitants? If any wrong has been done to the county through the want of attention on the part of the State authorities, equity would suggest that the State should bear the burden, and not cast it upon an innocent party residing far from the State and acting in reliance upon what it has done."

§ 267. Validity as affected by adverse decisions of a state court.

The Federal authorities have adopted without dissent the rule that where a public corporation under authority of law has issued its bonds, negotiable in their character and payable to bearer at a future date, and which under

the judicial decisions of the state are valid at the time of issue, that their validity before maturity, in the hands of bona fide purchasers, cannot be affected by subsequent decisions of the state courts holding the law, under authority of which the bonds were issued, unconstitutional or void.[17]

The leading decision on this point is that of Gelpcke v.

17—Havemeyer v. Iowa City, 3 Wall. 294; Thompson v. Lee County, 3 Wall. 327; Lee County v. Rogers, 7 Wall. 181; City of Kenosha v. Lamson, 9 Wall. 477; Calloway County v. Foster, 93 U. S. 567; Block v. Com'rs of Bourbon County, 99 U. S. 686; Douglas v. County of Pike, 101 U. S. 677; Thompson v. Perrine, 103 U. S. 806; Stewart v. Lansing, 104 U. S. 505.

Louisiana v. Pilsbury, 105 U. S. 278. The statute as thus expounded determines the validity of all contracts under which a subsequent change in its interpretation can affect only subsequent contracts. Taylor v. Ypsilanti, 105 U. S. 60; Twp. of Buffalo v. Cambria Iron Co., 105 U. S. 73; Carroll County v. Smith, 111 U. S. 556; Anderson v. Santa Anna, 115 U. S. 356; Scotland County v. Hill, 132 U. S. 107; Pleasant Twp. v. Aetna Life Ins. Co. 138 U. S. 67; Knox County v. Ninth National Bank, 147 U. S. 91.

Wade v. Travis County, 174 U. S. 499. The court after stating the rule that the decisions of the highest courts of the state construing their statutes and constitutions would be followed then said: "An exception has been admitted to this rule, where, upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the state. To have held otherwise would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security." United States v. Thompson, 2 Biss. 77; Smith v. Tallapoosa County, 2 Woods, 574; Wesson v. Saline County, 73 Fed. 917; Com'rs of Columbia v. King, 13 Fla. 451; State v. Saline County Court, 48 Mo. 390; Lewis v. Taylor, 18 Oh. Cir. Ct. Rep., 443; Germania Savings Bank v. Town of Darlington, 50 S. C. 337, 27 S. E. 846; Stallcup v. City of Tacoma, 13 Wash. 141, 42 Pac. 541.

But see Zane v. Hamilton County, 189 U. S. 370, where it was held that a purchaser of county railroad aid bonds has no contract rights protected by the Federal constitution against impairment because the purchase was made on faith of prior proceedings that municipal subscriptions to railroad stock were so far germane to railroad incorporation as not to require specific mention in the title of an act pro-

City of Dubuque.[18] The case involved the validity of certain bonds as against which certain grounds of defense were asserted by the city of Dubuque. These objections had been previously fully considered and repeatedly over-ruled by the Supreme Court of Iowa, however in a later case, State v. County of Wapello,[19] the Supreme Court of Iowa had over-ruled by unanimous opinion former decisions of that court sustaining the validity of the bonds and holding the law under which they were authorized unconstitutional and the bonds void. The opinion of the United States Supreme Court was delivered by Mr. Justice Swayne, who said in part, after noticing the claims asserted by the city as grounds of defense to the bonds involved in the suit: "All these objections have been fully considered and repeatedly over-ruled by the Supreme Court of Iowa (citing cases):

"The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject. It is urged that all the decisions have been overruled by the Supreme Court of the State, in the later case of the State of Iowa ex rel. v. The County of Wapello, and it is insisted that in cases involving the construction of a State law or Constitution, this court is bound to follow the latest adjudication of the highest court of the State. Leffingwell v. Warren is relied upon as authority for the proposition. In

viding for the incorporation of a railroad, affirming 104 Fed. 63.

Board of Com'rs of Oxford v. Union Bank of Richmond, 96 Fed. 293, reversing 90 Fed. 7. A holder of municipal bonds has no ground of complaint that a rule of decision announced by the Supreme Court of a state was changed by a subsequent decision of the same court when both decisions were made after he acquired his bonds. See, also, Graves v. Moore County Com'rs (N. D.), 47 N. W. 134.

18—1 Wall. 175.

19—13 Ia. 390.

that case this court said it would follow 'the latest settled adjudications.' Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur.

"However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

"We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and Constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law because a State tribunal has erected the altar and decreed the sacrifice." Such decisions may affect the validity of bonds not issued, but all persons into whose hands bonds already issued may come have the right to consider the constitu-

tionality of such authority conclusively established.[20] The validity of coupon bonds in the hands of innocent holders, it has even been held, will not be affected by the pendency of suits brought to test the question of their legality where the bonds were purchased during the pendency of such suit.[21] If, however, the holders of such bonds are made parties to such litigation or, as a few cases hold, have actual knowledge of its pendency, this rule would not apply.[22] The doctrine stated in this section applies to the validity of negotiable bonds, not only under the conditions already named, but also to acts ratifying or attempting to ratify a void issue of bonds although the judicial policy of the state may be against the constitutionality of the ratification act, yet before such decision, if bonds ratified by a legislature have passed into the hands of bona fide purchasers, such subsequent decision by the courts of the state cannot affect their validity.[23]

§ 268. Validity as affected by subsequent legislation.

If there exists a reason for the doctrine as stated in a preceding section in regard to subsequent adverse decisions of the courts as affecting the validity of bonds, good at the time of issue, there is an irrefutable reason for the principle followed by all courts, state as well as Federal, that the validity of bonds, corporate indebtedness

20—Stewart v. Lansing, 104 U. S. 505; see, also, cases cited in the preceding note.

21—See Sec. 228, et seq., ante; Warren County v. Marcy, 97 U. S. 96; Town of Orleans v. Platt, 99 U. S. 676; Cass County v. Gillett, 100 U. S. 585; Carroll County v. Smith, 111 U. S. 556.

22—Stewart v. Lansing, 104 U. S. 505; Durant v. Iowa County, 1 Woolw. 79, Fed. Cas. 4,189.

But see Diamond v. Lawrence County, 37 Pa. 353. The purchaser of bonds pendente lite and all subsequent purchasers are affected by a decree of the court in a suit pending at the time of purchase. Such bonds, however, not having the quality of commercial paper in Pennsylvania at that time under the state decisions.

23—See Sec. 321, et seq., post.

or obligations is determined by laws in force at the time when such bonds were issued or obligations incurred.[24] They cannot be affected by changes subsequently made and this rule will apply in the case of bonds authorized but not yet formally executed and delivered.[25] This rule also applies to legislation which impairs or destroys the power of a public corporation to levy taxes for the payment of either principal or interest of bonds legally issued when at the time of such issue the power to levy taxes for a specific purpose existed. The power to levy taxes, it is held, is a part of the contract between the corporation and the holder of negotiable bonds which cannot be impaired by subsequent action in violation of that provision of the Federal constitution forbidding the passage of laws impairing the obligation of a contract.[26] The principle also prevents the passage of legislation or other action diverting funds or property which was at the time of the issue of the bonds either devoted or to

24—Calloway County v. Foster, 93 U. S. 567; County of Scotland v. Thomas, 94 U. S. 682; County of Henry v. Nicolay, 95 U. S. 619; County of Ray v. Van Sycle, 96 U. S. 675; County of Macou v. Shores, 97 U. S. 272; Louisiana v. Pilsbury, 105 U. S. 278; Board of Com'rs of Henderson County v. Travellers Ins. Co., 128 Fed. 817; Clark v. City of Los Angeles (Calif.), 116 Pac. 722; People v. Peck, 62 Barb. (N. Y.), 545; Marsh v. Little Valley, 4 Thomp. & C. (N. Y.) 116; Dodge v. Platt County, 16 Hun (N. Y.), 285; City of Mitchell v. Smith, 12 S. D. 241, 80 N. W. 1077; Stallcup v. City of Tacoma, 13 Wash. 141; but see State v. Garronte, 67 Mo. 445.

25—Fairfield v. County of Gallatin, 100 U. S. 47; Ralls County v. Douglas, 105 U. S. 728; County of Dallas v. McKenzie, 110 U. S. 686; Board of Com'rs of Henderson County v. Travellers Ins. Co., 128 Fed. 817.

Chicago, etc. Ry. Co. v. Pinckney, 74 Ill. 277, construing the proviso of that provision of the Illinois Constitution as adopted in 1870 prohibiting the granting of railroad aid bonds. Board of Education v. Bolton, 104 Ill. 220.

But see Wade v. LaMoille, 112 Ill. 79. Railroad aid bonds issued by an Illinois town the day on which the constitutional amendment becomes operative are void even in the hands of bona fide purchasers for value.

26—See Sec. 37, ante, and Sec. 358, et seq., post.

be devoted to the payment of their principal or interest.[27] The general tendency of all courts, both Federal and state, is to protect the contract obligation existing in favor of the bona fide purchaser of negotiable securities issued by public corporations. The clause of the Federal constitution prohibiting a state from passing any law impairing the obligation of a contract affords a real and substantial protection to the investor.

§ 269. Validity, by what court decided.

The decisions bearing upon the question considered in this section upon analysis are found to involve the application and pertinency of state laws as affecting the validity of bonds; the decisions of state courts upon questions of general commercial law whether controlling or not upon the Federal courts; the violation of or interference with a Federal law or exclusive right or privilege and whether in all cases the Federal courts will follow state decisions which do not coincide with their views as to the merits of a particular question or the soundness of a particular principle.

The rule was stated in a preceding section that the Federal courts were not bound to follow the latest adjudicated decisions of the state courts on constitutional questions affecting the validity of bonds where there had been rulings in favor of the validity followed by subsequent adverse decisions.[28]

§ 269a. Construction of state statutes.

The rule announced by the Supreme Court of the United States, and therefore binding upon all Federal

27—See Sec. 371, post.

28—Talcott v. Twp. of Pine Grove, 19 Wall. 666; Town of Elmwood v. Marcy, 92 U. S. 289; Roberts v. Bolles, 101 U. S. 119; Douglas v. County of Pike, 101 U. S. 677; McCall v. Hancock, 20 Blatchf. 324; Taylor v. Ypsilanti, 105 U. S. 60; Rondot v. Rogers Twp., 99 Fed. 202; see Secs. 267 and 268, ante.

courts, is to the effect that the construction of the statutes of a state by its highest courts is to be regarded as a determination of their meaning and generally as binding upon United States courts.[29]

It has also been held that when the construction of a

29—Amy v. The Mayor, etc. of Alleghany City, 24 How. 362; Sup'rs v. United States, 18 Wall. 71; Chambers County v. Clews, 21 Wall. 317; County of Leavenworth v. Barnes, 94 U. S. 70; Township of East Oakland v. Skinner, 94 U. S. 255; County of Cass v. Johnson, 95 U. S. 360; Morgan County v. Allen, 103 U. S. 498; Fairfield v. County of Gallatin, 100 U. S. 47; Scipio v. Wright, 101 U. S. 665; Taylor v. Ypsilanti, 105 U. S. 60; Amoskeag Bank v. Ottawa, 105 U. S. 667; Burgess v. Seligman, 107 U. S. 20; Claiborne County v. Brooks, 111 U. S. 400; Meriwether v. Muhlenberg County Court, 120 U. S. 354; German Savings Bank v. Franklin County, 128 U. S. 526; Barnum v. Okolona, 148 U. S. 393; Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112.

Wade v. Travis County, 174 U. S. 499. In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look, not only at their Constitutions and statutes, but at the decisions of their highest courts giving construction to them. If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest adjudications in preference to the earlier ones. The court then stated as an exception to this rule the principle laid down sustaining the validity of bonds as based upon decisions at the time of their issue, as noted in Sec. 267, ante.

Loeb v. Trustees of Columbia Twp., 179 U. S. 472. The rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local laws as maintained by the highest court of the state at the time such rights accrued. Board of Com'rs of Wilkes County v. Coler, 180 U. S. 506; Francis v. Howard County, 50 Fed. 44.

City of Evansville v. Woodbury, 60 Fed. 718, 9 C. C. A. 244, following Railroad Company v. Evansville, 15 Ind. 395. This rule founded upon respect for property rights as well as of comity had its early expression by Chief Justice Marshall and has been upheld by an unbroken line of decisions. West Plains Twp. of Meade County v. Sage, et al., 69 Fed. 943; Brazoria County v. Youngstown Bridge Co., 80 Fed. 10, C. C. A. Rathbone v. Board of Com'rs of Kiowa County, 83 Fed. 125 C. C. A.; Springfield Safe Deposit & Trust Co. v. City of Attica, 88 Fed. 387; Board of Com'rs of Haskell County v. National Life Ins. Co., 90 Fed. 228 C. C. A.; Board of Com'rs of Seward County v. Aetna Life Ins. Co., 90 Fed. 222; Zane v. Hamilton County, 104 Fed. 63 C. C. A.; but see Town of Venice v. Murdoch, 92 U. S. 494.

state law has been settled by a series of decisions of the highest state court differently from that given to the statute by an earlier decision of the Federal courts, the construction given by the state courts will be adopted although it might not in all cases accord with the opinion of the Supreme Court of the United States. This rule is especially applicable in the consideration of statutes defining the duties of state officers.[30]

Some quotations from opinions of the Supreme Court of the United States will best illustrate the rule and its application. In one case,[31] involving the constitutionality of an act of the legislature as affected by objections to its mode of passage, the Supreme Court said: "It is declared by the Judiciary Act as a fundamental principle 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in the cases where they apply.' And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities. As a matter of propriety and right, the decision of the State courts on the question as to what are the laws of the State, is binding upon those of the United States."

And in another case [32] it was said, calling attention to

30—Norton v. Comm'rs of Shelby County, 118 U. S. 425; O'Brien, et al. v. Wheelock, et al., 95 Fed. 883; Board of Com'rs of Oxford County v. Union Bank of Richmond, 96 Fed. 293 C. C. A.; Board of Com'rs of Stanly County v. Coler, 96 Fed. 284 C. C. A.

31—Town of South Ottawa v. Perkins, 94 U. S. 260.

32—Weightman v. Clark, 103 U. S. 256.

an exception to the universal rule: "As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which in our opinion were lawfully made, that we disregard them."

And in another case [33] where the court held that upon a construction of the Constitution and laws of a state, this court as a general rule follows the decisions of her highest courts unless they conflict with or impair the efficacy of some principle of the Federal Constitution or of a Federal statute, or a rule of commercial or general law, and said: "It would lead to great confusion and disorder if a State tribunal, adjudged by the State Supreme Court to be an unauthorized and illegal body should be held by the Federal courts, disregarding the decision of the state court, to be an authorized and legal body and thus make the claims and rights of suitors depend, in many instances, not upon settled law, but upon the contingency of litigation respecting them being before a State or a Federal court. Conflicts of this kind should be avoided if possible by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction. On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; eligibility and election or appointment of their officers; and the passage of her laws. No Federal court should refuse to accept such decisions as expressing on

33—Norton v. Shelby County,
118 U. S. 425.

these subjects the law of the State. If, for instance, the Supreme Court of a State should hold that an act appearing on her statute-book was never passed and never became a law, the Federal courts could not disregard the decision and declare that it was law and enforce it as such."

§ 270. When state decisions will not be followed.

The rule laid down in the preceding section will not be followed by the Federal courts when the decisions of the highest courts of a state impair the efficacy of some principle of the Federal constitution or a Federal statute or in other words, where a Federal question is raised.[34]

The right is insisted upon by the Supreme Court of the United States to reverse all judgments of a state court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the constitution, laws or treaties of the United States and deciding against that right. It was said in a case in that court,[35] that "very little importance has been attached to the inquiries whether the Federal question was formerly raised, the true test, is not whether the record exhibits an express statement that a Federal question was presented but whether such a question was decided and decided adversely to the Federal right."

And this rule also follows where the state decisions construe a state law as valid which limits or affects the operation of the process or proceedings in the Federal courts. The Federal constitution, so it has been held,

34—Van Hoffman v. City of Quincy, 4 Wall. 535; Butz v. City of Muscatine, 8 Wall. 575; Murray v. Charleston, 96 U. S. 432; Fall Brook Irr. District v. Bradley, 164 U. S. 112; see also Loeb v. Trustees of Columbia Twp. 179 U. S. 472.

35—Murray v. Charleston, 96 U. S. 432.

would become a mockery if the state legislatures might at will annul the judgments of the Federal courts and the nation would be deprived of the means of enforcing its own laws by the instrumentality of its tribunals;[36] and where a state has authorized a public corporation to contract, the right to exercise the local power of taxation to the extent necessary to meet the power thus given cannot be withdrawn until the contract is satisfied.

The construction of such laws as valid by the state courts operates clearly as a violation of that provision of the Federal constitution prohibiting the passage of any law impairing the obligation of a contract.[37]

§ 271. State decisions not followed.

The Federal courts further will not be bound by state decisions but reserve the right to exercise their independent judgment when compelled to do so by reasons so obviously sound that to refuse to follow them to their

36—Riggs v. Johnson County, 6 Wall. 166.

37—See Sec. 362, post.

Butz v. City of Muscatine, 8 Wall. 575.

Board of Liquidation of City Debt of New Orleans v. State of Louisiana, 179 U. S. 622. When the jurisdiction of this court is invoked because of the asserted impairment of contract rights, arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract. Nevertheless, when the contract which, it is alleged, has been impaired, arises from a State Statute, as said in Burgess v. Seligman, 107 U. S. 34, 2 Sup. Ct. Rep. 10, 27 L. Ed. 365, "for the sake of harmony and to avoid confusion the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt." Clapp v. Otoe County, 104 Fed. 373.

But see Zane v. Hamilton County, 189 U. S. 370. Where it was held that a purchaser of county railroad aid bonds has no contract rights protected by the Federal Constitution against impairment because the purchase was made on faith of prior proceedings that municipal subscriptions to railroad stock were so far germane to railroad incorporation as not to require specific mention in the title of act providing for the incorporation of a railroad, affirming 104 Fed. 63.

logical conclusion would be an absolute denial of justice.[38]

§ 272. Absence of state decisions.

The Federal courts also will exercise their own independent judgment as to the construction of state statutes in the absence of state decisions construing and applying them.[39]

When a Federal question is involved as said by one decision:[40] "If, when the acts in question were passed, the general assembly was without power, under the Constitution, as interpreted by the highest court of Tennessee, to enact a special law authorizing a designated number of counties, without a previous vote of the people, to make subscriptions of stock to a particular railroad running through such counties, our duty is to accept

38—O'Brien et al. v. Wheelock, et al., 95 Fed. 883 C. C. A.

See also Block v. Com'rs, 99 U. S. 686. To those views expressed by the state court we cannot assent. They are not in harmony with many rulings of this court, made and repeated through a long series of years, and they are not such as in our opinion would administer substantial justice if applied in this case. Bolles v. Brimfield, 120 U. S. 759.

39—Town of Queensbury v. Culver, 19 Wall. 83; Pine Grove Twp. v. Talcott, 19 Wall. 666.

Claiborne County v. Brooks, 111 U. S. 400. It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of the highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State. But as all, or nearly all of the States of the Union, are subdivided into political districts similar to those of the country from which our laws and institutions are in great part derived, having the same general purposes and powers of local government and administration, we feel authorized, in the absence of local State statutes or decisions to the contrary, to interpret their general powers in accordance with the analogy furnished by their common prototypes, varied and modified, of course, by the changed conditions and circumstances which arise from our peculiar form of government, our social state and physical surroundings. Anderson v. Santa Anna, 116 U. S. 356; Bolles v. Brimfield, 120 U. S. 759.

40—County of Tipton v. Locomotive Works, 103 U. S. 523.

that construction of the fundamental law of the state. But if there was no such contemporaneous or fixed construction, this court, as was the court of original jurisdiction, is under a duty imposed by the Constitution of the United States, from the performance of which it is not at liberty to shrink, to determine for itself, what were the legal rights of parties at the time the bonds in suit were issued."

§ 273. Decisions of state courts not controlling on general questions of commercial law.

While it has been held that the Federal courts will follow the construction of a state constitution or law as settled by the decisions of state courts except under the circumstances noted, and will as a general rule accept such decisions as evidence of what the local law is even though against their own judgment, yet if the question is one which falls within the general principles and doctrines of commercial jurisprudence, the Federal courts hold that it is their duty to form an independent judgment in respect to which they are under no obligations to follow implicitly or otherwise the conclusions of any other court however learned or able it may be. The attention of the reader will be called to two decisions as particularly illustrative of this rule and in addition to the others cited in the notes: One from the Supreme Court of the United States [41] where the court said: "Our attention has been

41—Pana v. Bowler, 107 U. S. 527. See also Sup'rs v. Schenck, 5 Wall. 772; Town of Venice v. Murdock, 92 U. S. 494; but see Scipio v. Wright, 101 U. S. 665.

Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112. It was never intended that this court should as the effect of the amendment be transformed into a court of appeals where all decisions of state courts involving merely questions of general justice and equitable consideration in the taxing of property should be submitted to this court for this determination.

County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58. After referring to litigation in the Texas state courts in respect to the validity of the bonds involved in the pending suit (Ball Hutchins & Co. v. County of Presidio, 88 Tex. 60, 29 S. W. 1042)

called to the decision of the Supreme Court of Illinois in the case heretofore mentioned and reported as Lippincott v. Town of Pana, 92 Ill. 24, in which it was held that the election relied on in this case as the authority for the issue of the bonds was absolutely void, and the issue of them was, therefore, without authority. Our attention is also called to People v. Town of Santa Anna, 67 id. 57, and People v. Town of Laenna, id. 65, where similar elections under a like statute were held void. These last two cases were decided before the bonds in this case were issued. They were, however, suits brought to restrain the issue of bonds by the township officers, on account of the irregularities in the election. The rights of bona fide holders could not, therefore, arise, and were

the court said: "It is apparent that the supreme court of Texas proceeded in part upon grounds inconsistent with the decisions of this court in cases involving the rights of the holders of commercial paper. We allude here particularly to that part of its opinion holding that, whatever the import of the recitals in the bonds, a purchaser was bound to ascertain what were the provisions of the order of February 9th, 1886, under and by virtue of which the bonds purport to have been issued. In that view, we do not concur, as what has been said in this opinion sufficiently indicates. Since the decision in Swift v. Tyson, 16 Pet. 1, 19, 10 L. Ed. 865, 871, it has been the accepted doctrine of this court, that, in respect to the doctrines of commercial law, and general jurisprudence, the courts of the United States will exercise their own independent judgment, and, in respect to such doctrines, will not be controlled by decisions based upon local statutes or local usage, although, if the question is balanced with doubt, the courts of the United States, for the sake of harmony, "will lean to an agreement of views with the state courts." City of Huron v. Second Ward Savings Bank, 86 Fed. 272.

Clapp v. Otoe County, 104 Fed. 473. The court here after stating the rule that Federal courts follow decisions of the state courts in construing their statutes and constitutions said that there was an exception to this rule, namely "that conceding that the action of a municipal or quasi municipal body was illegal, as held by a state court, still the question whether or not the illegal action of such a body, in the exercise of a power granted to it, constitutes any defense to bonds issued or contracts made pursuant to such action, and held by a bona fide purchaser, is a question of general jurisprudence, which it would be a dereliction of duty for a federal court to decline to consider and determine for itself."

not passed on in those cases. But in the case first mentioned the bonds had been issued, and were presumptively in the hands of the bona fide holders. Nevertheless, the Supreme Court of Illinois held the bonds to be void in whosesoever hands they might be.

"It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a State Constitution or law has become settled by the decision of the State courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment on the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular and therefore void. But we are not bound to accept the inference drawn by the Supreme Court of Illinois, that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be." And another from the Circuit Court of Appeals of the Eighth Circuit,[42] where Judge Sanborn in writing the opinion for the court said: "But the question that has been under consideration here is not one of the construction of the constitution or of the statutes of the state of Iowa. It simply involves the con-

42—Independent School District of Sioux City v. Rew, 111 Fed. 1 C. C. A.

struction and effect of recitals in negotiable instruments. It is a question of commercial, and not of constitutional law; upon which the decisions of the state courts are not controlling in the Federal tribunals. It is not only the privilege, but the duty, of the Federal Courts, imposed upon them by the Constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Jurisdiction of such cases was conferred upon them for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them. And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents." [43]

§ 274. Validity of negotiable securities; the doctrine of estoppel.

Since it is universally held that securities issued by public corporations and negotiable in form partake of the character and are regarded as negotiable paper according to the strict meaning of the word as used in the law-merchant, we have for the protection of the bona fide holder the well-established principle applying to all negotiable

43—See, however, the earlier cases of Town of Venice v. Murdock, 92 U. S. 494, where the Supreme Court of the United States refused to follow New York decisions relative to the effect to be given to affidavits of town officials as to conditions required under a statute authorizing the issue of railroad aid bonds. In this case, contrary to the New York cases it held the affidavit conclusive but subsequently this decision was reversed pro tanto in Scipio v. Wright, 101 U. S. 665.

paper that a bona fide and innocent purchaser for value before maturity and without notice takes an absolute title and is not affected by equities which are good as between the original parties. The doctrine of estoppel has been held to apply to the maker in respect to the existence of certain conditions or circumstances which might relieve it from its obligation by recitals in the bonds, acquiescence, course of dealing and the payment of interest.[44]

A public corporation, for illustration, that has as such voted for and issued bonds, is estopped from setting up as a defense against an innocent holder defects in its incorporation. [45]

So also one having authority to issue bonds for one purpose is estopped from setting up as a defense against a bona fide purchaser of such bonds the fact that the moneys derived from their sale were used for a different purpose, perhaps an illegal one, from that from which they purported or were authorized to be issued or that such moneys were never expended for the benefit of the corporation. [46]

It has also been held that where the statutory authority exists and bonds are issued, the maker will be estopped from denying their execution when it has received and it

44—Pompton v. Cooper Union, 101 U. S. 196. If any error or wrong was committed in issuing these bonds, it was the acts of the agents of the plaintiffs in error; where one of two innocent persons must suffer a loss and one of them has contributed to the injury the law throws the burden upon him and not upon the other party. See generally cases cited under the following sections.

45—Aller v. Cameron, 3 Dill. 188; Nat. Life Ins. Co. of Montpelier v. Board of Education of Huron, 62 Fed. 778 C. C. A. See, also cases cited under Sec. 266, ante on de facto corporations.

46—See Secs. 262 and 263, ante and Sec. 289, post. Hackett v. City of Ottawa, 99 U. S. 86; Portland Savings Bank v. City of Evansville, 25 Fed. 389; Nat. Life Ins. Co. of Montpelier v. Board of Education of Huron, 62 Fed. 778 C. C. A. Borough of Freesport v. Marks, 59 Pa. 253; Jones v. City of Camden, 44 S. C. 319; Nolan County v. State, 83 Tex. 182 17 S. W. 823; Town of Clifton Forge v. Alleghany Bank, 92 Va. 283, 23 S. E. 284.

has retained the benefit of the money evidenced by the bonds.[47]

§ 275. Estoppel by delivery.

The principle of estoppel through a decision of one to whom the determination of certain facts has been committed has been applied to the mere fact of a delivery of the bonds. This, even in the absence of a recital to the effect that conditions precedent have been complied with, being regarded as tantamount to a decision to this effect. In Knox County v. Aspinwall,[48] the court said: "The right of a board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one from its organization and general duties fit and competent to be the depositary of the trust thus confined to it. The persons composing it were elected by the county and it was already invested with the highest functions concerning its general police and fiscal interest. * * * The purchaser of the bonds had a right to assume that the vote of the county which was made a condition to the grant of the power had been obtained from the fact of the subscription by the board to the stock of the railroad company and the issuing of the bonds." In a later case, Provident Trust Company v. Mercer County,[49] the bonds had been issued and placed in escrow to be delivered upon the condition that the railroad in whose aid they

47—See Sec. 319, post; Mobile v. Sands, 127 Ala. 493; Oswego Twp. v. Anderson, 44 Kan. 214, 24 Pac. 486.

48—21 How. 539; see also, Flagg v. Palmyra, 33 Mo. 440; Mutual Life Ins. Co. v. Elizabeth, 42 N. J. L. 401; Cotton v. New Providence, 47 N. J. L. 401.

49—170 U. S. 593.

had been issued should be completed through the county. The bonds were delivered before the fulfillment of the condition. The Supreme Court held them valid saying in part: "It is said that the bonds were placed in escrow and that when an instrument is so placed there can be no valid delivery until the condition of the escrow has been performed, and if without performance the instrument passes out of the hands of the one holding it in escrow it is not enforcible against the maker and that in a suit upon the instrument the inquiry is always open whether the condition of the escrow had been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract we are of the opinion that a different rule obtains when the instrument is a negotiable obligation."[50] The non-performance of conditions required to be done by the one entitled to the bonds, if acquiesced in by the corporation, is not sufficient to render the bonds invalid.[51] The doctrine of equitable estoppel also is applied for the protection of the bona fide holder of public securities where public corporations with full knowledge of defects in the manner of issue after having received and retained the benefits of the proceeds of their bonds, recognize directly, or indirectly the validity of them by the levying of a tax for their payment or the payment of interest;[52]

50—But see Buchanan v. Litchfield, 102 U. S. 278. Where the Supreme Court upon full consideration held that the mere fact that the bonds were issued without any recital of the circumstances bringing them within the power granted was not in itself conclusive proof in favor of a bona fide holder that the circumstances existed which authorized them to be issued, and the dissenting opinion of Mr. Justice Bradley in Knox County v. Aspinwall, wherein he said: "He has a right to rely upon the statements as a determination of the question but a mere execution and issue of the bonds without such recital is not in my judgment conclusive, it may be prima facie sufficient but the contrary may be shown."

51—See Sec. 318, et seq., post; Augusta Bank v. City of Augusta, 49 Me. 507; Shurtleff v. Inhabitants of Wiscasset, 74 Me. 130.

52—See Sec. 318, et seq., post.

exercise stockholders' rights on stock purchased with the proceeds;[53] acknowledge through their public officials or otherwise the validity of the securities issued;[54] retain the consideration,[55] or issue renewal or refunding bonds to replace them;[56] under these circumstances, public corporations will not be heard to raise the question of irregularities as a defense in an action against them to enforce the obligations incurred. These as well as the application of the doctrine of recitals will be considered in the immediately following sections.

§ 276. The doctrine of recitals.

The principle of estoppel as stated in the preceding section also applies to recitals in public securities which are statements of the constitutional or legislative authority for their issue; the performance or compliance with all of the conditions required by such authority necessary to be done or performed as precedent to a valid issue; and the existence of jurisdictional or essential facts; the doctrine as applied to recitals is substantially this, that where legislative authority has been given to a public corporation to issue bonds upon the performance of some precedent condition such as the assent of the votors at an election or a particular manner in which the election is to be held,[57] the necessity of making provision for a tax levy to meet the interest and provide for a sinking fund to pay off the bonds,[58] the prohibition of an issue in excess

53—See Sec. 318, et seq., post.

54—See Sec. 318, et seq., post.

55—See Sec. 318, et seq., post.

56—See Sec. 208, ante and Sec. 318, et seq., post.

57—Com'rs of Knox v. Aspinwall, 21 How. 539; Lynde v. Winnebago County, 83 U. S. 6; County of Moultrie v. Fairfield, 105 U. S. 370.

See the cases on this point cited and discussed in the later sections on elections as affected by recitals and Sec. 292, et seq.

58—National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 62 Fed. 778 C. C. A.; Hughes County v. Livingston, 104 Fed. 306 C. C. A.; see Sec. 120, ante and Sec. 373, et seq., post. But see Brazoria County v. Youngstown Bridge Co., 80 Fed. 10.

of certain limitations of indebtedness,[59] the performance of certain conditions by the payee named in the bond,[60] or the existence of some essential fact and where it might be gathered from the legislative enactment that certain officials of the corporation are vested with the power to decide whether the conditions precedent have been complied with or the required facts existed, their recitals or statement in the bonds issued by the public corporation that they have been so complied with or that certain facts and conditions exist, is conclusive of the matter so stated and recited and binding on the corporation for, as said by the Supreme Court of the United States: "The recital is itself a decision of the fact by the appointed tribunal."[61] Such a recital or "decision" as it is termed is conclusive upon the corporation as to bonds in the hands of a bona fide holder who it is held as to the facts recited is not bound to look for further evidence of a compliance with the conditions of issue.[62] In Burroughs on

59—City of Gladstone v. Throop, 71 Fed. 341 C. C. A.

Reis v. State (Calif.), 65 Pac. 1102, reversing 59 Pac. 298. Under Code of Civil Procedure, Sec. 1093, recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect and the state in an action on coupons attached to bonds issued under the "Indian War Bond Act" so-called, was estopped from urging a defense that the statute was in violation of the constitutional provision limiting the indebtedness of the state. City of Rome v. Whitestown Water Works Co., 100 N. Y. S. 357, affirmed 80 N. E. 1106; see Sec. 295, et seq., post.

60—County of Henry v. Nicolay, 95 U. S. 619. It was incumbent on him (a bona fide holder) to inquire whether the railroad company had pursued all the regular steps necessary to entitle it to receive the bonds. Its agents, that is, the agents of the branch road had them for sale and he had a right to presume that they were lawfully entitled to them. See Sec. 289, et seq., post.

61—Town of Coloma v. Eaves, 92 U. S. 484.

62—Grand Chute v. Winegar, 15 Wall. 355, reversing previous cases in the Supreme Court of the United States. Lynde v. Winnebago County, 16 Wall. 6; Town of Coloma v. Eaves, 92 U. S. 484; Com'rs of Douglas County v. Bolles, 94 U. S. 104; Orleans v. Platt, 99 U. S. 676; Pompton v. Cooper Union, 101 U. S. 196; City of Menasha v. Hazzard, 102 U. S. 81; Harter Twp. v. Kernochan, 103 U. S. 562; Clay County v. Society for Savings, 104

Public Securities page 305, the author states what he deduces as the three leading points of the municipal decision:

"I. The power of the officers to decide that the condi-

U. S. 579; Am. Life Ins. Co. v. Town of Bruce, 105 U. S. 328; County of Moultrie v. Fairfield, 105 U. S. 370; Town of Pana v. Bowler, 107 U. S. 529; New Providence v. Halsey, 117 U. S. 336; Chaffee County v. Potter, 142 U. S. 355.

Andes v. Ely, 158 U. S. 312. The court after stating the rule say "see the many cases beginning with Com'rs of Knox County v. Aspinwall, 21 How. 529 and ending with Citizens Savings Bank v. Perry County, 156 U. S. 692." City of Evansville v. Dennett, 161 U. S. 434; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58; Marshall v. Elgin, 3 McCrary Cir. Ct. 488; Deland v. Platt County, 54 Fed. 823; National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778 C. C. A.; Risley v. Village of Howell, 64 Fed. 453 C. C. A.; City of Columbus v. Denison, 69 Fed. 58.

Wesson v. Saline County, 73 Fed. 917. The recitals are indisputable proofs of the facts essential to the validity of the bonds. E. H. Rollins & Sons v. Board of Com'rs of Gunnison County, 80 Fed. 692, affirmed on this point in Board of Com'rs of the County of Gunnison v. E. H. Rollins & Son, 173 U. S. 255; Chilton v. Town of Grattan, 82 Fed. 873, affirmed 97 Fed. 145; Brown v. Ingalls Twp., 86 Fed. 261; City of Huron v. Second Ward Savings Bank, 86 Fed. 272; Town of Ninety-Six v. Folsom, 87 Fed. 304; Speer v. Board of Com'rs of Kearney County, Kan. 88 Fed. 749; Waite v. City of Santa Cruz, 89 Fed. 619, affirmed on this point in 184 U. S. 302; Lake County Com'rs v. Sutliff, 97 Fed. 270 C. C. A.; Wesson v. Town of Mt. Vernon, 98 Fed. 804, citing many cases; Pickens Twp. v. Post, 99 Fed. 659 C. C. A.; Cowley County Com'rs v. Heed, 101 Fed. 768; Independent School District of Sioux City v. Rew, 111 Fed. 1; Board of Com'rs of Henderson County v. Travellers Ins. Co., 128 Fed. 817; Gamble v. Rural Independent School District of Allison, 132 Fed. 513; Northwestern Savings Bank v. Town of Centreville Station, 143 Fed. 81; Village of Bradford v. Cameron, 145 Fed. 21; State v. City of Montgomery, 74 Ala. 226; Danielly v. Cabaniss, 52 Ga. 211; Chicago, K. & W. R. Co. v. Chase County Com'rs, 49 Kan. 399, 30 Pac. 456, following Hutchinson & S. R. Co. v. Kingman County Com'rs, 48 Kan. 70, 28 Pac. 1078, 15 L. R. A. 401; State v. Wichita County Com'rs, 62 Kan. 494, 64 Pac. 45; City of South Hutchinson v. Barnum, 63 Kan. 872, 66 Pac. 1035; Gibbs v. School Dist. No. 10, 88 Mich. 334, 50 N. W. 294; Spitzer v. Village of Blanchard, 82 Mich. 234; St. Paul Gas Light Co. v. Village of Sandstone, 73 Minn. 225; Lane v. Schomp, 20 N. J. Eq. (5 C. E. Green) 82; Mutual Benefit Life Ins. Co. v. Elizabeth, 42 N. J. L.

tions of issue have been fulfilled, is an implied one, deduced from the supposed necessity of the case that some one must decide before issue.

II. The evidence of the decision of the officers is to be found in the recital in the bond. This is the record of the decision, and a general recital that the law under which the bonds have been issued, has been complied with, is a decision that the precedent conditions have been fulfilled.

III. Such a decision is conclusive upon the municipality as to a bona fide holder of its bonds, who is not bound to look for further evidence of compliance with the conditions of issue. The recitals or statements work no estoppel, however, except where made by those officials or that tribunal especially designated by law or having the general power to perform such acts. If made by those having no authority to decide and assert the facts which constitute the conditions precedent to the legal issue of bonds, the recitals will not be accepted as a substitute for proof.[64]

235; Cotton v. New Providence, 47 N. J. L. 401; Belo v. Forsythe County Com'rs, 76 N. C. 489; Coler v. Dwight School Twp. 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; Flagg v. School Dist. No. 70 (N. D.) 58 N. W. 499; State v. Board of Education of Perrysburg, 27 Ohio St. 96; Kerr v. City of Corry, 105 Pa. 282; Coler v. Rhoda School Twp. 6 (S. D.), 640, 63 N. W. 158; Wilson v. Board of Education of Huron, 12 S. D. 535, 81 N. W. 952; City of San Antonio v. Lane, 32 Tex. 405; Cumberland County Sup'rs v. Randolph, 89 Va. 614, 16 S. E. 722.

But see National Bank of Commerce v. Town of Granada, 44 Fed. 262. A city is not estopped to show that an ordinance was never published as required by law where the bonds recited that they were issued under an ordinance "adopted" by the city council.

64—See Sec. 312, et seq., post; Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Bissell v. City of Jeffersonville, 24 How. (U. S.), 287.

Chisholm v. City of Montgomery, 2 Woods, 584 Fed. Cas. No. 2686. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals, and subject them to the consequences of their unauthorized acts. But the body politic cannot be thus silenced by

It is axiomatic that the doctrine of recitals will not apply where there are none or to other matters than those included in the recitals.[65]

Neither will the doctrine apply to recitals of legal authority to issue for in this respect it is held that every purchaser of bonds acquires and holds them charged with the full notice of the possession of power in the first instance on the part of the public corporation to issue them. The question of legislative authority in a public corporation to issue negotiable securities cannot be concluded by mere recitals even when the bonds have passed into the hands of bona fide holders for value.[66]

the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be sound proposition, that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it. Town of Coloma v. Eaves, 92 U. S. 484; Warren County v. Marcy, 97 U. S. 95; Bourbon County Com'rs v. Block, 99 U. S. 686; Dixon County v. Field, 111 U. S. 84; Merchants Bank v. Bergen County, 115 U. S. 384; Town of Oregon v. Jennings, 119 U. S. 74; Bernards Twp. v. Morrison, 133 U. S. 523; Rich v. Mentz Twp., 134 U. S. 632; Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173; Williams v. Town of Roberts, 88 Ill. 11; City of Vicksburg v. Lombard, 51 Miss. 111; Hudson v. Inhabitants of Winslow, 35 N. J. L. 437; Com. v. Common Councils of Pittsburgh, 88 Pa. 66; De Voss v. City of Richmond, 18 Grat. (Va.) 338.

65—Hannibal v. Fauntleroy, 105 U. S. 408. Carroll County v. Smith, 111 U. S. 556. Lake County v. Graham, 130 U. S. 674. It is therefore no estoppel as to the constitutional question because there is no recital in regard to it.

66—See Secs. 231, et seq., and 248, ante, and Sec. 330, et seq., post. Daviess County v. Huidekoper, 98 U. S. 98. In this case, Mr. Justice Hunt said: "These bonds are securities which pass from hand to hand with immunity given by the common law to bills of exchange and promissory notes. The persons who execute and deliver them—officers of the county court in this instance—are the agents of the municipal body authorizing their issue and not of the persons who purchase or receive them. If these agents exceed their authority as to form, manner, detail or circumstance, if they execute it in an irregular manner, it is the misfortune of the town or county and not of the purchaser; the loss must fall on those whom they represent and not on those who deal with them. There must indeed be power which, if formally and duly exercised, will bind the county or town; no bona

The distinction, however, is to be observed between a total want of power under any circumstances to issue and irregularities or informalities or conditions. This question will be considered in a subsequent section.[67]

The questions suggested have been considered or will be developed in detail in the following sections.

§ 277. In whose favor the doctrine of estoppel applies.

It is only to the bona fide holder for value before maturity and without notice that the doctrine of estoppel by recitals is of importance for to the original holder or a subsequent one not holding in good faith, no recitals can act as an estoppel against the public corporation issuing securities to set up irregularities in compliance with conditions precedent necessary for a legal issue.[68]

Public securities have acquired their large popularity

fides can dispense with this and no recital can excuse it.''

Northern Bank v. Porter Twp., 110 U. S. 608. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals, but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power or when the law prescribes conditions upon the exercise of the power granted and commits to the officers of such municipality the determination of the question whether those conditions have been performed the corporation will also be estopped by recitals which import such performance.

But see National Life Insurance Co. of Montpelier v. Board of Education of the City of Huron, 62 Fed. 778. Recitals in municipal bonds, by the representative body that issues them, to the effect that all the requirements of the laws with reference to their issue have been complied with * * * may constitute an estoppel in favor of a bona fide purchaser, even when the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of bonds, if that fact does not appear from the bonds the purchaser buys, the Constitution and statutes under which they are issued, and the public records referred to therein.

67—See Sec. 331, post.

68—Pendleton County v. Amy, 13 Wall. 297.

Chambers County v. Clews, 21 Wall. 318. As between the immediate parties the doctrine of estoppel through recitals will not apply. See Chap. X, ante on bona fide holding.

and pre-eminent standing as forms for investment through the establishment of their character as negotiable paper under the law-merchant and by the application of the doctrine of estoppel through recital and otherwise.

§ 278. Legal effect of recitals.

The doctrine of estoppel operates two ways: First, it acts equitably. Where a public corporation has received the full benefit of an issue of securities with a full knowledge of defects in the manner of issue or has acquiesced in the issue and acknowledged their validity it cannot subsequently be heard to set up as a defense the irregularities or defects of which it had full knowledge actually or constructively without placing the holder of the bonds in statu quo.

The doctrine of estoppel through recitals especially acts in the form of a municipal decision, that is, "where certain officers have authority to issue bonds of their municipality on the performance of certain conditions named in the statute, and the power is vested in them to determine whether the conditions have been complied with, and they do so determine, their decision that the conditions have been complied with is final and conclusive upon the municipality, although it may be true in point of fact that the conditions have not been complied with.[69]

§ 279. Leading and illustrative cases.

The first, and one of the leading cases in the Supreme Court of the United States is that of Knox County v. Aspinwall,[70] where it was held that when bonds on their face import a compliance with the law under which they

69—Bronson on Recitals, p. 41; see the authorities cited generally in the following sections as well as those cited under section 276, ante.

70—21 How. 539.

were issued, the purchaser is not bound to look further for evidence of a compliance with the conditions of a grant of the power. The defect involved was a failure to properly hold an election required by law as a requisite to the issue of bonds. It was held by the Supreme Court that the power to determine this question was vested in the board of commissioners of Knox county and that if they had acted by subscribing for the stock of the railroad and issuing bonds in the hands of bona fide holders, it would be too late even in a direct proceeding to call their decision in question, much less, the court said, could it be called in question to the prejudice of a bona fide holder of the bonds in a collateral way. The question was raised again in Town of Coloma v. Eaves,[71] when the court held that where a state statute confers authority to issue municipal bonds upon a certain condition and certain officers are vested with power to decide whether the condition precedent had been complied with and to issue the bonds, and there are recitals in the bonds issued by them that it has been complied with these will in favor of the bond holder for value bind the corporation and be conclusive of the fact. Mr. Justice Strong delivered the opinion of the court and said in part: "In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute the bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the

71—92 U. S. 484.

clerk signed them; and they were registered in the office of the auditor of the state, in accordance with an act, requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they 'are issued under and by virtue of the act incorporating the railroad company,' approved March 24, 1869. 'And in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law.' After all this, it is not an open question, as between a bona fide holder of the bonds and the township whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a bona fide purchaser is not bound to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others—to those most competent to decide it—and which the purchaser is, in general, in no condition to decide for himself.''

The principles stated in the above cases have been followed consistently by the Supreme Court of the United States, the doctrine being re-stated in a very recent deci-

sion,[72] where it was held that recitals in county bonds which fairly import a compliance in all respects with the statutes specified therein relieve a purchaser from the necessity of examining an order of the court referred to in the bonds as authorizing the issue and estop the county to assert as against the bona fide holder that his bonds were issued in excess of the authorized amount or were not issued for the purposes contemplated by the statutes. Reference to a recent decision,[73] by the United States Court of Appeals of the Eighth Circuit can also be made of value to the reader. The question of whether there could be an estoppel by recitals in the absence of lawful authority to issue and the operative effect of recitals on questions of fact were among the many propositions raised and decided. The court in its opinion by Judge Sanborn on the first point suggested above, said: "Their argument ignores the vital distinction between that total want of power which no act or recital of the municipality can remedy, and the total failure to exercise or the inadequate exercise of a lawful authority. It ignores the essential difference between a total lack of power under the laws under all circumstances, and a lack of power which results merely from the absence of some precedent facts or acts which condition either the existence or the exercise of the power. The former, it is true, cannot be affected by the estoppel of recitals, but the latter may be. A municipality or a quasi-municipality may not, by the recitals in its bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of conditions under which it would have authority to emit them. But if the laws are such that there might, under any state of facts or circumstances, be lawful power in the municipality or quasi-

72—County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58.

73—Hughes County (S. D.) v. Livingston, 104 Fed. 306 C. C. A.

municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, and that it had lawful power to send them forth, unless the constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances."

And on the second point suggested above the court said: " * * * Recitals are inserted in municipal bonds for the express purpose of inducing buyers to purchase them in reliance upon the truth of the certificates they contain. Purchasers universally do so. Then the salutory rule steps in, that one who by his acts or representations, or by his silence when he ought to speak out, induces another to change his situation in reliance upon those acts or representations or upon that silence, so that a denial of their plain meaning or effect will injure the latter, is estopped from making such a denial, and that rule forbids the inequitable defense that the recitals in such bonds were not true. If the legal effect of recitals is merely to declare that a state of facts or circumstances existed under which the municipality had the power to issue the bonds, this is a just and a reasonable rule, and it is and ought to be uniformly applied and enforced, because such facts and circumstances are peculiarly within the knowledge of the municipality and its officers, and without the knowledge of the purchasers of the bonds. On the other hand, if the laws are such that there can be no facts or circumstances under which the municipality could have the power to issue the bonds, the purchasers are charged with the knowledge of this state of the law. They cannot be deceived by recitals that the bonds were regularly or legally issued, because they must know that there was no way in which they could have been so issued, and in such a case recitals of this character constitute no estoppel in their favor against the municipality."

"Another argument of counsel is that the board of county commissioners of this county was its agent, with authority clearly limited by the terms of the act and the general laws of the state; that an agent with limited authority may not by recital or certificate that he has authority, create or enlarge his power; and that the board could not, by its certificate that a fundable debt existed, extend or enlarge its authority, and thereby estop the county. But this argument ignores the great principle upon which the effect of recitals in municipal bonds is based. That principle is that one may not vest in his agent the power to determine whether or not he has authority in a given case, and silently take the benefit of his decision and his act as agent, and then deny his authority, to the detriment of strangers who have innocently acted in the belief that his power was ample. It is that when a municipal body had lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to, and imposes the duty upon, its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them" (citing many cases) * * *

"In the consideration of the validity of contracts of municipalities, the fact must not be overlooked that municipal officers are not the agents of the purchasers of bonds. They are the agents of the municipalities. They are not selected by the creditors of the city or of the country they represent, nor by the courts, but they are chosen by the municipalities themselves. If there is danger that such officers will violate their oaths, and corruptly barter away the rights of the people whom they represent, through the abuse of rules of action which have been established for the guidance of honest men and faithful officials, the remedy is not the punishment of innocent

creditors who have purchased the negotiable securities of municipalities upon the faith of the acts of their officers, which were generally known to and acquiesced in by their citizens. It is in the election by those citizens of honest men and faithful officials."

§ 280. The doctrine in the state courts.

The state courts have quite generally followed the rule as to recitals stated in the preceding section although not to the same extent nor to the full effect as noted in the Federal courts. The doctrine that recitals in bonds may preclude the public corporation from setting up irregularities in the issue is admitted but they differ with the Federal courts upon the question as to what constitutes an irregularity. The state courts holding to the construction of certain conditions as absolute and therefore the recitals without operative effect while the Federal courts construe the same conditions as not essential to the existence of power to issue but the failure to perform which will be regarded as a mere irregularity in the exercise of a granted power, or stated differently, the state courts have given some precedent conditions imposed by statute an absolute force where the non-performance of the same would be treated by the Federal courts as mere irregularities.[74]

Illustrating this difference of holding, in Wisconsin it has been held that the lack of proper notice of election could not be regarded as a mere irregularity but such a defective compliance with the statute as to create a want of power which even a recital of a legally held election could not cure.[75]

74—State v. Board of Com'rs of Wichita County (Kan.), 64 Pac. 45; Spitzer v. Village of Blanchard, 82 Mich. 234, 46 N. W. 400.

State v. Commissioners, 37 Oh. St. 526; but see Danielly v. Cabaniss, 52 Ga. 211. A bona fide purchaser is not bound to ascertain that all the details directed have been observed where the bonds coutain recitals.

75—Veeder v. Lima, 19 Wis. 298;

In Missouri and Illinois, no recital of a legally held election requiring a majority vote or two-thirds can be substituted for an election in fact, hence the defense of no election is always available.[76]

In Nebraska a defective petition for or notice of election renders bonds invalid.[77]

New York requires that all the precedent steps leading up to an election be strictly complied with,[78] and many of the state courts hold that the condition imposing a legal limitation of indebtedness is an absolute one and therefore that no recital will preclude the defense of an over-issue.[79]

Although as to this point the Federal authorities except under the conditions noted in a preceding section[80] hold the same.[81] In some of the states the bona fide pur-

Bishop v. Milwaukee, 21 Wis. 257; see also Sec. 292, et seq., post.

76—Carpenter v. Lathrop, 51 Mo. 483; Steines v. Franklin County, 48 Mo. 167; Heard v. Calhoun School District, 45 Mo. App. 660; Marshall County v. Cook, 38 Ill. 52; Wiley v. Silliman, 62 Ill. 170; Town of Eagle v. Kohn, 84 Ill. 292; Williams v. People, 132 Ill. 574.

77—State v. Babcock, 21 Neb. 187; Fullerton v. School Dist. 41 Neb. 593; Hoxie v. Scott, 45 Neb. 199.

78—Starin v. Town of Granada, 23 N. Y. 439; Cagwin v. Town of Hancock, 84 N. Y. 532; Craig v. Town of Andes, 93 N. Y. 405; Ontario v. Hill, 99 N. Y. 324; Town of Ontario v. Union Bank of Rochester, 47 N. Y. S. 927; but see Town of Venice v. Murdock, 92 U. S. 494, subsequently over-ruled pro tanto in Scipio v. Wright, 101 U. S. 665; see also Sec. 126, ante.

79—Sutro v. Rhodes, 92 Calif. 117; Board of County Com'rs v. Standley, 24 Colo. 1; National State Bank v. Independent School Dist., 39 Iowa 490; Holliday v. Hildebrandt, 97 Iowa 177; Kane v. Independent School Dist. 82 Iowa 5 Allen v. City of Davenport, 107 Iowa 90; Lewis v. Commissioners, 12 Kan. 186; Catron v. Lafayette County, 106 Mo. 659; Hoffman v. Gallatin County, 18 Mont. 224; Sutton City v. Babcock, 24 Neb. 640; Millerstown v. Frederick, 114 Pa. St. 435; Fritsch v. County Commissioners, 15 Utah 83; but see Reis v. State (Calif.), 65 Pac. 1102, reversing 59 Pac. 298.

80—See Sec. 295, et seq., post; Chaffee County v. Potter, 142 U. S 355; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; City of Huron v. Second Ward Savings Bank, 86 Fed. 272.

81—Dixon County v. Field, 111 U. S. 83.

Lake County v. Graham, 130 U. S. 674. It is therefore no estoppel

chaser is required to know all the public records pertaining to an issue and the courts give to such records precedence over any recitals.[82]

In North Carolina, North Dakota and Ohio, however, the authorities seem to hold as strongly to the doctrine of recitals as the Federal courts.[83]

The rulings of the Federal courts are practically to the same effect when by statute the facts contained in certain designated records are made a test of the validity of the bonds.[84]

§ 281. Absence of recitals.

The securities as issued may contain no recitals either in respect to the power to issue or a compliance, complete or otherwise, with the conditions required by law to be performed as precedent to their legality. The effect of the absence of recitals is to put the bona fide purchaser upon inquiry both as to the existence of lawful authority to issue and further he is bound to ascertain at his peril whether the conditions required by law have been performed.[85]

as to the constitutional question because there is no recital in regard to it. Sutliff v. Lake County Com'rs, 147 U. S. 230.

82—Lewis v. Bourbon County, 12 Kan. 186; State v. Com'rs, 37 Oh. St. 526; Town of Eagle v. Kohn, 84 Ill. 292; Veeder v. Lima, 19 Wis. 298; see Sec. 255, et seq., ante.

83—Belo v. Com'rs of Forsyth County, 76 N. C. 485; Coler v. Dwight School Twp. of Richland County (N. D.), 55 N. W. 587; Flagg v. School District No. 70 (N. D.), 58 N. W. 499; State v. Board of Education, 27 Ohio State 96.

84—See Sec. 255, et seq., ante and Sec. 299, et seq., post.

85—Buchanan v. Litchfield, 102 U. S. 278; Katzenberger v. Aberdeen, 121 U. S. 172; Town of Concord v. Robinson, 121 U. S. 165; Hannibal v. Fauntleroy, 105 U. S. 408; Merchants Bank v. Bergen County, 115 U. S. 384.

Bolles v. Perry County, 92 Fed. 479 C. C. A. The fact that the bonds were registered under a law a strict compliance with which was essential in this respect to their validity will not in the absence of recitals that they were issued in accordance with the requirements of the statutes preclude the county from showing failure to perform conditions required. Lewis v. Com'rs, 12 Kan. 186; Green County

This principle has been announced in a number of cases and attention will be called in this text to some decided by the Supreme Court of the United States.

In County Commissioners v. Block,[86] where the bonds simply recited that they were "issued by order of the Board of County Commissioners," etc., the court said: "The bonds, it is true, contain no recitals. If they did contain a recital that an election had been held, and that a majority had voted for the issue of the bonds, the recital would have been conclusive upon the county, and a purchaser would have needed to look no further than to the act of the legislature. This is according to all our decisions, but in the absence of any recital, it may be conceded he was bound to inquire whether a majority vote had been returned for the issue of the bonds."

In Carroll County v. Smith,[87] the court in its opinion in discussing the effect of recitals and what they should contain as applied to the case before it held that the plaintiff in error in the case was not precluded from raising certain questions by any recitals in the bonds since they contained no statement of any election called or held or of the vote by which the issue of the bonds was authorized. That they did not embody even a general statement, that the bonds were issued pursuant to the statutes referred to. The utmost effect the court said that can be given to them is: "That of a statement, that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say nothing whatever as to any compliance with the requirements of the statute in respect to which the board of su-

v. Shortell (Ky.), 75 S. W. 251; Claybrooke v. County Com'rs, 114 N. C. 453; Hubbell v. Town of Custer City (S. D.), 87 N. W. 520.

86—99 U. S. 686.

87—111 U. S. 556.

pervisors were authorized and appointed to determine and certify. They do not, therefore, within the rule of decision acted on by this court, constitute an estoppel, which prevents inquiry into the alleged invalidity of the bonds."

In a later case, Hopper v. Covington,[88] the court held that where the bonds recited the special authority to issue and further did not contain any recital of matters in pais special authority to issue must be both alleged and proved and that no estoppel of any kind could arise. In a still later case, Citizens Savings & Loan Association v. Perry County,[89] where the law authorizing the bonds prescribed certain conditions to be performed as precedent to the issue and the bonds as issued failed to recite their performance, the court said: "But it is urged that the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightly done, the county is estopped to plead their invalidity as between it and a bona fide purchaser for value. This argument would have force, if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against bona fide holders for value. But this court, in Buchanan v. Litchfield, 102 U. S. 278, 292 (26 L. Ed. 138), upon full consideration held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted was not in itself conclusive proof in favor of a bona fide holder, that the circumstances existed which authorized them to be issued. In the bonds here in question there are no recitals precluding inquiry as to the performance of the conditions upon which the people, after

88—118 U. S. 148. 89—156 U. S. 692.

the passage of the act of April 16, 1869, voted in favor of a subscription to be paid by bonds of the county."

§ 282. Recitals contrary to statutory provisions.

The rule has been already stated that purchasers of public securities are charged with notice of what the bonds disclose upon their face and this principle is applied to those cases where the recitals in the bonds show in themselves that statutory provisions have not been complied with, the bona fide purchaser under such circumstances is afforded no protection by the doctrine of estoppel as applied to recitals but the recitals in themselves act as conclusive evidence of the invalidity of the bonds and consequently render them void.[90] This rule is based as well upon the doctrine that purchasers of bonds are charged with notice of the provisions of the statutes under which they purport to be issued.[91]

Many of the cases bearing upon the question involved in this section have already been cited.[92]

§ 283. Express and general recitals.

The character of a recital whether express or general has an important bearing upon the effect to be given to the recital in operating as an estoppel in respect to the facts stated therein. A recital, it will be remembered, is a statement of the constitutional or statutory authority under which the bonds are issued together with assertions in respect to the performance of required conditions or the existence of particular facts.[93] An express

90—See Sec. 261, ante.

91—McClure v. Oxford Twp., 94 U. S. 429; Anthony v. Jasper County, 101 U. S. 693; Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674; Manhattan, etc. Co. v. City of Ironwood, 20 C. C. A. 642; Horton v. Town of Thompson, 71 N. Y. 513; see also Sec. 248 et seq., ante.

92—See Secs. 231, et seq., and 248, et seq., ante.

93—See Sec. 276, ante.

recital is the express and exact statement in the bonds itself of the authority under which the bonds are issued, the performance of conditions precedent and the existence of essential facts. A general recital is a statement couched in broad language of the authority to issue and of the performance of the conditions required or a general statement of the existence of certain facts. The difference between the two may be best illustrated by the statement that a general recital would state that the bonds have been issued in pursuance of or in conformity to the authority therein stated while in case of an election as one of the precedent conditions, an express recital would state that on a certain day an election was held pursuant to law and that at said election a majority of the legal or qualified voters determined that the bonds should be issued.

The effect of many cases is to hold that a general recital that bonds were issued in conformity with or pursuant to a specified law operate as an estoppel in favor of a bona fide holder as to all the precedent conditions of the statute and a full compliance therewith.[94]

Some decisions, however, consider a general recital more in the nature of a formality and require in order that the doctrine of estoppel should apply that the bonds contain express recitals in respect to the different conditions required as precedent to legal issue and the existence of facts which may be made the test of validity.[95]

94—Knox County v. Aspinwall, 21 How. 539; Mercer County v. Hackett, 1 Wall. 83; Meyer v. Muscatine, 1 Wall. 384; Town of Coloma v. Eaves, 92 U. S. 484; Humboldt Twp. v. Long, 92 U. S. 642; Com'rs of Douglas County v. Bolles, 94 U. S. 104, 24 L. Ed. 46; School District v. Stone, 106 U. S. 183; Anderson County v. Beal, 113 U. S. 227; Cairo v. Zane, 149 U. S. 122; Evansville v. Dennett, 161 U. S. 434; Waite v. Santa Cruz, 184 U. S. 302; Huron v. Second Ward Savings Bank, 86 Fed. 272 C. C. A.; Independent School Dist. of Sioux City v. Rew, 111 Fed. 1; Com'rs of Henderson County v. Travellers Ins. Co., 128 Fed. 817; Coler v. Dwight Twp., 3 N. D. 249, 55 N. W. 587.

95—Citizens Savings & Loan Assoc'n v. Perry, 166 U. S. 689. In this case there was no recital as to a material condition required

If they do contain express recitals they are conclusive of the facts recited and every contrary defense is estopped.[96]

This difference in holding is well-illustrated by the cases considering the question of the validity of an issue as in excess of constitutional or statutory limitations of indebtedness, the Supreme Court of the United States holding in several cases that where there is an express recital to the effect that the issue in question does not exceed the constitutional or statutory limit, the corporation will be estopped to set up as a defense that the issue was in excess of such limit and this is especially true where the purchaser is not charged with notice of certain designated public records which are made the test of the existence of certain facts bearing upon the question of an excess or where these are insufficient to afford the necessary information to enable the purchaser to determine the facts of an excessive issue or otherwise.[97]

A late case on this question in the Supreme Court of the United States [98] holds, after reviewing all of the cases

by statute and the court held that the county was not estopped to set up a non-compliance with this condition as a defense.

Ninth Nat. Bank v. Knox County, 37 Fed. 75; see also Nugent v. Sup'rs of Putnam County, 19 Wall. 241, reversing 3 Biss. 105. Where in a dissenting opinion Mr. Justice Bradley while concurring in the decision lays down the principle that a general recital of an "issuance under the statute" should not be conclusive of a performance of the necessary conditions but that full credence should be given to specific recitals.

96—Grand Chute v. Winegar, 82 U. S. 355; Nugent v. Putnam County, 86 U. S. 241; Lake County v. Graham, 130 U. S. 674; Chaffee County v. Potter, 142 U. S. 355; Nesbit v. Independent Dist. 144 U. S. 611; Evansville v. Dennett, 161 U. S. 434; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 62 Fed. 778; Dudley v. Board of Com'rs of Lake County, Colo., 26 C. C. A. 82; see generally all cases cited under the various sections discussing the subject of recitals.

97—County of Chaffee v. Potter, 142 U. S. 355; see also Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255.

98—Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255.

in the Supreme Court involving the question of estoppel by recitals as applied to an issue of bonds in excess of the constitutional limitation that where a bona fide holder had no knowledge nor was chargeable with knowledge or notice that the debt created by the bonds exceeded the constitutional limit he was entitled to rely upon the direct recitals contained in them and that a recital in county bonds that the debt thereby created did not exceed the limit prescribed by the state constitution estopped the county from asserting as against such bona fide holder for value that the contrary is the fact, the court then say: "It is insisted with much earnestness that the principles we have announced render it impossible for a state by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a State Constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded, or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market in good faith. Indeed, it is entirely competent for a state to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that everyone understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities." On the other hand, there are decisions which maintain the doctrine that a general recital either as to debt limitations or conditions cannot be relied upon and that the purchaser is charged with no-

tice of all public records bearing upon the questions involved.[99]

§ 284. Recitals, to contain what, and their construction.

As a rule it is not necessary that recitals should contain a full and minute detail of all the proceedings involved or necessary to an issue of bonds. If they fairly import a compliance in all substantial respects with the statute giving authority to issue the securities, it is sufficient.[1]

Where the holder relies for protection upon mere recitals they should, however, at least be clear and unambiguous in order to estop a municipal corporation in whose name the securities have been made from showing that they were issued in violation or without authority of law.[2]

The rule of strict construction of recitals contained in bonds where it is proposed by mere recitals upon the

99—Buchanan v. Litchfield, 102 U. S. 278; Dixon County v. Field, 111 U. S. 83.

Katzenberger v. Aberdeen, 121 U. S. 172. The court here held that a general recital that "this bond is issued under and pursuant to the constitution and laws of the state of Mississippi Charter of the City of Aberdeen and Ordinances passed by the mayor and selectment of the City of Aberdeen on the 26th day of April, 1870," and which refers to no specific legislative authority, was merely a recital of law and did not estop the defense of want of vote to issue the bonds. Lake County v. Graham, 130 U. S. 674; Sutliff v. Lake County Com'rs, 147 U. S. 230; Francis v. Howard County, 4 C. C. A. 460; Town of Eagle v. Kohn, 84 Ill. 292; Lewis v. Bourbon County Com'rs, 12 Kan. 186; George v. Oxford, 16 Kan. 72; State v. Com'rs, 27 Oh. St. 526; Veeder v. Town of Lima, 19 Wis. 298.

1—Comanche County v. Lewis, 133 U. S. 198.

Board of Liquidation of City Debt v. State of Louisiana, 179 U. S. 622. Liquidation bonds issued under constitutional provisions and as a result of a judgment can include in their recitals the facts that they were issued by virtue of the constitution and as a result of a judgment.

Cleveland v. Calvert, 31 S. E. 871. It is not necessary to the validity of municipal bonds that they recite that the issue did not exceed the constitutional limit of the city's debt. Coler v. Dwight School Twp., of Richland County (N. D.), 55 N. W. 587.

2—McClure v. Twp. of Oxford, 94 U. S. 429.

part of officers of public corporations to exclude inquiry as to whether the securities issued in its name were made in violation of the constitution and of a statute of the provisions of which all must take notice should not apply where the recitals show fairly a substantial compliance with the authority to issue the bonds. The main thing to be determined is that under existing authority, the public corporation has issued its obligations to pay and that the conditions required have been performed.[3]

§ 285. Recitals as to lawful authority, constitutional provisions.

The recital that the securities are issued pursuant to or under the authority of a constitutional provision puts

3—School Dist. v. Stone, 106 U. S. 183.

Risley v. Village of Howell, 64 Fed. 453 C. C. A. In order to determine what effect should be given to this part of the recitals in the bonds, reference must be had to the whole instrument under the just and familiar rule of construction. The court after referring to the various recitals then goes on to say: "Bringing all of the recitals in the bonds together they amount to a representation, that they were issued to raise money to defray the expenses of a public improvement of a kind to be determined by the common council, that the requirements of the law had all been complied with, and that an ordinance in conformity with the law had been passed directing their issuance; for if the ordinance was not in conformity with the law, inasmuch as it preceded the issue of the bonds, it falsified the preceding statement that the bonds were issued in conformity with the statute. And we can entertain no doubt whatever but that this was precisely the way in which the framers of these bonds intended the recitals to be construed. They were inserted to fortify the bonds, and give assurance of their legal validity to purchasers, and invite their confidence. * * * The general rule of construction applies, that in determining the intent and meaning of any part the general purpose of the whole is to be regarded. And it would seem a very just rule also that the meaning which the maker of an instrument intends and expects the other party to put upon it should be adopted if the other has accepted it in that sense, and the words will bear that construction."

Kirkpatrick v. Van Cleave (Ind.), 89 N. E. 913. Constructions of public securities, which unsettle confidence in their value will not be made except where the terms of a statute compel.

the purchaser upon inquiry as to the terms of the provision referred to. A distinction was made in some of the earlier cases between the effect of a recital of a constitutional and a statutory provision and holding that under no circumstances could recitals operate as an estoppel in respect to constitutional provision and requirements but not holding so strictly in respect to statutory provisions.[4]

This rule cannot be said under the leading authorities to operate as a controlling principle where the distinction is merely based upon the fact that the one condition or requirement is to be found in a state constitution and another in some state statute. The character of the constitutional provision as either conferring or withholding power or prescribing conditions upon the performance of which the power will arise marks the true line for court decisions. Where the constitutional provision is to the effect that at the time the bonds are issued a tax must be levied to provide for the payment of the accruing in-

4—Lake County v. Graham, 130 U. S. 674. In this case the standard of validity is created by the constitution. In that standard two factors are to be considered, one the amount of assessed value and the other the ratio between that assessed value and the debt proposed, these being exactions of the constitution itself, it is not within the power of a legislature to dispense with them either directly or indirectly by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.

See also Sherman County v. Simons, 109 U. S. 735. Where the question was one of estoppel as against an exaction imposed by the legislature, the holding was that the legislatnre being the source of exaction had created a board authorized to determine whether its action had been complied with and that its findings was conclusive to a bona fide purchaser, and Oregon v. Jennings, 119 U. S. 74, where the condition violated was not one imposed by the constitution but one fixed by the subscription contract of the people; but see Gamble v. Rural Independent School Dist. of Allison, 132 Fed. 514, where it is held that a recital in bonds that they were issued in pursuance and in accordance with a certain named statute which is printed thereon is in effect a certification by the officers that all provisions of law, statutory as well as constitutional have been complied with and estops the district issuing them as against a bona fide holder to deny the facts there stated.

terest and to create a sinking fund for the payment of the principal or a part of it when it becomes due or prescribing some other condition to be performed by the corporation issuing the bonds or incurring the indebtedness, recitals in respect to the performance of these conditions will operate as an estoppel when in fact the conditions have not been performed if the recitals are made under the circumstances required for the operation of the doctrine of estoppel.[5]

However, the cases passing upon the validity of bonds containing a reference to constitutional provisions involve in nearly every instance the question of an issue in excess of a debt limitation. The principle controlling under the later authorities is determined from the character of the recital as general or express or the necessity for an examination of public records by the purchaser of the bonds. These questions have been sufficiently considered in previous sections.[6] It is sufficient to state

5—National Life Ins. Co. v. Board of Education of the City of Huron, 62 Fed. 778, 10 C. C. A. 637. It is, however, insisted that there is something in constitutional provision so sacred that no certificate of a compliance with its terms can estop the corporation that makes it from proving its falsity. The remark of Mr. Justice Jackson in Hedges v. Dixon Co., 150 U. S. 187, 14 Sup. Ct. 71, that, when municipal bonds are issued in violation of a constitutional provision, no estoppel can arise by reason of any recitals contained in the bonds, and his reference to Lake Co. v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651; Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654; and Sutliff v. Commissioners, 147 U. S. 230, 13 Sup. Ct. 318, are cited in support of this position. But there was no question of the effect of such recitals before the court in Hedges v. Dixon Co., and the remark was entirely unnecessary to the decision of the case. The bonds there in question had been adjudged void in Dixon Co. v. Field years before, and the question then before the court was whether, inasmuch as only a part of the issue was beyond the constitutional limit of indebtedness, a court of equity would scale down the amount, and permit a recovery for such a sum as was within the limit. * * * Upon reason and authority, therefore, our conclusion is that an estoppel may arise in a proper case upon a recital that an act has been performed which was required by a constitution, as well as upon the recital of the performance of an act required by statute.

6—See Secs. 255, et seq. and 297, et seq., ante.

here that the authorities hold that a general recital may work no estoppel,[7] but that where the securities expressly and in detail recite that a constitutional limitation of indebtedness has not been exceeded, such a recital will operate as an estoppel.[8]

§ 286. Recitals of authority; legislative.

The doctrine has already been stated and discussed in detail that recitals of legislative authority put the purchaser upon inquiry as to all of the terms and conditions of the same. He is bound to ascertain that the statute to which reference is made confers authority for the issue of the securities.[9] The further rule also obtains that where by statute facts contained in certain public records are made a test or one of the tests of the validity of the bonds, the purchaser will be charged with a knowledge of all of the facts contained in them.[10]

In a recital of legislative authority, however, whether general or express, the great weight of the authority is to the effect that the question of a compliance with the conditions required as precedent to the issue or the existence of essential facts need not be settled by the bona fide purchaser. He is entitled to assume and can presume from the recitals of a compliance with statutory authority as to conditions precedent that they have been performed as required and that the facts exist if the recitals are made by those public officials charged by law with this duty.[11]

7—Buchanan v. Litchfield, 102 U. S. 278; Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674; Sutliff v. Lake County Com'rs, 147 U. S. 230.

8—Chaffee County v. Potter, 142 U. S. 355; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; E. H. Rollins & Sons v. Board of Com'rs of Gunnison County, 80 Fed. 692 C. C. A.; see Sec. 295, et seq., post.

9—See Secs. 232, et seq. and 248, et seq., ante.

10—See Sec. 255, et seq., ante.

11—See the cases under the general subject of recitals in this chapter cited under the particular subject heading for which authorities are desired.

Under these general principles the cases are numerous to the effect that where bonds recite that they were "issued under the authority of certain acts," [12] "in pursuance of," or "pursuant to," [13] "in conformity with the provisions of an act," [14] "by virtue of and in accordance with," [15] and other familiar phrases, further coupled in some instances with the recital "that all conditions and things required to be done have been done," or language of similar import,[16] that such recitals are conclusive upon the performance of the conditions required or the facts required to exist as precedent to the validity of the bonds and will operate as an estoppel against the corporations issuing them as to the existence of the jurisdic-

12—Risley v. Village of Howell, 64 Fed. 453 C. C. A. City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449, C. C. A.; Grattan Twp. v. Chilton, 97 Fed. 145 C. C. A.

13—Com'rs of Knox County v. Aspinwall, 21 How. 539; Moran v. Miami County Com'rs, 2 Black 722; Mercer County v. Hackett, 1 Wall. 83; Grand Chute v. Winegar, 15 Wall. 55; Sup'rs v. Galbraith, 99 U. S. 214; Pompton v. Cooper Union, 101 U. S. 196; Bonham v. Needles, 103 U. S. 648; Ottawa v. National Bank, 105 U. S. 342; Granada County Sup'rs v. Brogdon, 112 U. S. 261; Bernard's Twp. v. Morrison, 133 U. S. 523; Miller v. Berlin, 13 Blatchf. 245; Twp. of Ninety-Six v. Folsom, 87 Fed. 304; Gamble v. Rural Independent School District of Allison, 132 Fed. 514; Kerr v. Corry, 105 Pa. St. 282; but see Kelly v. Milan, 21 Fed. 842.

14—St. Joseph v. Rogers, 16 Wall. 44; County of Moultrie v. Rockingham, Ten-Cent Savings Bank, 92 U. S. 631.

15—Com'rs of Johnson County v. January, 94 U. S. 202; City of Evansville v. Dennett, 161 U. S. 134.

16—Waite v. City of Santa Cruz, 184 U. S. 302; Kimball v. Town of Lakeland, 41 Fed. 289; Board of Com'rs of Kingman County v. Cornell Univ., 57 Fed. 149; National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778; City of Columbus v. Dennison, 69 Fed. 58 C. C. A.; Brown v. Ingalls Twp., 86 Fed. 261 C. C. A.; Twp. of Ninety-Six v. Folsom, 87 Fed. 304; Board of Com'rs of Haskell County v. National Life Ins. Co., 90 Fed. 228; Miller v. Perris Irrigation Dist., 99 Fed. 143; Hughes County, S. D. v. Livingston, 104 Fed. 206; Clapp v. Otoe County (Nebr.), 104 Fed. 473; Ind. School Dist. of Sioux City (Ia.) v. Rew. 111 Fed. 1; City of Defiance v. Schmidt, 123 Fed. 1, affirming 117 Fed. 702; City of Superior v. Marble Savings Bank, 148 Fed. 7; State v. Board of Com'rs of Wichita County (Kan.), 64 Pac. 45; but see Evans v. McFarland (Mo.), 85 S. W. 873.

tional facts and conditions. It must be noted, however, that the doctrine of estoppel is at all times subject to the principle that the officers making them must be charged by law with this duty.[17]

§ 287. Recitals of authority; ordinances, court orders.

In a preceding section [18] it was stated that a purchaser of public securities was charged with the terms and conditions of ordinances, reference to which was made in the recitals contained in the bonds. This principle is true in so far as it applies to the grant of authority to be found in the ordinance. It does not limit the doctrine of estoppel by recitals in respect to the performance of conditions required by the ordinance.[20] The bona fide purchaser is afforded the same protection as to conditions precedent or existing facts required in ordinances when authority for the issue of bonds to which he is entitled when the recitals refer to legislative or constitutional authority.[21]

The principle further does not apply to the form of the ordinance or the conditions imposed by statute as precedent to its passage, when prescribed by law. The

17—See Sec. 312, et seq., post.

18—See Sec. 255, et seq., ante.

20—City of Evansville v. Dennett, 161 U. S. 434.

21—Meyer v. Muscatine, 1 Wall. 384; Mitchell v. Burlington, 4 Wall. 270; Hackett v. Ottawa, 99 U. S. 86; Waite v. City of Santa Cruz, 184 U. S. 302; Wesson v. Saline County, 73 Fed. 917; Ashman v. Pulaski County, 73 Fed. 927.

Board of Com'rs v. Nat. Life Ins. Co., 90 Fed. 228, 32 C. C. A. 591, overruling pro tanto National Bank of Commerce v. Granada, 4 C. C. A. 212, and Hinkley v. Arkansas City, 16 C. C. A. 395; but see Bank of Commerce v. Granada, 4 C. C. A. 212. Recitals in municipal bonds that they were issued under an ordinance does not estop the town from showing that the ordinance was never published as provided by the Colorado statutes and they are therefore void. Since the ordinance was never published or recorded as required by law, it never went into effect and hence the authority was void, overruled pro tanto. Board of Com'rs of Haskell County v. National Life Ins. Co., 90 Fed. 228, 32 C. C. A. 591; Town of Klamath Falls v. Sachs, 35 Ore. 325, 57 Pac. 329.

bona fide holder is entitled to act upon the assumption that the ordinance or ordinances comply in all respects with the provisions of the statute under which passed.[22]

22—Hackett v. Ottawa, 99 U. S. 686. Either such representations were made inadvertently or with the intention by the use of inaccurate titles of ordinance to avert inquiry as to the real object in issuing the bonds and thereby facilitate their negotiation in the money markets of the country, in either case the city both upon principle and authority is cut off from any such defense. City of Evansville v. Dennett, 161 U. S. 434; Waite v. City of Santa Cruz, 184 U. S. 302.

National Bank of Commerce v. Town of Granada, 54 Fed. 100 C. C. A., affirming 44 Fed. 262, 48 Fed. 278. In this case it was held that a recital in a bond that it was issued under an ordinance does not estop the town from showing that the ordinance was never published as required by law since neither the mayor nor the clerk who signed the bonds had any duty in relation to publishing ordinances or determining whether they had been published according to law. Overruled pro tanto in Board of Com'rs of Haskell Co. v. National Life Ins. Co., 90 Fed. 228 on the authority of City of Evansville v. Dennett, 161 U. S. 434.

Wesson v. Saline County, 73 Fed. 917. The only reason for saying that a reference to an ordinance puts a party upon inquiry into the contents thereof is because the reference conveys knowledge of the existence of the ordinance. But common councils, boards of commissioners, and like municipal bodies can act only by order, ordinance, or resolution, as every one is bound to know; and, when a municipal bond is offered upon the market, it needs no mention in a recital to give a proposed purchaser notice that the bond was issued in pursuance of an ordinance, or resolution, or ordinance. The existence of the bond implies that much, and when there is a recital to the effect that the bond was issued in pursuance of a statute, the necessary import is that there was an ordinance, and a proper one, whether express mention is made of it or not. To say "In pursuance of a statute and an ordinance" is equivalent to an express statement that the ordinance is in conformity with the statute, and the purchaser of a bond containing that recital is not bound in that particular to look for further information. Evansville v. Dennett, 73 Fed. 966.

Village of Kent v. Dana, 100 Fed. 56. But lastly, it is recited in the bond "that all acts, conditions and things required to be done precedent to and in the issuing of said bonds have been properly done, happened and performed in regular and due form as required by law." If, as contended, the passage and publication of the ordinance was a condition precedent to the issuing of the bonds, this recital represented that these things had been done. But see Barnett v. Denison, 145 U. S. 135, which holds that a negotiable bond which merely gives the date of an ordinance authorizing its issue without stating the contents or the title thereof will not cut off an

A recent case in the Supreme Court of the United States [23] is illustrative of this principle, where the court said: "But the bonds issued on account of subscription to the stock of the Evansville, Henderson & Nashville Railroad Company recite that the subscription was 'made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof.' This imports not only compliance with the act of the legislature but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared in terms that all had been done that was required to be done in order that the power given might be exercised."

§ 288. Mis-recitals of legal authority.

Through inadvertance or carelessness, public securities in their recitals of authority whether a legislative act or some municipal ordinance may contain a mis-statement of the authority, refer to a statute as conferring authority which has been repealed, or cite two or more statutes as authority for the issue. The authorities under such circumstances hold without any dissent that the sole question to be determined is the existence of a lawful grant of power and that it is immaterial and will not affect the validity of the bonds if as a matter of fact authority for their issue does exist though an erroneous recital or a mis-recital has been made.[24]

A recital, as stated in one case, is valuable as affording

equitable defense where the charter requires all bonds issued by the city to specify the purpose for which they are issued. Mr. Justice Brewer dissenting.

23—City of Evansville v. Dennett, 161 U. S. 434; see also the later case of Waite v. City of Santa Cruz, 184 U. S. 302, where after a full review of all of the cases the rule announced in the Dennett case is followed.

24—Johnson County v. January, 94 U. S. 202; Crow v. Twp. of Oxford, 119 U. S. 215; Board of Education of Atchison v. De Kay, 148 U. S. 591; D'Esterre v. City of New York, 104 Fed. 605 C. C. A.; Board of Com'rs of Clark County (Kan.) v. Woodbury, 187 Fed. 412

a basis of estoppel when it is alleged by the public corporation that conditions precedent to the exercise of the power of issuing bonds as prescribed by statute have not been complied with but otherwise it is of no significance. If the power to issue the securities exists, their validity would not have been affected by the total absence of a recital of authority. An erroneous recital is inocuous.[25]

The recital in bonds of a repealed statute as authority for their issue will not invalidate them when it also appears from statements in them that the terms of an existing act under which they might be issued had been complied with.[26] So where two statutes are recited in the bonds as authority for their issue, the bondholder has a right to treat the bonds as if issued under authority of the act most favorable to him and is entitled to all of the remedies given thereunder, and if two are recited one conferring power and the other not the bonds will be held valid under the statute actually conveying a grant of power.[27]

An error in copying the title of the act into the bonds cannot affect in any way the validity of the obligation. The use of the word "organize" instead of "incorporate" in the bond, the latter being the one used in the statute was held by the Supreme Court of the United States as a trifling error having no effect whatever upon

C. C. A.; Board of Com'rs of Wilkes County v. Coler, 113 Fed. 725; Allen v. City of Davenport (Ia.), 77 N. W. 532; Starin v. Genoa, 23 N. Y. 439; Smith v. Clark County, 54 Mo. 58; Dawson County v. McNamar, 10 Nebr. 276; but see Board of Com'rs of Wilkes v. Call, 123 N. C. 308, 31 S. E. 481.

25—D'Esterre v. City of New York, et al., 104 Fed. 605.

26—Anderson County Com'rs v. Beals, 113 U. S. 227; see also Johnson County v. January, 94 U. S. 202; Gilson v. Dayton, 123 U. S. 59; Board of Com'rs of Wilkes County v. Coler, 113 Fed. 725 C. C. A. The same rule will apply where the act recited is unconstitutional. See Central Branch Union Pacific Ry. Co. v. Smith, 23 Kan. 745.

27—Knox County v. Ninth National Bank, 147 U. S. 91, affirming 37 Fed. 75; City of Evansville v. Dennett, 73 Fed. 966 C. C. A.; Smith v. County of Clark, 54 Mo. 58.

the validity of the bond,[28] and further illustrating the principles of this section, it has been held that the insertion of additional and unnecessary recitals, though to an act conferring no authority, would not affect the validity of the securities where the power to issue existed.[29]

§ 289. Recitals on matters of fact; purpose for which issued.

When the other conditions exist necessary to set in operation the doctrine of estoppel through recitals, the principle has been held by a long line of cases to apply to recitals in public securities concerning the purpose for which issued. Briefly stated, the rule is that a public corporation having the power to issue bonds and if when issued they recite that they were issued in conformity with the law and that all statutory or constitutional requirements have been duly complied with and further that the facts precedent exist, it cannot deny these obligations as against a bona fide holder who has purchased the bonds for value before maturity and defeat a recovery thereon by showing that the recitals in respect to purpose as well as to other matters are false even when in fact they were issued for an unauthorized and an illegal purpose.[30]

28—Atchison Board of Education v. De Kay, 148 U. S. 591.

29—City of Evansville v. Dennett, 161 U. S. 434; Fernald v. Town of Gilman, 123 Fed. 797.

30—Lewis v. Sherman County Com'rs, 1 McCrary 377; Guernsey v. Burlington Twp., 4 Dill. 372; National Life Ins. Co. v. Board of Edueation of City of Huron, 62 Fed. 778 C. C. A. A leading ease. Risley v. Village of Howell, 64 Fed. 453 C. C. A., reversing 57 Fed. 544; West Plains Twp., Meade County v. Sage, et al., 69 Fed. 943 C. C. A.; Wesson v. Saline County, 73 Fed. 917, 20 C. C. A. 227, over-ruling Post v. Pulaski County, 1 C. C. A. 405; Ashman v. Pulaski County, 73 Fed. 927 C. C. A.; Second Ward Savings Bank v. City of Huron, 80 Fed. 660; City of Huron v. Second Ward Savings Bank, 86 Fed. 272; Board of Com'rs of Haskell County v. National Life Ins. Co., 90 Fed. 228 C. C. A.; Clapp v. Otoe County, 104 Fed. 473; Clapp v. City of Marice, 111 Fed. 103; Perris Irr.

One of the earlier cases in the Supreme Court of the United States [31] held when the recitals stated that the bonds were "issued by the City of Ottawa by virtue of the charter of said city" and in accordance with a certain ordinance entitled "an ordinance to provide for a loan for municipal purposes" the defense that the bonds were issued as a donation and not for municipal purposes was unavailing in the face of these recitals. Following this decision will be found others [32] in the same court, the latest being one [33] where the court said after referring to various recitals in the bonds involved in the case which fairly imported a compliance in all respects with the statutes specified therein as conferring authority: "Whether the commissioners' court, which had statutory authority to issue such bonds as were necessary for courthouse and jail purposes, had previously made the requisite order therefor, was a matter peculiarly within the knowledge of its officers. They knew whether they had or had not directed bonds to be issued for such purposes. They knew, or ought to have known, whether the bonds ordered to be issued were in

Dist. v. Thompson, 116 Fed. 838; Town of Brewton v. Spira, 106 Ala. 229, 17 So. 606; State v. Wichita County, 62 Kan. 501, 64 Pac. 45; Thompson v. Village of Mecosta, 127 Mich. 528, 86 N. W. 1044; Common Council v. Schlich, 81 Mich. 405; Aberdeen v. Sykes, 59 Miss. 236; Jones v. City of Camden, 44 S. C. 319; Nolan County v. State, 83 Tex. 183; Mitchell County v. City National Bank (Tex.), 39 S. W. 628; Lynchburg v. Slaughter, 75 Va. 63; Town of Clifton Forge v. Alleghany Bank, 92 Va. 283, 23 S. E. 284; see also Northwestern Savings Bank v. Town of Centreville Station, 143 Fed. 81, and Secs. 262 and 263, ante.

31—Hackett v. Ottawa, 99 U. S. 86; see also City of Ottawa v. National Bank of Portsmouth, 105 U. S. 343 and City of Ottawa v. Carey, 108 U. S. 110. In the later case some of the bonds involved in the litigation were held invalid for the reason that the holder acquired them with full knowledge of their issue for an unlawful purpose.

32—Orleans v. Pratt, 99 U. S. 676; City of Ottawa v. National Bank of Portsmouth, 105 U. S. 343.

33—County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58.

excess of the amount authorized by the legislature. They had authority to determine whether the precedent conditions had been fully performed. When, therefore, the county, acting by the commissioners' court, did issue bonds, attested by the seal of the court and the signatures of its officers, and reciting that they were issued under the order of the court in virtue of the statute named, and were registered, such recitals fairly importing a compliance, in all substantial respects, with the statute giving authority to issue bonds,—a bona fide purchaser was entitled to accept the recitals as stating the truth, and the county cannot, as against such purchaser, allege the contrary. It will not be heard to say, that the bonds were in excess of the amount authorized or that they were not issued for the purpose contemplated by the statute referred to. These principles have become fairly established, as will be seen by an examination of the adjudged cases, some of which are cited in the margin."

A particular reference can also be made to a case in the United States Circuit Court of Appeals from Ohio which will be useful to the reader,[34] where bonds were issued for the ostensible purpose of extending the time of payment of certain indebtedness which the village of Kent was unable to pay at maturity as recited in the ordinance authorizing the issue. The defense was made in an action brought by Dana to recover upon certain interest coupons attached to the bonds that they were invalid because issued as a matter of fact for the purpose of enabling the Village of Kent to aid a glass factory which had been located in the village by making a donation to the same. The bonds contained the recital that "all acts, conditions and things, required to be done precedent to and in the issuing of said bonds have been properly done, happened and performed in regular and

34—Village of Kent v. Dana, 100 Fed. 56 C. C. A.

due form as required by law." In respect to the defense that the bonds were issued for an unlawful purpose, the court held that the village was estopped by its recitals and said on this point:

"It must be admitted that the scheme of issuing the bonds of the village for the purpose of promoting the glass factory was unlawful, and the device of exercising an unquestioned power of the council of the village to give its obligations the appearance of validity was in point of law a great abuse of authority. But it is evident enough that the electors of the village, as well as the members of the council, were involved in the conspiracy to gain an unlawful end, by professing an honest and lawful purpose, and using the means permitted for such purpose. It would be an utter perversion of justice if, by such an exploit, the result finally worked out should be that the public, who have confided in the good faith and integrity of the representations of those who sent the bonds into the market, should be made to pay the intended bonus to the glass factory, while the promoters of the scheme reap the benefits which were expected to result therefrom."

§ 290. Sufficiency of recitals.

The principle stated in the preceding section while not denied yet in some cases, the question has been raised of the sufficiency of recitals in respect to the purpose for which issued; whether the purchaser was not put upon inquiry through the character of the recital as being general,[35] or not referring sufficiently in detail, in the case of an issue of refunding bonds, for illustration, to the character of the indebtedness to be refunded,[36] or

35—Hackett v. City of Ottawa, 99 U. S. 86; Board of County Com'rs of Comanche County v. Lewis, 133 U. S. 198.

36—United States Trust Co. v. Village of Mineral Ridge, 104 Fed. 851 C. C. A. distinguishing Village of Kent v. Dana, 100 Fed. 56; Ashley v. Board of Sup'rs, 60 Fed. 55; Board of Com'rs of Kiowa County v. Howard, 83 Fed. 296; City of Jefferson v. Marshall

not referring in detail in case of an original issue of bonds to the particular purpose for which the bonds were issued.[37] On the first proposition, the authorities follow the case of Hackett v. Ottawa (cited above), where it will be noted the purpose of the issue was recited in the most general terms, namely "for municipal purposes." On the second proposition, a case from the Circuit Court of Appeals from Michigan, is illustrative of the rule followed,[38] where the City of Cadillac issued refunding bonds which recited that they were issued "by virtue of and in accordance with an ordinance duly passed by said city and approved by the mayor thereof on the 9th day of May, A. D. 1888, entitled 'an ordinance authorizing new bonds for the City of Cadillac to be issued in place of and to extend the time of payment of former bonds of said city falling due.'" The bonds contained further recitals importing full compliance with the law. The court held that the recitals in the new bonds as to the fact of "old bonds falling due" and that the new bonds were issued to take up the old would well lull an intending purchaser into security and that the city would be estopped by such recitals to set up as against a bona fide holder of the refunding bonds any defenses it might have made against the old bonds and also that the recital as

National Bank (Tex.), 46 S. W. 97; City of Tyler v. Tyler Bldg. & Loan Assoc'n (Tex.), 82 S. W. 1066; but see State v. School District No. 50 (N. D.), 120 N. W. 555, and Kechn v. City of Wooster, 13 Ohio Cir. Ct. Rep. 270.

37—Board of Education of City of Pierre v. McLean, 106 Fed. 817; City of Defiance v. Schmidt, 123 Fed. 1; School Dist. No. 11, Dakota County, Nebr. v. Chapman, 152 Fed. 887.

State v. School District, 34 Kan. 237. Where school district bonds refer to the act under which they are issued and the act states the purpose of the issue, it is immaterial that the bonds do not state the purpose of their issue as the statute says they must.

38—City of Cadillac v. Woonsocket Institute for Savings, 58 Fed. 935.

to the character of the indebtedness to be refunded was sufficiently specific.

In the case just cited, one of the points decided it will be noted was upon the validity of the new bonds as affected by the invalidity of the old. This subject has already been considered in a preceding section but it might not be improper to again state the rule as followed by the great weight of authority, namely: that a public corporation is estopped from defeating an action by a bona fide purchaser to enforce negotiable securities which recite that they were issued for the purpose of funding either outstanding judgments, bonds, warrants or floating debt of the corporation on the ground that the apparent debt they were issued to satisfy was invalid or fictitious.[39]

Upon the third proposition it is held that where authority is granted to issue bonds for a particular purpose the construction of bridges for example, that it is not necessary to recite in the bonds the particular bridge for the building of which the bonds were issued. As supporting this rule a case from the Supreme Court of the United States can be cited,[40] where under an act of the Legislature of Kansas, County Commissioners were author-

39—County of Jasper v. Ballou, 103 U. S. 745; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; City of Cadillac v. Woonsocket Inst. for Savings, 58 Fed. 935 C. C. A.; Board of Com'rs of Kiowa County v. Howard, 83 Fed. 296; Board of Com'rs of Seward County, Kan. v. Aetna Life Ins. Co., 90 Fed. 222; Geer v. Board of Com'rs of Ouray County, 97 Fed. 435 C. C. A.; Brattleboro Savings Bank v. Board of Trustees of Hardy Twp., 98 Fed. 524; Board of Com'rs of Barber County v. Society for Savings, 101 Fed. 767 C. C. A.; City of Pierre v. Dunscomb, 106 Fed. 611; Independent School District of Sioux City v. Rew, 111 Fed. 1 C. C. A.; Clapp v. Village of Marice City, 111 Fed. 103; Village of Bradford v. Cameron, 145 Fed. 21; City of Coolidge v. General Hospital Society of Connecticut (Kans.), 58 Pac. 562; Carver v. Board of Liquidation, 35 La. Ann. 261; State v. County of Dakota (Nebr.), 35 N. W. 225; Hills v. Peekskill Savings Bank, 101 N. Y. 490; see Secs. 206 and 207, ante.

40—Board of County Com'rs of Comanche County v. Lewis, 133 U. S. 198.

ized to issue bridge bonds. Pursuant to this act, bonds were issued which recited that they were issued in accordance with a vote of the majority of the qualified electors. They were endorsed with the official certificate of the auditor of the state, that they had been legally issued, that the signatures were genuine and that the bonds had been registered according to law. It was held that the recitals were sufficient to validate them in the hands of a bona fide holder, it not being necessary that they should specify the particular bridge for the building of which they were issued.

§ 291. Modifications of the rule.

The rules in respect to the doctrine of estoppel as applied to recitals of purpose contained in the bonds will not apply, so it has been held, in those cases where the bonds involved in the action contain no statement of the purpose for which they were issued, where the statutes confer authority to issue bonds for municipal purposes only, or where there are statutory or charter provisions to the effect that bonds issued must express on their face the purpose for which issued.[41] One of the leading cases is that of Barnett v. City of Denison,[42] this case involved the single question of whether a requirement of the charter that bonds issued by a municipal corporation should specify for what purpose they were issued is so far satisfied by a bond which purports on its face to be issued by virtue of an ordinance the date of which was given but not its title or contents, as to cut off defenses which otherwise might be made. The court held the bonds issued void, having been issued in this case for a purpose not named in the ordinance but as a donation to a Refrigerator Car Company which had agreed to erect

41—Hopper v. City of Covington, 118 U. S. 148; but see State v. School Dist. 34 Kans. 237; see cases cited under Sec. 289, ante and Sec. 296, post.

42—145 U. S. 135.

a certain plant in the city of Denison in consideration of aid to be extended. The court said: "It is certainly a reasonable requirement that the bonds issued shall express upon their face the purpose for which they were issued. In any event, it was a requirement of which the purchaser was bound to take notice, and if it appeared upon their face that they were issued for an illegal purpose they would be void. If they were issued without any purpose appearing at all upon their face, the purchaser took the risk of their being issued for an illegal purpose, and, if that proved to be the case, they are as void in his hands as if he had received them with express notice of their illegality. Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance, and the city would be estopped to show the fact to be otherwise. But where the statute requires such purpose to be stated upon the face of the bonds it is no answer to say that the ordinance authorized them for a legal purpose, if in fact they were issued without consideration, and for a different purpose."[43] The rule clearly also will not apply where the purpose as contained in the recitals is clearly unlawful. This subject has been considered and cases cited in a preceding section.[44]

The point has also been raised that when a purchaser is charged with constructive notice of public records if these disclose the illegality of the bonds in respect to the purpose for which issued that the doctrine of estoppel by recitals will not apply although the bonds recite that they were issued for a lawful purpose. This contention is disposed of by the rule already stated in a previous

43—Citing in the above quotation, Hackett v. City of Ottawa, 99 U. S. 86 and City of Ottawa v. First National Bank of Portsmouth, 105 U. S. 342.

44—See Sec. 261, ante; White River Savings Bank of White River Junction v. City of Superior, 148 Fed. 1.

section, namely, that a purchaser is not charged with or the validity of the bonds will not be affected by facts disclosed in records which are not public nor which so far as the facts contained in them are concerned are not made by law a test or one of the tests of the validity of the bonds.[45]

§ 292. Estoppel by recitals, as applied to elections and matters pertaining thereto.

One of the conditions most frequently required by statutory or constitutional provisions as precedent to the issue of public securities is the securing of the assent of the people of the community to the issue through an election held either pursuant to general laws or the express provisions of the grant conferring the power. The doctrine of estoppel operates equally through recitals by public officials charged with this duty in respect to the performance of this condition as to others required by law. It may not be inappropriate to refer to a case in the Supreme Court of the United States, St. Joseph Township v Rogers,[46] which involved the validity of an election as well as other questions. The court by Mr. Justice Clifford said, on the question of estoppel by recitals: "Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the Legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the Legislature to grant such aid, they are invalid, even in the hands of innocent holders.

"Such a power frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications, but if it appears that the bonds issued show by their recitals that the power was exer-

45—See Sec. 255, et seq., ante. 46—16 Wall. 644.

cised in the manner required by the Legislature, and that the bonds were issued in conformity with those regulations, and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled." And after discussing the question of the validity of the election involved in the case, added: "Authorities to support that proposition are hardly necessary, but another answer may be given to the proposition quite as satisfactory as either of the others, which is, that the 14th section of the Act makes it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription, and inasmuch as he passed upon that question and subscribed for the stock and subsequently executed and delivered the bonds, it is clearly too late to question their validity where it appears, as in this case that they are in the hands of an innocent holder."

In accordance with the principle thus announced by the Supreme Court of the United States and followed by the Federal cases it can be stated with confidence that the doctrine of estoppel through recitals when made by the proper officials and under circumstances which permit it to operate will apply to and correct all defects and infirmities of an election including the various details involved.[47]

47—See also cases cited generally under the immediately following notes; Com'rs of Knox County v. Aspinwall, 21 How. 539.

Marshall County v. Schenck, 5 Wall. 772. The defense was urged in this case that the County Court instead of the Board of Supervisors as required by law ordered the election, all subsequent proceedings be-

The doctrine will apply to irregularities in the notice calling the election both as to the time when issued, its form and publication and by whom issued.[48]

It will also apply to those cases where the issue is primarily based, not upon an election but upon a petition signed by certain designated persons, tax payers or voters, and to the form of such petition, its filing and other matters of detail connected with its execution and presentation to some designated body upon which then rests the duty of issuing the bonds. Irregularities in re-

ing legally and duly performed. The doctrine of estoppel was held to apply. Kenicott v. Wayne County, 16 Wall. 452; St. Joseph Twp. v. Rogers, 16 Wall. 644; Marcy v. Oswego Twp., 92 U. S. 637; Rock Creek Twp. v. Strong, 96 U. S. 271; San Antonio v. Mehaffy, 96 U. S. 312; Menasha v. Hazzard, 102 U. S. 812; Harter v. Kernochan, 103 U. S. 562; Anderson County v. Beale, 113 U. S. 227; Commissioners of Comanche County v. Lewis, 133 U. S. 198; Graves v. County of Saline, 161 U. S. 370.

Provident Life & Trust Co. v. County of Mercer, 170 U. S. 593. By a long series of decisions such recitals are held conclusive in favor of a bona fide holder of bonds that precedent conditions prescribed by statute and subject to the determination of those county officers have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a bona fide holder be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to those in the bonds before us. State v. City Council of Montgomery, 74 Ala. 226; Deming v. Inhabitants of Houlton, 64 Me. 254.

State v. Saline County Court, 48 Mo. 390; but see Post v. County of Pulaski, 47 Fed. 282. A recital that the election authorizing the bonds was held pursuant to law, it was here held, did not estop the voters from denying the authority of the county commissioners to issue the bonds, affirmed, 49 Fed. 628. Writ of certiorari denied, 145 U. S. 650; Deland v. Platt County, 54 Fed. 823; Manhattan Co. v. City of Ironwood, 74 Fed. 535 C. C. A. Bonds held invalid where this fact is disclosed upon their face; Smith v. County of Clark, 54 Mo. 58.

48—County of Warren v. Marcy, 97 U. S. 96; Town of Roberts v. Bolles, 101 U. S. 119; County of Clay v. Society for Savings, 104 U. S. 579; Com'rs of Anderson County v. Beal, 113 U. S. 227; City of Clarksdale, Miss. v. Pacific Imp. Co., 81 Fed. 329 C. C. A.; Board of Sup'rs of Cumberland County v. Randolph (Va.), 16 S. E. 722.

spect to the required number of signatures will be covered as well.[49] The same principle equally applies when

49—Bissell v. City of Jeffersonville, 24 How. 287. Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended constituted three-fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Von Hostrup v. City of Madison, 1 Wall. 538; Town of Venice v. Murdock, 92 U. S. 494; see, however, Town of Scipio v. Wright, 101 U. S. 665, 25 L. Ed. 1037. Town of Genoa v. Woodruff, 92 U. S. 502; Livingston County v. Bank of Portsmouth, 128 U. S. 102; Bernard's Twp. v. Morrison, 133 U. S. 523; Andes Twp. v. Ely, 158 U. S. 313; Miller v. Berlin, 13 Blatchf. 245; Chilton v. Town of Grattan, 82 Fed. 873.

Fulton v. Town of Riverton, 42 Minn. 397. The second assignment raises the question as to whether these bonds and coupons are valid in the hands of innocent and bona fide purchasers for value, as against the defendant. * * * The claim is that in respect to the petition, the statute was not complied with; that the one actually presented, and upon which the town authorities proceeded, did not bear the requisite number of signatures; and that this irregularity or defect vitiates the bonds and coupons, wherever they may be found. It is obvious that by the legislative act referred to the township supervisors were created a tribunal to examine and determine whether or not the requisite two-thirds in number of the legal voters had affixed their signatures to the petition. It was their duty to ascertain and decide as to this condition precedent to a proper exercise of their authority to issue the bonds. * * * The board of supervisors did decide this question and thereupon issued the bonds. In each was a statement that it was issued in pursuance of the special act before cited, coupled with a recital and certificate that "all acts, conditions and things required to be done precedent to and in the issuing of said bonds have been properly done, happened and performed in regular and due form as required by law." This recital and certificate was a declaration of the decision made by a body or tribunal invested with power to pass upon the existence of the facts therein stated, and was conclusive in a suit brought against the township by a bona fide holder of the bonds. Coler v. Rhoda School Twp. (S. D.), 63 N. W. 158; see, however, the New York cases cited in Sec. 126, ante.

a petition is the basis for an election instead of a notice as required in some cases by law.[50]

The election and the canvass of votes if had or made in an irregular or even in an unlawful manner will not affect the validity of bonds in the hands of a bona fide purchaser where the recitals are to the effect that the election was properly conducted and that a required majority of the voters designated assented to the issue of the bonds.[51]

Proper recitals will also remedy other irregularities in

50—Town of Roberts v. Bolles, 101 U. S. 119; Township of Ninety-six v. Folsom, 30 C. C. A. 657; National Bank of Commerce v. Town of Granada, 41 Fed. 87.

Rondot v. Rogers Twp., 99 Fed. 202. The board under the special act was given authority to issue the bonds. It was its duty to order the special township meeting in accordance with the written application of the ten legal voters who were freeholders within such township. It was therefore within its implied authority to pass upon the validity of such application. Before issuing the bonds, it must decide that the proper vote had been taken at the township meeting, upon a notice properly issued. As it was the tribunal to decide these questions it necessarily had authority to recite its decision in the face of the bonds. These conclusions bring this cause within the numerous cases in which municipal corporations having statutory power to issue bonds have been held estopped to deny the validity of bonds issued by them, by the recitals of the issuing officer or body in the face of the bonds that all the steps preliminary to the lawful issue of the bonds have been complied with. See, however, New York cases cited in Sec. 126, ante.

51—City of Lexington v. Butler, 14 Wall. 282; Lynde v. The County, 16 Wall. 6; Kenicott v. Wayne County, 16 Wall. 452.

Humboldt Twp. v. Long, 92 U. S. 642. Law required thirty days notice for holding election it was held in less time, bonds were held valid. Town of Rock Creek v. Strong, 96 U. S. 271.

Block v. Com'rs of Bourbon County, 99 U. S. 686. The bonds in this case contained no recitals but the Board of Commissioners of Bourbon County in their records declared that on canvass of the returns the majority of the votes were in favor of the subscription. The bonds were thereafter issued, the court said: "He (the bona fide holder) was not bound to canvass the vote for himself, or to revise and correct a mistaken canvass, any more than he was bound to inquire into the qualifications of the electors. And if, relying upon the canvass of the board and the declared result, he accepted the obligations of the county, it would be a strange doctrine were we to hold that a second canvass, made many years afterwards, could reverse the

the election proceedings, as for illustration, the fact that the bonds as issued do not comply in all their technical details with the proposition as directly submitted to the voters for their action.[52]

first and annul the rights that had been acquired under it. There is no such law. For all legal purposes the result of an election is what it is declared to be by the authorized board of canvassers empowered to make the canvass at the time when the returns should be made, until their decision has been reversed by a superior power, and a reversal has no effect upon acts lawfully done prior to it.'' Town of Walnut v. Wade, 103 U. S. 683; County of Clay v. Society for Savings, 104 U. S. 579.

Independent School District v. Stone, 106 U. S. 183. Recitals held to be conclusive on the question of a lawful election but not to estop the district from showing that the indebtedness evidenced by the bonds exceeded the constitutional limit. Pana v. Bowler, 107 U. S. 529; Com'rs of Anderson County v. Beal, 113 U. S. 227; Town of Oregon v. Jennings, 119 U. S. 74.

Citizens Savings & Loan Assoc'n v. County of Perry, 156 U. S. 692. The number of such voters who, at the time of the election, lived in the county was a fact dehors any official record of votes, and was to be ascertained by the county court or county judge upon examination. It did not depend wholly upon an official record, speaking as of the date of the election. Under any reasonable interpretation of the act, the county court was invested with authority to determine whether the majority of voters living in the county voted in favor of the subscription imposed. If the purchaser had examined the orders of the county court, he would have ascertained that those orders several times expressly stated that all the conditions prescribed by the county and upon which the people voted had been fully complied with. It would be rank injustice to permit the county, after the lapse of so many years, to say that the majority of the voters living in the county at the time of election—a matter not determinable by any public record—did not vote for the subscription. Huidekoper v. Buchanan County, 3 Dill. 175; Westerman v. Cape Girardeau County, 5 Dill. 112; Lewis v. Com'rs of Comanche County, 35 Fed. 343; National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 62 Fed. 778; McLean v. Valley County (Nebr.), 74 Fed. 389.

Brown v. Ingalls Twp., 86 Fed. 261 C. C. A. The failure of county commissioners to canvass the vote will not avail a township as a defense to bonds in the hands of a bona fide holder. City of South St. Paul v. Lamprecht Bros., 31 C. C. A. 585; Brooklyn Trust Co. v. Hebron, 51 Com. 22; Gibbs v. School District No. 10 (Mich.), 50 N. W. 294; State v. Sanderson, 54 Mo. 203; but see Harshman v. Bates County, 92 U. S. 569; Deland v. Platt County, 54 Fed. 823.

52—Meyer v. City of Muscatine,

§ 293. The effect of no election.

Where the recitals are to the effect that an election was duly held as authorized by and in the manner prescribed by law but, in fact, no election was held, the courts are at variance as to the effect of the actual facts upon the validity of the bonds issued. The Federal authorities apparently present no case bearing directly upon this point although the language used in a number of cases is such as to indicate that a recital if made in the proper form and by duly authorized officers will be as conclusive upon this question of fact as upon other conditions which also involve questions of fact, in other words, the doctrine of estoppel by recitals fully applies in the Federal Courts to a wrongful recital of an election held, equally as to other conditions. In support of this statement, attention will be called to the language used in a number of Supreme Court decisions: The Knox County v. Aspinwall case,[53] has already been referred to but this involved merely the question of whether an election was properly held. In a subsequent case, Town of Coloma v. Eaves,[54] the authority to make the subscription was made by statute to depend upon the result of the submission of the question to a popular vote and its approval by majority of legal votes cast but whether the statute in these particulars was complied with was left to the decision of certain persons sustaining official relations with the municipality in whose behalf the pro-

1 Wall. 384; Board of Com'rs of Cowley County, Kans. v. Heed, 101 Fed. 768 C. C. A.; Clapp v. Otoe County, 104 Fed. 473 C. C. A.; City of Kearney v. Woodruff, 115 Fed. 90; City of Defiance v. Schmidt, 123 Fed. 1, affirming 117 Fed. 702.

53—21 How. 542.

See also Grand Chute v. Winegar, 15 Wall. 355. The defense here also attempted to show that no vote was ever taken and the record showed that no election had been held as required by the statute which gave the town power to issue the bonds. The recitals stated that the bonds were issued "in pursuance of the aforementioned legislative act" and these were held conclusive of the facts.

54—92 U. S. 484.

posed subscription was to be made. The court said: "When legislative authority has been given to a municipality or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been made in the bonds issued by them and held by a bona fide purchaser is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal."

The language of the court in the case of St. Joseph v. Rogers Township,[55] and already quoted in the preceding section will be noted, namely, "the fourteenth section of the Act makes it the duty of the supervisor who executed the bonds to determine the question whether an election was held."

In a later case[56] it was said by Mr. Justice Harlan: "Had the statutes of Ohio conferred upon a township in Delaware County, authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital, by its proper officers, such as is found in the bonds in suit would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for, in such case it would be clear that the law had referred to the officers of the township, not only the ascertainment but the decision of the facts involved in the mode of exercising the power granted. But, in this case, as we have seen, power in the township to subscribe did not come into existence,

55—16 Wall. 644.

56—Northern National Bank of Toledo v. Porter Twp., 110 U. S. 608.

except where the county commissioners had not been duly authorized to make a subscription."

A later case,[57] and the last one to be referred to here in detail since the decisions in the Supreme Court of the United States follow these early cases, the bonds recited the enabling act and further that they had been issued in pursuance of a vote of the majority of the qualified electors of the County of Douglas at a special election regularly called and held. The court said in respect to the effect of these recitals: "They are untrue if the board had not followed the directions of the law and if there had not been a popular vote at an election approving the issue of those bonds, the truth or falsity of the assertion cannot be inquired after here, for as we have said, the recitals are practically an annunciation of the board that all the steps required by law had been taken. Behind such a recital as we have seen, a bona fide holder for value is not bound to look except for legislative authority."

§ 294. The doctrine of no election in the state courts.

There are some decisions to be found in the state courts to the effect that where constitutional or statutory provisions require an election as a precedent condition to the issue of bonds that this election is a jurisdictional fact, that is, that the question of the existence of power is dependent upon the holding of the election as required. This condition is held to be absolute and a failure to hold an election will not be considered as a mere irregularity in the exercise of a given power but as that act of the public corporation which confers authority. If no election is held, therefore, the bonds are invalid and no recitals by public officials, even those upon whom by law the duty of making recitals is cast, will estop the public

57—Commissioners of Douglas County v. Bolles, 94 U. S. 104.

corporation from asserting the non-existence of the jurisdictional fact.[58] The New York cases have already been referred to under a preceding section.[59]

§ 295. Bonds issued in excess of limit; effect of recitals.

In preceding sections, the attention of the reader was called to the existence of statutory and constitutional provisions prohibiting the issue of public securities or the incurring of indebtedness by public corporations in excess of a designated amount or a certain percentage of the taxable property. In some cases securities have been issued in excess of these statutory and constitutional limitations, and their validity contested. The bonds have contained recitals to the effect that they were either within or not in excess of the legal limit and in others no recitals of this character were made. Upon an examination of these cases it will be found that the courts have made their decision in a particular case to depend wholly or in part upon the questions of an absence of recitals; the recitals if made whether express or general; the prohibition, whether statutory or constitutional; whether the holder was charged by law with a knowledge of the facts contained in certain designated records; and in some instances where recitals were made whether the officers making the same were charged by law with the duty of determining whether the issue was within or without the legal limit.

Recitals to operate as an estoppel must be made by those public officials charged by law directly or indirectly with this duty.[60]

58—Spitzer v. Village of Blanchard (Mich.), 46 N. W. 400; Steins v. Franklin County, 48 Mo. 167; Carpenter v. Town of Lathrop, 51 Mo. 483; Veeder v. Town of Lima, 19 Wis. 280.

59—See Sec. 126, ante.

60—Bank v. Bergen County, 115 U. S. 384; Daviess County v. Dickinson, 117 U. S. 657; Chisholm v. Montgomery, 2 Woods 384; Hudson v. Winslow, 35 N. J. L. 437; Cagwin v. Hancock, 84 N. Y. 583; Broadway Savings Inst. v. Town of

§ 296. No recitals.

The principles to be applied in those cases where no recitals are found in the bonds are easy to determine. It is the universal rule that in the absence of recitals a purchaser of public securities, though he may have acquired them in good faith for value and before maturity, is bound to ascertain not only the existence of authority for the issue but further of all the facts and conditions necessary to and attendant upon their legality.[61]

§ 297. General recitals.

Among the cases will be found those holding that a general recital to the effect that the securities were issued in conformity to law or in pursuance of or by virtue of some designated legal authority, will operate as an estoppel against the public corporation issuing the bonds to set up the defense of an over issue.[62]

Pelham, 83 Hun. (N. Y.) 96; see, also, the many cases cited under Sec. 312, post, on authority to make recitals.

61—County of Dixon v. Field, 111 U. S. 83.

Merchants National Bank v. Bergen County, 115 U. S. 384. Any further issue was beyond its authority. Unless, therefore, there is something in connection with the issue to estop the county from contesting their validity they can in no manner bind the county. In these bonds there are no recitals. The bank, in taking them, was bound to ascertain whether or not they were authorized. Had it examined the register of bonds issued to take up the matured bonds, which was a public record of the county and open to its inspecton, it would have learned that the bonds it received were not of the number so authorized. County of Lake v. Graham, 130 U. S. 674; Geer v. School District No. 11, 38 C. C. A. 392; see, also, on the general subject of no recitals, Sec. 296, ante.

62—Marcy v. Twp. of Oswego, 92 U. S. 637; Humboldt Twp. v. Long, 92 U. S. 642; Wilson v. Salamanca, 99 U. S. 499.

Sherman County v. Simons, 109 U. S. 1093. In this case the records of the county commissioners showed that they had estimated the debt of the county at such an amount as to bring the proposed issue within the statutory limit. The court then said: " According to the repeated decisions of this court being such, he (a bona fide holder) was not bound to go behind the law in the recital of the bonds to inquire into the amount of the county indebted-

As typical of this line of authorities, the case of Humboldt Twp. v. Long,[63] can be cited, where the bonds contained recitals that they were issued "in pursuance of and in accordance with an Act of the Legislature." The statute prescribed that no bonds should be issued on which the interest required an annual levy in excess of one per cent of the value of taxable property of the public corporation issuing them. The objection was made to the validity of the bonds that the limitation of the indebtedness had been exceeded in the issue. This was a matter which easily could have been ascertained by reference to the assessment rolls both in the town and the county, but the court said in its opinion to which Mr. Justice Miller, dissented: "The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners, when they were inquiring what the value of the taxable property of the township was; but the bonds are not invalid in the hands of a bona fide holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township as against those who issue the bonds, it cannot set up against a bona fide holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870."

In another case decided at the same term of court, Marcy v. Town of Oswego,[64] the court held that where the bonds recited that they were executed and issued

ness." County of Dallas v. McKenzie, 110 U. S. 686; New Providence v. Halsey, 117 U. S. 336; Town of Oregon v. Jennings, 119 U. S. 74.

City of Gladstone v. Throop, 71 Fed. 341. On the question of illegality because in excess of the debt limit the presumption is in favor of the validity of the bonds. City of Huron v. Second Ward Savings Bank, 86 Fed. 272; Board of Com'rs of Lake County v. Sutliff, 38 C. C. A. 167; Coler v. Board of County Com'rs of Santa Fe County (N. Mex.), 27 Pac. 619.

63—92 U. S. 642.

64—92 U. S. 637.

"by virtue of and in accordance with," etc., it could not be shown as a defense to a recovery that at the time of voting and issuing the bonds, the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing of the whole series of bonds. The statute authorizing the issue provided that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest. The court held that all prerequisite facts to the issue and execution of the bonds being by the statute referred to the Board of County Commissioners the plaintiff was not bound when he purchased to look beyond the legislative act and the recitals in the bonds, citing and approving Town of Coloma v. Eaves, 92 U. S. 484.

The later cases, however, modified by the exceptions to be suggested in this and the following sections hold that as to an excessive issue a general recital is to be regarded more as a formality and a statement of a legal conclusion, especially when referring to constitutional provisions, than as a recital which will operate as an estoppel against an issue illegal because excessive.[65]

65—Buchanan v. Litchfield, 102 U. S. 278. While this case is authority for the rule stated in the text, yet it is also authority for the proposition stated in the following quotation, for though the court held the bonds void in the hands of a bona fide holder because not sufficiently explicit as to recitals, it was also said in the opinion: "Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement, as to the extent of its existing indebtedness."

Independent School District v. Stone, 106 U. S. 76. It was here held that recitals must be clear and unambiguous in order to carry protection to the bona fide holder. They were not held sufficient in this

§ 298. Express recitals.

On the contrary, however, the authorities hold almost without dissent, referring to both constitutional and statutory provisions, that express recitals in securities, that the total amount of the issue does not exceed or is within the legal limit of indebtedness, will estop the corporation as against a bona fide holder for value from disputing the truth of the recital, when taken in connection with the fact that the bonds do not show upon their face either the total indebtedness or the total of the issue in question, and when taken in connection with the further fact that the purchaser is not charged by law with a knowledge of facts contained in some public record the existence of which is made one of the tests of the validity of the bonds.[66]

case to estop the defense of an issuance in excess of the constitutional limitation of indebtedness although the court intimated that had the recitals been to the effect that the bonds were issued "in pursuance of" or "by virtue of" the act granting authority that such might have been held to import a full compliance with precedent conditions. Board of Com'rs of Lake County v. Graham, 130 U. S. 674; Hedges v. County of Dixon, 150 U. S. 187; Sutliff v. Lake County, 47 Fed. 106, But see id. 97 Fed. 270; Francis v. County of Howard, 4 C. C. A. 460; Shaw v. Independent School District of Riverside, 62 Fed. 911; Geer v. School District No. 11, 38 C. C. A. 392; Prickett v. City of Marceline, 65 Fed. 469; Springfield Safe Deposit & Trust Co. v. City of Attica, 85 Fed. 277 C. C. A.

66—Marcy v. Twp. of Oswego, 92 U. S. 637; Twp. of Humboldt v. Long, 92 U. S. 642; Wilson v. Town of Salamanca, 99 U. S. 499; County of Sherman v. Simons, 109 U. S. 735; County of Dallas v. McKenzie, 110 U. S. 686; Town of New Providence v. Halsey, 117 U. S. 282; Oregon v. Jennings, 119 U. S. 74; Board of County Com'rs of Chaffee County v. Potter, 142 U. S. 355; Sutliff v. Board of Com'rs of Lake County (Colo.), 147 U. S. 230; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, affirming 80 Fed. 692; County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58; Potter v. Chaffee County, 33 Fed. 614; Dudley v. Board of Com'rs of Lake County, 26 C. C. A. 82; Rathbone v. Board of Com'rs of Kiowa County, 83 Fed. 125 C. C. A. Board of Com'rs of Meade County v. Aetna Life Ins. Co., C. C. A. 90 Fed. 237; Board of Com'rs of Lake County v. Sutliff, 97 Fed. 270; Citizens Savings Bank v. City of Newburyport, 169 Fed. 766 C. C.

§ 299. Limitation; whether statutory or constitutional.

Some of the cases make a distinction between a limitation which exists by virtue of some constitutional provision and one found in a statute, either a general or a special law and under which the authority to issue the bonds in question is claimed. The tendency being to hold that a constitutional provision is more absolute in its character, that it is subject to a greater extent to the rule of strict construction and consequently that irregularities in the issue of securities will make them invalid which might not affect their validity when statutory provisions are to be applied. The bona fide purchaser of public securities, in other words, being held to a less degree of care when the validity of his bonds are affected by statutory provisions than when subject to constitutional limitations.[67]

A.; State v. Board of Com'rs of Wichita County (Kan.), 64 Pac. 45.

But see Fairfield v. Rural Independent School District of Allison, 111 Fed. 453; Corbet v. Town of Rocksbury (Minn.), 103 N. W. 11.

Evans v. McFarland (Mo.), 85 S. W. 873. The recital in a municipal bond "that all acts, conditions and things required by the Constitution and laws of the state to be done precedent to and in the issuance of this bond have been properly done, in regular and due form and time, as required by law, and that the total indebtedness of the city, including this bond, does not exceed the constitutional or statutory limitations," is a mere self-serving narration, and estops no one to investigate its validity.

67—County of Lake v. Graham, 130 U. S. 674; Hedges v. County of Dixon, 150 U. S. 182.

But see National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778. While here the question did not arise of an issue in excess of constitutional limitation the court said, referring to the defense urged that the Board of Education in issuing the bonds had failed to comply with a constitutional requirement that at or before the time of incurring the indebtedness provision should be made for the collection of an annual tax to pay interest and principal and which had not been done. "It is, however, insisted that there is something in a constitutional provision so sacred that no certificate of compliance with its terms can estop the corporation that makes it from proving its falsity." And then after reviewing a number of cases in the Supreme Court of the United States the court further added: "Upon reason and authority therefore our conclusion is that an es-

§ 300. Examination of records.

Recitals in bonds further will not estop the maker from setting up the falsity of their statements when by law the purchaser is referred to and charged with an investigation and knowledge of certain designated public records, statements of indebtedness or assessment rolls, for illustration. This principle obtains even when the recitals contain a statement that the essential facts in respect to the public indebtedness have been determined by the public officials and that the bonds issued are within the debt limit. Such an official determination cannot relieve the purchaser from his own personal investigation.[68]

The leading case on the subject of the necessity for an examination of public records is that of County of Dixon v. Marshall Field.[69] The action was brought in the court below by the defendant in error to recover the amount of 100 interest coupons of $50 each, cut from bonds issued by the county of Dixon, Neb. The trial there resulted in a verdict and a judgment for $6,000 with costs which was reversed by the Supreme Court of the United States on writ of error to that court. The bonds were a part of a series, eighty-seven in number, each for $1,000, which contained recitals to the effect that they were issued pursuant to Chapter 35 of the General Statutes of Nebraska with its Amendments and the Constitution of that state. Each bond also contained a certificate of

toppel may arise in a proper case upon a recital that an act has been performed which was required by a constitution as well as upon the recitals of the performance of an act required by statute.'' Chilton v Grattan, 82 Fed. 873.

68—Dixon County v. Field, 111 U. S. 83; County of Lake v. Graham, 130 U. S. 674; Francis v. Howard County, 54 Fed. 487; Quaker City National Bank v. Nolan County, 59 Fed. 660; Geer v. School District No. 11, 38 C. C. A. 392; Fairfield v. Rural Independent School District of Allison, 111 Fed. 453; St. Lawrence Twp. v. Furman, 171 Fed. 400 C. C. A.; Corbet v. Town of Rocksbury (Minn.), 103 N. W. 11; Citizens Bank v. City of Terrell, 78 Tex. 456, 14 S. W. 1003; see, also, Sec. 255, et seq., ante.

69—111 U. S. 83.

the county clerk to the effect that the question of issuing said bonds had been duly submitted to the people of the county and that the total issue aggregated $87,000; each bond was endorsed with the certificate of the secretary and auditor of Nebraska to the effect that it was issued pursuant to law and the further certificate of the auditor that upon the basis of data filed in his office it appeared that the bond had been regularly and legally issued by said county of Dixon and registered in his office as required by law. From the books of public record of said county it appeared that the valuation of the taxable property upon which to determine the extent of the issue was $587,331.00, and no more. The constitutional limitation in effect at the time of the issue prohibited a donation to railroads by various named civil subdivisions of not to exceed ten per cent in the aggregate of their assessed valuation, with a further provision that this might be increased by two-thirds vote to an additional five per cent. The defense was insisted upon at the trial that the bonds were issued without authority of law and were void, while the plaintiff contended that the county was estopped by its recitals in the bonds from setting up that defense. The Supreme Court of the United States construed the constitutional provision relative to an increase of five per cent in addition to the ten per cent of indebtedness as requiring express statutory authority of the legislature, which in this case had not been given. The bonds therefore on their face disclosed that the aggregate issue was in excess of the constitutional limit. The court said in part in its opinion by Mr. Justice Matthews: "Recurring then to a consideration of the recital in the bonds, we assume, for the purposes of this argument, that they are in legal effect equivalent to a representation, or warranty, or certificate, on the part of the county officers, that everything necessary by law to be done has been done, and every fact necessary, by law, to

have existed, did exist, to make the bonds lawful and binding.

"Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself.

"And the estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains, that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. * * * So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact,

as shown by the record, and not upon its ascertainment and determination by anyone; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument. * * *

"In the present case there was no power at all conferred to issue bonds, in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors, the amount of the bonds to be issued, and the amount of the assessed value of the property for the purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but ex vi termini, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic and

proves itself by inspection and concludes all determinations that contradict it."

§ 301. Board of County Commissioners of Chaffee County v. Potter.

In this case,[70] the question of the validity of bonds issued by Chaffee county, Colorado, for the purpose of funding its floating indebtedness was the issue before the court. The county set up as a defense, with others, that the bonds and each of them were issued in violation of Sec. 6, Art. 11, of the Constitution of the State of Colorado, and it was urged in favor of their validity that the county was estopped by the recitals contained in the bonds which was to the effect "that the total amount of this issue does not exceed the limit prescribed by the Constitution of the State of Colorado." The bonds further did not show upon their face how many were issued or the amount. The county was held to be estopped by this recital. This case has already been referred to and discussed under a previous section and a lengthy quotation from the opinion given there.[71]

It is sufficient for the present section to state that in substance the court held that where county bonds recited that all the requirements of the law by which their issue had been authorized had been fully complied with, that a vote of a majority of the qualified electors was given in their favor and that the whole amount of the issue did not exceed the limit of indebtedness prescribed by the constitution, taken in connection with the fact that the bonds themselves afforded no data from which the total amount of the issue was ascertainable, that as against a bona fide holder the county would be estopped by the recitals from questioning the validity of the recitals on the ground that the percentage of the indebted-

70—142 U. S. 355. 71—See Sec. 258, ante.

ness allowed by the Constitution was exceeded. Reference was made to the necessity for an examination of the public records by the purchaser of the bonds relative to the assessed valuation, and the court said on this point:

"In our opinion, these two features are of vital importance in distinguishing this case from Lake County v. Graham, and Dixon County v. Field, and are sufficient to operate as an estoppel against the county. Of course, the purchaser of bonds in open market was bound to take notice of the constitutional limitation on the county with respect to indebtedness which it might incur. But when, upon the face of the bonds, there was an express recital that that limitation had not been passed and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the Lake County case and in Dixon County v. Field, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment-roll whether the county had exceeded its power, under the Constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment-roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the Constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at any one time, as that is not the usual course of business of this kind. The test is, What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false,

of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in Lake County v. Graham, and Dixon County v. Field. But that is not this case. Here by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the Constitution of the State and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue."

§ 302. Board of Commissioners of Gunnison County v. E. H. Rollins & Sons.

The rule laid down in the Chaffee County v. Potter case was followed in Board of Commissioners of Gunnison County v. E. H. Rollins & Sons,[72] where bonds were issued containing recitals that "all the requirements of the law have been fully complied with by the proper officials in the issuing of this bond." And that the total amount of the issue did not "exceed the limit prescribed by the Constitution of the State of Colorado, "and that such issue had been authorized by a vote of the majority

72—173 U. S. 255.

of the duly qualified electors of the county voting on the question at a general election duly held in the county on the day named.

It was again held that recitals of the character noted would estop the county from asserting against a bona fide holder for value that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution. The court said that as under the law the county commissioners were authorized to determine whether the proposed issue of bonds did in fact exceed the limit prescribed by the constitution and the statute, "The recital in the bonds to the effect that such determination had been made and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true."

To the contrary, the courts hold when by law a purchaser is not charged with any such investigation or duty, he can then rely upon the recitals as contained in the bonds and the maker will be estopped to assert their falsity.[73] It has also been held that where public records, the facts contained in which are made one of the tests of the validity of the bonds, have been negligently, inaccurately or insufficiently kept and do not show the details necessary for a determination of the essential data from which the purchaser can compute or ascertain whether the bonds in question exceed the legal debt limit that he can then rely upon the recitals contained in the bonds in respect to the facts which should otherwise have appeared in that public record.[74]

73—City of Evansville v. Dennett, 161 U. S. 134; Waite v. City of Santa Cruz, 184 U. S. 302; County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58; see, also, cases cited in Sec. 255, et seq., ante.

74—Mathias v. Runnells County, 66 Fed. 494; Board of Com'rs of Lake County v. Sutliff, 97 Fed. 270; Citizens Savings Bank v. City of Newburyport, 169 Fed., 766 C. C. A.; see Sec. 255, et seq., ante.

The rule in respect to an examination of the public records is also modified in some cases where it has been held that if the records required to be examined are peculiarly within the knowledge and control of the public officials issuing the bonds that the purchaser is not charged with a knowledge of their contents and that the recitals of public officials concerning the facts contained in them will operate as an estoppel in favor of the bona fide holder.[75]

§ 303. When officials charged with duty of determining debt limit.

When by law the public officials are charged with the duty of determining the debt limit of the corporation issuing the bonds and their determination in this respect that the total debt, including the bonds in question, is not in excess of the debt limit, their recital is conclusive and the purchaser is not bound to look further to ascertain if authority exists for the issue of the securities. This rule holds true although this duty may not be especially cast upon the public officials, if it appears from a construction of the legal authority as a whole that this is one of their duties in connection with the issue of bonds.[76]

75—New Providence v. Halsey, 119 U. S. 336; Mutual Benefit Life Ins. Co. v. City of Elizabeth, 42 N. J. L. 235; Cotton v. New Providence, 47 N. J. L. 401.

76—Sherman County v. Simons, 109 U. S. 735; New Providence v. Halsey, 117 U. S. 336; Commissioners of Chaffee County v. Potter, 142 U. S. 355; Chilton v. Town of Grattan, 82 Fed. 873.

Board of Com'rs of Lake County v. Sutliff, 97 Fed. 270 C. C. A. Bonds recited they were issued "under and by virtue of and in compliance with" a certain named act and "that the provisions of said act have been fully complied with by the proper officials in the issue of these bonds," the court held that the county was estopped by these recitals from proving as a defense to them that they were in excess of the constitutional debt limitation; that such recital "was necessarily a certificate that they had been issued in compliance with, and not in violation of, the constitutional as well as statutory limitation."

Dudley v. Board, 80 Fed. 672.

Illustrative of this principle, the decision of the Supreme Court of the United States in Sherman County v. Simons [77] can be quoted: "But if it be conceded that a purchaser of the bonds was required to inspect the records of the county to ascertain the amount of its indebtedness, and whether there had been an overissue of bonds, it appears from the findings of fact that the records of the commissioners contained an estimate of the indebtedness of the county, made by them for the express purpose of fixing the amount of bonds to be issued, and in pursuance of which they were issued, which showed that there was no overissue. This was a decision by the very officers whose duty it was, under the law, to fix the amount of bonds which could be lawfully issued. A purchaser of bonds was not required to make further inquiry, and if the finding of the commissioner was untrue, he could not be affected by its falsity."

§ 304. Validity of issue in excess of legal authority.

A public corporation may possess the legal authority to issue negotiable securities up to and including a des-

A certificate or recital, by the officers authorized to determine the question and to make the recital, that a constitutional limitation has not been exceeded, or that a constitutional condition has been fulfilled, raises an estoppel in favor of a bona fide purchaser as conclusive as a recital or certificate of like effect relative to a statutory limitation or requirement. This rule was announced by this court, in 1894 in National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 62 Fed. 778, and it was affirmed by the Supreme Court, upon a review of the authorities, in 1891, in Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255. (Citing other cases.) The following authorities expressly hold that such recitals as those contained in these bonds—recitals which import an issue in accordance with the terms of the law or Constitution which contains the limitation—estop the municipality from defeating the bonds on the ground that its debt exceeded the prescribed limitation. (Further citing many authorities.) Brattleboro Savings Bank v. Board of Trustees of Hardy Twp. 98 Fed. 524, affirmed 106 Fed. 986; State v. Board of Com'rs of Wichita County (Kan.), 64 Pac. 45.

77—109 U. S. 735.

ignated or ascertainable amount. There may be also, usually the case, constitutional or statutory provisions prohibiting the incurring of indebtedness in excess of this sum or the limit may be fixed in the special authority conferring the power to issue. The corporation, however, issues its negotiable securities in excess of the sum thus legally authorized and the question of the validity of such an excess then arises. There are found in substance three lines of decisions; the one holding that the bonds issued in excess of the amount authorized are void in toto even in the hands of bona fide purchasers; another holding that where a public corporation has issued securities to an amount in excess of its legal authority, that if the bonds in excess of the limitation can be separated from those within the limit the former will be held void and the latter valid. Other decisions hold in substance that where a public corporation has issued securities to an amount in excess of its constitutional or legislative authority, all of which were issued at the same time, each bond is valid to the extent of its proportionate share of the indebtedness falling within the prohibited limit.

§ 305. When excess securities held good.

There are some decisions, to the effect that the validity of the bonds will be sustained in the hands of bona fide purchasers even when in excess of a prohibited amount. These decisions are based upon the doctrine of estoppel by recitals, a full consideration of which was given in preceding sections, and the reader is referred to them for a citation of authorities.[78]

78—Chaffee County v. Potter, 142 U. S. 355; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255; County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58; Rathbone v. Board of Com'rs, 83 Fed. 125 C. C. A.

But, see Hedges v. Dixon County, 150 U. S. 187, where it was held that the whole issue was void. "From the facts of this case it

Although the rule has already been stated and discussed in detail, in view of its importance, it will not be considered inappropriate to concisely re-state it—in the language of Judge Sanborn in the City of Huron case:[79] "Recitals in municipal bonds, by the representative body that issues them, to the effect that all the requirements of the laws with reference to their issue have been complied with, * * * may constitute an estoppel in favor of a bona fide purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of bonds, if that fact does not appear from the bonds the purchaser buys, the Constitution and statutes under which they are issued, and the public records referred to therein."

§ 306. Excess securities held void in toto.

A number of cases will be found holding that bonds issued in excess of an amount authorized are void in toto even in the hands of bona fide purchasers.[80]

will be noted that the broad statement that no estoppel can arise by reason of any recital contained in the bonds in respect to a constitutional limitation is to be applied to the circumstances arising in that particular case and following the rule announced by the Supreme Court of the United States that general expressions in every opinion are to be taken in connection with the case in which those expressions are used." Millerstown v. Frederick, 114 Pa. St. 435.

79—National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 62 Fed. 778 C. C. A.

80—Daviess County v. Dickinson, 117 U. S. 657; Nesbitt v. Independent District of Riverside, 144 U. S. 610; Prickett v. City of Marceline, 65 Fed. 469; Rathbone v. Board of Com'rs of Kiowa County, 73 Fed. 395, reversed in 83 Fed. 125; Board of Com'rs of Stanley County, 24 Colo. 1.

The Iowa decisions are uniform in holding to this rule. See the cases commencing with Carter v. Dubuque, 35 Ia. 416; Allen v. County of Davenport, 107 Ia. 90; Anderson v. Orient Fire Ins. Co. (Ia.), 55 N. W. 348, and ending with Reynolds v. Lyon County (Ia.), 96 N. W. 1096. Hoffman v. Gallatin County, 18 Mont. 24; Reineman v. Covington R. R. Co.,

An application of this rule in an indirect way will be found where a determination of the legal debt of a public corporation is the question at issue. It is held that in computing outstanding indebtedness of a public corporation for the purpose of determining whether a constitutional or statutory limit has been or will be exceeded, that securities previously issued and invalid because of their being in excess of the prohibited limit or for other reasons are not to be included in such computation, not constituting a valid or legal obligation of the corporation issuing them. The fact that these bonds may be subsequently paid will have no bearing upon the question of validity as affected by the question of excessive issue.[81]

§ 307. Issue held valid in part.

Another line of authorities hold that where a proposed debt or issue of securities in the aggregate is in excess of a prohibited limitation and arises upon a contract which is divisible and separable or consists of an issue of securities delivered from time to time and part within

7 Nebr. 310; Sutton County v. Babcock, 24 Nebr. 640.

Millerstown v. Frederick, 114 Pa. St. 435. The doctrine of estoppel by recitals was held to apply to bona fide holders. Fritsch v. County Com'rs, 15 Utah 83; Thornburgh v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635. It was held in this case that a contract, the basis of the indebtedness between a county and a railway company is entire. Bonds issued cannot be sealed down to an amount which the county might legally have contracted to pay but in so far as it was a severable contract, bonds issued within the limit would be enforced.

See, also, Gibson v. Knapp, 41 N. Y. S. 446. Where it was held that the test of the validity of bonds in respect to excess is whether they were valid when sold. The fact that at a subsequent time to their issue the bonds may be in excess does not affect the rivalidity; and Childs v. City of Anacortes, 5 Wash. St. 452, following the rule stated in Gibson v. Knapp.

81—Ashuelot Nat. Bank v. Lyon County, 81 Fed. 127, 87 Fed. 137; Keene Five-Cent Savings Bank v. Lyon County, 90 Fed. 523, affirmed 100 Fed. 337; German Ins. Co. v. City of Manning, (Ia.), 95 Fed. 597.

and in part without the prohibited limit, that the validity of those securities within the limit will be sustained and the rest held void.[82] In Daviess County v. Dickinson,[83] where bonds were issued at different times but in the aggregate in excess of the amount authorized, the court said, in respect to the question of validity: "Then comes the question which of the bonds are valid and which invalid. We can have no doubt that the test is which were first delivered, if that can be ascertained, and without regard to the classification of bonds according to times of payment in the order of the County Court; for, as the County Court was authorized to determine at what time the bonds should be payable, any one, taking a bond signed by the presiding judge and the clerk and bearing the seal of the county had the right to presume that it was valid, provided the County Court had not already issued bonds to the amount limited by the statute and by the vote."

§ 308. Scaling down.

Some of the Federal authorities sustain the proposition that where a public corporation has issued its securities

82—Daviess County v. Dickinson, 117 U. S. 657; City of Litchfield v. Ballou, 114 U. S. 190; Nesbitt v. Independent District of Riverside, 144 U. S. 610; Millsaps v. City of Terrell, 60 Fed. 193 C. C. A.; Aetna Life Ins. Co. v. Lyon County, 95 Fed. 325; Everett v. Independent School District of Rock Rapids, 109 Fed. 697; Sutro v. Pettit, 74 Calif. 332, 16 Pac. 7, followed in Sutro v. Rhodes, 92 Calif. 117, 28 Pac. 98; Ind. District of Rock Rapids v. Society for Savings (Ia.), 67 N. W. 370; Turner v. Woodson County Com'rs, 27 Kan. 314; Daviess County v. Howard, 13 Bush (Ky.), 101. Board of Com'rs of Iowa Drainage District v. Wilkins County (La.), 51 So. 91. Excess drainage bonds are valid up to the amount of taxes authorized to be levied in respect to those first negotiated and delivered. Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049; Catron v. Lafayette County, 106 Mo. 659, 17 S. W. 577; Ball v. Presidio County, 88 Texas 60, 29 S. W. 1042; Hardeman County v. Foard County (Tex.), 47 S. W. 30; Fisher v. City of Seattle (Wash.), 104 Pac. 655; McGillivray v. Joint School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100.

83—117 U. S. 657.

to an amount in excess of the constitutional or legislative limitation all of which were issued at the same time, each bond is valid to the extent of its proportionate share of the indebtedness authorized.[85] There are, however, authorities equally as good which hold that where an entire issue was voted at one election and issued at one time, there is created an indivisible and inseparable contract and that the whole issue will be void and the principle of scaling down will not be recognized.[86]

Decisions from various state courts follow the rule of scaling down and hold that where bonds are issued all at the same time that the amount of the valid debt should be equally distributed among them all and that none should have any priority in respect to their validity.

In one case from Iowa where a school district had issued bonds partially in excess of an authorized limit, it was said: "The district may become indebted to the amount of $2,057.50 by bond. If the debt exceeds that amount it is void as to the excess because of the inhibition on the power of the district to exceed the limit, and the bonds as to the same excess are void because of the non-existence of a valid debt therefor. But this restriction does not extend to the sum of $2,057.50, for which the district had power to issue its bonds. That sum is a valid debt. The bonds to that extent are valid. It is no unusual thing for instruments of this character to be partly valid and partly invalid. So far as they secure

85—Francis v. Howard County, 50 Fed. 44. Bonds issued by a county in excess of the amount allowed by law are void and their collection cannot be enforced even by a bona fide purchaser for value; and when a number of bonds partially invalid on this account, are issued and delivered at the same time, or at different times as part of one transaction, the invalid portion should be equally distributed among all and none should have priority. City of Columbus v. Woonsocket Institution for Savings, 114 Fed. 162.

86—Hedges v. Dixon County, 150 U. S. 182. This case is referred to in a later paragraph of this section. Crogster v. Bayfield County, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

a lawful debt they are valid. So far as the debt is unlawful they are invalid. The case is analogous to the act of an agent, which is partly within his authority and partly without. The act, so far as authorized, would bind the principal; while to the extent it was unauthorized, it would not be binding. * * * It appears that the bonds all bear the same date, and were issued, though at different times, as a part of one transaction. They were intended as security for the debt of $15,000 which was attempted to be contracted in building the schoolhouse. It cannot be said that, in justice, invalidity should attach to certain particular bonds while others, to the amount for which the district could lawfully contract indebtedness, should be held valid. Each bond being but a part of the whole debt, must partake alike of invalidity and validity —it must be partly valid and partly invalid. The whole alleged debt is $15,000; of this sum, $2,057.50 is valid. Each bond will be valid to the extent it represents a portion of the debt lawfully contracted."[87]

§ 309. Hedges v. Dixon County.

This case in the Supreme Court of the United States,[88] is frequently cited in connection with the subject of scaling down an issue of bonds, part in excess of a constitutional limitation. The decision was rendered in an ap-

87—McPherson v. Foster Bros., 43 Ia. 48; see, also, Reynolds v. Lyon County, 121 Ia. 733, 96 N. W. 1096; Gillim v. Daviess County (Ky.), 14 S. W. 838; Taylor v. Daviess County (Ky.), 32 S. W. 416; Nolan County v. State, 83 Tex. 182, 17 S. W. 823; Morrill v. Smith County (Tex.), 33 S. W. 899; Citizens Bank v. Terrell, 78 Tex. 450, 17 S. W. 1003.

But see Crogster v. Bayfield County, 99 Wis. 1. This case also held that bonds based upon an indivisible contract could not be scaled down when part were in excess. Thornburgh v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

88—150 U. S. 182 distinguishing Louisiana v. Wood, 102 U. S. 294; Reed v. City of Plattsmouth, 107 U. S. 568; Daviess County v. Dickinson, 117 U. S. 657; see, also city of Litchfield v. Ballou, 114 U. S. 190.

peal from a judgment of the Circuit Court of the United States for Nebraska, dismissing on demurrer a suit in equity brought by Hedges et al., against the County of Dixon, to declare good and valid and for the payment of certain county bonds of said county after reducing the amount of their issue to the limit authorized to be issued by said county. The bonds therein questioned had been adjudged void in Dixon County v. Field (111 U. S. 83), and the question then before the court was, whether inasmuch as only a part of the issue was beyond the constitutional limit of indebtedness a court of equity would scale down the amount and permit a recovery for such a sum as was within the limit, the court held that this could not be done and said: "Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident or mistake to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."

§ 310. Other recitals.

In this section, attention will be called to recitals involving some questions other than those already noted. The doctrine of estoppel by recitals has been held to apply in the following cases: where $40,000 of bonds were issued instead of $30,000 as voted by the people at election;[89] where the bonds were issued to a railroad

89—Walnut v. Wade, 103 U. S. 683.

company formed by consolidating one, to which bonds had been voted, with others;[90] where there was an irregular exchange of bonds for stock;[91] where the authority for the issue in respect to the mode of making a proposed agreement between the municipality and the railroad company was not complied with;[92] where an agreement by the railroad company and the county was for a standard gauge road which was constructed when the company under its charter could only build a narrow gauge road;[93] where an annual tax to pay the principal and interest was not levied as required by law;[94] where bonds were issued as a donation to a railroad company when the statute only authorized a subscription to its stock;[95] when bonds ran for a straight term of thirty years while the vote authorized their issue due in thirty years but payable in ten years at the county's option;[96] where proper action was not taken by a county board and a resolution passed as required by law;[97] where no estimate or designation of the amount of money necessary to be raised by issuing bonds was made by the board of directors of an irrigation district as required by law;[98] where a board of county commissioners failed to establish

90—Harter v. Kernochan, 103 U. S. 562.

91—Cairo v. Zane, 149 U. S. 172.

92—Kimball v. Town of Lakeland, 41 Fed. 289.

93—Board of Com'rs of Kingman County v. Cornell University, 57 Fed. 149.

94—National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 62 Fed. 778; Hughes County v. Livingston, 104 Fed. 306; see, also, Citizens Savings & Loan Assoc'n v. Perry County Ill., 156 U. S. 692; Wilson v. Board of Education of City of Huron (S. D.), 81 N. W. 952; Winston v. City of Fort Worth (Tex.), 47 S. W. 740; but see Montpelier Savings Bank & Trust Co. v. School Dist. No. 50 of Town of Ludington (Wis.), 92 N. W. 439.

95—Wesson v. Saline County, 73 Fed. 917.

96—Heed v. Com'rs of Cowley County, 82 Fed. 716, affirmed 101 Fed. 768; but see Sauer v. Town of Gillett (Colo.), 78 Pac. 1068, and Woodruff v. Okolona, 57 Miss. 806.

97—Board of Com'rs of Haskell County v. National Life Ins. Co., 90 Fed. 228; see, also, Brown v. Ingalls Twp., 86 Fed. 261.

98—Miller v. Perris Irrigation Dist., 99 Fed. 143.

legal precincts in a county as required;[99] where the bonds ran for a longer period than specified by the petition presented to the township board asking for the election;[1] where a city council in issuing sewer bonds did not provide funds for their payment as required;[2] where there were irregularities in proceedings leading up to and in the issue of refunding bonds in respect to the levy and collection of taxes.[3]

The doctrine of estoppel by recitals, it has also been held, will apply in respect to the performance of conditions by the recipient of the bonds, although the conditions have either been not performed or not performed in the manner required under the grant of aid;[4] and also where the bonds were not issued by the regular municipal officers but by commissioners named by a court;[5] as to the performance of conditions generally;[6] where a statute required registration;[7] as against irregularities in securing title to a schoolhouse site;[8] that the improvement required to be made was not completed or that the contractor did not comply with his contract.[9]

In some cases it apparently has been held that where

99—Clapp v. Otoe County, 104 Fed. 473.

1—Syracuse Twp., Hamilton County, Kan. v. Rollins, 104 Fed. 958; see, also Board of Com'rs v. Cowley County, Kan. v. Heed, 101 Fed. 768 C. C. A.

2—City of Superior v. Marble Savings Bank, 148 Fed. 7.

3—Brown v. Milliken, 42 Kan. 769, 23 Pac. 167.

4—Menasha v. Hazard, 102 U. S. 81; Provident Life & Trust Co. v. Mercer County, 170 U. S. 590; Board of Com'rs of Stanly County v. W. N. Coler & Co., 190 U. S. 437, 47 L. Ed. 1126, affirming 113 Fed. 705; Phelps v. Yates, 6 Blatchf. 192; State v. Horne, 7 Ohio St. 327; but see Cooper v. Sullivan County, 65 Mo. 542.

5—Town of Andes v. Ely, 158 U. S. 312.

6—Insurances Co. v. Bruce, 105 U. S. 328; Graves, et al. v. County of Saline, 161 U. S. 359; Town of Ninety-six v. Folsom, 87 Fed. 304; Grattan Twp. v. Chilton, 97 Fed. 145; State v. Board of Education, 27 Oh. St. 96; see, also, Sec. 276, et seq., ante.

7—Hughes County v. Livingston, 104 Fed. 306.

8—Flagg v. School District No. 70 (N. D.), 58 N. W. 499.

9—Town of Klamath Falls v. Sachs (Ore.), 57 Pac. 329.

the conditions are prescribed by the voters that recitals will not operate as an estoppel where they remain unfulfilled.[10]

§ 311. Invalidity as based upon express statutory recital.

The doctrine of estoppel by recitals, it has been held in a number of instances, will not apply even to the bona fide holder for value when the grant of authority for the issue of the securities declares in express terms that unless the conditions prescribed are performed, the bonds either cannot be issued or if issued shall not be binding obligations upon the maker,[11] under the rule that a purchaser of bonds is charged with notice of the legal authority for their issue. Where the grant of power contains an express provision of the character noted above he is charged with its requirements, and to establish the validity of bonds in his hands, the conditions required must be performed.[11a]

In an early case, Anthony v. County of Jasper,[12] the statute required that the bonds to be issued pursuant to its authority should be registered by the state auditor and this act was made essential to their validity. The bonds were not registered as required by law and the court held them void for this and other reasons.

In a later case, The German Savings Bank of Davenport, Iowa v. County of Franklin,[13] the bonds involved in the action were issued under an Act of 1869, by Section 7, of which the county had the right in voting for the subscription to prescribe the conditions upon which the

10—German Savings Bank of Davenport, Iowa v. City of Franklin, 128 U. S. 526; Craig v. Town of Andes, 93 N. Y. 405; but see Graves et al. v. County of Saline, 161 U. S. 359.

11—See cases noted in detail in the following paragraphs of this section.

11a.—Calif., Art. 11, Sec. 18, as amended in 1900 and 1906; Idaho, Art. 8, Sec. 3; Mont., Art. 13, Sec. 5; Neb., Art. 12, Sec. 2; N. Y., Art. 8, Sec. 10; N. D., Art. 12, Sec. 183; see, also, Wyo., Art. 16, Sec. 8.

12—101 U. S. 693.

13—128 U. S. 526.

subscription should be made and that section further declared that such subscription should not be valid and binding until such conditions precedent had been complied with. The court on passing upon this provision of the act said: "Under such circumstances any condition imposed by the vote as a condition precedent to the issuing of the bonds in payment of the subscription was a part of the authority for the subscription within the meaning of the proviso to the article of the Constitution above cited, so also any condition prescribed by the vote as a condition precedent upon which the bonds should be issued must have been complied with in order to make the bonds valid and binding." One of the conditions prescribed by the vote authorizing the issue of bonds was that the railroad should be commenced in Franklin County within nine months from the date of the election. In fact the railroad was not commenced in the county until a number of years afterwards when the bonds were then issued. The decree of the court below adjudging the bonds to have been issued without authority of law and to be void was affirmed. The Supreme Court of the United States in passing upon the questions involved referred to the Town of Eagle v. Kohn,[14] in the following language: "That was a suit against the Town of Eagle, brought by innocent holders for value, to recover on coupons cut from bonds issued by the town to a railroad company, December 1, 1870, in payment of a subscription to stock, in pursuance of a vote of the people of the town, had November 2, 1869. In that vote, certain conditions as to time had been prescribed, upon which the bonds should be issued. Those conditions had not been complied with. The question arose in the case, whether the declaration of the statute that the bonds should not be valid and binding until such conditions precedent had been complied with, was to be confined in its operation

14—84 Ill. 292.

to the railroad company to which the bonds should have been issued, or whether it extended to innocent holders for value. The court held that although the statute did not declare that the bonds should be void, its declaration that they should not be valid and binding until the conditions precedent should have been complied with, was an imperative and peremptory declaration that the bonds should not be valid and binding until the conditions named should have been complied with, even in the hands of innocent holders without notice; and it declared the bonds to be invalid in the hands of the plaintiffs.

"This interpretation of section 7 of the Act of April 16, 1869, accompanied all bonds subsequently issued, into the hands of whoever took them, whether a bona fide holder or not. This court must recognize the decision of the Supreme Court of Illinois as an authoritative construction of the statute, made before the bonds were issued, and to be followed by this court."

Statutory conditions, however, of the character noted when performed at a later time than provided by law will be regarded as a full compliance with legal requirements when there has been a waiver by the maker.[15]

In the case from the Supreme Court of the United States, Graves v. Saline County, just cited, it appears that bonds were issued by Saline County, Illinois, in payment of a subscription for railroad stock coupled with a condition which was never complied with. The legal authority for the issue, namely, the Act of April 16, 1869, provided that any bonds, subscriptions or donations made thereunder, should not be valid and binding until the conditions precedent had been complied with. The validity of the bonds, however, was continually recognized by the county through the payment of interest and in 1885, refunding bonds were issued to replace them pur-

15—Graves v. Saline County, 161 U. S. 359.

suant to a vote of the electors. The county retained during all of the time the stock in the railway company for which it had subscribed and to pay for which the original bonds were issued. The action in the present case involved the refunding bonds and they were held valid in the hands of a bona fide purchaser, the court said: "If the present case stood only on the footing of the original conditional contract of subscription we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that the original bonds were uncollectible even by innocent holders. But we have here an additional feature, not present in the case of German Savings Bank v. Franklin County (128 U. S. 526, 9 Sup. Ct. Rep. 159, 32 L. Ed. 519), or in the case of Town of Eagle v. Kohn (84 Ill. 292), and that is found in the fact that in the years 1885, in pursuance of the Illinois funding bond act, approved February 13, 1865, as amended by acts approved April 27, 1877, and June 4, 1879 (Laws of Illinois, 1879, p. 229), and in pursuance of a vote of a majority of the legal voters of Saline county as prescribed by said statutes, new bonds were issued and registered in manner as directed in the law, and were delivered to the holders of the original bonds, which latter were surrendered and cancelled. The county of Saline thereafter, until the year 1890, paid the annual interest on such new issue of bonds. While it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities."

"It may be fairly said that, while a municipal corporation may not ratify a contract into which it had no

power to enter, and may not waive a condition put by the legislature upon the exercise of a given power, yet it may well waive a condition made by itself and not a condition upon the exercise of the power. Such a waiver is not an attempt to ratify a void contract, but is rather an admission that the condition has been complied with in an equitable sense."

§ 312. Recitals; power to make.

The principle of law is well settled by an overwhelming weight of authority, both Federal and state, that recitals in bonds of the performance of conditions precedent or the existence of essential facts when made by public officers invested with this power, operate as an estoppel in favor of the bona fide holder against the maker of the obligation to deny the truth of the statements contained in them. In view of the importance of the effect thus given to recitals, it may not be inappropriate to call attention to the doctrine as stated by two leading authors. In Daniel on Negotiable Instruments [16] it is said: "That, if it appears to have been the sole province of the officers who execute and issue the bonds or securities to decide whether or not there has been antecedent compliance with the regulation, condition, or qualification prescribed to their authority, their determination that there has been such compliance and declaration to that effect is sufficient, and cannot be impugned as against a bona fide holder."

And in Gray's Limitations of the Taxing Power and Public Indebtedness,[17] the principle is stated in the following language: "Where the constitution or statute under which bonds are issued makes the existence of any fact, or the performance of any conditions, a prerequisite to the issue of bonds, and by the constitution or the law,

16—Fifth Ed., Sec. 1537. 17—Sec. 2177.

the duty of determination whether such fact exists is committed to some board or officers, and that board or those officers certify, by recitals in the bonds, that the requisite facts exist, or that the conditions have been performed, the purchaser of the bonds may rely upon the recitals; and in a suit by a bona fide purchaser upon the bonds the municipality is estopped from setting up the defense that the fact did not exist or that the conditions were not complied with."

And the rule has also been tersely and clearly stated by Judge Sanborn of the United States Circuit Court of Appeals of the Eighth Circuit, as follows: "When a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to and imposes the duty upon its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them." [18]

From the statement of the rule in this book, in many cases cited here and elsewhere, it appears that the principle operates only when the recitals are made by those public officials who have been by law duly invested with the power or as stated in some authorities charged by law with the sole province of making them, but when they are so empowered with such right and authority, their acts are conclusive. This subject is so directly involved with the question of estoppel by recitals that all of the cases heretofore cited under the various propositions stated in connection with that subject state as a rule that as a condition precedent to the operation of the doctrine of estoppel by recitals, the public officials making them must be charged by law with this duty. For a full

18—Independent School District of Sioux City v. Rew, 111 Fed. 1 C. C. A.

citation of authorities and to avoid an unnecessary repetition the reader is referred to the many cases already cited.[19]

In importance, therefore, this section and the ones immediately following discussing the question of authority to make recitals should perhaps precede the consideration of the doctrine of estoppel through recitals. In the absence of authority to make recitals they cannot operate as an estoppel in respect to the facts and statements contained in them.

One of the early cases, [20] in the Supreme Court of the United States in distinguishing the cases then before the court and others involving the subject of estoppel by recitals, directs attention to a principle which should be considered by a purchaser of public securities after he has satisfied himself that the power to issue exists, namely, that he is charged with the duty of investigation in respect to the authority of the public officials to make the recitals which may be contained in the issue of bonds which he contemplates acquiring. The court there said in its opinion by Mr. Justice Harlan: "Granting that the recital in the bonds, that they were issued in pur-

19—Com'rs of Knox County v. Aspinwall, 21 How. 539; Town of Coloma v. Eaves, 92 U. S. 484; Town of Venice v. Murdock, 92 U. S. 494; Com'rs of Marion County v. Clark, 94 U. S. 278; Com'rs of Douglas County v. Bolles, 94 U. S. 104; Merchants Bank v. Bergen County, 115 U. S. 384; National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 62 Fed. 778 C. C. A.; Grattan Twp. v. Chilton, 97 Fed. 145, affirming 82 Fed. 873; Hughes County v. Livingston, 104 Fed. 306; Independent School District of Sioux City v. Rew, 111 Fed. 1 C. C. A.; Board of Com'rs of Wilkes County v. Coler, 113 Fed. 725 C. C. A.; Bolton v. Board of Education, 1 Ill. App. 193; City of South Hutchison v. Barnum (Kan.), 66 Pac. 1035; Deming v. Holton, 64 Me. 254; Harrington v. Town of Plainview, 27 Minn. 224; Fulton v. Town of Riverton, 42 Minn. 395, 44 N. W. 257; Vicksburg v. Lombard, 51 Miss. 111; Madison County v. Brown, 67 Miss. 684; Mutual Benefit Life Ins. Co. v. City of Elizabeth, 13 Vroom. 235, 42 N. Y. S. 235; Coler v. Dwight School Twp., 3 N. D. 249, 55 N. W. 587.

20—Northern Bank of Toledo v. Porter Twp. Trustees, 110 U. S. 258.

suance of the provisions of the several acts of the general assembly of Ohio, is equivalent to an express recital that the county commissioners had not been authorized by a vote of the county to subscribe to the stock of this company and that consequently the power conferred upon the township was brought into existence; still it is the recital of a fact arising out of the duties of county officers and which the purchaser and all others must be presumed to know did not belong to the township to determine so as to confer or create power which under the law did not exist." It appeared in this case that the legislature granted power to the township to issue bonds if the commissioners of the county were not authorized by the voters to so issue, and although the bonds contained recitals of the performance of conditions it was held that the recitals were not such as to preclude the defense that the commissioners were authorized for a recital on this point, was a matter beyond the judicial investigation or discretionary power of township officers to certify and that a non-authorization of the commissioners could not be implied from the issuance and recitals of the township officials.

§ 313. Authority to make; how given.

The authority to make recitals as to the performance of conditions or the existence of essential facts may be given in express terms in the legal grant of power and which may further provide that the official determination shall be final and conclusive. When this condition exists little difficulty is experienced in ascertaining whether the recitals in question are made by officials charged by law with this duty.[21]

21—Livingston County v. First National Bank of Portsmouth, 122 U. S. 102; Town of Oregon v. Jennings, 119 U. S. 74; City of Defiance v. Schmidt, 123 Fed. 1, affirming 117 Fed. 702; People v. Mitchell, 45 Barb. (N. Y.) 208; Flaag v School Dist. No. 70 (N. D.), 58 N. W. 499.

On the other hand, it is seldom that such explicit and detailed directions are found in statutory or constitutional authority for the issue of securities. The legal right of public officials to make recitals is then to be implied from an examination and construction of the authority as a whole and the cases decided will be found largely to involve a determination of such authority under the condition noted.[22]

The courts have repeatedly held from the very nature of the question that it is not necessary to the legal effect of recitals as an estoppel that the power to make them be expressly granted to the public officials. In an early case and a leading one on the doctrine of estoppel,[23] the court said in speaking of the authority to determine the performance of certain conditions required by statute and the time of making such determination: "Who is to determine whether or not the election has been properly held and a majority of the votes cast in favor of the subscription? Is it to be determined by the court in a collateral way in every suit upon a bond or coupon attached, or by the Board of Commissioners as a duty imposed upon it before making the subscription? The right of the board to act in the execution of the authority is based upon the fact that the votes had been cast in favor of the subscription and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depository of the trust thus

22—Twp. of Bernard's v. Morrison, 133 U. S. 523; Mercer County v. Provident Life & Trust Co., 72 Fed. 623; Fulton v. Town of Riverton, 42 Minn. 395, 44 N. W. 257; Mutual Benefit Ins. Co. v. City of Elizabeth, 42 N. J. L. 235, 13 Vroom. 235; Coler v. Dwight School Twp., 3 N. D. 249, 55 N. W. 587.

23—Knox County v. Aspinwall, 21 How. 539.

confided to it. The persons composing it were elected by the county and it was already invested by the highest functions concerning its general policy and fiscal interests."

In the next case in the same court,[24] where by the statute the supervisors and town clerk were designated as the officers to execute the bonds "if it should appear" that a majority of the legal votes had been cast in favor of the proposition. The court there said: "At some time or other it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly invested somewhere and once for all, and the only persons spoken of who have any duties to perform respecting the election and action consequent upon it are the town clerk and supervisor, or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that these officers, or one of them at least, should determine whether the requirements of the act prior to the subscription to the stock of the railroad company had been met. 'If it should appear,' the act said. Appear when? Why, plainly before the subscription was made and the bonds were executed, not afterwards. Appear to whom? In regard to this there can be no doubt. Manifestly not to a court after the bonds had been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town clerk. Their right to issue the bonds

24—Town of Coloma v. Eaves, 92 U. S. 484.

was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question, and there can be no doubt who was intended by the law to be the arbiter."

And in another and a later case in the same court, Bernard's Township v. Morrison,[25] it was said: "Express direction and authority for commissioners or other officials to decide that preliminary conditions have been complied with are seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named."

It is sufficient if the bonds containing the recitals are executed under the direction and order of the officers charged by law with the duty of making the recitals. This, it has been held, is equivalent to a due execution of them and the recitals operate as if made by them. This doctrine was stated in Warren v. Marcy,[26] where the bonds, which recited that they were issued "in conformity with a vote of the electors of said county held on the 23d day of September, 1869," were executed by the clerk of the board of supervisors under their order and direction, the court in its opinion said: "We have substantially held (citing cases) that if a municipal body has lawful power to issue bonds or other negotiable securities dependent only upon the adoption of certain preliminary proceedings such as a popular election of the constituent body, the holder in good faith has a right to presume that such preliminary proceedings have taken place, if the fact be certified upon the face of the bonds themselves by the authorities whose primary duty it is to determine it; now that is the case here. The bonds

25—133 U. S. 523.

26—97 U. S. 96.

See, also, Rees v. Olmstead, 135 Fed. 396 C. C. A. and Shelby v. Jarnagin (Tenn.), 16 S. W. 1040; 3 Shannon's Cases, 179; but see as to extent of lawful delegation of authority, Jackson County v. Brush, 77 Ill. 59.

are executed by the Board of Supervisors or which is the same thing by the clerk under their order and direction." The county was held estopped to set up as a defense the irregular performance of precedent conditions.

§ 314. Recitals without authority.

Stating the proposition in the negative, recitals will not operate as an estoppel if it appears that they were made by officials who neither under the grant of authority, were made the tribunal to decide whether the precedent conditions have been complied with, nor when any such authority cannot be fairly inferred or implied from their general power to act for the public corporation which they represent and for which they assume to act.[27]

This principle is well illustrated by the cases cited in the preceding note and also in those cited under the sections relating to the authority to make recitals where from the positive statement of the rule in respect to the authority to make recitals the negative is necessarily to be inferred. In Dixon County v. Field,[28] Mr. Justice Matthews writing the opinion of the court said: "If the officers authorized to issue the bonds upon a condition

27—Daviess County v. Dickinson, 117 U. S. 657. In this case a certificate by the judge of the county court was endorsed upon the back of each bond to the effect that it was issued as authorized by statute and by an order of the county court in pursuance thereof. The court held that to this certificate could not be given the effect of a recital for "neither the statute nor the vote of the people, nor the order of the county court empowered them to make such a certificate or to determine the question whether the county court had exceeded the power conferred upon it. An officer's certificate of the fact which he has no authority to determine is of no legal effect." Chisholm v. Montgomery, 2 Woods 584. National Bank of Commerce v. Town of Granada, 54 Fed. 100 C. C. A.; Williams v. Roberts, 88 Ill. 11; Faulkenstein Twp. of Stanton County v. Fitch, 2 Kan. App. 193, 43 Pac. 376; Spitzer v. Blanchard, 82 Mich. 334; Gibbs v. School Dist. (Mich.), 59 N. W. 294; Duanesburgh v. Jenkins, 46 Barb. (N. Y.) 294; Cagwin v. Hancock, 84 N. Y. 583.

28—111 U. S. 83.

are not the appointed tribunal to decide the facts which constitute the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

Recitals made by public officials in respect to the performance of conditions or the existence of essential facts will not also operate as an estoppel when by law some public record is made the test of the performance of the conditions or the existence of the fact, the officers then do not constitute a tribunal to decide the matters which they may state. Public corporations cannot be estopped by the recitals of their officials under such circumstances.[29]

§ 315. Estoppel by judgment.

No attempt will be made to discuss the general principles relating to the subject of estoppel by judgment, but attention will be directed to some cases involving the application of the principle to actions involving public securities.

The general rule as laid down by the Supreme Court of the United States is that a decision by a court of competent jurisdiction in respect to any essential fact or question in the one case is conclusive between the parties and their privies in all subsequent actions, even though the form and causes of action be different.[30]

29—See Secs. 255, et seq., and 300, et seq., ante.

30—Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095; Southern Pac. R. R. Co. v. United States, 168 U. S. 1, 42 L. Ed. 355.

The case of Town of Beloit v. Morgan,[31] is one of the earliest decisions of the Supreme Court of the United States on the subject of estoppel by judgment applied to municipal bonds. The bonds and coupons involved in the litigation were issued under the same statute and for the same purpose as those in Morgan v. Town of Beloit, et al.,[32] in which the appellee in this case recovered a judgment at law against the appellant herein upon another portion of the securities although not the same with those in question in this case. A bill was filed to enjoin the appellee from proceeding in the suits at law which he had instituted upon a part of the securities in his hands and to have those and all others belonging to him delivered up and cancelled. The court below dismissed the case and the Supreme Court, in its opinion by Mr. Justice Swayne said, upon the conclusiveness of the judgment at law: "On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities, though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the res of that case, but as to all further litigation between same parties touching the same subject-matter, though the res itself may be different.

"A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. The judgment at law established conclusively the original

31—7 Wall. 619. 32—7 Wall. 613.

validity of the securities described in the bill, and the liability of the town to pay them. Nothing is disclosed in the case which affects this condition of things."

In a subsequent case, and one which has been repeatedly cited, Cromwell v. County of Sac,[33] the action was brought upon four bonds of the county of Sac in the State of Iowa, each for $1,000 with interest coupons attached. As a defense the county relied upon the estoppel of a judgment rendered in its favor in a prior action, brought by one Smith, upon certain earlier maturing coupons from the same bonds, accompanied with proof that the present plaintiff was in fact the owner of the coupons in controversy in that action and which was prosecuted for his benefit. In that action the bonds were held void for fraud and illegality, the plaintiff not establishing his character as a bona fide holder. When the present case was first tried the court below held that the judgment in the Smith case was conclusive against the plaintiff and refused to permit him to prove that he had received the bonds and coupons in this suit before maturity for value and gave judgment for the county. On appeal the Supreme Court held that the court erred in refusing to admit this proof and that the matters adjudged in the Smith case were only that the bonds were void as against the county in the hands of parties who had not thus acquired them before maturity and for value, thus holding in effect that when a subsequent suit is between the same parties but upon a different claim, the judgment in the first suit operates only as an estoppel when the controverted points are the same. In Nesbitt v. The Independent District of Riverside,[34] the rule announced in Cromwell v. Sac County, was followed and applied. In a former suit brought by Eleanor Nesbitt on coupons detached from bonds, judgment was rendered in her favor on the ground that the recitals estop-

33—94 U. S. 351. 34—144 U. S. 610.

ped the corporation from showing the issue in excess of the legal debt limitation, no notice of the original invalidity to the holder being shown. In the present case notice was proved and the court held that this was an additional fact put into the case and which made a new question for decision; that the effect of recitals is one thing, that of recitals coupled with notice is another, the one question, the court said, was litigated and determined in the first suit, the other is presented here. "Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others." The court also said, repeating the doctrine as stated in the Cromwell case: "It was there decided that when the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive, in the latter, as to every question which was or might be presented and determined in the first action; but when the second suit is upon a different cause of action although between the same parties, the judgment in the former action operates as an estoppel only to the point or action actually litigated and determined and not as to other matters which might have been litigated and determined."

In a subsequent case, Bissell v. Township of Spring Valley,[35] the case of Cromwell v. County of Sac was referred to and the court held that a final judgment entered upon a demurrer to a pleading is a bar to any further action upon the specific claims in suit, that their validity could not be again litigated in any form by the parties, the court said: "There is nothing in that decision which can be made to support the contention of the plaintiff in this case. In the former action against the present defendant the adjudication was that the bonds themselves were never signed by the proper officers required by the

35—124 U. S. 225.

statute of the state to sign them, and therefore they were no legal obligations of the township. Their invalidity equally affected the coupons attached to them, and not merely those in suit, but all others. If the plaintiff could give any evidence consistent with that adjudication there would be no objection to his doing so, and the former action would not estop him; but the bonds being found to be invalid and void, he is precluded from attempting to show the contrary, either of the fact of their wanting the signature of the county clerk, or of the law that for that reason they were not binding obligations of the municipality. The fact and the law are adjudged matters between the parties, and not open, therefore, to any further contest."

The settled doctrine, therefore, seems to be that in an action by the same parties or those in privity with them upon the same claim or demand, a judgment upon the merits is conclusive not only as to every matter offered but as to every admissible matter which might have been offered to sustain or defeat the claim or demand, but not in a case in which the second action is upon a different claim or demand. The prior judgment is then only an estoppel as to those matters in issue or points of controversy upon the determination of which the finding or the verdict was rendered.[36]

36—City of Beloit v. Morgan, 7 619; Cromwell v. County of Sac, 94 U. S. 351; United States ex rel. Harshman v. County Court, 122 U. S. 306; Bissell v. Spring Valley Twp., 124 U. S. 225; Eleanor Nesbitt v. Independent District of Riverside, 144 U. S. 610; United States v. The Haytian Republic, 154 U. S. 118.

County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58. In this case one of the questions involved was the conclusiveness of a judgment in a state court against the validity of the bonds, the court said: "We hold that, upon the present record, the plaintiff company is to be taken as having purchased the bonds here in suit before maturity and for value, without notice of any circumstances indicating that their validity was or could be impeached; consequently, the judgment in favor of the county in the suit brought in the state court by Ball, Hutchins & Company on some of the coupons of the bonds

The rule as to estoppel by judgment was further amplified in another case in the Supreme Court of the United States,[37] though not involving the validity of negotiable securities, where the court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases but exists even though there be different demands, when the question upon which the recovery of the second demand depends, has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear." The court then in its opinion proceeds to review the leading cases upon the subject in hand.

now in suit—in which suit the present plaintiff company was not a party and of which it is not shown to have had notice—does not preclude a judgment in its favor against the county on the bonds."

Board of Com'rs of Oxford County v. Union Bank of Richmond, 96 Fed. 293. A judgment by the Supreme Court of the state on the validity of a legislative act is not conclusive on that or other courts in a subsequent trial on different constitutional questions. Edwards v. Bates County, 55 Fed. 436.

Geer v. Board of Com'rs of Ouray County (Colo.), 97 Fed. 435. Re-affirming Board of Com'rs of Lake County v. Platt, 79 Fed. 567. A judgment is conclusive even where the debts involved were in excess of the constitutional limit.

Board of Com'rs of Lake County, Colo. v. Sutliff, 97 Fed. 270 C. C. A. Full discussion of subject of res adjudicata.

Ransom v. City of Pierre, 101 Fed. 665. A reversal of a state judgment by the state supreme court will be recognized by a Federal court and effect given to that judgment setting aside a former adjudication.

Burlington Savings Bank v. City of Clinton, 106 Fed. 269. A former adjudication not binding on a bond holder who was not a party. Woodall v. Town of Adel (Ga.), 50 S. E. 102; Mayor, etc. of Patterson v. Baker, 26 Atl. 324; Daly v. Brown, 4 N. Y. 71; see, also, Sec. 228; ante, on lis pendens as notice to holder.

37—City of New Orleans v. Citizens Bank of Louisiana, 167 U. S. 371.

§ 316. Collateral attack; collusive judgment.

The rule above stated makes the judgment when conclusive free from collateral attack in any proceeding brought to enforce the rights of the parties thereunder.

In the United States v. New Orleans,[38] where the question was raised of the right to have a tax levied to pay the debt represented by judgment secured on outstanding bonds, the court said: "In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgment. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed."

The rule is supported by many cases to be cited in the note,[39] where reference will be made to the particular

38—98 U. S. 381.

39—Sup'rs v. United States ex rel., 4 Wall. 435. Application for writ of mandamus to pay judgment. Orleans v. Platt, 99 U. S. 676; Lyons v. Munson, 99 U. S. 684; Ralls County Court v. United States, 105 U. S. 733. Mandamus proceedings.

Lewis v. Brown Twp., 109 U. S. 162. Judgment in state court against validity of bonds held conclusive in proceeding to enforce the levy of a tax to pay the bonds in suit.

Cape Girardeau County Court v. Hill, 118 U. S. 68. If any question could have been raised as to their validity (the bonds in question) it is concluded by the judgment which is the foundation of the present proceedings. The only question now before us is whether the relator is entitled to have a tax levied upon any property other than the real estate lying within the county.

Harshman v. Knox County, 122 U. S. 306. Mandamus proceedings to enforce the levy of a tax to pay judgment rendered on bonds.

Chanute City v. Trader, 132 U.

proceeding involved in respect to which the judgment was held conclusive.

The rule as to the conclusiveness of a judgment as between the parties is modified in a number of decisions where the judgment was rendered in a collusive suit between the holders of coupons or bonds and the public corporation issuing them. A judgment so rendered, it was held in one case, could not be considered as an adjudication binding upon the bond holders in any subsequent controversy between them and the town,[40] but it has also been held to the contrary in a number of cases that, where a judgment was obtained by fraud and collusion, this fact will not serve as a defense in a subsequent action or proceeding; the court decided in one case,[41] that

S. 210. Mandamus proceedings to compel levy of tax to pay judgment.

Mayor, etc. of New Orleans v. United States ex rel. Stuart, 49 Fed. C. C. A. 40. Mandamus proceedings for collection of judgment.

Police Jury of Jefferson v. United States ex rel. Fiske, 60 Fed. 249. Judgment in state court held conclusive in mandamus proceedings. Board of County Com'rs of Lake County v. Platt, C. C. A. 79 Fed. 567; Fleming v. Trowsdale, 85 Fed. 189 C. C. A.

Marion County v. Coler, 88 Fed. 59. Mandamus proceedings to compel the levy of a tax to pay judgment recovered on refunding bonds.

Mayor, etc. of City of Helena v. Helena Water Works Co., 104 Fed. 113. Mandamus proceedings to compel a city to pay a judgment recovered. Hicks County Auditor, et al., v. Cleveland, 106 Fed. 459; Padgett, et al. v. Post, 106 Fed. 600. Mandamus proceedings.

40—Andes v. Ely, 158 U. S. 312. See, also, Graham v. City of Tuscumbia (Ala.), 42 So. 400. A judgment is conclusive on the question of the validity of bonds in the *absence of fraud in* obtaining it.

41—Board of Com'rs of Lake County v. Platt, 79 Fed. 567.

See, also, Mayor, etc. of City of Helena v. Helena Water Works Co., 104 Fed. 113. The court had jurisdiction to hear and determine the question whether the mayor and city council had authority to pass this ordinance and enter into an agreement therein contained. This was part of the original case, and entered into the judgment; and the court having determined that question in favor of the plaintiffs, the judgment whether right or wrong, is not open to impeachment by collateral attack. This would be the rule even though the allegation of the answer amounted to a charge that the judgment was obtained through fraud or collusion. Oswego Twp. v. Anderson (Kan.), 24 Pac. 486.

the doctrine of collateral attack would apply and further that while a direct suit might undoubtedly be maintained in a proper case to set aside a judgment for fraud in obtaining it, until such a suit was brought and until a decree of voidance was rendered therein a judgment even in a state court which had jurisdiction of the subject-matter and of the parties, would be conclusive upon the merits of the controversies determined by that judgment between the parties and their privies in every court of the United States and that it could not be collaterally impeached for fraud or collusion.

The rule announced in Andes v. Ely, above cited, will also apply where a consent decree or a compromise judgment was entered by the action of public officials not having authority in this respect. In Kelly v. Milan,[42] it was said: "The act of the mayor in signing that agreement could give no validity to the bonds if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare them valid. The mayor had no such authority. The decree of the court was based solely upon the declaration of the mayor, in the agreement that the bonds were valid; and that declaration was of no more effect than the declaration of the mayor in the bill in chancery, that the bonds were invalid. The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds. This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision, by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally."

42—127 U. S. 139; see, also, Board of Com'rs of Oxford County v. Union Bank of Richmond, 96 Fed. 293 C. C. A.

§ 317. Examination of original cause of action.

Attention will be called to some cases involving the right of the court in a subsequent proceeding brought to enforce rights growing out of the rendition of a judgment in favor of the moving party to examine into the original cause of action. In Commissioners of Taxing District v. Loague,[43] the question was raised in a proceeding in mandamus to enforce the payment of a judgment. It appeared from the facts in the case that under the legislation between the issue of the bonds in 1870, and the application in the present case in March, 1886, authority to levy taxes to pay debts of the character represented by the judgments when uncompromised did not exist at the latter date, so that the plaintiff was remitted in the assertion of his right to that remedy to the time when the bonds were issued, and as the city had then no power to tax to pay them, other than that derived from the Act of 1870, the relator by his pleadings opened the facts which attended the judgments for the purpose of counting upon that act as furnishing the remedy which he sought. In this the court held he, in effect, asked it to order the levy of a tax to pay the coupons and relied upon the judgments principally as creating an estoppel upon a denial of the power to do so. The court said: "Thus invited to look through the judgments to the alleged contracts upon which they are founded and finding them invalid for want of power must we, nevertheless concede to the judgments themselves such effect by way of estoppel as to entitle the plaintiff ex debito justitio to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued. * * * When the relator is obliged to go behind his judgments as money merely, to obtain the remedy per-

43—129 U. S. 493, distinguishing Harshman v. Knox County, 122 U. S. 306.

taining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists, res judicata may render straight that which is crooked and black that which is white; but where application is made to collect judgments by process not contained in themselves and requiring to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." In an earlier case in the same court, Louisiana, ex rel Nelson v. Police Jury of St. Martin's Parish,[44] the court held that upon an application for writ of mandamus to compel the payment of a judgment it was competent for it to inquire into the cause of action on which the judgment was rendered when the judgment creditor prayed for the enforcement of the judgment by proceedings which were authorized by legislation existing at its date but subsequently repealed, to this extent, namely, whether the judgment was founded upon a contract the obligation of which the state was prohibited from impairing; the court further held that it could not re-examine the question of the validity of the contract or the propriety of the judgment. The court said on this last point: "The inquiry, however, which may be thus instituted into the nature of the original cause of action does not, where the judgment was rendered upon a contract, authorize a re-examination of the validity of the contract or of the propriety of the judgment. That would involve a re-trial of the case."

§ 318. Estoppel by the payment of interest.

As a particular form of the application of equitable estoppel against a public corporation to deny the validity

44—111 U. S. 716.

of its securities in the hands of bona fide holders, there are many authorities holding that when a corporation pays the interest upon its obligations for a series of years or a portion of the principal, it will thereafter be estopped to deny their validity. The memorandum of time following the cases cited in the note refer to the number of years the interest was paid by the corporation in the particular case cited.[45]

45—Sup'rs of Marshall County v. Schenck, 5 Wall. 772; Eight years Com'rs of Johnson County v. January, 94 U. S. 202; Pompton v. Cooper Union, 101 U. S. 196; Harter v. Kernochan, 103 U. S. 562; Kirkbride v. Lafayette County, 108 U. S. 208. Three years. Anderson County Com'rs v. Beal, 113 U. S. 227. Ten years. Board of Education of the City of Atchison v. De Kay, 148 U. S. 591. "For years." Citizens Savings & Loan Assoc'n v. Perry County, 156 U. S. 692. Seventeen years. Graves v. Saline County, 161 U. S. 359. Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, reversing 72 Fed. 623. Three and a half years. Luling v. Racine, 1 Bissell 314. Several years. First National Bank of Oswego v. Wolcott, 19 Blatchf. 370. Six years. First National Bank of Oswego v. Town of Wolcott, 7 Fed. 892. Denison v. City of Columbus, 62 Fed. 775, affirmed 69 Fed. 58, 84 Fed. 1015. Eleven years. Dudley v. Board of Com'rs of Lake City, 80 Fed. 672 C. C. A. Several years. Second Ward Savings Bank v. City of Huron, 80 Fed. 660. Several coupons paid. Heed v. Com'rs of Cowley County, 82 Fed. 717. Thirteen years. Rondot v. Rogers Twp., 99 Fed. 202 C. C. A. For a time. Washington County v. Williams, 111 Fed. 801 C. C. A. Twenty-eight years. Board of Com'rs of Stanly County v. Coler, 113 Fed. 705. A number of years. Fernald v. Town of Gilman, 123 Fed. 797. Until maturity. Keithsburg v. Frick, 34 Ill. 405. A series of years. Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462. Thirty-four years. Leavenworth R. R. Co. v. Douglas County, 18 Kan. 170. Two years. Brown v. Milliken, 42 Kan. 769; Town of Eminence v. Grasser's Exers, 81 Ky. 52. Schmitz v. Zeh, 97 N. W. 1049. 91 Minn. 290. Thirteen years.

Town Council of Lexington v. Union National Bank, 75 Miss. 1, 22 So. 291. Interest paid on railroad aid bonds for five years then under an act of legislature they were renewed for twenty years and interest on renewal bonds paid for ten years, the town was held estopped to deny their validity. Hannibal & St. Joe R. R. Co. v. Marion County, 36 Mo. 294. A number of years.

Colburn v. McDonald (Nebr.), 100 N. W. 961. Interest for thirty years paid and a part of the principal. Municipality held estopped unless bonds were absolutely void when issued.

Calhoun v. Millard, 121 N. Y. 69. Six years. The town and the taxpayers permitted the bonds to be dealt with and taken by savings banks and others for nearly ten

The authorities are not uniform, however, on this point, some holding that the corporation will not be so estopped by the payment of interest. Upon the examination of these cases it will be noted that their conclusion is based in nearly every case upon the non-existence of the power to issue, the distinction being made between the absolute want of power to issue and an irregularity in the exercise of a given power.[46]

years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition encouraged investment therein as safe and valid securities. * * * They are now in the hands of bona fide holders. The denial of relief in this case may result in the enforcement of the bonds in question and also of other town bonds issued and held under similar circumstances. But in contrasting the relative conduct and situation of the town and of the taxpayers on the one side, and the purchaser of the bonds on the other, we cannot say that such a result will be repugnant to any principle of justice or equity. Town of Cherry Creek v. Becker, 123 N. Y. 161. Six years. State v. Van Horn, 7 Ohio State 331. Nelson v. Haywood County (Tenn.), 11 S. W. 885, 3 Pick. 781. Nolan County v. State, 83 Tex. 182, 17 S. W. 823; Noel-Young Bond & Stock Co. v. Mitchell County, 21 Tex. Civ. App. 638, 54 S. W. 284.

46—Marsh v. Fulton County, 10 Wall. 676; Citizens Savings & Loan Assoc'n v. City of Topeka, 20 Wall. 665; Town of South Ottawa v. Perkins, 94 U. S. 260; Parkersburg v. Brown, 106 U. S. 487; Daviess County v. Dickinson, 117 U. S. 657. Doon County v. Cummins, 142 U. S. 366. It is hardly necessary to add that the payments of some installments of interest cannot have the effect of ratifying bonds issued beyond the constitutional limit; for a ratification can have no greater effect than a previous authority; and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest, or otherwise. Cowdery v. City of Caneadea, 16 Fed. 532; Ashuelot Nat. Bank v. School District No. 7, 41 Fed. 514; Brown v. Ingalls Twp., 81 Fed. 485; Board of Com'rs of Oxford County v. Union Bank of Richmond, 96 Fed. 293; Clarke v. Town of North Hampton, 120 Fed. 661 C. C. A., affirming 105 Fed. 312; Marshall County v. Cook, 38 Ill. 44; Schaeffer v. Bonham, 95 Ill. 368; Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048; First National Bank v. District Township of Doon (Ia.), 53 N. W. 301; Daviess County v. Howard, 13 Bush (Ky.), 101; Green County v. Shortell (Ky.), 75 S. W. 251; Bogart v. Lamotte Twp., 79 Mich. 294; Com'rs of Buncombe County v. Payne, 123 N. C. 432, 31 S. E. 711; Glenn v. Wray, 126 N. C. 730, 36 S. E. 167, following Union Bank of Richmond v. Board of Com'rs of

§319. Equitable estoppel as based upon other grounds.

The principle of equitable estoppel is also applied for the protection of the bona fide holder of securities issued by public corporations in other ways, namely, where the corporation with a full knowledge of defects in the manner of issue has received and retained the benefits of the proceeds of its bonds;[47] where it recognizes directly or indirectly the validity of the bonds by the levy of taxes for their payment or the payment of interest as it accrues from time to time;[48] where stock in railroad cor-

Exford, 116 N. C. 339, 21 S. E. 410; Debnam v. Chitty (N. C.), 43 S. W. 3; City of Memphis v. Bethel (Tenn.), 17 S. W. 191; Noel-Young Bond & Stock Co. v. Mitchell County, 54 S. W. 284, 21 Tex. Civ. App. 638.

47—Com'rs of Johnson County v. January, 94 U. S. 202; Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, reversing 72 Fed. 623; First National Bank of Oswego v. Wolcott, 19 Blatchf. 370; Dudley v. Board of Com'rs of Lake County, 80 Fed. 672 C. C. A.; Chilton v. Township of Grattan, 82 Fed. 873; Rondot v. Rogers Twp., 99 Fed. 202 C. C. A.; New York Life Ins. Co. v. Board of Com'rs of Cuyahoga County, 106 Fed. 123; Wykes v. City Water Works Company of Santa Cruz, 184 Fed. 752; Mobile County v. Sands (Ala.), 29 So. 26; Nolan County v. State, 83 Tex. 182, 17 S. W. 823; but see Thornburgh v. School District No. 175 (Mo.), 12, 75 S. W. 81; Washington County v. David (Neb.), 89 N. W. 737; Weismer v. Douglas, 64 N. Y. 91; Superior Mfg. Co. v. School District No. 3, Kiowa County (Okla.), 114 Pac. 328.

Municipal Securities Company v. Baker County (Ore.), 54 Pac. 174. A county by receiving benefits is not estopped to assert the invalidity of warrants issued in excess of the constitutional limitation of indebtedness.

48—Campbell v. City of Kenosha, 5 Wall. 194; Sup'rs of Marshall County v. Schenck, 5 Wall. 722; Nugent v. Sup'rs of Putnam County, 19 Wall. 241; County of Ray v. Vansycle, 96 U. S. 687; Howard County v. Boonesville Central Bank, 108 U. S. 314; Washington County v. Williams, 111 Fed. 801 C. C. A.; Jones v. Cullen, 142 Ind. 335, 40 N. E. 124; Keithsburg v. Frick, 34 Ill. 405; Morris County Com'rs v. Hinchman, 31 Kan. 729; State v. Board of Com'rs of Scott County (Kan.), 49 Pac. 663; Eminence v. Grasser's Exers., 81 Ky. 52; David v. East Baton Rouge, 27 La. Ann. 230; Brown v. Bon Homme County, S. D., 46 N. W. 173; Mills v. Gleason, 11 Wis. 470; but see Galbraith v. City of Knoxville (Tenn.), 58 S. W. 643.

porations purchased with the proceeds of railroad aid bonds has been retained by a public corporation and it has exercised the rights of a stock holder by voting the stock or otherwise;[49] where the validity of the bonds has been recognized by duly authorized public officials or by the corporation as evidenced by its course of conduct in respect to the existence of the securities as outstanding and valid obligations;[50] and, finally, by the issue of

49—Sup'rs of Marshall County v. Schenck, 5 Wall. 772.

Pendleton County v. Amy, 13 Wall. 297. In this case there were no recitals but the court held that the doctrine of estoppel should apply—it said on this point: "The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and, therefore, that the third plea cannot be sustained." Nugent v. Sup'rs of Putnam County, 19 Wall. 241; Luling v. Racine, 1 Biss. 314; Board of Com'rs of Stanly County v. Coler, 113 Fed. 705; Keithsburg v. Frick, 34 Ill. 421.

Barrett v. County Court of Schuyler County, 44 Mo. 197. If there were defects in the original subscription the subsequent action of the county in representing and voting on the stock subscribed must be held for the purpose of this suit a waiver of such matters.

50—Amey v. Alleghany County, 24 How. 364. They were circulated for ten years, and were constantly acknowledged by the city as its bonds for the purposes for which they were issued. They are now in the hands of bona fide transferees to whom they must be paid according to their terms. It would be inequitable, if the city could repudiate them at all, and more especially if that were allowed to be done upon the ground of any fault in the corporation in their issue. Campbell v. City of Kenosha, 5 Wall. 194; Sup'rs of Marshall County v. Schenck, 5 Wall. 772; County of Tipton v. Locomotive Works, 103 U. S. 523; County of Jasper v. Ballou, 103 U. S. 745; City of Hannibal v. Fauntleroy, 105 U. S. 408; National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 62 Fed. 778 C. C. A.; Town of Darling v. Atlantic Trust Co., 68 Fed. 849; Washington County v. Williams, 111 801 C. C. A.; Society for Savings v. New London, 29 Conn. 174; Morris County Com'rs v. Hinchman, 31 Kan. 729; Barrett v. County Court, 44 Mo. 197; Calhoun v. Millard, 121 N. Y. 69; Shoe-

renewal or refunding bonds to replace the outstanding securities.[51]

Under all of these conditions and circumstances, the courts have repeatedly held as will be noted by the cases cited, that the public corporation is estopped to raise the question of irregularity or defects in the issue of securities in actions brought against it to enforce the obligations arising out of the transaction. The cases cited in the preceding notes, holding contrary to the rule as stated in the text, are invariably based upon the principle that in the absence of authority to issue securities such an act is ultra vires and cannot be ratified by any act of acquiescence or acknowledgement of validity.

Irregularities in the exercise of a given power may be cured by acts which constitute an estoppel but an absolute want of original authority can not be cured by acts of ratification. This subject will be further considered in the following sections on ratification and curative legislation.

maker v. Goshen Twp., 14 Oh. St. 509; State v. Mitchell, 31 Oh. St. 592; Brown v. Bon Homme County, S. D., 46 N. W. 173; State v. Anderson County, 8 Baxter (Tenn.), 249.

Pennington v. Park, 50 Vt. 178; but see Weismer v. Douglass, 64 N. Y. 91. Where a municipal corporation has assumed to issue bonds for a purpose altogether beyond the scope of its powers it is not estopped from asserting their invalidity by any conduct of its officers or agents or any acts of acquiescence and approval on the part of the inhabitants. Oswego County Savings Bank v. Town of Genoa, 72 N. Y. S. 786.

51—Campbell v. City of Kenosha, 5 Wall. 194; Little Rock v. National Bank, 98 U. S. 309; County of Jasper v. Ballou, 103 U. S. 745; Graves v. County of Saline, 161 U. S. 359; Union Bank of Richmond, Va. v. Board of Com'rs of Oxford County, 90 Fed. 7; Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462; City of Coolidge v. General Hospital Society of Connecticut (Kan.), 58 Pac. 562; Carver v. Board of Liquidation, 35 La. Ann. 261; Town Council of Lexington v. Union National Bank (Miss.), 22 So. 291; State v. County of Dakota (Nebr.), 35 N. W. 225; State v. Wilkinson, 31 N. W. 376; Hills v. Peekskill Savings Bank, 101 N. Y. 490.

§ 320. Equitable estoppel; the doctrine of laches.

It is a fundamental rule of equity that the courts will not permit one to sit idly by while rights are being asserted adverse to his interests without promptly acting for his protection. This doctrine is applied in favor of the bona fide holder of public securities and the courts have repeatedly held that where a public corporation fails to raise defenses which are open to it within a reasonable length of time, that it will thereafter be estopped by laches to question the validity of securities in the hands of bona fide holders in respect to irregularities and infirmities in their issue.[52]

In Marshall County v. Schenck, [53] objection was made to the validity of certain county bonds which had been issued in payment for railroad stock on the ground that the election to which the vote was in their favor had been irregularly called. The interest, however, had been paid for a series of years and no steps had ever been taken by the county or any of the taxpayers at the time of or prior to the issue of the bonds to assert their illegality. The court in its opinion by Mr. Justice Clifford said:

52—Ritchie v. Franklin County, 22 Wall. 67; Anderson County Com'rs v. Beal, 113 U. S. 227; Board of Education of City of Atchison v. De Kay, 148 U. S. 591; Cronin v. Patrick County, 89 Fed. 79; Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462; Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049; Calhoun v. Delhi, etc. R. R. Co. (N. Y.), 38 Hun. 379; State v. Van Horne, 7 Oh. St. 327.

Presidio County v. City National Bank (Tex.), 44 S. W. 1069. Where the business of a County had all been transacted at a county seat for more than twelve years and which the legislature has recognized though indirectly as the legal county seat, a county is estopped to assert the invalidity of bonds issued for the erection of its court house on the ground of the illegal removal of the county seat to that place.

First National Bank of Johnsbury v. Concord, 50 Vt. 257; but see McDowell v. Mass., etc. Company, 96 N. C. 514; Town of Springport v. Bank, 75 N. Y. 379. Tax payers held not estopped by the lapse of two years' time.

53—5 Wall. 581.

"Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be forever concluded, if they remain silent and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. Nothing of this kind was attempted in this case, and the defendants have never rescinded, or attempted to rescind, the contract; and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the company, but have annually acknowledged the validity of the bonds, by voting taxes for the payment of accruing interest, and have actually paid the same to the amount of six thousand dollars. * * * Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, the delegated authority will be presumed."

This principle was well stated in an early case in Ohio, State v. Van Horn,[54] where irregularities had occurred in the original issue of the bonds. The court in its decision after referring to the undoubted right of a tax payer or of the corporation before the issue of the bonds to have intervened and enjoined their issue on account of the irregularities complained of, said: "They, however, either intentionally or from neglect failed to assert their legal rights and without protest or interference, suffered the election to take place, their public agents, the trustees, to subscribe for stock, to issue the bonds and receive the proceeds. They also afterward, and for a period of three or four years, paid the interest by taxa-

54—State v. Horn, 7 Oh. St. 331.

tion, and thus gave credit to the bonds of the township. They now desire to retain the money of the original bondholders, refuse to pay interest, deny their obligations to pay back the principal, disaffirm the acts of their public agents, who under the forms of law and by their direct instigation through the ballot box, issued and negotiated these bonds. They had an opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin their proceedings, and protect themselves; they did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so, as against innocent third persons. They are concluded, not simply by the acts of their public agents, but by their own."

In some localities this principle has been formally recognized by the passage of legislation which prohibits the validity of securities from being questioned after a certain designated time. In Georgia in 1897, a law was passed to the effect that when a municipal loan in that state is to be floated a petition shall be filed by the solicitor or attorney general in the office of the clerk of the superior court setting forth the details of the issue. All questions of law and fact are then to be determined by the judge of that court. If no bill of exceptions is filed within twenty days or if the Supreme Court of the state affirms the judgment of the lower court if contested, the judgment of the superior court "Shall be forever conclusive upon the validity of said bonds against said county municipality or division and the validity of said bonds shall never be called in question in any court of this state." [55]

55—Code of Georgia, 1911, Sec. 445, et seq., Acts of 1897, p. 82. Lippitt v. City of Albany (Ga.), 63 S. E. 33; Holton v. City of

In the province of Ontario, the municipal act limits the time within which action may be taken to quash by-laws purporting to authorize a bond issue and it further provides that if any principal which may have become due shall be paid or if accruing interest is paid for one year, the bonds will be held valid.[56]

§ 321. Estoppel by ratification further discussed.

In the immediately preceding sections, attention has been called to various acts by public corporations which the courts have held operate as an estoppel to deny the validity of bonds on account of irregularities or defects in their issue. From an examination of the authorities cited it will be seen that the principles which they announce have met with general favor and that the doctrine of equitable estoppel is applied very freely in the enforcement of public obligations. It will be noted also that the application of the doctrine has been denied in those cases where the non-existence of the power to issue has been shown. This limitation applies not only to acts of ratification by the public corporations themselves but also in the attempted passage of curative legislation where the want of power is based upon some constitutional limitation or provision. If the power to issue in any event is vested either in the public corporation or in the legislature, it can by the necessary acts of ratification or the passage of curative legislation validate void securities theretofore issued, or to state the doctrine in another way, irregularities in the exercise of a given power may be cured by acts of ratification, but no recitals, acquiescence, acknowledgment or other acts of the corporation and its officials or legislation can create the power to issue where none before existed.[57]

Camilla (Ga.), 68 S. E. 472; see also Secs. 174 and 175, ante.

56—Revis. Stats. Ontario, 1897, p. 2490, Sec. 396, et seq.

57—Lewis v. City of Shreveport, 108 U. S. 282. Corporate ratification without authority from the legislature cannot make a munic-

Attention has been directed to various acts by the corporation or its duly authorized officials which the courts have held constitute a ratification, namely, the payment of interest, the levy of taxes and others which operate in a similar manner.[58]

Some cases involving acts of a miscellaneous character which the courts have held will operate as an estoppel under the conditions noted, will now be referred to. In Bissell v. City of Jeffersonville,[59] the city council assuming that it had legal authority to make a subscription on behalf of the city to the stock of a railroad company and to issue bonds in payment therefor on a petition of the legal voters, but having no such authority in fact, accepted and acted upon such a petition and issued the bonds in question. The legislature subsequently passed an act by which it was provided that it might "at any time after the passage of this act ratify and affirm such subscription." The city council thereupon proceeded to adopt and enter of record a resolution ratifying and confirming the former contract between the city and the railroad company. The defect in the original authority was held remedied by the curative legislation of the legislature taken in connection with the subsequent confirmation and ratification by the city council.

The act of official authorities contracting an indebtedness in excess of a legal limitation without the express consent of the electors is ratified by their subsequent vote

ipal bond valid which was void when issued for want of legislative power to make it. Kelly v. Milan, 137 U. S. 139; Sage v. Fargo Twp., 107 Fed. 383 C. C. A.

McNutt v. Lemhi County (Ida.), 84 Pac. 1054. The county cannot ratify an indebtedness incurred in direct violation of the constitution. Pugh v. Moore (La.), 10 So. 710; Herwig v. Richardson (La.), 11 So. 135; Anderson v. Ripley County (Mo.), 80 S. W. 263; Hodges v. City of Buffalo, 2 Denio (N. Y.) 110; Oswego County Savings Bank v. Town of Genoa, 65 N. E. 1120, affirming 72 N. Y. S. 786; Balch v. Beach (Wis.), 95 N. W. 132.

58—See Secs. 318-320, ante.

59—24 How. 287.

authorizing the authorities to create an indebtedness to liquidate the obligations illegally contracted.[60]

§ 322. Act of ratification; how performed.

Where the ratification is sought to be effected through the doing of an act or the compliance with a condition required, it must proceed in the same way as necessary for the original exercise of the power. The act of ratification when it consists of something required originally to be done but which was not done, must be performed in the same manner as if it were not an act of ratification but an original exercise of the power.[61]

The converse of this rule necessarily follows and there are many cases holding the act of ratification non-effectual because not performed in the manner required for a valid original exercise of the power.[62]

§ 323. Valid ratification equivalent to an original authority.

The cases are uniform in holding that an act of ratification when valid and whether consisting of municipal

60—Bell v. Burgess and Town Council of Borough of Waynesboro, 125 Pa. St. 299, 45 Atl. 930.

61—Bissell v. City of Jeffersonville, 24 How. 237; Givens v. Hillsborough County (Fla.), 35 So. 88; Sykes v. Columbus, 55 Miss. 115; State v. Getchell (N. D.), 55 N. W. 585; Demattos v. City of New Whatcom (Wash.), 29 Pac. 933.

62—Katzenberger v. Aberdeen, 121 U. S. 172. A statute attempting to validate municipal bonds where no power to issue exists is inoperative when under the constitution such power can be granted only upon a two-thirds vote which had not been obtained. Hill v. City of Memphis, 134 U. S. 198.

Post v. Pulaski County, 49 Fed. 628. Attempted curative legislation is of no avail which does not provide for a popular vote as required by law for the court held that the legislature cannot impose an obligation upon a municipality without its consent legally expressed, citing Choisser v. People, 140 Ill. 21, 29 N. E. 546. Motion for writ of certiorari denied, 145 U. S. 650, 36 L. Ed. 860; Lehman v. City of San Diego, 83 Fed. 669, affirming 73 Fed. 105; Atchison & Santa Fe R. R. Co. v. Com'rs of Jefferson County, 17 Kan. 29; Cudd v. Calvert, 54 S. C. 457, 32 S. E. 503.

action in some form or curative legislation relates back to the inception of the proceedings, cures all defects and irregularities and operates in a legal sense as the equivalent of original authority. This rule applies as noted above not only to acts of ratification by public corporations, but also to curative legislation passed by legislative bodies and is axiomatic.[63]

In Beloit v. Morgan,[64] it was said: "Whenever it has been presented the ruling has been that in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the legislature is in all respects equivalent to original authority, and cures all defects of power if such defects existed and all irregularities in its execution."

§ 324. Curative legislation.

In the proceedings of public corporations mistakes and irregularities are of frequent occurrence and this is especially true in the incurring of indebtedness or the issue of negotiable securities. The proceedings may be further void because not at that time authorized by the legislature or because the public corporation has acted in excess of its statutory authority. The unquestioned rule applies in such cases that all these acts may be ratified and the defects cured by remedial legislation where

63—Rogers v. Keokuk, 3 Wall. 74; Campbell v. City of Kenosha, 5 Wall. 194; Lee County v. Rogers, 7 Wall. 181; Beloit v. Morgan, 7 Wall. 619; City of Kenosha v. Lamson, 9 Wall. 477.

Mattingly v. Dist. of Columbia, 97 U. S. 687. If the Congress or the Legislative Assembly had the power to commit to the board the duty of making improvements and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized and the ratification if made was equivalent to an original authority. Red River Furnace Co. v. Tennessee Central Ry. Co. (Tenn.), 87 S. W. 1016; Ball v. Presidio County (Tex.), 27 S. W. 702.

64—7 Wall. 619.

the legislature could have originally conferred the power.[65]

65—Ritchie v. Board of Com'rs of Franklin County, 22 Wall. 67; Mattingly v. District of Columbia, 97 U. S. 687; National Bank v. County of Yankton, 101 U. S. 129; Thompson v. Perrine, 103 U. S. 806, 106 U. S. 589.

Otoe County v. Baldwin, 111 U. S. 1. As the Legislature had power to authorize the issue of bonds without any precedent action of the voters of the county, it could validate the issue of the bonds by curing and legalizing defects in respect to voting. The bonds were assigned by the railroad company, and came to the plaintiff after the acts of 1869 were passed, and he became a bona fide holder of them on the faith of those acts. The doctrine is well settled in this court, that the Legislature of a state, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and interest on them, with or without a popular vote; and to cure, by a retrospective act, irregularities in the exercise of the power conferred. Cooper v. Town of Thompson, 13 Blatchf. 234; Mayor, etc. of Columbus v. Dennison, 69 Fed. 58 C. C. A. 84 Fed. 1015; Steele County v. Erskine, 98 Fed. 215, affirming 87 Fed. 630.

New York Life Ins. Co. v. Board of Com'rs of Cuyahoga County Ohio, 106 Fed. 123. A retroactive statute is not unconstitutional when passed in furtherance of justice for the fulfillment of a moral obligation, so held in respect to curative legislation validating indebtedness evidenced by county bonds issued under authority of an act which was held subsequent to the issue of the bonds to be unconstitutional.

Clagett v. Duluth Twp., 143 Fed. 824. A curative act which provides that it shall not apply to any bonds "where the legality of the same has been questioned in any action or proceeding in any court" operates subject to this condition. Carpenter v. Greene County (Ala.), 29 So. 134.

Courtner v. Etheridge (Ala.), 43 So. 368. Where the legislature had the power to authorize a loan by school commissioners their ultra vires act in making such loan is remedied by an act ratifying the same if no contract or vested rights are violated or impaired. Yavapai County v. McCord (Ariz.), 59 Pac. 99; Clark v. City of Los Angeles (Calif.), 116 Pac. 722; Middleton v. City of St. Augustine (Fla.), 29 So. 421. The validity of the curative act is not affected by a prior suit testing the validity of bonds and which has not yet proceeded to judgment.

Potter v. Lainhart (Fla.), 33 So. 251. An act validating certain bonds includes those delivered as well as agreed to be delivered in the suit of the same issue.

Givens v. Hillsborough County (Fla.), 35 So. 88. A curative legislation is valid in respect to bonds theretofore adjudicated invalid by the court of competent jurisdiction. Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E. 212; Bass v. Columbus, 30 Ga. 845; Keithsburg v. Frick, 34 Ill. 405; McMillen v. Boyles, 6 Ia. 304.

Cutler v. Madison County Sup'rs,

As said by the Supreme Court of the United States in one case,[66] "Argument to show that defective subscription of the kind may in all cases be ratified where the legislature could have originally conferred the power is certainly unnecessary as the question is authoritatively settled by the decisions of the Supreme Court of the state, and of this court in repeated instances. Such laws when they do not impair any contract or injuriously affect the rights of third parties are never regarded as objectionable and certainly are within the competency of the legislative authority."

§ 325. Curative legislation; character of; construction.

The curative legislation, however, must be clear and certain in its application,[67] and cannot act prospectively.[68] It need not be in all cases expressly given, but if it has the effect claimed by fair implication it will be given an operative effect.[69]

56 Miss. 115. Defects in the form of bonds may be cured by a subsequent legislation.

Oswego County Savings Bank v. Town of Genoa, 65 N. E. 1120, affirming 72 N. Y. S. 786. Conditional curative legislation operates subject to the conditions. Rogers v. Rochester, etc. R. R. Co., 21 Hun. 44; Alexander v. Com'rs of McDowell, 70 N. C. 208; Wharton v. City of Greensboro (N. C.), 62 S. E. 740; Duke v. Williamsburgh, 21 S. C. 414; State v. Whitesides, 30 S. C. 579; Board of Com'rs of Cumberland County v. Randolph (Va.), 16 S. E. 722; Bell v. Farmville, etc. R. R. Co., 91 Va. 99, 20 S. E. 942; Baker v. City of Seattle, 2 Wash. 576; Kimball v. Rosendale, 42 Wis. 407.

Bain v. Savage, 76 Va. 904. The power of the legislature to remedy irregularities also applies to defects in the bond in respect to form or rate of interest. Herman v. Goodyear, 56 Conn. 210.

66—St. Joseph v. Rogers, 16 Wall. 644.

67—Hayes v. Holly Springs, 114 U. S. 120; Board of Finance v. Jersey City, 57 N. J. L. 452.

68—Town of Concord v. Robinson, 121 U. S. 165; Williams v. People (Ill.), 24 N. E. 647, disapproving City of Jonesboro v. R. R. Co., 110 U. S. 192.

69—Campbell v. City of Kenosha, 5 Wall. 194. This is not in terms a curative act but it has that effect by fair implication. It is not doubted the legislature could by direct act of confirmation legalize the issue of this script notwithstanding the submission of the question to the vote of the people was under

A mere reference to an invalid act by the legislature in a subsequent one will not give it validity when it is not shown that the subsequent act was intended to have any such effect. As said in one case,[70] "To give to such a reference in a subsequent act as is here relied on, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous and would lay the foundation for evil practices. The legislature might in this way be entrapped into the enactment or re-enactment of laws when it had no intention, or even suspicion, that it was doing so."

The tendency, therefore, is to apply the rule of strict construction and to deny the effect of curative legislation unless its intent is clearly shown.[71] It has also been held that the curative legislation should apply to and validate in specific terms the securities issued under the void authority rather than to validate the act if unconstitutional under which they were issued.[72] An illustration of this rule is found in the case of Lehman v. City of San Diego,[73] where bonds were issued pursuant to ordinance for the issuance of which there was no legal authority. The legislature passed an act ratifying and declaring valid to all intents and purposes the ordinances

the wrong law. If by a direct act so equally in any other way, if the intention of the legislature to legalize clearly appears. In this case the curative act was in the form of the revised charter of the city.

Courtner v. Etheredge (Ala.), 43 So. 368; but see Coleman v. Broad River Twp., 50 S. C. 321, 27 S. E. 774, where it was held that an act changing the name of a railroad company and validating all the acts and contracts of the old company did not thereby make valid illegal bonds issued in aid of the old company at a prior time.

70—Town of South Ottawa v. Perkins, 94 U. S. 260.

71—Hayes v. Holly Springs, 114 U. S. 120; Santa Ana v. San Buenaventura, 65 Fed. 323; Nichols v. Board of Directors of School Dist. No. 10, Wash., 81 Pac. 325.

72—Grannis v. Cherokee Twp., 47 Fed. 427; State ex rel. Dickinson v. Neely, 30 S. C. 587, 9 S. E. 664; Cudd v. Calvert, 54 S. C. 457, 32 S. E. 503.

73—83 Fed. 699.

in question, and further providing that all bonds already issued or that may be hereafter issued under and in accordance with their provisions were declared to be legal and valid obligations of and against said city. In the original issuance of the bonds the terms and conditions prescribed in the ordinances were not complied with. The court held the bonds void and said in respect to the curative act that it "did not attempt in any manner to change the terms and conditions as to the issuance of the bonds. The ordinances as thus ratified constituted the mode and the measure of the power of the board of trustees and could not be departed from."

The effect of the curative legislation may also depend upon its constitutionality. The same tests are applied to legislation of this character as to other legislative acts, and a curative act may be held void not because of its nature as such or because it attempts to validate a void issue of securities but because of its unconstitutionality.[74]

74—Read v. Plattsmouth, 107 U. S. 568. An act legalizing municipal bonds issued without authority was here held unconstitutional under the Nebraska Constitution, forbidding the "passage of a special act conferring corporate powers." Anderson v. Santa Anna, 116 U. S. 356, discussing constitutionality of ratifying statutes. Bolles v. Brimfield, 120 U. S. 759.

Springfield Safe-Deposit & Trust Co. v. City of Attica, 85 Fed. 387, C. C. A. Special curative act in this case held not within the provision of Kansas Constitution, Art. 2, Sec. 17, prohibiting the passage of special legislation where a general law can be made applicable. Steele County v. Erskine, 98 Fed. 215, affirming 87 Fed. 630.

City of Redlands v. Brook (Calif.), 91 Pac. 150. Act legalizing certain bonds held not special law.

Potter v. Lainhart (Fla.), 33 So. 251. Curative act held valid against objections in respect to its mode of passage in the legislature.

Shawnee County v. Carter, 2 Kans. 115. Curative act held unconstitutional.

State v. Brown (Minn.), 106 N. W. 477. General laws of 1905, Chap. 76 and 77, legalizing certain school bonds held to be curative acts and not special legislation in conflict with Constitution, Art. 4, Secs. 33 and 34; Union Bank of Richmond v. Com'rs of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

Com'rs of Buncombe County v. Payne, 123 N. C. 432, 31 S. E. 711. Private laws of 1876-77, Chap. 40, validating bonds issued by Bun-

Curative acts which ratify or attempt to ratify void bonds are not usually held unconstitutional because in violation of provisions to the effect that special laws shall not be passed where a general law can be made applicable, nor are such acts held to contravene constitutional provisions prohibiting the legislature from passing special laws conferring corporate powers.[75]

Neither do such acts contravene constitutional prohibitions against the passage of retroactive legislation.

In City of Orleans v. Clark,[76] it was said in the opinion by Mr. Justice Field: "A law requiring a municipal corporation to pay a demand which is without legal obligation but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not retroactive law,—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the state, or any of its subordinate agencies, with respect to past transactions. It is designed to pre-

combe County unconstitutional, violating Constitution, 1868, Art. 2, Sec. 14.

State v. Whitesides, 30 S. C. 579, 9 S. E. 661. Curative act held constitutional.

Coleman v. Broad River Twp., 50 S. C. 321, 27 S. E. 774. An act declaring certain bonds illegally issued to be township debts and providing for their payment is not unconstitutional since it is not a validation act but an exercise of the power to tax.

75—Read v. City of Plattsmouth, 107 U. S. 568. Coupon bonds were issued without authority of law and the legislature passed an act legalizing them. This was held not to be a violation of that provision in the constitution which enacts that "the legislature shall pass no special act conferring corporate powers" as the act merely recognized the existence of an obligation and provided a medium for enforcing payment according to the original intention of the parties. No new corporate powers were thereby conferred. Springfield Safe-Deposit & Trust Co. v. City of Attica, 85 Fed. 387; see also some of the cases cited in preceding note.

76—95 U. S. 644; see also State v. Newark, 27 N. J. L. 185; State v. Dickerman, 16 Mont. 278, 40 Pac. Rep. 698.

vent retrospective legislation injuriously affecting individuals and thus protect vested rights from invasion."

Cooley in his work on Constitutional Limitations,[77] in discussing the power of the legislature to pass a retrospective law says: "We think investigation of the authorities will show that a party has no vested right in a defense based upon an informality not affecting his substantial equities." * * * A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matter of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for the taxation and the levy of taxes thereon; irregularities in the organization or elections of corporations; irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause; irregular proceedings in court, etc.

"The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

§ 326. Curative legislation; original want of authority.

In some instances the curative legislation has been held to apply to bonds for the issue of which there existed no authority whatever. This is entirely true where the leg-

77—7th Ed., pp. 528-531.

islative body possesses the power to authorize the issue of securities under the circumstances and the conditions involved.[78]

This rule is well illustrated by several cases in the Supreme Court of the United States. In one,[79] where it was held that whether an act of the territorial legislature authorizing the issuance of bonds by counties to aid in the construction of a railroad was valid or not made no difference, the Act of Congress considered in the decision had the effect of validating the bonds involved in the suit. The court held that it was "equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute." And in another case,[80] railroad aid bonds had been issued by the County of Pima, Arizona, without any legal authority. Afterwards Congress authorized the territorial officials to issue new bonds in exchange for these as well as others. It was held that this act of Congress effected a validation of the bonds; the court said: "We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subse-

78—Granada County Sup'rs v. Brogden, 112 U. S. 261; Bolles v. Town of Brimfield, 120 U. S. 759; Com'rs of Comanche County v. Lewis, 133 U. S. 198; Harper County Com'rs v. Rose, 140 U. S. 71; Dows v. Town of Elmwood, 34 Fed. 114; Cornell University v. Village of Maumee, 68 Fed. 418; Steines v. Franklin County, 48 Mo. 167; Nolan v. State (Tex.), 17 S. W. 823.

Ball v. Presidio County (Tex.), 27 S. W. 702; see also City of Redlands v. Brook (Calif.), 91 Pac. 150. It has been held that the recognition by the legislature of a public corporation defectively organized is tantamount to a ratification of bonds previously issued by it. See Sec. 266, ante.

79—National Bank v. County of Yankton, 101 U. S. 129.

80—Utter v. Franklin, 172 U. S. 416.

quently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the territories, as full as that which a state legislature has over its municipal corporations."

§ 327. Curative legislation, other conditions.

The curative effect of legislation is most frequently invoked, however, in those cases involving an irregularity in the exercise of a given power rather than the issue of securities without authority.

Excessive issue. The amount of securities issued may be in excess of that authorized and it is then perfectly proper for the Legislature, if it possessed the power in the first instance, to pass legislation validating the excessive issue.[81]

Where constitutional questions are involved other principles will apply which have already been discussed. The generally accepted doctrine prevails that except in unusual cases constitutional provisions cannot be evaded by acts of the legislature.[82]

81—Read v. Plattsmouth, 107 U. S. 568; Wharton v. City of Greensboro (N. C.), 62 S. E. 740; Hodge v. Levi, 80 S. C. 518, 61 S. E. 1009; Daggett v. Lynch (Utah), 54 Pac. 1095; but see Hasbrouck v. City of Milwaukee, 13 Wis. 37.

82—Katzenberger v. Aberdeen, 121 U. S. 172; Post v. Pulaski County, 49 Fed. 628; Choisser v. People, 140 Ill. 21; Marshall v. Silliman, 61 Ill. 218; Shearer v. Board of Sup'rs of Bay County (Mich.), 87 N. W. 789; Sykes v. Columbus, 55 Miss. 115.

Coleman v. Broad River Twp., 50 S. C. 321, 27 S. E. 774. That act could only legalize and validate the contracts or obligations that were legal; and no contract could be legal that was not constitutional, no act of the old company could be legal or valid which in its incipiency and at its completion was clearly unconstitutional and void; therefore, this act to declare, if that had been its purpose, that such bonds issued in pursuance of it was legal and valid, would be beyond the scope of the legislature itself.

Balch v. Beach (Wis.), 95 N. W. 132; but see Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E 212, which holds that a curative act passed after the adoption of a constitutional provision which prohibits the creation of city debts in excess of a certain limit legalizes bonds issued before the adoption of the constitutional provision does not

Unauthorized subscriptions. The particular defect alleged in securities may arise through the making of an unauthorized subscription to the capital stock of a railroad corporation, payment for which is to be made through an issue of bonds. It is clearly within the the power of the legislature in these instances by curative legislation to validate a subscription and the bonds issued in connection therewith or to authorize the public corporation to act again in the matter. Defective subscriptions clearly can be ratified where the legislature could have originally conferred the power.[83]

Election irregularities. Frequent occasion for the passage of curative legislation is in connection with irregularities in the election by which they were voted; defects in the election notice, the manner or time of holding the same, the canvass of votes and others which because of their existence either render the bonds invalid or throw a cloud upon their validity. Again, the universal holding of the courts is to the effect that if the legislature originally prescribed the conditions or might have prescribed them, it is entirely within its power to pass legislation declaring the bonds valid and thus curing all of the defects complained of.[84]

Unauthorized election: Failure to hold election. An election at which the question of issuing bonds is sub-

contravene it, though the city indebtedness including the bonds exceeds the limit fixed in the constitution. The creation of the debt dates from the issue of the bonds.

83—Bissell v. City of Jeffersonville, 24 Howard 237; St. Joseph v. Rogers, 16 Wall. 644; Quincy v. Cook, 107 U. S. 549; Jonesboro City v. Cairo & St. Louis R. R. Co., 110 U. S. 192; Grenada County Sup'rs v. Brogden, 112 U. S. 261; Anderson v. Santa Anna, 116 U. S. 356; Bolles v. Brimfield, 120 U. S. 759; Red River Furnace Co. v. Tenn. Cent. R. R. Co. (Tenn.), 87 S. W. 1016; Board of Com'rs of Cumberland County v. Randolph (Va.), 16 S. E. 722; Hall v. Baker, 74 Wis. 118, 42 N. W. 104.

84—St. Joseph v. Rogers, 16 Wall. 663. Election held on wrong day; Carpenter v. Greene County (Ala.), 29 So. 134; City of Redlands v. Brook (Calif.), 91 Pac. 150; Bell v. Farmville, etc. R. R. Co., 91 Va. 99, 20 S. E. 942.

mitted may be held without any legal authority therefor. It has been held that it is entirely competent for the legislature to validate the election by subsequent enactment and bonds issued pursuant to such election will be regarded as valid.[85] The same rule will also apply where there has been a failure to hold an election as required by a statute under authority of which the bonds were issued. If it was within the power of the legislature to authorize in the first instance the issuance of securities by public corporations without requiring the assent of the voters, clearly it could effect the same result by subsequent action validating an issue not based upon an election.[86]

Informalities in official proceedings. The defects in securities may be occasioned through irregularities and informalities in the proceedings of official bodies charged with the duty of issuing the bonds in the first instance or as based upon authority given by the people at an election. The power of the legislature as stated extends to the validation of securities issued under such circumstances.[87]

85—Sup'rs of Marshall County v. Schenck, 5 Wall. 772; Jonesboro City v. Cairo & St. Louis R. R. Co., 110 U. S. 192; Otoe County v. Baldwin, 111 U. S. 1; but see Gaddis v. Richland County, 92 Ill. 119.

86—Ritchie v. Franklin County, 22 Wall. 67. A number of counties in Missouri had made extensive road improvements and issued bonds in payment of same without submitting the question to the voters as required by law, the legislature passed a curative act and the Supreme Court of the United States held that the illegality of the bonds was thereby remedied.

"In many cases retroactive laws, although intended to effect a good purpose, have features of injustice about them. This is not that case. The bonds here were issued under a supposed authority and no one interposed an objection. The taxpayers rested until the mischief was done and then tried to get relief. It is certainly not unjust to them that the legislature should say, 'you must pay for an expenditure which you saw incurred and could have prevented, but did not.' If the county court had acted wholly outside of its duties the aspect of the case might have been different." Thompson v. Perrine, 106 U. S. 589; Quincy v. Cook, 107 U. S. 549; Otoe County v. Baldwin, 111 U. S. 1; First Municipality v. Orleans Theatre Co., 2 Rob. (La.) 209.

87—Thompson v. Perrine, 103 U.

Defect in the original act. The original act authorizing the issue of securities may be defective in some particular either in respect to its form or its mode of passage. Such defects may be remedied by subsequent legislation and the authority therein legally conferred will, under the doctrine already stated, relate back to and validate securities attempted to be issued under the defective act.[88] As illustrating this rule a case from North Carolina may be cited,[89] where an act authorizing the issuance of bonds failed to state by whom they were to be signed and issued, it was held that a subsequent legislature could amend the act in this respect nunc pro tunc and thus validate the unauthorized acts of those who had issued the bonds.

§ 328. Williams v. Town of Duanesburgh.

This case,[90] decided by the New York Circuit Court of Appeals, illustrates many of the propositions referred to in the preceding sections and a quotation from the decision will not be inappropriate: "It is the doctrine of this court, established in the cases arising under statutes for bonding towns in aid of railroads, that when the

S. 806, 106 U. S. 589; Cooper v. Town of Thompson, 13 Blatchf. 234; Clark v. City of Los Angeles (Calif.), 116 Pac. 722; Middleton v. City of St. Augustine (Fla.), 29 So. 421.

Potter v. Lainhart (Fla.), 33 So. 251. A curative act will validate bonds issued by county commissioners before they have provided by resolution for a sinking fund for their redemption as required by statute. Barton v. Walker, 47 Mo. 202.

88—Granniss v. Cherokee Twp. of York County, 47 Fed. 425; Yavapai County v. McCord (Ariz.), 59 Pac. 99; Campbell v. City of Indianapolis, 155 Ind. 186, 57 N. E. 920; State v. Whitesides, 30 S. C. 579, 9 S. E. 661; State v. City of Cincinnati (Ohio), 40 N. E. 508; but see Union Bank of Richmond v. Com'rs of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

89—Alexander v. Com'rs of McDowell County, 70 N. C. 208.

90—66 N. Y. 129; see also Town of Duanesburgh v. Jenkins, 57 N. Y. 177.

right to issue the bonds of the town is made by the statute to depend upon the consent of taxpayers or other conditions precedent, and the bonds are issued without the conditions having been performed, they are void in whosoever hands they may be. But the legislature may overlook a defective execution of the power conferred, and, by retroactive legislation, cure defects in the action of municipalities under these statutes. The legislature may, in the first instance, prescribe the conditions upon which the bonds may be issued. It may designate the agencies through which the municipality shall act, and determine what measure of consent of taxpayers shall be required, and in what form it shall be expressed. It may by subsequent legislation where there has been a failure to perform conditions precedent, and the bonds have been issued, dispense with said conditions, and ratify and confirm, and make valid and obligatory upon the municipality, bonds issued without such performance—at least, it may do so in cases where the municipality has, through the construction of the road, or by the receipt of the stock of the company in exchange for the bonds, received the benefit which the statute contemplated as the equivalent for the liability it was authorized to incur. The officers authorized under these statutes to issue the bonds are public agents and the legislature looking over the whole matter, may, when in its judgment justice requires it, ratify and confirm their acts which otherwise would not be valid."

§ 329. Extent of legislative power.

The limitation upon the power of the legislature or of the public corporation to ratify an issue of invalid securities, namely, that ratification can be effective only when the party ratifying possesses the power to perform the act ratified, has already been stated. This rule has been

repeatedly announced not only in the Federal courts but elsewhere.[91]

In Thompson v. Lee County,[92] it was said: "If the legislature possessed the power to authorize the act to be done it could by a retrospective act cure the evils which existed because the power thus conferred had been irregularly executed, the question with the legislature was one of policy and the determination made by it was conclusive." And again in the case of Norton v. Shelby County,[93] referring to an attempted validation of bonds by a county court, the Supreme Court held that a county court could not give validity by acts of ratification to bonds previously issued without authority, unless at the time of performing such acts of ratification the court had power to issue the bonds. And again in the case of

91—Marsh v. Fulton County, 10 Wall. 676. Bonds issued without legal authority cannot be ratified so as to bind a municipality for their payment by the subsequent acts of its officers or agents.

Citizens Savings & Loan Assoc'n v. City of Topeka, 20 Wall. 655. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose. City of Grenada v. Brogden, 112 U. S. 261; Norton v. Shelby County, 118 U. S. 425; Bolles v. Town of Brimfield, 120 U. S. 759.

Katzenberger v. Aberdeen, 122 U. S. 172. The bonds in the present case, when issued, were unauthorized and void, so that the only question is whether the curative statute has made them good. The objection to them is not that they were issued irregularly, but that there was no power to issue them at all. They are to be made good, if at all, not by waiving irregularities in the execution of an old power, but by the creation of a new one. Clearly, therefore, if the legislature had no constitutional authority to grant the new power, a statute passed for that purpose could not have the effect of validating the old bonds. Commercial National Bank of Cleveland v. Iola City, 154 U. S. 617, 22 L. Ed. 463, affirming 2 Dill. 353; Dows v. Town of Elmwood, 34 Fed. 114; Deyo v. Otoe County, 37 Fed. 246; Mercer County v. Provident Life & Trust Co., 72 Fed. 623 C. C. A.; Barnes v. Town of Lacon, 84 Ill. 461; Gaddis v. Richland County, 92 Ill. 119; Sykes v. Town of Columbus, 55 Miss. 115.

92—3 Wall. 327.

93—118 U. S. 425.

Rogers v. Keokuk,[94] the court in passing upon the effect of a curative act held that as the legislature of Iowa had the power to authorize the City of Keokuk to subscribe for and take stock in a railroad company and to issue its bonds in payment therefor and to levy a tax to pay the interest upon such bonds, its act legalizing the issue of certain bonds gave validity to them notwithstanding any informality or illegality in their original issue. In Sage v. Fargo Township,[95] it was held that bonds which were issued without legal authority could not be validated by any subsequent act of ratification by the body which issued them, and the state courts have followed generally the same doctrine and have repeatedly held that bonds which were invalid because in excess of an amount which the Constitution at the time of their issuance empowered the legislature to authorize could not be validated by subsequent curative legislation.[96]

In a case from Wisconsin, Knapp v. Grant,[97] the distinction in the application of curative legislation to bonds which the legislature could not have authorized in the first instance, and those in respect to which mere irregularities in their issue existed, was stated and discussed. The court held in that case that where city bonds were issued without authority of law, merely because the act authorizing the issue had not been published at the time so as to take effect that the legislature might subsequently with consent of the municipal authorities ratify the issue and give validity to the bonds. Such, they said, "is not a case where the legislature had no power to pass the act in the first instance, and consequently could not ratify it or the proceedings had under it by a subsequent general statute recognizing the validity of all debts contracted under it. The act failed, or rather the valid execution of the bond failed, by reason of a non-compliance, at the time it was

94—154 U. S. 546.
95—107 Fed. 383.
96—See Sec. 324, et seq., post.
97—27 Wis. 147.

issued, with a requirement of the constitution, which related not to the action of the legislature itself, which was regular and sufficient, but to the time when such action should become completely efficacious and operative as an expression of the legislative will in proper form. The legislative consent, so far as the legislature itself could act, had been duly given before the bonds were issued, but was inoperative at that time because the act had not been published. The substance of the thing required,—the actual consent of the legislature,—existed; but the form necessary to give it due force and effect under the constitution was absent. It was not a case, therefore, where the legislative consent can be said to have been entirely wanting, but one where it was competent for the legislature, with the assent of the proper city authorities, to ratify a defective execution and delivery of the bonds by subsequent enactment."

CHAPTER XIII

DEFENSES

§ 330. Want of power.

This phrase is the one commonly used by the courts and by text-book writers in passing upon and discussing questions of validity relating to public securities and it denotes the absolute lack of authority to issue them. It is a familiar principle that purchasers of negotiable securities are charged with the duty of ascertaining the existence of the power to emit the securities they have purchased or negotiations in respect to which are pending.[1]

It is also a familiar rule as noted repeatedly in the cases cited in the various sections especially relating to recitals and ratification that no public corporation will be estopped to deny the want of authority to issue nor can any act of ratification operate as a creation of power when it is entirely wanting.

The rule therefore obtains that a public corporation can always set up as a defense in an action brought to enforce the obligations arising through the creation of indebtedness by the issue of negotiable securities, its want of power to emit them. Obligations incurred without authority although negotiable in form are invalid even in the hands of a bona fide holder.[2] The want of power,

1—See Sec. 248 et seq., ante. McClure v. Twp. of Oxford, 94 U. S. 429; Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674; Sutliff v. Lake County Com'rs, 147 U. S. 230; Citizens Savings & Loan Assoc'n v. Perry County, 156 U. S. 692; Cagwin v. Town of Hancock, 84 N. Y. 532.

2—St. Joseph v. Rogers, 16 Wall.

as above stated, may be either real or apparent and this statement raises the distinction made frequently by the courts between an absolute want of power, using the term in its true sense and the irregular exercise of a power which exists but which can only be used under the conditions prescribed in its grant. This distinction will be considered at length in a subsequent section.[3]

A want of power, using the term now in its true and strict meaning, can arise where there is the lack of any legal authority either statutory or constitutional; where there is to be found an express statutory or constitutional prohibition absolute in its character and unaccompanied by conditions; and also where the statute under which the authority to issue the securities in question it is claimed is void because unconstitutional. If these conditions exist, or any one of them, it can fairly be said that the power to issue is absolutely wanting and the invalidity cannot be cured by recitals or otherwise.[4]

644; Northern Bank of Toledo v. Porter Twp. Trustees, 110 U. S. 608.

Merchants Bank v. Bergen County, 115 U. S. 384. As an essential preliminary to protection as a bona fide holder authority to issue must appear. If such authority did not exist the doctrine of protection to a bona fide holder has no application.

Graves v. Saline County, 161 U. S. 359. It must be admitted as a well settled principle of law that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such defense by admissions or by issuing securities negotiable in form nor even by receiving and enjoying the proceeds of such bonds.

Hopple v. Hipple, 33 Ohio State 116. The rule stated in the text is so directly involved in the subject of what facts and conditions a purchaser is charged with notice of and of recitals in securities that the cases cited under these questions as considered in preceding sections are in nearly every instance an authority for the proposition stated above and to avoid an unnecessary repetition they are omitted here.

3—See sec. 331, post.

4—Northern Bank of Toledo v. Porter Twp. Trustees, 110 U. S. 608. Porter Township is estopped by the recitals in the bonds from saying that no township election was held or that it was not called or conducted in the particular mode required by law, but it was not estopped to show that it was without legislative authority to order an election of August 30, 1851, and

This doctrine is so well established and also so familiar to those interested in the subject as purchasers or in a professional way that attention will be called to but few of the leading authorities. To do otherwise is also unnecessary for the cases already cited under the sections relating to estoppel and ratification as well as elsewhere. in this work discuss fully and in many instances in detail the subject of want of power. In St. Joseph Township v. Rogers,[5] it was said that bonds payable to bearer and issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, but if issued by such a corporation which possessed no power from the legislature to grant such aid, they were invalid even in the hands of innocent holders. In Parkersburg v. Brown,[6] the court said: "There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the city, under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some installments of interest on the bonds (Loan Assn. v. Topeka ubi supra), or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust. No

to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals. Town of Gilson v. Dayton, 123 U. S. 59; Board of Com'rs of Lake County v. Graham, 130 U. S. 674; Thomas v. Lansing, 14 Fed. 618; Twp. of Washington v. Coler, 51 Fed. 362 C. C. A.; Swan v. City of Arkansas City, 61 Fed. 478; Ashuelot National Bank v. School District No. 7, 5 C. C. A. 468; Dodge v. City of Memphis, 51 Fed. 165; Coffin v. Board of Com'rs of Kearney County, 57 Fed. 137; Lehman v. City of San Diego, 27 C. C. A. 669; Board of Com'rs of Oxford County v. Union Bank of Richmond, 96 Fed. 293 C. C. A.; Hancock v. Chicot County, 32 Ark. 575; Dent v. Cook, 45 Ga. 323; Sykes v. Columbus, 55 Miss. 115; Peck v. City of Hempstead, 65 S. W. 653.

5—16 Wall. 644.

6—106 U. S. 487.

such acts can give validity to the statute or to the bonds, however they may affect the status of the property dealt with or the relation of the city to such property." In a leading case,[7] and which has been repeatedly cited and discussed,[8] it was held that a purchaser of municipal bonds, is bound to ascertain whether the municipality has power to issue them and an utter want of such power is not cured by any recitals in the bonds.

In Hayes v. Holly Springs,[9] the court held that even a bona fide holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond; that recitals on the face of the bond or acts in pais operating by way of estoppel may cure irregularities in the execution of statutory power, if legislative power was wanting the bond would have no validity. It is useless to multiply the citation of authorities on this proposition as the courts invariably, both state and Federal, have announced it and adhered to it.[10]

The rule is applied, as already stated, not only to the utter absence of statutory or constitutional authority but in some cases where the bonds have been issued under an unconstitutional law.[11]

7—Dixon County v. Field, 111 U. S. 83.

8—See secs. 258 and 300, ante.

9—114 U. S. 120.

10—South Ottawa v. Perkins, 94 U. S. 260; County of Dallas v. McKenzie, 94 U. S. 660; Wells v. Pontotoc County, 102 U. S. 625; Ogden v. Daviess County, 102 U. S. 634; Buchanan v. Litchfield, 102 U. S. 278; Dixon County v. Field, 111 U. S. 83; Hayes v. Holly Springs, 114 U. S. 120; Katzenberger v. Aberdeen, 121 U. S. 172; Hedges v. Dixon County, 150 U. S. 182; Chisholm v. City of Montgomery, 2 Woods. 584; Coffin v. Board of Com'rs of Kearney County, 57 Fed. 137; Dodge v. City of Memphis, 51 Fed. 165; D'Esterre v. City of Brooklyn, 90 Fed. 586; Travellers Ins. Co. v. Johnson City, 40 C. C. A. 58; Bissell v. Kankakee, 64 Ill. 249; Ryan v. Lynch, 68 Ill. 160; Schaeffer v. Burham, 95 Ill. 119; Thornburgh v. School Dist. No. 3 (Mo.), 75 S. W. 81; Williamson v. City of Keokuk, 44 Ia. 88; Debnam v. Chitty (N. C.), 43 S. E. 3.

11—Amoskeag National Bank v. Ottawa, 105 U. S. 667; Norton v. Shelby County, 118 U. S. 425; Webb v. Lafayette County, 67 Mo. 353.

Graves v. Moore County Com'rs (N. C.), 47 S. E. 134. Bonds issued under a void legislative act are void,

In Town of South Ottawa v. Perkins,[12] the act of the legislature relied upon as authority for the issue of the bonds had been held void by the Supreme Court of the State of Illinois. The Supreme Court of the United States followed this ruling on the constitutionality of the act and adjudged the bonds void, holding in effect that no estoppel could exist as against the town even in favor of bona fide holders of the securities, that "want of such authority is a fatal objection to their validity no matter under what circumstances the holder may have obtained them." And again in Post v. Supervisors,[13] it was said by the same court that "that which is not a law can give no validity to bonds purporting to be issued under it even in the hands of those who take them for value and in the belief that they have been lawfully issued." In Norton v. Shelby County,[14] it was said that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

§ 331. Irregularities in the exercise of a given power.

The absolute want of power has been claimed to exist by some dishonest communities of a repudiating turn for one or more of the following reasons: where the statutory or constitutional authority for the issue of securities had prescribed as a prerequisite to the issue the performance of certain conditions and there has been either a partial or total failure to perform such conditions or the performance had proceeded in an irregular and per-

and no recital in such bonds protects the bona fide purchaser. Bank v. Com'rs of Oxford, 119 N. C. 214; Com'rs v. Snuggs, 121 N. C. 394; Charlotte v. Shepard, 120 N. C. 411, 122 N. C. 602; Rodman v. Town of Washington, 122 N. C. 39; Wilkes Co. v. Call, 123 N. C. 308; Cass County v. Wilbarger (Tex.), 60 S. W. 988.

12—94 U. S. 260.

13—105 U. S. 667.

14—118 U. S. 425.

haps even an unlawful manner; where bonds have been issued in excess of a statutory or constitutional limit; where the bonds have been authorized for a designated purpose but they have been issued for a different one or perhaps, for a purpose entirely illegal. Under these various conditions and circumstances it cannot be said that there is a total absence of power to issue. The authority is granted but coupled with a performance of conditions or the existence of facts. If such essential facts existed and if the conditions were performed as required, the bonds issued pursuant to the authority unquestionably would be legal.

In this, as will be noted there clearly arises the distinction between the want of power and the irregular exercise of a granted power.[15] This distinction has been clearly stated in a number of cases both in the Federal and the state courts. In County of Daviess v. Huidekoper,[16] where without stating the facts in the case in detail as they are immaterial, the court said upon the question now discussed: "These bonds are securities which pass from hand to hand with the immunity given by the common law to bills of exchange and promissory notes. The persons who execute and deliver them—the officers of the County Court in this instance—are the agents of the municipal body authorizing their issue, and not of the persons who purchase or receive them. If these agents exceed their authority as to form, manner, detail, or circumstance, if they execute it in an irregular manner, it

15—Northern Bank of Toledo v. Porter Twp. Trustees, 110 U. S. 608. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or when the law prescribes conditions upon the exercise of the power granted and commits to the officers of such municipality the determination of the question whether those conditions have been performed the corporation will also be estopped by recitals which import such performance.

16—98 U. S. 98.

is the misfortune of the town or county, and not of the purchaser; the loss must fall on those whom they represent and not on those who deal with them. There must indeed be power, which, if formally and duly exercised, will bind the county or town. No bona fides can dispense with this, and no recital can excuse it. Thus, if the Constitution or the statute should peremptorily prohibit a municipal body from loaning its credit to or subscribing for stock in a railroad corporation, a subscription or a loan made subsequently to the passage of the act would give no right against the county, although the bond should recite that there was such authority, and the purchaser should pay full value in the belief of its truth. There is no difficulty in appreciating the distinction stated; and we are now to ascertain whether the error we are considering, assuming it to be one, arises from an irregularity in the exercise of an existing power, or whether there is total want of authority to act."

Judge Sanborn, writing the opinion for the court in the City of Huron case,[17] said, after discussing a number of cases cited by counsel for the defendant in error: "The distinction between these cases and that at bar is marked and the bonds in those cases disclosed the fact that it was not in the power of the representatives who issued them, by any act of theirs, to make a lawful issue of the bonds, and that if they had done every act and performed every condition in their power the bonds would still have been unauthorized. In the case at bar there was no lack of power in the board of education to make a lawful issue of bonds when those in suit were issued. Article 3, under which they were issued, provided that the taxable property of the whole corporation should be subject to taxation by them (section 1825,

17—National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron, 62 Fed. 778.

Comp. Laws Dak.), and that they should annually levy a sufficient amount to pay the interest on all bonds they issued under this article, and to create a sinking fund for the payment of the principal (section 1833, Id.). An ordinance or resolution of this board, passed at or before the issuance of the bonds, providing for the collection of such an annual tax until the bonds and coupons were paid, would have complied with the provision of the constitution. If this was not passed, it was not from lack of power in the board, but from a failure on its part to exercise the power with which it was vested in the manner provided by the constitution.

"It is this difference between the inadequate exercise of ample power and the total absence of power to be exercised that widely separates this case from Dixon Co. v. Field, 111 U. S. 83 (and other cases cited), cited by counsel for defendant. * * * The other cases cited above rest upon the same principle. In each of them the bonds failed, not because the municipal representatives who issued them failed to exercise the power they had in the manner prescribed but because they had no power to exercise, and the constitution, statutes and public records referred to therein gave notice to the purchasers of this want of power."

And again in another opinion by the same Judge, Hughes County, South Dakota v. Livingston,[18] where the invalidity of the bonds was urged by the plaintiff in error for some of the reasons noted in the opening paragraph of this section, it was said by the court "conceding to the plaintiff in error, however, the soundness of this premise, their conclusion does not follow. Their argument ignores the vital distinction between that total want of power which no act or recital of the municipality can remedy, and the total failure to exercise or the inadequate exercise of a lawful authority. It ignores the essen-

18—104 Fed. 306.

tial difference between a total lack of power under the law under all circumstances, and a lack of power which results merely from the absence of some precedent facts or acts which condition either the existence or the exercise of the power. The former, it is true, cannot be affected by the estoppel of recitals, but the latter may be. A municipality or a quasi municipality may not, by the recitals in the bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of conditions under which it would have authority to emit them. But if the laws are such that there might, under any state of facts or circumstances be lawful power in the municipality or quasi municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, and that it had lawful power to send them forth, unless the constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances."

This doctrine of a distinction between an absolute want of power and a failure to exercise a given power in the precise manner prescribed, has been applied in many cases to irregularities in election proceedings, and elections, insufficient and incomplete petitions, irregular action of public officials or of official bodies and other conditions required by statutory or constitutional provisions are prerequisite to the issue of securities. The reader is referred for a full citation of the authorities to the cases noted under the appropriate subject title in the preceding sections.[19]

19—Moran v. County of Miami, 2 Black, 722. Irregularities in proceedings of board of county commissioners.

Meyer v. Muscatine, 1 Wall. 384. Election irregularities.

Van Hostrup v. Madison City, 1

§ 332. Performance of conditions; waiver.

The subject of a performance of conditions, it is assumed, has been sufficiently considered in preceding sections.[20]

Wall. 291. Defects in preliminary petition of free holders.

Brooklyn v. Aetna Life Ins. Co., 98 U. S. 362. Irregularities in issue of bonds to payee authorized.

Orleans v. Platt, 99 U. S. 362. Irregularities in issue of bonds.

Roberts v. Bolles, 101 U. S. 119. Irregularities in calling election, also defective petition of electors.

Northern Bank of Toledo v. Porter Twp. Trustees, 110 U. S. 608. Bonds held void in this case being issued without legislative authority, but the court also stated the general rule which follows: "The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals, but the power existing in the municipality may be estopped by recitals to prove irregularities in the exercise of that power." Board of Com'rs of Kingman County v. Cornell University, 57 Fed. 149.

Burlington Savings Bank v. City of Clinton, Iowa, 106 Fed. 269. Bonds held good though method provided by statute for assessing cost of improvement against abutting property was illegal. E. M. Derby & Co. v. City of Modesto, 104 Calif. 515, 38 Pac. 900.

Greeley v. Jacksonville, 17 Fla. 174. Irregularities in notice of election.

Floyd County Com'rs v. Shorter, 50 Ga. 489. Irregularities on the part of justices of the inferior court in the issuance of bonds will not invalidate them in the hands of a bona fide holder.

Ryan v. Lynch, 68 Ill. 160. Where bonds of a municipal corporation are issued without any power or authority in law, as, under what purported to be a law, but which was not passed in the constitutional mode, they are absolutely void, no matter in whose hands they may be; but if the legal power to issue them existed, but was defectively or irregularly executed, they are only voidable, and an innocent holder may collect them. Harding v. Rockford County, 65 Ill. 90; Springfield, etc. R. R. Co. v. Cold Springs Twp., 72 Ill. 603; Burr v. City of Carbondale, 76 Ill. 455; Town of Middleport v. Aetna Life Ins. Co., 82 Ill. 562; Hewitt v. Normal School District, 94 Ill. 528; Town of Douglas v. Niantic Savings Bank, 97 Ill. 228; C. B. & Q. R. R. v. Aurora, 99 Ill. 205.

Evansville R. R. Co. v. Evansville, 15 Ind. 395. Irregularities in proceedings of city council.

20—Brand v. Town of Lawrenceville (Ga.), 30 S. E. 954. The validity of bonds issued for the purpose of purchasing school property is not affected by the fact that the system of schools contemplated had been formally established before the bonds had been issued and sold.

Where the conditions have been imposed by the municipality the full performance of them may be waived. In considering this the Supreme Court of the United States in a case from Illinois,[21] said "while it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities. It must be admitted, as well-settled law, that where there is a total want of power to

State v. Kiowa County, 39 Kan. 657. Election irregularities; State v. Hordey (Kan.), 18 Pac. 942.

Bowman v. City of Middlesboro (Ky.), 91 S. W. 726. Irregularities in proceedings in board of education and city authorities in the issuing of school bonds. Lane v. Embden, 72 Me. 354; Shurtliff v. Wiscasset, 74 Me. 130.

State v. Saline County Court, 48 Mo. 390. The general rule is that where the statute gives authority to contract a debt on specified conditions, their performance is necessary to support the authority; and in a direct proceeding to prevent the consummation of the contract, the substantial performance of every required condition may be insisted on. But when the contract is completed and the rights of the innocent third parties supervene, the rule is relaxed. And in such case, where an attempt has been made to comply with the condition specified, and the bond or other instrument indicates a compliance therewith, the innocent purchaser will be protected. Bouknought v. Davis, 33 S. C. 410, 12 S. E. 96.

State v. Union Twp., 8 Oh. St., 394. Irregularities in proceedings preliminary to election.

Goshen Twp. v. Shoemaker, 12 Ohio St. 624; but see Rich v. Mentz Twp., 134 U. S. 632. This case following the New York decisions held that the requirements of the New York statutes as to preliminary petition of tax payers for the issue of bonds are mandatory and that compliance with them was jurisdictional. The petition in this case not having conformed to the requirements of the statutes it was held that the bonds were void. See New York cases cited Sec. 126, ante.

21—Graves v. Saline County, 161 U. S. 359; see also County of Randolph v. Post, 93 U. S. 502; Converse v. City of Fort Scott, 92 U. S. 503; Coleman v. Board of Sup'rs 50 Calif. 493; Chiniquy v. People etc., 78 Ill. 570; but see Neale v. County Court of Wood County, W. Va., 27 S. E. 370; and Platteville v. Galena, etc. R. R. Co., 43 Wis. 493.

subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defense by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted, that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet where the right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions.

"But where the municipality is empowered to subscribe with or without conditions, as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons. Such was the present case."

§ 333. Fraud.

Fraud by the agents of a public corporation in the issuing of public securities has been urged as a defense in some instances and the courts have almost without dissent held it non-available as against a bona fide holder.[22]

22—Hughes County, S. D. v. Livingston, 104 Fed. 306. If there is danger that such officials will violate their oaths and corruptly barter away the rights of the people whom they represent through the abuse of rules of action which have been established for the guidance of honest men and faithful officials, the remedy is not the punishment of innocent creditors who have purchased the negotiable securities of municipalities upon the faith of the acts of their officers, which were generally known to and acquiesced in by their citizens. It is in the election by those citizens of honest men and faithful officials. See, also, Black v. Cohen, 52 Ga. 621; Donnelly v. Cabaniss, 52 Ga. 212; Prettyman v. Sup'rs, 19 Ill. 406; Maxey v. Williamson County, 72 Ill. 207; Clapp v. Cedar County, 5 Iowa 15; State v. Com'rs of Han-

In an early case in the Supreme Court of the United States,[23] the claim was made that the bonds were not issued in good faith but were procured by fraud, deception and collusion. The court held that where the plaintiff was a bona fide holder for value of municipal bonds and his title accrued before the maturity, a want of compliance with the forms of law or fraud in the agents of the makers cannot be shown to defeat a recovery upon them. In another case in the United States Court of Appeals from New York,[24] where it appeared that the plaintiff was a bona fide holder for value and that the bonds had been illegally sold by the officers to a prior holder on credit and that the maker never received any consideration therefor, the court held the irregularity did not affect the validity of the bonds in the hands of the plaintiffs.

§ 334. Miscellaneous defenses.

The fact that an injunction has been granted in a suit by a tax payer to restrain a municipal corporation from paying certain bonds issued by it, constitutes no defense in an action on such bonds by a holder who was not a party to the injunction proceedings.[25] The fact that a public corporation is without money with which to meet obligations arising through the issue of negotiable securities is not available as a defense in an action brought to

cock County, 12 Oh. St. 596; Commonwealth v. Com'rs of Alleghany County, 37 Pa. St. 237; Bond Debt cases, 12 S. C. 273; but see Pugh v. Moore (La.), 10 So. 710.

Herwig v. Richardson (La.), 11 So. 135, holding that the state is not liable for its bonds fraudulently issued and put into circulation by its treasurer.

Richardson v. Marshall, 100 Tenn. 346. Where negotiable county bonds had been paid and cancelled, but subsequently fraudulently put into circulation again, they were held null and void even in the hands of a bona fide holder.

23—Town of Grand Chute v. Winegar, 15 Wall. 355.

24—D'Esterre v. City of New York, 104 Fed. 605.

25—Clagett v. Duluth Twp., 143 Fed. 824.

enforce the obligation, and this rule applied both to the payment of interest and principal of the securities.[26]

The Supreme Court of the United States in several cases has expressed itself in no uncertain language in respect to the availability of a lack of funds as a defense. In City of Galena v. Amy,[27] the court said: "The counsel for the plaintiffs in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them."

In a later case,[28] the language used by the same court was equally emphatic: "Upon a class of the defenses interposed in the answer and in the argument it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offense in a commercial community and is just cause of war between nations. So far as the defense rests upon these principles we find no difficulty in overruling it."

And in a case in the United States Circuit Court of Appeals,[29] it was held that hardship was no excuse, the court said: "So far as this averment was interposed as a defense to the claim of the relator to the ultimate issue of the warrants it is futile. It often increases the embarrassment of the debtor, whether public or private, to pay just obligations that have long been ignored. But

26—Reis v. State (Calif.), 65 Pac. 1102, reversing 59 Pac. 298; Lawrence County v. Lawrence Fiscal Court (Ky.), 113 S. W. 824.

27—5 Wall. 705.

28—Rees v. City of Watertown, 19 Wall. 107.

29—City of Little Rock v. United States, 103 Fed. 418.

the right of a creditor to the payment of his debt, and to the enforcement of that payment by all the legal remedies which the law of the land has given him, cannot be stricken down or impaired because the enforcement of that right may embarass the debtor."

Failure of consideration is not available against a bona fide holder for value without notice;[30] nor is the fact that irregularities occurred making a subscription to the stock of a railroad company by the officers and agents of the county authorized to extend the aid in this form;[31] nor will the fact that negotiable securities were given in settlement of the lawful debt instead of non-negotiable obligations as authorized;[32] nor will the validity of street improvement bonds be affected by the fact that the street work was done under a contract stipulating that Chinese should not be employed thereon and that eight hours should constitute a day's work.[33]

30—City of Cripple Creek v. Adam (Colo.), 85 Pac. 184.

See, also, on the question of consideration West Plains Twp., Meade County v. Sage, 69 Fed. 943. Where bonds were issued under a law authorizing townships to refund their indebtedness contained recitals that all the requirements of the law had been complied with, it was held that the township could not defend an action on the bonds by a bona fide holder on the ground that the script refunded by the bonds was issued to the original payee without consideration and merely to create an apparent debt to be refunded.

31—Street v. Com'rs of Craven, 70 N. C. 644.

32—Pacific Improvement Co. v. City of Clarksdale, 74 Fed. 528 C. C. A.

33—Hellman v. Shoulters (Calif.), 44 Pac. 915.

CHAPTER XIV

THE PAYMENT OF PUBLIC SECURITIES

§ 335. General observations.

From the viewpoint of the private investor the subject of this chapter is undoubtedly of the greatest importance. The mere possession of beautifully engraved promises to pay issued by public corporations, whether a state or any one of its subordinate civil subdivisions, does not afford the owner great satisfaction unless coupled with the prompt payment of interest as it accrues from time to time and the certainty of a liquidation of the debt at its maturity. The questions involved in payment include more than a mere discussion of legal principles and the citation of authorities sustaining them. Some of these are political in their nature, some economic and still others racial and local, especially when the fact of repudiation exists. For a consideration of questions other than legal the reader is referred to various works upon public finance and those treating the subject of bond investment from the economic standpoint. The scope of this work is necessarily limited to a discussion of the legal questions that have been raised and decided by the courts. A few general observations, however, may not be inappropriate.

§ 336. Motives and reasons for payment.

The title of this section so far as its discussion is concerned naturally resolves itself into a consideration of the motive or reasons for the payment of debts by sovereign states and those of its civil subordinate subdivi-

sions. In the case of the sovereign state, the motives are mainly political, although to a large extent and larger than is commonly recognized, economic grounds should afford a substantial reason for the liquidation of state obligations. It can be fairly stated as an axiom that the state, speaking generally of an organized government is not a creator of wealth, is not a producer in the economic sense of that term. Its principal source of revenue, if not its sole source, in nearly all instances, is the exercise of the taxing power. Whatever disbursements are made or debts incurred become ultimately and directly or indirectly a burden upon and an obligation of the worker and property owner; a tax upon individual industry and thrift. A government has no mysterious and inexhaustible fund which can be drawn upon indefinitely for its expenditures. The proper functions of a state are to regulate and govern, and based upon sound reasons it is neither desirable nor legal that it engage in undertakings or transact that business which naturally and properly should be left to private enterprise. The fundamental powers of a state are limited to establishing and safe-guarding political and industrial equity and equality between its citizens or groups of citizens who are created legal persons by its authority. It cannot be the object or purpose of an organized state to supplant private and individual enterprise, thrift and industry, or personal care and responsibility. A serious consequence of public waste, extravagance and debt is the diversion of private capital and savings from private, productive enterprises to governmental non-productive uses. The prompt payment of public obligations releases for the economic upbuilding of a country its private capital. The constant diversion of a nation's wealth which should be used in private productive enterprise for its advancement to the waste of wars past and to come, and to unlicensed, unnecessary and unwarranted governmental activities and extravagances will surely lead, since a viola-

tion of fundamental economic laws which cannot be permanently defeated in their operation, to the demoralization and impoverishment of the people.

Another reason for the liquidation of debts created by not only state governments but also by subordinate civil subdivisions is political. Nothing is of such essential assistance in war time or in case of some great financial emergency as unimpaired credit, and nothing impairs public credit so much as a heavy and permanent debt charge. The payment for a political reason of a large debt with as great rapidity as compatible with reasonable commercial industrial prosperity is sound policy.

In the case of subordinate civil subdivisions especially an economic argument for the repayment of the principal of the debt applies, for in most instances local indebtedness is created for the construction of works of public improvement, sewers, street improvements, water works, lighting plants and the like which are subject to depreciation and which require ultimate replacement. To neglect in such cases to repay the principal of the debt within a reasonable time would be to confront a situation in the future where the utility of the property had vanished and the debt charge had become a burden holding the community in mortmain. Unquestionably, the economic life of property as estimated by competent engineers should determine the period at the end of which the debt incurred for such property should be extinguished. As illustrating this phase of public indebtedness, an analysis of public debt incurred in the United States for the year 1911 is interesting. The figures as given by the Commercial and Financial Chronicle show that during that year of a total increase in municipal indebtedness amounting to nearly four hundred million dollars, the term municipal including all subordinate civil subdivisions, in round figures four and a half per cent was issued for refunding purposes, nineteen per cent for water supply, twenty-two per cent for streets

and bridges, eight and a half per cent for sewers and drainage, twelve per cent for schools and school buildings, ten per cent for general buildings, four per cent for parks and museums, nearly one per cent for lighting plants, five per cent for other improvements and nearly fifteen per cent for miscellaneous purposes.[34]

The soundness of this argument is conceded, for in a number of states constitutional provisions have been adopted which prohibit the issue of bonds either in general or for special purposes to run in excess of the number of years therein specified, generally a limited term.[35]

In other cases the point has been covered by provisions to the same effect in general statutes or special laws conferring authority to issue securities. And the general proposition that posterity should not be burdened with debt incurred for present comforts and, perhaps, extravagances, is recognized by provisions commonly found at the present time in grants of authority for the issue of so-called serial bonds. These may either take the form of an issue, a portion of which is payable annually,[36] or the bonds or a portion of them may be callable at the option of the maker after the lapse of a designated period less then the date of the maturity of the issue.[37] Requirements for sinking funds to be here-

34—State and City Supplement, May, 1912.

35—See Sec. 352, post.

36—Knox County v. Ninth Nat. Bank, 147 U. S. 91; City and County of Denver v. Hallett (Colo.), 83 Pac. 1066; McCormack v. Village of West Duluth, 47 Minn. 272, 50 N. W. 128; Kemp v. Town of Hazlehurst (Miss.), 31 So. 908.

37—Roberts & Co. v. City of Paducah, 95 Fed. 62; City and County of Denver v. Hallett (Colo.), 83 Pac. 1066; Little River Twp., Reno County v. Board of Com'rs of Reno County (Kan.), 68 Pac. 1105; Turpin v. Madison County Fiscal Court (Ky.), 48 S. W. 1085; Colbert v. State (Miss.), 39 So. 65; State ex rel. City of Carthage v. Gordon (Mo.), 116 S. W. 1099; Carlson v. City of Helena (Mont.), 102 Pac. 39.

Territory v. Hopkins, 9 Okla. 133, 59 Pac. 976. The phrases "redeemable at the pleasure of the county" and "subject to call by the municipality at any time" import no legal distinction.

after considered also recognize the principle of the necessity for a partial payment of the obligation before its maturity for this is the substantial effect of a sinking fund.[38]

§ 337. Payment dependent upon what.

In the purchase of public securities the investor should consider in his investigations bearing upon the advisability of a purchase the various elements entering into the probability of the prompt payment of accruing interest and of the principal upon maturity. These elements may be divided into three classes and they are placed according to the judgment of the writer in the order of their importance, although the question of good faith which is to be placed first may depend somewhat upon the other two, namely, the validity of the issue and the financial competency of the public corporation to pay the debt incurred.

Stated then in the order of their importance, the three questions for investigation by the investor are: First, the good faith of the community issuing the securities; Second, the validity of the securities in question, and, Third, the financial competency of the public corporation emitting the promises to pay.

§ 338. Good faith.

In view of the assertions by municipal bond dealers and the statements repeatedly appearing in public print that public securities are "always good" it may seem presumptuous to assert that the question of good faith stands first in importance when determining a prospective investment in public securities, yet in view of the constant and repeated repudiations by states, counties,

38—See Secs. 373 and 374, post, and Sec. 120, ante.

cities and all other subordinate civil subdivisions, and the further fact that in practically all instances the only security for the payment of the debt is the inclination of the maker, this element does not lose its place or its importance.[39] The latter reason noted will be fully considered later.

§ 339. State defaults.

The history of state repudiation is familiar to all interested in the subject of public securities and need not be repeated here. Unfortunately a list of repudiating states would include those from every section of the United States, however, it can be said because of the "improvement in the moral fibre of the people as a whole" and especially because of the constitutional limitations to be found in nearly every state of the Union and to which a reference has already been made in detail,[40] the possibilities of repudiation are materially lessened if not an entire improbability at the present time.

§ 340. County repudiations.

A distinction is to be made here between counties of a rural and of a municipal character. The extent of repudiation as to the latter not being so great or so frequent as in the case of the former. To read the decisions of the state and especially the Federal courts for a period of many years, commencing in the late sixties, is a sad commentary upon the honesty of the people of the rural communities in the great Mississippi Valley and in the West. It is estimated that during an early period the repudiation of county and other bonds amounted to over one billion dollars. From an article in the North American Review of August, 1884, may be gathered the facts that in Missouri of over one hundred counties and

39—See Sec. 343, post. 40—See Secs. 99 and 100, ante.

townships issuing bonds nine-tenths defaulted; of over three hundred municipalities in Illinois, including counties and townships, more than one-third defaulted; the record of Kansas, of Arkansas and of other states in that section of the Union noted is humiliating. In some of the states the communities were almost unanimous in attempting repudiation. While there has been a marked improvement in this respect largely from the effect upon the credit of the community, yet the desire to repudiate has not entirely disappeared nor has the fact of repudiation become a lost art. To establish the truth of this statement it is only necessary to refer to the litigation within a comparatively recent date in respect to the validity of bonds issued by Buncombe, Henderson, Wilkes and Stanly counties, North Carolina, and the frequent litigation both in the Federal and State courts involving the issue of bonds by counties and municipal organizations in Colorado, South Dakota and elsewhere.[41]

The distinction between rural and municipal counties was noted above and little need be said on this point except to point out the distinction. Counties of a municipal character, that is, those which include within their limits large cities, or which are practically co-extensive with large cities, have not been often guilty of repudiation—a fact due largely if not entirely to what might be termed the financial competency of the community to bear the burdens imposed through the incurment of debt.

41—Wilkes County v. Coler, 180 U. S. 506; Wilkes County v. Coler, 190 U. S. 107; Board of Com'rs of Stanly County v. Coler, 190 U. S. 437; Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674; Lake County v. E. H. Rollins & Sons, 130 U. S. 662; Sutliff v. Board of Com'rs of Lake County, 147 U. S. 230; Lake County v. Dudley, 173 U. S. 243; Board of Com'rs of Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255.

Reference is made only to cases in the Supreme Court of the United States, citations in cases in lower courts omitted.

§ 341. Municipal defaults.

It would not seem as if communities of a municipal nature, using that term in its proper legal sense as applied to cities and incorporated towns and villages, should be included in any discussion of the question of good faith as bearing upon the payment of their valid obligations, but to a large degree the same observations are applicable that were made in respect to states, counties, school districts and others of a similar character. Although prosperity and financial competency is the best guaranty of debt payment and the technical validity of securities an able second, as it has been said, yet the question of good faith does exist separate and apart from these two factors, although it is easily influenced by the absence of the other two. It is easy for a community with small assessed valuation to avoid the payment of even a legal obligation. It is almost axiomatic with a bond attorney at the present time, in examining a proposed issue of securities, to say that his first inquiry is in respect to the name of the municipality proposing to issue the bonds and the section in which it is located. It was not very many years ago that in Missouri a general convention was held of representatives from various parts of that state for the purpose of seeking ways and means for municipal bond legislation, and in one of the addresses delivered upon that occasion, the following language was used: "Many labored efforts have been made to show that there are questions of good faith and moral obligation in reference to the payment of these bonds wholly independent of the question of their legality. We maintain that arguments based on such considerations have no application to the payment of municipal obligations and never had. * * * The only questions to be asked and answered in reference to a bond of that character are, has it been issued by proper authority of law? Is the taxable property of the locality sufficient to meet the obliga-

tion if its payment has to be enforced by law? These are the true foundations of public credit as applied to municipal corporations and they are matters of law purely.'' With such a sentiment prevailing, and it might be said that it was the prevailing one, the list of repudiating municipalities vies with that of counties to excel in length.

The improvement in public sentiment has been especially marked of late years in municipal communities as said by a recent author, Chamberlain, on the ''Principles of Bond Investment:'' ''Finally there can be no greater assurance of good faith given investors in municipal bonds than the simple statement (for which we have authoritative support) that no American municipality of any importance has defaulted in recent years on the principal or interest of any of its obligations.'' The criticisms of municipalities cannot be applied either at an earlier or at the present time to a large number of American cities which have met their obligations with commercial promptness, and in some cases have paid in full bonds which were technically invalid, and in other cases when they have suspended payment on account of some financial crisis have promptly resumed the payment of their obligations at a later time. But it cannot be said that the repudiating spirit is entirely eliminated for as late as 1910, a city in Ohio deliberately defaulted an issue of its six per cent bonds, the sole reason being that it desired to refund them at a lower rate of interest and the bonds not being callable it resorted to this method to force a refunding, disregarding entirely the rights of the investor, and attention can be called to the vicious attempt at repudiation of bonds issued by the Board of Education of the City of Huron,[42] where moneys were illegally used by the City of Huron for the conduct of its

42—National Life Insurance Co. of Montpelier v. Board of Education of the City of Huron (S. D.), 62 Fed. 778.

campaign in the Legislature of South Dakota to secure the selection of the City of Huron as the capital of that state. The Board of Education of that city issued bonds ostensibly for the construction of school-houses, used the proceeds of their sale in liquidation of the debts incurred as above noted and then deliberately repudiated the bonds, claiming that the moneys had been used for an illegal purpose and the bonds were therefore void.

§ 342. Validity of securities.

Second in order of importance is a determination of the technical validity and legality of securities issued by public corporations. It is easier for a community so inclined, and less of a strain on the public conscience, to repudiate an issue of securities the legality of which cannot be sustained by the courts. The causes of invalidity may upon analysis be roughly classified in four groups, those which have to do with:

First, the authority to issue;

Second, the purpose of the issue;

Third, the detailed and technical processes involved in the issuing of securities; and

Fourth, violations of constitutional or statutory debt limitations and restrictions upon the taxing power. The subject of the authority to issue has been fully considered in preceding sections. Also the purposes for which bonds may be issued. The various technicalities and processes involved in the actual emitting of the securities,[43] and questions relating to constitutional and statutory debt limitations and tax restrictions have also been considered.[44]

The validity of an issue of securities by the United States has never been questioned and the same is true to a very large extent of those issued by private corpora-

43—See Chaps. VII and VIII, ante.

44—See Secs. 99 and 100, ante, and 358, et seq., post.

tions. In respect to the subordinate civil subdivisions of a state, the circumstances under which securities may be issued are so many and various; the laws authorizing the issue so obscure, diverse and in a great many instances, untested; the public corporations differ so materially in their nature and powers; and their legislative and executive officials are so lamentably careless, incompetent and inefficient, that the opportunities for loss to the investor are many which may arise through the invalidity of securities offered for sale. The right of the bondholder to enforce the obligation through a compulsory levy of taxes will be considered in the next chapter, and in the immediately following sections some further questions relating to the mode and the manner of payment will be discussed.

§ 343. Sources of payment.

Assuming the financial competency of the public corporation to pay its obligations when due, and also the fact that their validity has been established by a court of competent jurisdiction, the further question then arises of the existence of resources or property legally subject to the lien of a judgment rendered or which may be seized by the creditor in satisfaction of his claim. It is here that the question of good faith may be emphasized for in the vast majority of instances, in fact, so great that the exception is a mere negligible circumstance and not to be taken into consideration, the holder of the securities is absolutely without a remedy other than the inclination on the part of the people of the community to pay the debt no matter how just or legal its character may be.

This condition is based upon the reason that except when by law or contract a lien upon specific property exists, the property of a public corporation cannot be seized under any process of law and sold for the extin-

guishment or in liquidation of a debt. The property ordinarily of a public corporation can only be sold at the cost of abandoning the discharge of normal governmental administrative duties. The possession and use of such property is an essential condition of governmental activity. Generally speaking, outside of New England, municipal bankruptcy does not even suggest foreclosure proceedings or the enforcement of a legal lien. With the few exceptions to be noted the conditions involved in public indebtedness is not at all analogous to private indebtedness or the issue of bonds by a private corporation secured by mortgage.[45]

Ordinarily, a public corporation cannot be forced to observe its bargain in respect to payment with its creditor. It may repudiate without having to abscond, it may default and not fail. It is immune from the process server and can laugh, metaphorically speaking, at the lien of a judgment.

Re-stating the rule somewhat in detail and suggesting the only remedies open to the creditor, it may be said that the property of the public corporation acquired by them for public purposes and in their capacity as governmental agents is held in trust for the public for the uses and purposes for which acquired.[46] This trust property

45—Litchfield v. Ballou, 114 U. S. 190. The purchaser of bonds issued in excess of the constitutional limitation has no lien upon public water works in the construction of which the moneys derived from the sale of bonds is alleged to have been expended, if other funds have also been expended upon such works.

46—Mobile Transportation Co. v. City of Mobile, 128 Ala. 335, 30 So. 645; City of Oakland v. Oakland Water Front Co., 118 Calif. 160, 50 Pac. 277.

City of Salem v. Lane & Bodley Co., 90 Ill. App. 560. A mechanic's lien cannot be established through a sale of the property of a municipal corporation. Ransom v. Beal, 29 Iowa 68; Mariner v. Mackey, 25 Kan. 669.

Egerton v. Third Municipality, 1 La. Ann. 435. Taxes due cannot be seized under execution.

Carter v. State, 42 La. Ann. 927, 8 So. 836. The only effect of a judgment rendered in an action against the state and authorized by an act of the legislature is to effect a

cannot be reached by process and sold to satisfy their debts no more than can other trust property be sold to satisfy the individual debts of any other trustee.[47] A judgment, therefore, in the absence of express statutory provisions against a public corporation, cannot be enforced by execution,[48] neither is it a lien upon any of its property.[49] Specific property may by law, however, be made subject to process or the collection of a judgment authorized in a designated manner.[50] The remedy ordinarily

settlement of disputed questions of law and fact. The judgment is only morally binding upon the state and it possesses no executory force. Darling v. City of Baltimore, 51 Md. 1; Burlington Mfg. Co. v. Board of Courthouse & City Hall Com'rs, 67 Minn. 327, 69 N. W. 1091; Foster v. Fowler, 760 Pa. 27.

Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. 596. A mechanics lien cannot run against public property. Brown v. Gates, 15 W. Va., 131; but see City of Louisville v. University of Louisville, 54 Ky. (15 B. Mon.), 642. See, also, Florman v. School Dist. No. 11, 6 Colo. App. 319; Monaghan v. City of Philadelphia, 28 Pa. 207.

47—Sioux City v. Weare, 59 Iowa, 95. A judgment may be satisfied by the issue of bonds. Lowber v. City of New York, 7 Abb. Pr. (N. Y.), 248. See, also, Van Horn v. Kittitas Co., 46 App. Div. 623, 61 N. Y. S. 1150.

48—Weaver v. Ogden City, 111 Fed. 323; City of Virden v. Fishback, 9 Ill. App. 82; Randolph County v. Ralls, 18 Ill. 29; King v. McDrew, 31 Ill. 418; City of Olney v. Harvey, 50 Ill. 453; City of Danville v. Mitchell, 63 Ill. App. 647; City of Morrison v. Hinkson, 87 Ill. 587; City of Geneva v. People, 98 Ill. App. 315; Village of Dolton v. Dolton, 196 Ill. 154, 63 N. E. 642; Gabler v. Elizabeth City, 42 N. J. Law 79; Lyon v. Elizabeth City, 43 N. J., Law, 158; Presidio County v. City Nat. Bank (Tex. Civ. App.), 44 S. W. 1069; but see Ware v. Pleasant Grove Twp., 9 Kan. App. 700, 59 Pac. 1089; Littlefield v. Inhabitants of Greenfield, 69 Me. 86; Gaskill v. Dudley, 47 Mass. (6 Metc.), 546; Coler v. Coppin, 7 N. D. 418, 75 N. W. 795; Gordon v. Thorp (Tex. Civ. App.), 53 S. W. 357. An execution may run against a city since there is no statute expressly prohibiting it. See, also, Weaver v. City and County of San Francisco, 111 Cal. 319.

49—People v. Superior Ct. of Cook County, 55 Ill. App. 376; Whiteside v. School District No. 5, 20 Mont. 44, 49 Pac. 445.

50—United States v. City of New Orleans, 31 Fed. 537; Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 670; Goldsmith v. San Francisco County Sup'rs, 115 Cal. 36, 46 Pac. 816; Buck v. City of Eureka, 119 Cal. 44, 50 Pac. 1065; Mason v. Com'rs of Roads & Revenues, 104 Ga. 35, 30 S. E. 513; City of Cairo v. Allen, 3 Ill. App. 398;

available is writ of mandamus directed to the proper officers to compel the levy of a tax within constitutional or statutory limitations sufficient to pay the obligation,[51] or where the judgment is against the state, to secure an appropriation from the legislature for its payment.[52] This principle has been universally adopted on the grounds of public policy since it is not considered permissible or advisable that the state or a governmental agent should be hampered or prevented through a loss of its public property from exercising its public powers or carrying out its governmental functions.[53] It has, however, been modified in some instances by confining its application to property absolutely essential to the existence of the corporation or necessary and useful to the exercise of governmental powers or the performance of public duties.[54] Property held by a public corporation as an investment of funds merely, for the purposes of income

Carney v. Village of Marseilles, 136 Ill. 401, 26 N. E. 491; People v. Chicago & A. R. Co., 193 Ill. 364, 61 N. E. 1063; Osborne County Com'rs v. Blake, 25 Kan. 356; Fernandez v. City of New Orleans, 50 La. Ann. 485, 23 So. 611; State v. City of New Orleans, 45 La. Ann. 1389, 14 So. 291; Hammond v. Place, 116 Mich. 628; 74 N. W. 1002; Griswold v. City of Ludington, 117 Mich. 317, 75 N. W. 609; State v. Cascade County Com'rs, 16 Mont. 271, 40 Pac. 595; McCully v. Tracy, 66 N. J. L. 489, 49 Atl. 436; Lorence v. Bean, 18 Wash., 36, 50 Pac. 582; State v. City of Milwaukee, 20 Wis. 87.

51—Miller v. McWilliams, 50 Ala. 427. Neither can private property of inhabitants be seized under execution. Emeric v. Gilman, 10 Cal. 404; City of Chicago v. Sansum, 87 Ill. 182; Chase v. Morrison, 40 Iowa 620; Lockard v. Decatur County Com'rs, 10 Kan. App. 316, 62 Pac. 547; State v. Cape Girardeau County Ct. (Mo.), 3 S W. 844; State v. Norvell, 80 Mo. App. 180; Alter v. State, 62 Nebr. 239, 86 N. W. 1080. Nebr. Code, Sec. 482, relative to judgments becoming dormant, applies to those against municipal corporations; a mandamus proceeding, however, to compel a levy and collection of taxes will be regarded as the equivalent of issuing an execution. See Secs. 418, et seq., post.

52—Carter v. State, 42 La. Ann. 927, 8 So. 836; Clements v. State, 77 N. C. 142.

53—Brinckerhoff v. Board of Education of N. Y. 37 How. Pr. (N. Y.), 499. See also Meriwether v. Garrett, 102 U. S. 472.

54—City of New Orleans v. Home Mutual Ins. Co., 23 La. Ann. 61.

or for sale and unconnected with purposes of municipal government,[55] or in its proprietary or private capacity,[56] can be seized upon execution for the debts of the corporation.

§ 344. Meriwether v. Garrett.

The early and leading case on this question is that referred to in the title of this section [57] and it has already been quoted from at length and the facts stated in the first part of this book.[58] On the point now under discussion it was suggested in the argument of counsel for Garrett, the bond holder, that "a municipal corporation possesses a dual character, the one governmental, legislative or public, the other proprietary or private. Over its first or governmental aspect, which is political, the legislative control is said to be omnipotent or supreme. But as to its second or private character, under which it purchases and holds property, makes contracts, incurs debt and issues evidences thereof, borrows money, etc., it is 'quo ad hoc a private corporation,' and over this character of it the legislative power is not omnipotent." And that, therefore the market houses, fire engines, engine houses, horses, wagons and other property including the city hall and square which the corporation owned at the time of its dissolution were assets for the creditors. Mr. Chief Justice Waite announced the conclusions reached by the court in part as follows: "Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of

55—Darlington v. City of New York, 31 N. Y. 164.

56—City of New Orleans v. Morris, 3 Woods (C. C.), 115, Fed. Cas. No. 10, 183; City of Birmingham v. Rumsey, 63 Ala. 352.

57—102 U. S. 472.

58—See Sec. 24, ante.

the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the state, the power once delegated to the city in that behalf having been withdrawn.

"The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the states, that such property can be reached directly on execution against the municipality, has not been generally accepted."

In the concurring opinion by Mr. Justice Field, he said: "And the decree (of the court below) further adjudged that all the property within the limits of the territory of the city of Memphis was liable and might be subjected to the payment of all the debts of the city, and that such liability would be enforced thereafter from time to time, in such manner as the court might direct. This decree is manifestly erroneous in its main provisions. It proceeds upon the theory that the property of every description held by the municipality at the time of its extinction, whether held in its own right or for public uses, including also in that designation its uncollected taxes, were chargeable with the payment of its debts, and constituted a trust fund, of which the circuit court would take possession and enforce the trust; and that the private property of the inhabitants of the city was also liable, and could be subjected by the circuit court to the payment of its debts. In both particulars the theory is radically wrong." Justices Strong, Swayne and Harlan dissented. In the dissenting opinion written by Mr. Justice Strong on the question of seizure, he concurred with the majority opinion and said: "Whatever may be said of the equities of complainants and of their power to enforce those rights in a court of equity, I agree that the decree (in the court below) as entered was too broad. It

declared and adjudged that all the assets and property of every description theretofore belonging of the city of Memphis, or so much thereof as may be necessary for the purpose, including taxes theretofore assessed and remaining unpaid and due the city, should be applied to the payment of the debts due to the complainants and other creditors who had made or might thereafter make themselves parties to the suit. This included not only the private property of the city, but also that which it had held for public uses, viz: for governmental purposes and as a trustee for the State, such as public buildings, streets, squares, parks, school-houses, promenades, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held by the city for merely municipal purposes. To this extent, I think, the decree cannot be sustained. Such property cannot be subjected to the payment of the debts of the corporation. Its public character forbids such an appropriation. It could not be subjected to taxation at the instance of the municipality. It was never held for the payment of debts. Instead, thereof, it was held by the city merely as a trustee for the public. It would not be contended that it could have been taken in execution at law, and for the same reason it cannot be reached in equity to satisfy creditors.

"I think, also, that part of the decree which adjudges that all the property within the limits of the territory of the City of Memphis is liable and may be subjected to the payment of all the debts owing by the city, and that such liability shall be enforced hereafter, from time to time, in such manner as the circuit court might order and direct, is erroneous. Notwithstanding what has been held in some of the New England States, I think the doctrine is generally accepted, that the private property of individuals within the territorial limits of a municipal corporation cannot be reached by its creditors directly, any more than the private property of stockholders in other

corporations can be thus reached. It may, it is true, be subjected to taxation for the payment of the corporate debts, but the levy of taxes must be made by the corporation itself, or by the State."

But on the broad question of compelling a municipal corporation to levy taxes and to meet its obligations in some manner, he said: "It can make no difference that the City of Memphis was a municipal corporation. Its character as such does not affect the nature of its obligations to its creditors, or its *cestuis que trust,* nor impair the remedies they would have if the city was a common debtor or trustee. While as a municipal corporation the city had public duties to perform, yet in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities, as attend such persons. Over its public duties, it may be admitted, the Legislature had plenary authority. Over its private obligations it has not."

§ 345. Exceptions to rule above stated.

The courts have held that when the authority has been granted to issue securities their payment may be secured by a direct pledge of property, and where this is done the remedies upon default of the bond holder are analagous to those actions against a private person or corporation. Securities of this class are best illustrated by those issued to construct a water works or a lighting plant and which in some instances are secured by a direct pledge of the property.[59] In Illinois and some other states, possibly,

59—Merchants National Bank v. Escondido Irrigation District (Calif.), 77 Pac. 937. Under California laws relating to irrigation district bonds the board of directors of the district may pledge by mortgage or otherwise all the property of the district and this authorizes a mortgage foreclosable in the ordinary way so as to convey to the

special improvement bonds are often issued having a direct lien upon the property benefited by the improvement when so endorsed by the owner of the property.[60]

In New Jersey, a law was recently passed under which school district bonds issued under the terms of the school act are secured by a lien on all the real estate and personal assets of the district issuing them, though it has been held that the bonds issued cannot be regarded as mortgages in the strict sense of that term, notwithstanding the terms of the statute above referred to.[61]

In Idaho,[62] an Act was recently passed providing for the improvement of roads, Section 21 of that Act provided that the Board of County Commissioners should create a special taxing or assessing district to pay bonded

purchaser the legal and equitable title to the property.

Adams v. Rome, 59 Ga. 765. The mayor and city council may mortgage city water works to secure payment of bonds lawfully issued for its erection and the right to foreclose on failure of conditions is a necessary incident in such a case to the mortgage. Culbertson v. City of Louisville (Ky.), 128 S. W. 292; 129 S. W. 95.

City of Eugene v. Williamette Valley Co. (Ore.), 97 Pac. 817. The charter of Eugene City provides that water bonds in addition to being a general obligation of the city shall be a first and exclusive lien upon the water plant.

60—German Savings & Loan Society v. Ramish (Calif.), 69 Pac. 89. On street improvement bonds upon sale of property assessed the bond act gives title as against a holder of a mortgage prior to assessment proceedings. Union Trust Company of San Francisco v. State (Calif.), 99 Pac. 183. Street Improvement Bonds.

Fox v. Workman (Calif.), 100 Pac. 246. Proceedings to enforce the lien and effect a sale of the property covered by street improvement bonds must be strictly followed. So held in respect to the demand in writing of the city treasurer to sell the property subject to the lien.

Blackwell v. Village of Coeur D'Alene (Ida.), 90 Pac. 353. Session laws of 1905, p. 334, authorized the holder of bonds issued for sewer improvements to collect the assessments on property benefited and foreclose the lien thereof upon a failure of the city to do this. State v. Rathbun, 22 Wash. 651, 62 Pac. 85. Street improvement bonds.

Smith v. City of Seattle (Wash.), 65 Pac. 612. Water works bonds. See, also, Spring Creek Drainage District v. Elgin, etc., Ry. Co., 249 Ill. 260, 94 N. E. 529.

61—McCully v. Board of Education of Ridgefield Twp. (N. J.), 42 Atl. 776.

62—Laws of 1909, p. 27.

indebtedness created under the act, such district to be subject and liable to such a portion of the bonded indebtedness and in such a degree as the Board should designate; the bonds issued to constitute a lien upon all taxable property in the district as to the portion designated by the Board. The Act, however, was held inoperative for other reasons.[63]

It is possible that in other instances particular property has been pledged by a public corporation for the payment of its securities, but naturally such cases do not come before the courts for the adjudication of the rights of the parties.

The rule as applied in New England was expressly repudiated by Chief Justice Waite in the Meriwether v. Garrett case. This doctrine as stated by Dillon is: "In the New England States, judgments against municipalities are not enforced by mandamus but in a mode peculiar to those states. By the common law of the New England States derived from immemorial usage, the estate of an inhabitant of a county, town, territorial parish or school district is liable to be taken on execution on a judgment against a corporation.[64]

The doctrine as followed in New England has also been expressly repudiated by constitutional provision in a number of states. In California, article II, section 15, the Constitution provides that "private property shall not be taken or sold for the payment of the corporate debt of any political or municipal corporation" and provisions of a similar nature are to be found in Colorado, article X, section 14; Illinois, article IX, section 10; Missouri, article X, section 13; Montana, article XII, section 8; Nebraska, article IX, section 7 and Wyoming, article XI, section 13.[65]

63—Cunningham v. Thompson (Idaho), 108 Pac. 898.

64—Municipal Corporations, 4th Ed. Note to Sec. 849, p. 1027. Beardsley v. Smith, 16 Conn. 368.

65—See, also, Miller v. McWilliams, 50 Ala. 42.

§ 346. Duty of corporation to pay.

It has been repeatedly held by the Supreme Court of the United States and other courts that it is the duty of the public corporation to provide for and pay its obligations within, of course, its legal limits of taxation and this duty existing it is clear that it is not discretionary but an imperative one. But the means of compelling the performance of a moral duty is equally lacking either in the case of an individual or a public corporation in the absence of a legal method of compulsion.[66]

When the power is conferred upon a public corporation to issue its negotiable securities, the courts hold that their payment is obligatory and not discretionary. On this point, it was said in an Indiana case,[67] "It is claimed * * * that as the language of the statute is merely permissive, conferring the power and authority upon the officers mentioned without in terms making it their duty to take up and redeem the bonds, etc., they have a discretion to do so or not to do so and that therefore, mandamus will not lie against them to compel them to do so. But we are clear in the opinion that there was no such discretion to be exercised by the officers named. It was the intention of the legislature that the bonds should be paid and not that they should be paid or left unpaid at the option of the officers named. This is clearly gathered

66—Mayor, etc., of New Orleans v. United States ex rel. Stewart, 49 Fed. 40. In no case has it been declared that it is within the discretion of the city government to pay or to refuse to pay its liabilities and to permit the accumulation of the same. Citizens' Savings Bank v. City of Newburyport, 169 Fed. 766.

Sawyer v. Colgan (Calif.), 33 Pac. 911. A special mode of procuring payment may be required.

City of Pueblo v. Dye (Colo.), 96 Pac. 969. A particular mode of discharging public obligations prescribed by law is exclusive and must be followed. People v. Chicago, etc., R. R. Co. (Ill.), 93 N. E. 410; Gray v. State, 72 Ind. 567; Murphy v. Police Jury, St. Mary's Parish (La.), 42 So. 979. See chapter XV post on "Actions on Public Securities."

67—Gray v. State, 72 Ind. 567.

from the tenor of the entire act. The appropriation of money, and the authority conferred upon the officers named to borrow money for the purpose of the act, tend to repel the idea that the legislature intended to leave it to the option or discretion of the officers named, whether to pay the bonds or not."

A public corporation possesses the implied power in the issue of its securities to pledge its credit.[68]

§ 347. Corporate obligation.

In some states, township or precinct organizations are either prohibited by law from issuing securities or are considered corporations of such an incomplete and subordinate grade as to be incapable of incurring obligations of this character. In these states provision is generally made by law for the issue of securities on behalf of such organizations by the county authorities and the question has arisen in several instances of what corporation are the bonds so issued to be regarded as obligations. The courts have held that in legal effect they are to be regarded as the contracts of the county, and the only difference between them and the ordinary bonds of the county is not in the obligation of the county to pay them but in the method by which they may raise the money to discharge the obligation. In the former case noted it has been held that the county may levy the taxes upon the property in the precinct or township which voted their issue; in the latter case upon all the property in the county. The obligation of the county to pay them is as sacred and effective in the one case as in the other.[69]

The legislature, it will be remembered, has the power to compel a subordinate public corporation to incur liabilities or to provide for the payment of certain indebted-

68—Grosse Pointe Twp. v. Finn (Mich.), 96 N. W. 1078.

69—Clapp v. Otoe County (Nebr.), 104 Fed. 473; Davenport v. County of Dodge, 105 U. S. 237. Blair v. Cuming County, 111 U.

ness. Following this principle it has been held that in disputed cases it is competent for the legislature to arbitrarily make an issue of public securities an obligation of some designated subordinate civil subdivision.[70]

§ 348. Medium of payment.

A negotiable security is a particular form of contract and the medium of payment is established by its terms, provided, however, that it is not of such a nature as to contravene one of the essentials of a negotiable instrument in respect to the medium of payment which, it will be remembered, is money.[71]

The promise to pay bonds in gold coin of the United States of the present standard of weight and fineness is construed as a money obligation and not a promise to

S. 363. An action was properly brought against a county to collect railroad bonds issued by the county board on behalf of a precinct of such county.

Menasha County v. Frank, 120 U. S. 41. Following the case just cited and holding that in Nebraska an action is properly brought against the county on precinct bonds.

Breckenridge County v. McCracken, 61 Fed. 191, C. C. A. A county is liable in actions on precinct bonds but the judgment against it is to be satisfied out of a tax levied upon the precincts alone. See, also, People v. Porter, 18 Mich. 101.

People v. Sup'rs of Livingston, 42 Barb (N. Y.), 298. County bonds are county obligations though a portion of the money derived from their sale is distributed to various towns within the county for the purpose of paying bounties. Neale v. County Court of Wood County (W. Va.), 27 S. E. 370.

70—New York Life Insurance Co. v. Board of Com'rs of Cuyahoga County, 106 Fed. 123. It is within the province of the legislature to determine as between a state and a county on which the moral obligation rests to discharge a debt.

Rice v. Shealy, 71 S. C. 161, 50 S. E. 868. Express legislation authorizing the issue of bonds may establish the obligation to pay. See Secs. 31 and 32, ante.

See also Van Pelt v. Bertilrud et al., 117 Minn. 50, where it is held that drainage bonds issued under the provisions of chap. 230, Laws 1905, are the direct obligation of the county issuing them.

71—Tipton v. Smythe (Ark.), 94 S. W. 678; Opinion of the court, 49 Mo. 216. See sec. 214, ante.

deliver a specific article which would otherwise destroy their negotiability.[72]

The authority for the issue may be silent in this respect and it is then perfectly competent for the parties to agree upon a payment in "gold coin of the United States" or "gold coin of the United States of the present standard of weight and fineness" or "in gold coin or lawful money of the United States." The obligation of the maker is then fixed to pay in the medium designated by the contract.[73]

Illustrative of this line of authorities, a case from Kentucky may be more particularly referred to.[74] The legislature by an Act of March 30, 1880, authorized the city of Louisville to refund its floating indebtedness and for that purpose and under this authority the general council of the city issued and delivered to the Board of Commissioners of the Sinking Fund of the city coupon bonds, payable both principal and interest in gold coin of the United States. The Act authorizing the issue and sale was silent as to the medium in which they were to be made payable. The plaintiffs in error were sued by the Sinking Fund Commissioners to enforce a contract for

72—Winston v. City of Fort Worth, 475 S. W. 740.

73—Woodruff v. State of Mississippi, 162 U. S. 291; Moore v. City of Walla Walla, 60 Fed. 961; Pollard v. City of Pleasant Hill, 3 Dill. 197; Judson v. City of Bessemer, 87 Ala. 240; Lane v. Gluckauf, 28 Cal. 289; Murphy v. City of San Luis Obispo, 119 Calif. 624; Hillsborough County v. Henderson (Fla.), 33 So. 997; Atkinson v. Lanier, 69 Ga. 460; Heilbron v. City of Cuthbert, 96 Ga. 312; Churchman v. Martin, 54 Ind. 380; Farson v. Sinking Fund Com'rs of Louisville, 97 Ky. 119; Opinion of the Court, 49 Mo. 216; Carlson v. City of Helena (Mont.), 102 Pac. 39; Ross v. Lipscomb, 83 S. C. 136, 65 S. E. 451; Wood v. Ross (S. C.), 67 S. E. 449; Bond v. Greenwald, 51 Tenn. 453; Winston v. City of Fort Worth, 47 S. W. 740; Packwood v. Kittitas County, 15 Wash. 88, 45 Pac. 640; Kenyon v. City of Spokane, 17 Wash. 57. But see Skinner v. City of Santa Rosa, 107 Calif. 464, 29 L. R. A. 512; City of Cincinnati v. Anderson, 10 Ohio St. C. C. Reps. 265; Burnett v. Maloney, 97 Tenn. 697, 37 S. W. 689, Snodgrass, C. J., and Beard, J., dissenting.

74—Farson, Leach & Co. v. Board of Com'rs of Sinking Fund of City of Louisville, 97 Ky. 119, 30 S. W. 17.

the purchase of bonds of this issue and one of the defenses urged was that the bonds were made payable in gold coin of the United States. The contention was not sustained, the court saying in its opinion: "Looking now at the power granted in the case before us, and the objects and purposes of the same, we find that they were, among other things, and mainly, to issue its negotiable securities, running over a period of twenty years for the purpose of borrowing money by the sale thereof at their face value and carrying a low rate of interest. These bonds were to be offered on a market in which there is current more than one circulating medium, but one which is regarded as more stable and less subject to fluctuations than any other, which is the recognized standard of value, and which is the equivalent of and corresponds in value with that which the borrower is to receive from its bonds. Can there be any legal reason why the borrower, in case it should be seen, in the exercise of a sound discretion, both prudent and advantageous, to stipulate for the payment of the loan in that particular medium of circulation, so that the exact measure of the contract—what is to be paid by the borrower on the one hand, and what is to be received by the lender, on the other—may be fixed and understood by both the contracting parties, should not be allowed to so contract? It seems to us, that this is purely a matter of contract which should be and is entrusted to the discretion of the borrower who is then authorized to go into the open market to negotiate the desired loan, and who might under some circumstances be seriously embarrassed, or possibly rendered wholly unable to negotiate his security, if denied this privilege of contracting as to these details, as an individual might do. We, therefore, see no valid objection to these bonds by reason of their having been made payable in gold coin."

The authority, however, may prescribe the medium of payment and a disregard of mandatory provisions in this

respect leads to the invalidity of the securities issued, although the tendency of the court is to hold such provisions directory merely.[75]

Where a corporation debtor has an option to pay in money or to fund in bonds or to pay by sale of bonds it should be granted an opportunity to exercise that option.[76] A city cannot compel a holder of old bonds to receive refunding bonds issued in lieu thereof at a premium although that is the market price.[77]

As an illustration of the rule of strict construction under the conditions just noted, a case from California can be cited.[78] The city of Santa Rosa duly authorized, issued bonds for the purpose of constructing a system of water works and other public improvements. The ordinance provided that the bonds to be issued should be payable, principal and interest, "in gold coin or lawful money of the United States." This ordinance was passed pursuant to legislative acts, some of which provided "that such bonds shall be payable in gold coin or lawful money of the United States." The city, unable to negotiate the bonds containing the clause as above quoted, passed a new ordinance rescinding the old and making the bonds payable "in gold coin of the United States of the present standard of weight and fineness with interest at four per cent, payable semi-annually in like gold coin." The court held the bonds invalid, stating in ef-

75—Bannock v. Bunting & Co. (Calif.), 37 Pac. 277.

Murphy v. City of San Luis Obispo (Calif.), 51 Pac. 1085, 39 L. R. A. 444. Under a statute which provides that "all municipal bonds for public improvements shall be payable in gold coin or lawful money of the United States" bonds of a city may be payable in either gold coin of the United States or lawful money of the United States at the option of the officials issuing them. But see Murphy v. San Luis Obispo, 119 Calif. 624, 48 Pac. 974.

76—United States ex rel. Baer v. City of Key West, 78 Fed. 88, C. C. A.

77—Lloyd v. City of Altoona (Pa.), 19 Atl. 675.

78—Skinner v. City of Santa Rosa (Calif.), 40 Pac. 742. See, also, Murphy v. City of San Luis Obispo, 119 Calif. 624, 48 Pac. 974; Murphy v. City of San Luis Obispo (Cal.), 51 Pac. 1085.

fect that the statute which provided that the bonds of the class named should be made payable in gold coin or lawful money of the United States was a mandatory provision and intended to restrict the power of public corporations to contract with reference to the medium of payment.

In a case in the Supreme Court of the United States,[79] which involved the validity of bonds they recited that the maker was "indebted to the bearer in the sum of One Thousand Dollars in gold coin of the United States of America," etc. The coupons attached were made payable in "currency of the United States." The Supreme Court of the State of Mississippi,[80] construed the bonds as obligations to pay in gold coin and held that the power conferred to borrow money on the maker did not authorize that corporation to borrow gold coin or issue bonds acknowledging the receipt thereof and agreeing to pay therefor in the same medium and that the bonds were void for want of power in that particular. The Supreme Court of the United States, however, reversed this decision and held that the power to borrow money was expressly granted unaccompanied by any definition of word "moneys" which might operate as a restriction on the power. At the time the bonds were issued the money of the United States consisted, under the decisions of the Supreme Court of the United States, of gold and silver coin and United States notes, gold being in every respect unlimited in its legal tender capacity, but all were equally valid as money of the United States. It was further held that the bonds were legally solvable in money of the United States whatever its description, and not in any particular kind of that money, for there was no agreement to pay the obligation in any particular kind of money. Mr. Justice Field in a concurring opinion said

79—Woodruff v. State of Mississippi, et al, 162 U. S. 291.

80—Woodruff v. State, 66 Miss. 298.

in referring to the decision of the Supreme Court of Mississippi: "I cannot concur in the decision of that court, in my judgment no transaction of commerce or business, or obligation for the payment of money, that is not immoral in its character and which is not, in its manifest purpose, detrimental to the peace, good order, and general interest of society, can be declared or held to be invalid because enforced or made payable in gold coin or currency when that is established or recognized by the government. And any acts by state authority impairing or lessening the validity or negotiability of obligations thus made payable in gold coin are violative of the laws and Constitution of the United States."

The acceptance, however, by a creditor of payment in any other medium than that provided by the contract, even though it may be depreciated currency, where the obligation calls for a payment in gold coin extinguishes the debt and he has no right in a subsequent action to recover the difference.[81]

§ 349. The legal tender cases.

No case involving the payment of public securities has been rendered in which the effect of the legal tender cases, so-called, has been directly raised. As a matter of historical interest and also because involving possibilities, a brief reference to these cases may not be out of place. The Constitution of the United States, Article 1, Section 10, provides that: "No state shall * * * coin money; emit bills of credit; make anything but gold or silver coin a tender in payment of debts." It is also provided that Congress shall have power "to coin money and regulate the value thereof" but no power is directly conferred upon it to make anything but coined money

81—Pollard v. City of Pleasant Hill, 3 Dill. 195; Gilman v. County of Douglas, 6 Nev. 27.

legal tender in discharge of debts nor is anything said on that subject. During the Civil War as a means of raising revenue for its prosecution, Congress on February 25, 1863, passed an Act providing for the issue of treasury notes and declared that they "should be receivable in payment of all taxes, internal duties, excises, debts and demands of every kind due to the United States except duties on imports and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States except duties on imports and interest, as aforesaid."

In the first case before the Supreme Court of the United States in which the constitutionality of the Legal Tender Act was raised, the court held that Congress had no power to make anything but coined money a legal tender in payment of debts contracted before the passage of the Legal Tender Act and that accordingly the note involved in the action which was payable in dollars could not be discharged by tender of Treasury Notes.[82] The decision was written by Chief Justice Chase, Justices Miller, Swayne and Davis dissenting. Before the next case came up for its decision on this question, the personnel of the court had changed through the resignation of Justice Grier and the appointment of two new members, Justices Strong and Bradley, the court having been meantime increased by an Act of Congress from eight to nine members. Two cases then came up for decision,[83]

82—Hepburn v. Griswold, 8 Wall. 603.

83—Knox v. Lee and Parker v. Davis, noted in 11 Wall. 682, and reported in full in 12 Wall. 457, and re-affirmed in Dooley v. Smith, 13 Wall. 605; Bigler v. Waller, 14 Wall. 298, and Railroad Company v. Johnson, 15 Wall. 195. Justices Strong and Bradley delivering an opinion in which a majority of the court concurred, Justices Field, Clifford and Nelson with Chief Justice Chase dissenting.

and the court reversed its former decision, over-ruling Hepburn v. Griswold.

§ 350. To whom payable.

Negotiable bonds in common with other instruments of a like character are usually made payable to bearer or order with provisions for endorsement in blank and registration. When payable to bearer or endorsed in blank by the one to whom originally payable, such bonds are payable to bearer and the holder is entitled to payment.[84] Where provision is made for registration, when registered in the required manner and by the proper officials, they then become payable only to the party in whose name they stand upon the registration books of the trustee or municipality.[85] But a provision for registration does not prevent the holder of unregistered bonds from recovering interest.[86] The fact that a rail-

84—Amey v. Alleghany City, 24 How. (U. S.) 364; Strong v. District of Columbia, 4 Mackey (D. C.) 242; Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; City of Ottawa v. First Nat. Bank of Portsmouth, 105 U. S. 342; Sinton v. Carter County, 23 Fed. 535; City of Cadillac v. Woonsocket Inst. for Savings, C. C. A., 58 Fed. 935; Ashley v. Presque Isle County Supr's, C. C. A., 60 Fed. 65; West Plains Twp. v. Sage, 60 Fed. 943.

Pacific Imp. Co. v. City of Clarksdale, C. C. A., 74 Fed. 528. A bond negotiable in form when not so authorized is not void but simply non-negotiable.

D'Esterre v. City of Brooklyn, 90 Fed. 586; Edwards v. Bates County, C. C. A., 99 Fed. 905; Evans v. Cleveland & P. R. Co., Fed. Cas. No. 4,557; Carpenter v. Greene County, 130 Ala. 613, 29 So. 194.

Blackman v. Lehman, 63 Ala. 547. Under Ala. Code, Sec. 2098, the legal title to municipal bonds payable to bearer passes only by indorsement. Clapp v. Cedar County, 5 Iowa 15; Sioux City v. Weare, 59 Iowa 95; School District No. 40 v. Cushing, 8 Kan. App. 728; Town of Lexington v. Union Nat. Bank, 75 Miss. 1; Manhattan Sav. Inst. v. Town of East Chester, 44 Hun. (N. Y.), 537; Com. v. Allegheny County Com'rs, 37 Pa. 237; City of Austin v. Nealle, 85 Tex. 520. See, also, Sec. 186, ante.

85—Chapman v. City Council of Charleston, 30 S. C. 549, 3 L. R. A. 311, 28 S. C. 373, 13 Am. St. Rep. 681. See, also, Sec. 173, ante.

86—St. Louis County Com'rs v. Nettleton, 22 Minn. 356. A statute required the registration of bonds and the point was made that interest could not be paid on those unregis-

road corporation to whom aid bonds are originally voted may become consolidated with another corporation does not usually release the public corporation issuing such bonds from its obligations, and this is especially true where there is a statutory authority permitting the consolidation of railroad corporations at the time of the issue of such bonds. It has been held that such statutory authority must be considered as a "silent factor" in determining the legal rights of the parties to such a transaction. The bonds then become payable to the consolidated company instead of that company to whom the aid was originally granted.[87]

§ 351. Amount recoverable.

A bona fide holder of negotiable securities acquiring the same in the open market is entitled to recover the

tered because it provided that "all bonds heretofore issued and still unpaid shall be registered by the holder thereof." The court said: "Although the language is in form imperative when we consider that construing it strictly would render the act of doubtful validity we think it was not intended to require a registration of the bonds as a condition of the holder's right to demand the interest but was intended only for the convenience of those bondholders who may choose to avail themselves of it and consequently that it was not intended to take from the county commissioners the authority to provide for paying the interest on bonds not registered. The commissioners still provide for raising, by tax, the amount required to pay all the interest on the county debt, the county treasurer pays to the state treasurer the amount which has been certified by the state auditor to the county auditor, and the balance remains in the county treasury to pay the interest according to the terms of the bonds or contracts under which the debts exists. The levy of the $12,000 for railroad bond interest was valid and the court below will sustain the same."

87—See Sec. 109, et seq., ante. Pope v. Lake County Com'rs, 51 Fed. 769. Any person or corporation subscribing for stock in a railroad company in aid of its construction does so with the knowledge that such company may become merged into a new consolidated railroad corporation. It must be held to have been in the contemplation of such subscriber that such a consolidation might occur. The law enters as silent factor into every contract. The subscriber by his contract impliedly authorizes the railroad company for whose stock he has subscribed to consolidate with any other

full or face value of the bonds, although they may have been originally issued at less than par in violation of some statutory provision and this rule will also apply in the absence of such a limitation. The leading case on this question is County of Sac v. Cromwell,[88] where the court held that a payment of the par value of the securities was not necessary to the right of a bona fide holder to recover the full amount, the court said on this point: "But independently of the fact of such full payment, we are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if bona fide purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes only a loan upon such paper, or takes it as collateral security for a precedent

railroad company. He is not thereby released from liability, but with his implied consent he is brought into the same contractual relations with the consolidated company which he occupied with the company for whose stock he subscribed.

88—96 U. S. 51. See, also, Sec. 245, et seq., ante, citing authorities.

debt, may be limited in his recovery to the amount advanced or secured." There is, however, some authority to the contrary.[89]

§ 352. Time of payment.

For economically sound reasons in a number of states by constitutional provision the life of an issue of securities either state or municipal or both has been limited to a specific number of years: To five as applied to state bonds in Wisconsin;[90] to ten in South Dakota;[91] to not less than ten nor more than fifteen in Colorado;[92] to fifteen in Maryland;[93] to twenty in Idaho,[94] Illinois,[95] Iowa,[96] Missouri,[97] Washington,[98] and West Virginia, state securities;[99] to twenty-five in Oklahoma;[1] to thirty in Georgia,[2] North Dakota,[3] and Pennsylvania;[4] to thirty-four years in respect to municipal securities in West Virginia;[5] to thirty-five in New Jersey;[6] to forty in California,[7] Kentucky,[8] and South Carolina;[9] to fifty years

89—County of Armstrong v. Brinton, 47 Pa. St. 357. At the time this decision was rendered, municipal bonds were not regarded as negotiable instruments in Pennsylvania.

90—Art. VIII, Sec. 6.

91—Art. XI, Sec. 1.

92—Art. XI, Secs. 4, 6, 8.

93—Art. III, Sec. 34.

94—Art. VIII, Secs. 1, 3.

95—Art. IX, Sec. 12.

96—Art. VII, Sec. 5.

97—Art. X, Sec. 12, 12a Art. IV, Sec. 44. State debt, thirteen years.

98—Art. VII, Sec. 1 and Art. VIII, Sec. 3.

99—Art. X, Sec. 4.

1—Art. X, Secs. 25, 26, 27.

State v. Millar (Okla.), 96 Pac. 747. A constitutional provision that a city on incurring indebtedness for the construction of public utility must provide an annual tax sufficient to pay the interest on such indebtedness and to constitute a sinking fund for the payment of the principal within twenty-five years should be construed as clearly meaning that the bonds issued shall not run for a period of more than twenty-five years. See, also, Arizona Const., Art. IX, Sec. 3.

2—Art. VII, Sec. 7, Pars. 2 and 11.

3—Art. XII, Sec. 182.

4—Art. IX, Sec. 10.

5—Art. X, Sec. 8.

6—Art. IV, Sec. 6, Par. 4.

7—Art. XI, Sec. 18.

Brook v. City of Oakland (Calif.), 117 Pac. 433. Case held not to involve the question of whether the bonds ran longer than forty years.

8—Sec. 159.

9—Art. X, Sec. 11.

in New Mexico,[10] and New York,[11] but an exception is here made in respect to water bonds which are limited to a term of twenty years.

In Texas and Arizona no definite period is set although Texas achieves the same result by requiring the levy of a tax at the time the debt is incurred sufficient to meet the accruing interest and provide a sum for the sinking fund equivalent to two per cent of the par of the loan.[12] See also the constitutions of Maine,[12a] Minnesota,[12b] Nevada,[12c] and Wisconsin,[12d] which contain provisions either fixing arbitrarily the maturity of a debt to be incurred or requiring provisions for payment within a specified time.

§ 353. Certainty in respect to time of payment.

Since certainty of the time of payment is one of the essentials of the negotiable instrument, it follows that public securities to fall within the class designated must contain this essential and the time of payment must be definitely and certainly fixed,[13] although it has been held that bonds are not deprived of the character of a negotiable instrument by being made payable on or before

10—Const. Art. IX, Secs. 8, 10, 12.

11—Art. VII, Sec. 4.

City of Rochester v. Quintard, 136 N. Y. 221, 32 N. E. 760. Laws of 1892, Chap. 350, authorizing the city of Rochester to issue water bonds for a term of fifty years does violate Constitution, Art. VIII, Sec. 11, relative to the incurring of indebtedness and issuing of bonds for a limited period of time.

12—Texas Const. Art. IX, Secs. 4, 5, 7.

Bagley v. Bateman, 50 Tex. 446. The constitutional provision does not prevent making a debt payable in ten years.

Arizona Const. Art. IX, Sec. 3. Provision must be made to pay loan within twenty-five years.

See, also, Georgia Const. Art. VII, Sec. 7, Par. 2. Thirty years.

12a—Art. IX, Sec. 15. State debt, twenty-one years.

12b—Art IX, Secs. 5; 14a. State debt either 15 years or 10-30 years.

12c—Art. IX, Sec. 4. State debt, twenty years.

12d—Art. VIII, Sec. 6. State debt, five years. Art. XI, Sec. 3. City debt, twenty years.

13—See Sec. 214, et seq., ante.

a certain date at the option of a public corporation issuing them.[14]

This rule was announced and stated in an early case in the Supreme Court of the United States,[15] where the court held that a municipal bond, issued under the authority of the law to a named person or order for a fixed sum of money payable at a designated time therein limited, is a negotiable security within the law-merchant. The bonds involved in this case were issued pursuant to lawful authority which provided that the same "shall be payable at the pleasure of the district at any time before due." The contention was made that this provision deprived the securities of their negotiability in not complying with that well established essential of negotiable instruments, that the time of payment must be certain. The court said on this point: "But it is contended that the word 'negotiable,' in the Iowa statute, is qualified by that clause, in the same enactment, which provided that the bonds issued under it shall 'be payable at the pleasure of the district at any time before due.' These words were not incorporated into the bond. But if the holder took, subject to that provision, as we think he did, it is clear that this option of the district to discharge the debt, in advance of its maturity, did not affect the complete negotiability of the bonds; for, by their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for non-payment until that passed."

In the absence of a constitutional or statutory requirement in respect to the time of payment, the courts are uniform in holding that where a public corporation has the lawful authority to borrow money and issue bonds it

14—See Sec. 215, et seq., ante; see, also, Sec. 355 post.

15—Independent School District of Ackley v. Hall, 113 U. S. 135. See, also, Union Cattle Co. v. International, etc., Co., 149 Mass. 492.

may make the principal and the interest payable at its pleasure and no question can be raised in respect to their validity on this point.[16] The general tendency of court decisions is to require a substantial compliance only with legal requirements as to the maturity of the bonds or the rule can be stated in another way, namely, that the provisions relative to the maturity of public securities will when there has been a substantial compliance with them be construed as directory rather than mandatory.[17] As illustrative of this rule the case of Township of Rock Creek v. Strong,[18] can be cited. The claim was made that the bonds were void for the reason that they were made payable in thirty years and thirty-five days from the date of their execution, drawing interest, however, only for the last thirty years of said time. The second section of the act authorizing their issue provided that the bonds issued thereunder should be payable in not less than five nor more than thirty years from the date thereof. The bonds issued were dated September 10, 1872, made payable thirty years from the 15th of October, 1872, with interest

16—Com'rs of Marion County v. Clarke, 94 U. S. 278; Board of Com'rs of Kiowa County v. Howard, 83 Fed. 286, C. C. A.; Chicago, etc., R. R. Co. v. City of Aurora, 99 Ill. 205; Peoples National Bank of Brattleboro v. Ayer, 24 Ind. App. 212; Flagg v. City of Palmyra, 33 Mo. 440; Board of Sup'rs v. Simmons (Mich.), 62 N. W. 292; Singer Mfg. Co. v. City of Elizabeth, 42 N. J. L. 249; Syracuse Savings Bank v. Seneca Falls, 21 Hun. 304. See, also, Knox County v. Ninth National Bank, 147 U. S. 91; Tyson v. City of Salisbury (N. C.), 86 S. E. 532.

17—Township of Rock Creek v. Strong, 96 U. S. 271; Gilchrist v. Little Rock, 1 Dill. 261; Dows v. Town of Elmwood, 34 Fed. 114; Twp. of Washington v. Coler, 51 Fed. 362, C. C. A.

City of Alma v. Guaranty Savings Bank, 60 Fed. 203. Bonds made payable in "twenty years after date" complied with the requirements of a law that bonds "shall be payable in not less than ten years nor more than twenty years from the date of their issue." Roberts & Co. v. City of Paducah, 95 Fed. 62; Kemp v. Town of Hazlehurst (Miss.), 31 So. 908; Singer Mfg. Co. v. Elizabeth, 52 N. J. L. 249; Brownell v. Town of Greenwich, 114 N. Y. 518; 22 N. E. 24; Hoag v. Town of Greenwich, 133 N. Y. 152, 30 N. E. 842.

18—96 U. S. 271.

thereon from the latter date at the rate of seven per cent. When they were delivered to the railroad company, being railroad aid bonds, did not appear in the case although they were not registered by the auditor of the state until October 17, 1872. The court held that the provisions in respect to time of maturity were obviously directory and not of the essence of the power and that under the conditions noted they were practically thirty years bonds. Their legal effect, so far as interest payments were concerned, were the same as if October 15th had been inserted in the bonds as the date of execution instead of September 10th. The legislative direction was substantially followed and the bonds held good.

There are some authorities, however, holding contrary to the views expressed in the case just cited and which incline to a strict construction of statutory provisions of the character noted. They in effect require the public corporation to follow strictly statutory or constitutional provisions relative to the dates of maturity, the penalty for a disregard of such provisions being the invalidity of the securities involved. These cases save some exceptional ones have generally been decided upon what might be termed a material departure from the terms of the authority granting the power and it might be suggested that if in any one of them there had been a substantial compliance the ruling of the court might perhaps have been different.[19]

In Norton v. Dyersburg,[20] an act of Tennessee author-

19—Barnum v. Town of Okolona, 148 U. S. 393; City and County of Denver v. Hallett (Colo.), 83 Pac. 1066; Cairo, etc., R. R. Co. v. City of Sparta, 77 Ill. 705; McMullen v. Inghram, Circuit Judge, 102 Mich. 608, 61 N. W. 260 Board of Sup'rs of Alpena County v. Simmons (Mich.), 62 N. W. 292.

Catron v. Lafayette County, 106 Mo. 659, 17 S. W. 577. Under statutory authority to issue bonds to run not exceeding twenty years,—bonds running for one year without coupons are valid. Hoag v. Town of Greenwich, 15 N. Y. S. 743, following Potter v. Greenwich, 92 N. Y. 662.

20—127 U. S. 160.

ized the Town of Dyersburg to subscribe to the capital stock of a certain named railroad company not to exceed $50,000 in amount, payable in not exceeding four years by annual assessments. The act further provided that bonds of the town might be issued in anticipation of such collections. The court held that this statute gave no authority to the town to issue bonds payable in ten years but only authorized short term bonds to be paid as the assessments were collected. In City of Brenham v. German American Bank,[21] a city ordinance authorized the issuance of bonds payable twenty years after date but redeemable at the city's option at any time after five years from date. This ordinance the court held conferred no authority to issue bonds redeemable after the expiration of ten years from the date of the bonds. In Barnum v. Town of Okolona,[22] a statutory grant authorized the issue of bonds payable at such time as the makers might deem best but "not to extend beyond ten years from the date of issuance." The court held that bonds issued for a longer period of time than ten years were void. An extreme case holding to the rule just stated is from North Dakota,[23] where a statute authorized the issue of bonds payable in not less than ten years from date, and the court held that bonds issued and payable in eleven days less than ten years were void even in the hands of a bona fide purchaser.

In determining the date of maturity of public securities for the purpose of ascertaining whether there has been a compliance with the law in respect to maturity, the courts hold as in the Rock Township case just cited that the date of commencement is to be determined by the interest period,[24] and also that the time when the ma-

21—144 U. S. 173.

22—148 U. S. 393.

23—Peoples Bank v. School District No. 7, 3 N. D. 496, 57 N. W. 787.

24—City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449, C. C. A.

turity period commences to run should be calculated from the actual date of issuance and delivery rather than when the bonds were authorized or voted.[25]

§ 354. Order of payment and preference.

The debt represented by an issue of securities for purposes of payment is considered as an entirety and indivisible. There can be therefore no priority or preference in the payment of individual bonds when the whole issue falls due. The holder of bond No. 1, for illustration, is not entitled to a preference over the holders of bonds bearing a sequent number. The order of presentation determines the order of payment.[26]

When a default in interest occurs the question of whether the entire debt both principal and interest becomes due is dependent upon the terms of the contract contained in the bonds. If these include provisions to the effect that upon default in an interest payment the entire debt, both principal and interest then becomes due and payable, the rights of the parties will be determined and established by these recitals.[27]

25—Dows v. Town of Elmwood, 34 Fed. 114; Syracuse Twp., Hamilton County v. Rollins, 104 Fed. 958, C. C. A.; Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24.

26—Ranger v. New Orleans, 2 Woods 128. Where bonds irregularly issued passed into the hands of bona fide holders the owners of prior securities cannot claim a preference in order of payment over the irregularly issued securities. Shelly v. St. Charles County Court, 21 Fed. 699.

Jewell v. City of Superior, 135 Fed. 19. Holder of local improvement bonds secured by pledge of special assessments is entitled to his proportionate share only of moneys collected by the city.

Baker v. Meacham, 18 Wash. 319, 51 Pac. 404. District improvement bonds maturing during the year are entitled to payment out of the special assessments of that year although bonds maturing in preceding years have not been paid in full.

27—Mayor, etc., of Griffin v. City Bank of Mason, 58 Ga. 584; Moore v. Jefferson, 45 Mo. 202.

See, also, Washington County, Nebraska, v. Williams, 111 Fed. 801. Upon a failure of county authorities to levy taxes and make payments on bonds the holder has no right to recover a judgment for

§ 355. Right of corporation to call for payment.

The right of the public corporation to call for payment outstanding bonds before their maturity again will depend upon the terms of the contract contained in them. If the payment of the bonds is made optional within a certain designated period, clearly the public corporation has this right but otherwise not,[28] although the court held in

the full amount of the bonds and accrued interest but is limited to the amount due under the terms of the contract. Jewell v. City of Superior, 135 Fed. 19.

28—National Bank of the Republic v. City of St. Joseph, 31 Fed. 216; Stewart v. Henry County, 66 Fed. 127; Roberts & Co. v. City of Paducah, 95 Fed. 62; City and County of Denver v. Hallett (Colo.), 83 Pac. 1066; Town of Essex v. Day, 52 Conn. 483.

Turpin v. Madison County Fiscal Court (Ky.), 48 S. W. 1085. The time of redemption of bonds should be fixed before they are issued under a statutory provision to the effect that bonds are "to run not more than thirty years and to be redeemed within that time at the pleasure of the court."

Suffolk County Savings Bank v. City of Boston, 149 Mass. 364, 21 N. E. 65. A bona fide subsequent purchaser is not bound, however, by a contract made by a city with the original purchaser of bonds for the annual redemption of some of the issue. Kemp v. Town of Hazlehurst (Miss.), 31 So. 908.

Town of Pontotoc v. Fulton (Miss.), 31 So. 102. A provision in a bond reserving the right of payment after ten years is void but this fact will not affect its validity. The statutes providing that no part of the principal of a municipal bond issue shall be called in until its maturity. Colbert v. State (Miss.), 39 So. 65.

State ex rel City of Carthage v. Gordon (Mo.), 116 S. W. 1099. Where bonds are issued payable in not less than five years nor more than twenty years from the date of issue at the option of the city, such exception is intended for its benefit and may be waived.

Carlson v. City of Helena (Mont.), 102 Pac. 39. A provision in respect to redemption at the option of the city before maturity is mandatory.

State v. McBride (Nev.), 99 Pac. 705. Construing particular terms of redemption as involving exercise of taxing power. Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24; Hoag v. Town of Greenwich, 133 N. Y. 152, 30 N. E. 842; Territory v. Hopkins, 9 Okla. 133, 59 Pac. 976.

City of Memphis v. Memphis Savings Bank (Tenn.), 42 S. W. 16. Under the legislation referred to in the case it was held that a bond issued without any stipulation thereon as to redemption was not subject to call after the lapse of six years. Nolan County v. State, 83 Texas 182.

a particular case that as between two public corporations, one holding bonds of the other, no vested right existed to defeat a call for payment made before the maturity of the bonds.[29]

A subsequent bona fide holder of municipal securities is not bound by a contract between the municipality and the original purchaser whereby the municipality agrees to annually redeem a certain portion of the issue, neither will such a contract bind a subsequent purchaser with notice of the contract who has himself purchased from a bona fide purchaser without notice.[30]

§ 356. Option in favor of holder.

In a Pennsylvania case,[31] the bonds were payable twenty-five years after date with interest and each contained this recital: "This bond will be redeemed if desired twelve years after date." The school district issuing the bonds at the expiration of twelve years tendered the principal and accrued interest, in full to date to the holder, which was refused and in an action brought to recover subsequently accruing interest the court held that the provision noted was intended for the benefit of the holder only, and not for the benefit of the maker. The court said: "The bonds, on their face, purport to have been issued as security for a twenty-five years' loan. The semi-annual interest for that entire period is provided for by the coupons attached to and forming part of each bond; and there is nothing to indicate that the school district has any right to pay the principal before the expiration of the time named. The declaration at the close of each bond, that it 'will be redeemed, if desired, twelve years after date,' is evidently intended for

29—Little River Township, Reno County, v. Board of Com'rs of Reno County (Kan.), 68 Pac. 1105.

30—Suffolk Savings Bank v. City of Boston, 149 Mass. 364, 21 N. E. 665.

31—Allentown School District v. Derr, 115 Pa. St. 449.

the benefit of the holder alone, giving him the option of demanding payment of the principal at the expiration of twelve years. If he then desired payment, the school district was bound, on his demand, but not of its own motion, to redeem the bonds by paying the principal and accrued interest."

The courts have also held in a particular case [32] that the obligation of a contract was not impaired by Arkansas Laws of 1901 (p. 262), which required the state treasurer to make a call for valid outstanding state bonds for payment, and declaring that unless the bonds were presented within the time specified they should be invalid although at the date of the issuance of the bonds no authority existed in law for peremptorily calling in the bonds for payment. This case also held that a contract obligation was not impaired by that provision in the act referred to when the bonds in question had been made by their terms receivable in payment of the purchase price of certain designated real estate for as the court said: "There can be no higher method of discharging a past due obligation than by payment in money."

§ 357. Place of payment.

In the absence of statutory or constitutional provisions to the contrary, it is the universal holding that the validity of the bonds is not affected by the fact that they in terms are made payable, either the interest or the principal or both, at some designated place outside the geographical limits of the public corporation issuing them.[33]

32—Tipton v. Smythe (Ark.), 94 S. W. 678.

33—Meyer v. City of Muscatine, 1 Wall. 384; City of Lexington v. Butler, 14 Wall. 282; Com'rs of Marion County v. Clark, 94 U. S. 278; Sup'rs of Calhoun County v. Galbraith, 99 U. S. 214; Lynde v. Winnebago County, 16 Wall. 6; Town of Enfield v. Jordan, 119 U. S. 680; City of Cairo v. Zane, 149 U. S. 122.

Mygatt v. City of Green Bay, 1 Bissell 292. Where bonds are made

In California, by constitutional provision, Article XI, Section 13 1-2, adopted in 1905, it is provided that nothing in this constitution shall be construed as prohibiting the state or any subordinate corporation issuing bonds under the laws of this state "to make said bonds payable at any place within the United States designated in said bonds." The principle clearly applies, however, that if in the grant of power the place of payment is designated, this controls although the validity of the bonds is not affected by a disregard of such a requirement. The only result is that payment cannot be compelled at any place other than that provided by law. The Illinois decisions are uniform in holding that under the laws of that State public securities cannot be made payable at any place other than the office of the treasurer of the corporation issuing them. Provisions for payment elsewhere are regarded as illegal. The rule, however, affects merely the validity of the provision and does not avoid the bonds.[34]

The decisions in Illinois further hold that the rule followed in that state applies even where the statute which gives the authority to issue the bonds is silent as to the place of payment.[35]

In the case of People v. County of Tazewell, cited above, the court held that public corporations were not obliged to seek their creditors in order to discharge their indebtedness and that when payment is desired a demand should be made at the treasury of a corporation. To do

payable in New York City without express authority of law they are not void for this reason but the maker is not bound to transport funds to New York for their payment. Hughes County, South Dakota, v. Livingston, 104 Fed. 306; City of Vicksburg v. Lombard, 51 Miss. 111; Kunz v. School District No. 28, 11 S. D. 578; Austin v. Gulf, etc., R. R. Co., 45 Tex. 236.

34—Town of Enfield v. Jordan, 119 U. S. 680; City of Los Angeles v. Teed, 112 Calif. 319; Johnson v. Stark County, 24 Ill. 75; Sherlock v. Village of Winnetka, 68 Ill. 530; Flagg v. School District, 4 N. D. 30.

35—People v. Tazewell County, 22 Ill. 147; City of Pekin v. Reynolds, 31 Ill. 529; Sherlock v. Village of Winnetka, 68 Ill. 530.

otherwise would impose an obligation on the fiscal officer of the corporation to provide funds for the payment of the securities, or their interest or accruing interest, in some other state or country at a considerable expense and risk of loss. The fact that bonds were made payable at the office of Weare & Allison in Sioux City, Iowa, instead of at the office of the Treasurer of the County as the law directed, was held in an Iowa case in the Federal Courts [36] to be an immaterial deviation, both places being within the same county. In the absence of any recital of the place of payment of securities, the treasurer's office of the corporation issuing the securities is held to be the proper place,[37] although the case just cited also holds that where no limitations are placed upon a county in the grant of authority to issue refunding bonds, except in respect to the rate of interest and the term of the loan, the power to designate in the bonds a place of payment beyond the limits of the county is implied.

§ 358. The power to tax.

The courts have upheld in many cases the validity of public securities issued in violation of the plain provisions of the law, in some cases those issued in excess of the constitutional or statutory limitation of indebtedness or those issued in violation of other constitutional requirements, but as it has been said: "But that court is powerless when it reaches the question of remedies if the statutes of the state fail to provide a sufficient tax levy or when they especially restrict the levy to such an amount as will not be sufficient to pay the validated bonds and interest. One cannot read the municipal bond cases in the United States Supreme Court Reports of the seven-

36—Independent School District of Sioux City v. Rew, 111 Fed. 1.

37—Skinker v. Butler County, 112 Mo. 332, 20 S. W. 613. See, also, Friend v. City of Pittsburg, 131 Pa. St. 305.

ties and eighties without being impressed with the belief that the legality of bonds is of less importance than the power of taxation behind them."

It is seldom that public securities are secured by a pledge of particular property for their payment, and the question of financial competency therefore resolves itself into a determination of the extent and character of the power existing in the public corporation issuing securities to levy taxes for the payment of the principal and accruing interest.[38]

In many states constitutional limitations are to be found either expressly limiting the tax rate or authorizing legislation to the same purpose—a reference to these will be found in the subjoined note.[39]

In other states general legislation exists fixing the rate of tax levy for special purposes and providing a maximum amount. There are also other limitations not found in any constitutional or statutory provisions relating to the purposes of taxation and the manner of its exercise in respect to equality and uniformity which are equally imperative. The reader is referred to general works on taxation for a full consideration of questions involved in

38—See Sec. 343, et. seq., ante.

39—Ala., Art. XI, Sec. 214, et seq.; Ark., Art. XII, Sec. 4, Art. XVI, Sec. 9, and Sec. 8 as amended in 1906; Colo., Art. X, Sec. 11; Fla., Art. IX, Sec. 1, Art. XII, Secs. 10, 11; Ga., Art. IV, Sec. 1; Idaho, Art. VII, Sec. 9; Ill., Art. XIV, Secs. 8, 10; Ind., Art. X, Sec. 1; Kan., Art. XI, Sec. 1, Art. XII, Sec. 5; Ky., Sec. 157, et seq.; La., Arts. 232, 281; Minn., Art. IX, Secs. 1, 2, 3; Miss., Art. IV, Sec. 112, Art. XI, Sec. 236; Mo., Art. X, Secs. 1, 11; Mont., Art. XII, Sec. 9; Nebr., Art. IX, Sec. 1; Nev., Art. X, Sec. 1; N. J., Art. IV, Sec. 7, Par. 12; N. Y., Art. XII, Sec. 1; N. C., Art. V, Secs. 1, 3, 6; N. D., Art. VI, Sec. 130; Ohio, Art. XII, Sec. 2; Okla., Art. X, Secs. 9, 10; Ore., Art. IX, Sec. 1; Pa., Art. IX, Sec. 1; S. C., Art. VIII, Sec. 3, Art. X, Sec. 1; S. D., Art. X, Sec. 2, Art. XI, Sec. 1; Tenn., Art. 2, Sec. 28; Texas, Art. VIII, Sec. 9.; Utah, Art. XIII, Secs. 3, 7; Va., Art. XIII, Secs. 188, 189; Wash., Art. VII, Sec. 2; W. Va., Art. X, Secs. 1, 7; Wis., Art. VIII; Wyo., Art. XV, Secs. 4, 5, 6.

the exercise of power of taxation.[40] The ability of the public corporation to pay its obligations is necessarily limited by these provisions. Legislative enactments on the question are changing almost constantly and for this reason cannot be considered in detail here as such a discussion might be of little value within a few months.

§ 359. The implied power to levy taxes for the payment of interest or principal.

On the creation of a valid obligation there arises the legal duty on the part of the public corporation creating it to levy taxes or to make other provisions for its payment. The doctrine is well established by the Supreme Court of the United States as well as state courts that when authority is granted for the issue of interest bearing negotiable securities there is impliedly granted at the same time the power to levy taxes for the payment of both principal and interest.[41]

40—Cooley on Taxation. Gray's Limitations of Taxing Power and Public Indebtedness.

41—Citizens Savings & Loan Assoc'n v. Topeka, 20 Wall. 655; United States ex rel v. New Orleans, 98 U. S. 381; Wolff v. New Orleans, 103 U. S. 358.

Ralls County Court v. United States, 105 U. S. 733. It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. East St. Louis v. Amy, 120 U. S. 600.

Scotland County Court v. United States ex rel Hill, 140 U. S. 41. The authority to tax implied from the grant of authority "to take proper steps to protect the interest and credit of the county." Ex parte Parsons, 1 Hugh 282; Sibley v. City of Mobile, 4 Am. Law Times, N. S. 226.

Breckinridge County v. McCracken et al., 61 Fed. 191, C. C. A. The purpose that this debt shall be paid by taxation is made clear, that no general authority exists to levy an ad valorem tax for general county purposes is not important. The power to assess and levy a special ad valorem tax is by implication

This doctrine was well stated in an early case in the Supreme Court of the United States and one frequently cited when occasion requires,[42] where the court said in discussing the question of the authority to tax as implied from the grant of authority to incur obligations: "The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

"For the same reason, when authority to borrow money or incur an obligation in order to execute a public

clearly inferred in Sec. 14, to say nothing of the implication which results from the granting of power to create the debt and issue the bonds. United States ex rel. Baer v. City of Key West, 78 Fed. 88; United States v. Saunders, 124 Fed. 124, C. C. A.; Rose v. McKie, 145 Fed. 584, affirming 140 Fed. 145; Young v. Board of Com'rs of Tipton County, 137 Ind. 323, 36 N. E. 1118; Coy v. Lyon City, 17 Ia. 1; Ellis v. Trustees of Graded School of Oxford (N. C.), 72 S. E. 2; Vallely v. Board of Park Com'rs of city of Grand Forks (N. D.), 111 N. W. 615; Commonwealth of Allegheny County Com'rs, 32 Pa. 218; Commonwealth v. Pittsburg, 34 Pa. St. 496; State v. Baron (S. C.), 9 S. E. 765; State v. City of Bristol (Tenn.), 70 S. W. 1031; see, also, Meade v. Turner, 112 N. Y. S. 127.

But see Board of Com'rs of Grand County v. King, 67 Fed. 202, C. C. A. There is no connection between the power to contract debts and the power to levy taxes. The power to contract a debt does not imply the power to levy taxes to pay it.

Hightower v. City of Raleigh (N. C.), 65 S. E. 279. A special tax cannot be levied without legislative authority.

42—United States et al. v. New Orleans, 98 U. S. 381.

work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. 'It is therefore to be inferred,' as observed by this court in Loan Association v. Topeka (20 Wall. 660), 'that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.'

"Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The later is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it."

The doctrine as announced in this case has been repeatedly followed and so emphatically stated and restated by both the Federal and state courts that further discussion is unnecessary. A reference to leading cases has been made in a preceding note. The decisions also take cognizance of the rule stated which operates as a modification of the power to tax, namely, the existence of constitutional or statutory limitations upon that power for, as was said by the United States Circuit Court of Appeals:[43] "The relators have been deprived of no

43—United States ex rel. Spitzer v. Town of Cicero, 50 Fed. 147; see, also United States ex rel. the County of Macon, 99 U. S. 582; Stryker v.

right. They were bound to take notice of the limitations upon the power of the respondent to levy and collect taxes for the prompt payment of the interest and principal of the debt, and they must be held to have bought their bonds knowing just what provision had been made for their payment. They took the chance of that provision being ample, and it is their misfortune that it is not. U. S. v. County of Macon, 99 U. S. 582."

§ 360. When not implied.

The cases have been noted in the preceding section which hold that when a public corporation has been empowered to borrow money and issue bonds, the power will be implied to levy a tax for an amount adequate to discharge such obligations, although no such power appears to have been expressly granted when the debt was authorized, but when the laws of a state prescribe the method of paying an indebtedness which a public corporation has contracted and further limit the rate of taxation for that purpose, this method of payment is exclusive. No court has the power to vary the mode of payment or to increase the rate of taxation, although it may be that the means provided by the legislature for cancelling the indebtedness are defective or insufficient.[44] Where a provision has been made to enable a public corporation to discharge its debts, the fact that this is inadequate will not authorize a court to devise a different

Board of Com'rs of Grand County (Colo.), 77 Fed. 567; United States ex rel. Baer v. City of Key West, 78 Fed. 88.

Brown v. City of Lakeland (Fla.), 54 So. 716. When special sources of revenue are provided the general power to tax will not be implied. Coggeshall v. City of Des Moines (Ia.), 41 N. W. 617; State v. Macon County Court, 78 Mo. 29; Com'rs of Pitt County v. MacDonald, McKay & Co. (N. C.), 61 S. E. 643; see, also, Sec. 418, et seq., post on right of bond holder to writ of mandamus to compel the levy of taxes.

44—Stryker v. Grand County (Colo.), 77 Fed. 567, C. C. A; see, also City of Cleveland v. United States ex rel., 111 Fed. 341; see, also, Sec. 426 et seq., post.

plan or to compel a larger exercise of the power of taxation.

§ 361. The direct power to tax.

When the power is directly given in the grant of authority to levy taxes for the payment of the principal of and the interest on public securities it is generally construed as of a mandatory character and although the language may be permissive in form, it is usually held peremptory in effect.[45]

The extent to which the decisions go in sustaining this rule is illustrated by a case in the Supreme Court of the United States,[46] where an act of the State of Illinois provided that boards of supervisors in such counties as may be owing debts when their current revenue under existing laws was not sufficient to pay the same, "may, if deemed advisable, levy a special tax," etc. This language was declared to be peremptory in its character and not merely permissive, the court said: "The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, 'may, if deemed advisable,' which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument.

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before it, or in equivalent language—whenever the public interest or individual rights call for

45—City of Little Rock v. United States, 103 Fed. 418, C. C. A.

46—Sup'rs of Rock Island County v. United States ex rel., etc., 4 Wall. 435.

its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'

"The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This class clearly does not fall within the latter category."

The power to directly authorize public corporations to levy taxes for the payment of their obligations, it has been held, is not an illegal delegation of the taxing power as residing in the legislature.[47] Such a grant moreover, it has been held, is not exclusive in its character and additional powers in respect to the levy of taxes or further sources of payment may be added by subsequent legislation without impairing the obligation of any contract that may be included in the direct grant of the power to tax or provide means of payment. So long as the granted sources of payment are not lessened or impaired the rights of the creditor clearly are not interfered with through provisions for additional sources of payment.[48]

§ 362. Contract obligation, how impaired.

The Constitution of the United States in article 1, section 10, clause 1, prohibits any state from passing a

47—English v. Sup'rs, 19 Calif. 172.

48—Cape Girardeau County Court v. Hill, 118 U. S. 68; Desha County v. State (Ark.), 84 S. W. 625; Carlson v. City of Helena (Mont.), 102 Pac. 39; Daughlin v. County Com'rs, 3 New Mex. 420.

"law impairing the obligation of contracts." This provision has been repeatedly applied to attempts by state legislatures to defeat the payment of public securities. The Federal courts have held without dissent that the power to levy taxes for the payment of the interest or principal of negotiable securities, whether directly or indirectly given or to provide in other ways for their payment, constitutes a contract between the bondholders and the corporation which cannot be impaired or destroyed until the contract is satisfied. The public corporation may be compelled to levy the necessary taxes for the payment of either the interest or principal notwithstanding the fact that a legislative body may have assumed or attempted to repeal or vary the authority to levy the taxes or provide other sources of payment. In United States ex rel. Von Hoffman v. City of Quincy,[49] it was held that as the bonds had been issued and sold the power given to the corporation by the statute authorizing the issue to levy taxes for their payment was a contract within the meaning of the Constitution and could not be repealed until the contract was satisfied. This doctrine has been repeatedly re-stated in substantially the same language in all subsequent decisions, the cases holding that the contract rights cannot be affected by subsequent legislation or by attempts at the repeal of laws granting the power to tax and which were in force at the time of the issue of the securities.[50]

49—4 Wall. 535.

50—Von Hoffman v. City of Quincy, 4 Wall. 535. As to the validity of a subsequently enacted statute restricting the city's power of taxation the court said, "the act of 1863 is so far as it affects these bonds a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right of no practical value—and render the protection of the constitution a shadow and a delusion." Riggs v. Johnson County, 6 Wall. 166; Ralls County Court v. United States ex rel., etc., 105 U. S. 753; United States ex rel., etc., Jefferson County Court, 1 McCrary 356; Maenhaut v. New Orleans, 3 Woods 1; Hicks

The rule has been extended to those cases where subsequent laws have effected a change in the manner of levying taxes for providing sources of payment. If the later legislation provides a materially different procedure not so prompt and efficacious as the former the change in the law will be regarded as an impairment of the contract obligation and unconstitutional.[51]

County et al. v. Cleveland, 106 Fed. 459; Padgett et al. v. Post, 106 Fed. 600, C. C. A.

Ex parte Folsom, 131 Fed. 496. Certain South Carolina townships under authority of law had stipulated for stock of a certain railroad company and issued bonds therefor. A constitutional amendment was subsequently passed provided that the "corporate existence of such townships be and the same is hereby destroyed and all officers of such townships are abolished and all corporate agents removed." The court held that this constitutional amendment was intended to impair the means provided by law for the payment of the bonds so issued and to that extent contravened that provision of the federal constitution prohibiting a state from passing a law impairing the obligation of a contract. City of Fort Madison v. Fort Madison Water Company, 134 Fed. 214; Merchants National Bank v. Escondido Irrigation District (Calif.), 77 Pac. 937; In re opinion of the Justices (Mass.), 77 N. E. 1038; Fremont, etc., R. R. Co. v. Pennington (S. D.), 116 N. W. 75.

Bassett v. City of El Paso (Tex.), 30 S. W. 893. A city ordinance providing for the payment of the interest and principal of bonds issued pursuant thereto is a part of the contract between the city and the holder of the bonds. City of Austin v. Cahill (Tex.), 80 S. W. 542.

State v. Byrne (Wash.), 73 Pac. 394. If no contract rights are impaired subsequent legislation changing the manner of levying taxes will be sustained. But see New York Guaranty Company v. Board of Liquidation, 105 U. S. 622. Construing a particular legislative act and holding that it did not impair the obligation of the contract; State ex rel. Saunders v. Kohnke (La.), 33 So. 793; State v. Braxton County Court, 60 W. Va. 39, 55 S. E. 382. In this case although on its face it holds contrary to the doctrine stated in the text yet the proceedings were not instituted by one of the bond holders affected by a change in the manner of levying taxes. This point is directly noted in the application for writ of certiorari in the same case in the supreme court of the United States, 208 U. S. 192, which was there denied.

51—Wolff v. City of New Orleans, 103 U. S. 358; Louisiana v. Pilsbury, 105 U. S. 278.

Louisiana ex rel. Nelson v. Police Jury of St. Martin's Parish, 111 U. S. 716. The rule applied to legislation changing the rate of tax applicable to the payment of a judgment when based on a contract ob-

On this point, the case of Siebert v. Lewis,[52] is instructive. When the bonds involved in the suit were issued, the laws of Missouri provided in substance that the bonds and interest thereon should be paid by a special tax to be levied from time to time "in the same manner as county taxes." This provision was subsequently repealed and another enacted providing for the levy of such taxes in a materially different manner. It was held that the change in the law impaired the creditor's remedy and was unconstitutional, the court said: "It is in this vital point that the obligation of the contract with the relator has been impaired by the section of the law under which the respondent seeks to justify his disobedience of the mandate of the Circuit Court. Those sections provide one mode for the collection of county taxes by the direct action of the County Court; they provide another mode for the collection of the special tax for the payment of obligations such as those held by the relator and merged in his judgment. They expressly declare that he shall not be entitled to a tax collected in the same manner as county taxes, but add limitations and conditions which, whatever may have been the legislative motive, compared with the original remedy provided by the law for the satisfaction of his contract, cannot fail seriously to embarrass, hinder, and delay him in the collection of his debt, and which make an express and injurious discrimination against him."

In a very recent case in the Supreme Court of the United States the doctrine was again applied,[53] where it was held that creditors were unconstitutionally deprived of the right of taxation by the City of New Orleans for the payment of their claims by an act of the legislature which provided that the payment of these claims might

ligation. State of Louisiana v. City of New Orleans, 215 U. S. 170.

52—122 U. S. 284.

53—State of Louisiana v. City of New Orleans, 215 U. S. 170.

be indefinitely postponed until such time as the city was ready and willing to make the payment.

The court in its opinion reviewed its former decisions upon the point in question and also those involving the constitutionality of the acts of the legislature of the State of Louisiana in question, referring expressly to the cases of Louisiana v. New Orleans, 102 U. S. 203, and Wolff v. New Orleans, 103 U. S. 359. It quoted with especial approval from the opinion of Mr. Justice Field in Louisiana v. New Orleans to the following effect: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened. The Latin proverb, Qui cito dat bis dat,—he who gives quickly gives twice,—has its counterpart in a maxim equally sound,—Qui serius solvit, minus solvit,—he who pays too late pays less. Any authorization of the postponement of payment, or of means by which such payment may be effected, is in conflict with the constitutional inhibition."

Where a special source of revenue or specific property is pledged for the payment of the principal and interest of bonds issued this cannot be diverted or lessened without impairing the contract obligation created by the original transaction. This rule has been applied in Massachusetts where in the construction of a subway, certain tolls were pledged for the payment of the principal and interest of the bonds issued to pay the cost. The Supreme Court of Massachusetts held that there was thereby a contract created and that the tolls could not be subsequently diminished without impairing its obligation.[54]

54—In re opinion of the Justices, 77 N. E. 1038; see, also, State ex rel. Saunders v. Kohnke (La.), 33 So. 793; City of Fort Madison v.

As recognizing the principle involved in the constitutional prohibition against the impairment of a contract obligation, several states in their constitutions have declared that provisions for the levy of taxes or means of payment made at the time of the incurment of a debt are irrevocable and irrepealable. The language of the New Jersey Constitution is typical,[55] where in limiting the power of the state to create debt it is stated "which law shall provide the ways and means exclusive of loans to pay and discharge the principal of such debt or liability within thirty-five years of the time of the contracting thereof, and shall be irrepealable until such debt or liability and the interest thereon are fully paid and discharged."

§ 363. Sources of payment.

Negotiable securities as issued by public corporations may have provision made for their payment in the grant of authority from a special fund or by a special tax levy upon specific property, or they may constitute a general obligation of the corporation and payable from its general revenues from whatever source derived. In the former case the general rule obtains that the securities are not an indebtedness coming within the meaning of the constitutional provisions in respect to the incurring of debt,[56] but simply an assignment of the rights of the public corporation in and to certain sources of revenue and further do not constitute a general obligation of the maker. The holder of such a security is limited in his recovery either of principal or interest in or to the revenue or funds specifically designated. A complication

Fort Madison Water Company, 134 Fed. 214. But see Sinclair v. Brightman (Mass.), 84 N. E. 453.

55—Art. IV, Sec. 6, Par. 4. See, also N. Y. Const., Art. VII, Secs. 4, 12; Pa., Art. XV, Sec. 3; S. D., Art. XIII, Secs. 2, 5; Wis., Art. VIII, Sec. 6.

56—See Sec. 78, ante.

arises in some cases where the particular tax levy or assessment may be invalid; where by the language of the security it may be payable out of the general revenues of the corporation, in the event of an insufficiency of funds derived from special sources, or again a question may arise as to the character of the obligation whether it is in fact a general one or limited so far as the payment is concerned to the particular sources designated. These three phases of the question, namely, the character of the securities as a general obligation, its established character as a special charge only and those instances where the security may be both, and cases of doubt, will be considered in the order named.

Securities a general charge. Where the language of the grant of authority or of the security itself is clear and unquestioned in establishing its character as a general charge or obligation upon the revenues of the public corporation issuing it, questions relating to its payment are necessarily based upon other conditions than its character as a general or a special obligation.[57]

§ 364. Payable from either special or general sources of revenue.

In many instances the indebtedness may be incurred for special purposes but the security by its wording or absence of apt phrasing may constitute a charge upon both special sources of payment and the general revenues of a corporation. If negotiable securities are phrased as general obligations of the public corporation or the language denoting a special charge is ambiguous, although they may contain provisions for their payment from a special fund or tax upon specific property, as in the case of local improvement bonds, the authorities are quite uniform in holding that upon the exhaustion of

57—Durrett v. Davidson (Ky.), 93 S. W. 25.

such special fund or tax levy the general revenues of the corporation can be drawn upon to meet the obligations. The promise to pay is the primary contract, the obligation on the part of the public corporation to raise a special fund or levy special taxes is a separate and independent one, the failure to perform which does not or cannot affect the right of the holder to enforce the security according to its terms and against the maker.[58]

§ 365. United States v. Fort Scott.

In this case,[59] the city of Fort Scott under authority of law passed an ordinance providing for the improve-

58—United States v. Clark County, 96 U. S. 211; Kimball v. Grant Co., 21 Fed. 145.

Vickrey v. Sioux City, 115 Fed. 437. Street improvement bonds.

Board of Com'rs of Franklin County (Ohio), v. Gardiner Savings Institution, 119 Fed. 36. Street improvement bonds.

United States v. Saunders, 124 Fed. 124. District bonds of the city issued for internal improvements.

City of Superior v. Marble Savings Bank, 148 Fed. 7. Construction of sewers.

Simons v. City of Eugene, 159 Fed. 307. Lighting and power plant.

Birmingham Trust & Savings Co. v. Jefferson County (Ala.), 34 So. 398. Construction and maintenance of sanitary and water system. Slutts v. Dana (Ia.), 109 N. W. 794; State v. Board of Com'rs of Shawnee County, 83 Kan. 199, 110 Pac. 92; Sinclair v. Brightman (Mass.), 84 N. E. 453.

State v. Traumel (Mo.), 11 S. W. 747. Necessary county expenses have a preference for payment out of the ordinary funds as against warrants issued to pay railroad aid bonds.

State ex rel. City of Joplin v. Wilder (Mo.), 116 S. W. 1087. So held as to the levy of taxes for the construction of sewers. Mutual Benefit Life Ins. Co. v. Elizabeth, 42 N. J. L. 235.

Horton v. Andrus, 191 N. Y. 231, 83 N. E. 1120. Construction of sewers.

People v. City of Buffalo (N. Y.), 89 N. E. 1109. Improvement of navigation in Buffalo River.

Gable v. City of Altoona, 200 Pa. 15, 49 Atl. 367. Even when a special tax is provided, the holder is not limited to such a tax, unless it is provided the bonds shall not be paid in any other manner. Such bonds are the debts of the corporation and after the application of the proceeds of a special levy the holder is entitled to have the balance paid out of the general funds of the corporation. Avery v. Job, 25 Ore. 512, 36 Pac. 293; City of Eugene v. Willamette Valley Co. (Ore.), 97 Pac. 817.

59—United States ex rel. etc. v. City of Ft. Scott, 99 U. S. 152.

ment of one of its streets and for the payment of the cost of work by the issue of special improvement bonds of the city. The ordinance in its terms provided that the bonds "shall be paid, principal and interest, solely from special assessments to be made upon and collected solely from the plots and pieces of ground fronting upon or extending along the street the distance improved." Each of the bonds as issued recited that it was "a special improvement bond of the city of Fort Scott, Kansas" and that the city "for value received acknowledges itself to owe and promises to pay to the holder" the amount thereof. Further, the statute under which the ordinance was framed authorized the council to pay the cost of the special improvement by issuing "the bonds of the city." The bonds also contained upon their face a reference to the city ordinance under which they were issued. In a suit brought by a bona fide holder the city sought to avoid payment on the ground that the bonds stated on their face that they were issued in pursuance of such ordinance and that therefore they were to be paid only such special assessments. The court in its opinion by Mr. Justice Harlan said: "The general reference, upon the margin of the bonds, to the ordinance under which the improvement was projected should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the City, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is, that the City shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances to withhold payment at maturity or to postpone payments until the City should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if by the special assessment

should prove inadequate for payment. Experience informs us that the City would have met with serious, if not insuperable obstacles in its negotiations, had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and pervades the Statute of March 2, 1871, required an explicit avowal of such purpose in the bond itself, or, in some other form, by language, brought home to the purchaser, which could neither mislead nor be misunderstood."

The court also in construing the statute under which the ordinance was passed and in answer to the claim that the special assessment was the bond holder's sole security said: "To that interpretation of the contract we cannot yield our assent. It is true that section 17 declares that 'for the payment of said bonds' assessments shall be made 'upon the taxable property chargeable therewith,' that is, 'on all lots and pieces of ground to the center of the block, extending along the street or avenue, the distance improved.' But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the statute, comply with its promise to pay the bonls, with interest, at maturity. As between the city and its taxpayers, it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. Hitchcock v. Galveston, 96 U. S. 341."

§ 366. Payment from general funds though special tax provided.

In other cases the grant of authority for the issue of securities contains provisions for the levy of a specific tax with which to meet the accruing interest and ultimately pay the principal of the bonds. The claim has been made that the holder of the security is limited in his right to recovery to the proceeds of the tax thus levied and that if this proves insufficient for the purposes contemplated that he is without a remedy. The authorities generally hold on this proposition that although a special tax may be levied at the time the securities are issued either under special statutory provisions or otherwise that the bonds thus issued are not to be regarded as payable only from this special tax from the special fund thus derived but are general charges upon the revenues of the corporation and if the special tax provided proves insufficient for the purpose contemplated the authorities can be compelled by mandamus to levy additional taxes for the payment of the principal and the accruing interest provided such additional taxes do not exceed a constitutional or a statutory limitation on the rate of taxation, if such exists.[60]

One of the earliest and a leading case on this proposition was decided by the Supreme Court of the United States in 1887,[61] The County of Clark subscribed for the stock of a railroad company and issued bonds in pay-

60—United States ex rel. v. Clark County, 96 U. S. 211; Knox County Court v. United States ex rel. Harshman, 109 U. S. 229; United States, etc., ex rel. v. Knox County, 51 Fed. 880; Louisiana ex rel. Nelson v. Police Jury of St. Martin's Parish, 111 U. S. 716; Morrill v. Smith County (Texas), 33 S. W. 899; Kennedy v. Birch (Tex.), 74 S. W. 593. But see Howard County Court, 1 McCrary 218; United States ex rel. Baer v. City of Key West, 78 Fed. 88; City of Cleveland v. United States ex rel., 111 Fed. 341; State v. Trammel (Mo.), 11 S. W. 747, affirmed in 106 Mo. 510, 17 S. W. 502.

61—United States v. Clark County, 96 U. S. 211.

ment therefor pursuant to a law which authorized the levy of a special tax to pay them "not to exceed one-twentieth of one per cent upon the assessed value of taxable property for each year." This act contained no provision that the funds so derived should be the only ones to be applied to the payment of the bonds and the accruing interest. The court held that the bonds as issued were debts of the county as fully as any other of its liabilities and that for any balance remaining due on account of the principal or interest after the application of the proceeds of such tax thereto, the holders of them were entitled to payment out of the general funds of the county. This decision has been followed by others in the same court and elsewhere.[62]

In a later case[63] the city of Fort Madison contracted with a Water Company for the erection of water works and the furnishing of water for public use. Under McClain's Code,[64] the city was authorized to pay therefor such sum or sums of money as might be agreed upon by the contracting parties and the code further provided in Section 643 that the city could levy each year and cause to be collected a special tax sufficient to pay the water rents so agreed to be paid but providing that the said tax should not exceed the sum of five mills on the dollar for any one year. The court held that the latter provision was not a limitation upon the power to contract conferred upon the city by the statutory provisions referred to but merely arranged for a special fund to be applied on the rentals to be paid by the city and that the application of the fund raised from this tax if insufficient to discharge the contract obligation in full did not release the city from further liability.

62—United States ex rel., etc., v. Macon County, 99 U. S. 582; Macon County Court v. United States ex rel., etc., 109 U. S. 229; United States v. Knox County, 51 Fed. 880.

63—Fort Madison Water Co. v. City of Fort Madison, 110 Fed. 901.

64—Iowa, Section 641.

§ 367. Securities a general charge when special tax or assessment invalid.

The authorities also hold that when a special tax or assessment is provided for the payment of securities and this either because levied under a void law or invalid because of irregularities in the levy, cannot be collected, the obligations so issued then become a general charge upon the maker. The parties, so it has been held, repeatedly contemplate only valid charges on the property. As said in one case,[65] "If a municipal corporation which has the power to make a contract for street improvement contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds realized or to be realized by assessments upon abutting property, the city is primarily and absolutely liable to pay the contract price itself, if it has no power to make such assessments, or if the assessments it attempts to make are void."

65—Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336 C. C. A., citing the following authorities: City of Memphis v. Brown, 20 Wall. 289; Hitchcock v. Galveston, 96 U. S. 341; Bucroft v. City of Council Bluffs, 63 Ia. 646, 19 N. W. 807; Scofield v. City of Council Bluffs, 68 Ia. 695, 28 N. W. 20; City of Chicago v. People, 56 Ill. 327; Maher v. City of Chicago, 38 Ill. 266; Miller v. City of Milwaukee, 14 Wis. 699; Fisher v. City of St. Louis, 44 Mo. 482; Commercial National Bank v. City of Portland, 24 Ore. 188, 33 Pac. 532.

See also Barber Asphalt Paving Co. v. City of Harrisburg, 64 Fed. 283. The parties contemplated valid charges on the property. The term "assessment" clearly implies this; nothing short of a lawful assessment —one capable of enforcement, satisfies it. It was such assessments the plaintiff agreed to accept, and assumed the risk of collecting. The parties were mutually mistaken respecting the authority to pay in the special manner designated; but this does not relieve the defendant from its obligation to pay. Denny v. City of Spokane, 79 Fed. 719; Burlington Savings Bank v. City of Clinton (Iowa), 106 Fed. 269; Board of Com'rs of Franklin County, Ohio v. Gardiner Savings Institute, 119 Fed. 36. The unconstitutionality of a method provided by law for making special assessments to pay road improvement bonds does not affect their validity as obligations of the county; Gable v. City of Altoona, 200 Pa. 15, 49 Atl. 367; but see O'Brien v. Wheelock, 95 Fed. 883; Chicago, etc. R. R. Co. v. Aurora, 99 Ill. 205.

§ 368. Payment from special fund by special tax.

Negotiable securities issued by public corporations in many cases are specially payable not out of the general revenues of the corporations but from a special fund raised through the imposition of taxes or special assessments upon certain property or in a certain manner and having for its purpose the reduction and ultimately the payment of such obligations. This contention is especially true where the debt whether evidenced by negotiable bonds or in other forms was incurred for the especial purpose of constructing works of local improvement, namely, bridges, highways, and, in municipal corporations for the grading, paving or general improvement of streets, the construction of sewers, the acquirement of public parks and other objects of a similar nature. Where the indebtedness in its terms is clearly and unquestionably a charge of the character noted, the holder is limited in his recovery to the revenues or funds thus provided or set apart, the obligation is not regarded as a general charge upon the revenues of the public corporation but simply an assignment of its rights in and to certain sources of payment. The securities when in their terms made payable from a fund raised in a specific manner or from taxes levied upon specific property and not so phrased as to constitute a general obligation of the public corporation issuing it are payable only from such funds or taxes and the general rule is that the liability of the public corporation issuing them is limited to the proper collection and application of the special taxes, assessments or funds pledged for their payment.[66]

66—United States ex rel. etc. v. City of Macon, 99 U. S. 582; Maenhaut v. New Orleans, 3 Woods 1; United States v. Knox County, 51 Fed. 880; Braun v. Board of Com'rs of Benton County, 66 Fed. 476, 70 Fed. 369 C. C. A., gravel road bonds; following Strieb v. Cox, 111 Ind. 299, 12 N. E. 481; Washington County, Nebr. v. Williams, 111 Fed. 801; Mather v. City and County of San Francisco, 115 Fed. 39; Vickrey v. Sioux City, 115 Fed. 437; Jewell v. City of Superior, 135 Fed.

In a recent case in the United States Circuit Court of Appeals from Wisconsin, the court held that a city issuing municipal improvement bonds and pledging assessments levied on the property benefited for their payment was not a guarantor of the bonds but a mere statutory trustee for the collection of the assessments and that it was required only to exercise due diligence to collect the same according to law and enforce the lien thereof when

19; White River Savings Bank v. City of Superior, 148 Fed. 1; Schmitz v. Special School District of City of Little Rock (Ark.), 75 S. W. 438; Davis v. County of Yuba (Calif.), 13 Pac. 874; City of Redondo Beach v. Cate (Calif.), 68 Pac. 586; German Savings & Loan Society v. Ramish (Calif.), 69 Pac. 89; Meyer v. City and County of San Francisco (Calif.), 88 Pac. 722; Street improvement bonds. Fox v. Workman (Calif.), 100 Pac. 246; Brook v. City of Oakland (Calif.), 117 Pac. 433; Hawkins v. Mitchell, 34 Fla. 40, 16 So. 311; Wilson v. Mitchell (Fla.), 30 So. 703; McGilvary v. City of Lewiston (Ida.), 90 Pac. 348; Blackwell v. Village of Coeur D'Alene (Ida.), 90 Pac. 353; Pettibone v. West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387; Ewing v. Same, 215 Ill. 357; West Chicago Park Com'rs v. City of Chicago, 216 Ill. 54, 74 N. E. 771; City of Chicago v. Brede, 218 Ill. 528, 75 N. E. 1044; Northern Trust Co. v. Village of Wilmette, 220 Ill. 417, 77 N. E. 169; Whittemore v. People, 227 Ill. 453, 81 N. E. 427; Spring Creek Drainage District v. Elgin, etc. Ry. Co., 249 Ill. 260, 94 N. E. 529; Walker v. Board of Com'rs of Monroe County (Ind.), 38 N. E. 1095; Kirsch v. Braun (Ind.), 53 N. E. 1082.

Town of Windfall City v. First National Bank (Ind.), 87 N. E. 984. A town making street improvements in pursuance of Barrett Law so-called and issuing bonds therefor incurs no personal liability on the bonds. Sisson v. Board of Sup'rs of Buena Vista County (Ia.), 104 N. W. 454; Silva v. City of Newport (Ky.), 104 S. W. 314; Sinclair v. Brightman (Mass.), 84 N. E. 453; State, etc. v. Hodapp (Minn.), 116 N. W. 589; Kelly v. City of Minneapolis, 63 Minn. 125; State ex rel. Wright v. Hortsman, 149 Mo. 290, 50 S. W. 811.

State v. Rice (Mont.), 83 Pac. 874. Laws of Montana 1905, page 5, authorizing the issue of Normal School Bonds and providing for a special fund for their payment from the sale of certain lands and timber held to be a violation of Constitution, Article XI, Section 12. Baker v. Meacham, 18 Wash. 319, 51 Pac. 404; State v. Rathbun, 22 Wash. 651, 62 Pac. 85; Smith v. City of Seattle (Wash.), 65 Pac. 612.

State v. Moss (Wash.), 86 Pac. 1129. A special indebtedness irregularly created cannot by ratification be converted from a special to a general liability. See Abbott Municipal Corporations, Sec. 162 and authorities cited.

unpaid for the benefit of the bond holders and further that it was liable only for a failure to perform such duty or to pay over the moneys collected.[67]

§ 369. Taxing districts.

Somewhat allied to question discussed in the preceding section is that of the establishment of separate taxing districts, the purpose of which is to conduct or carry on some phase of municipal or governmental activity. It is unquestionably within the power of the state to establish local and subordinate civil subdivisions even if the same are wholly or partially co-extensive in territory. The subject of the right to tax of these separate districts where co-extensive in territory has already been considered in a previous section.[68]

There is practically no limit to the creation of separate districts except the public functions for which they may be formed. The frequency of the creation of these districts may affect in many cases considered from the standpoint of the investor, the financial competency of the public corporation in the ultimate payment of the securities they issue. The liquidation of their obligations is dependent upon the taxes they are authorized to levy, generally limited in extent and purpose. Securities issued by such subordinate taxing districts cannot be regarded as the general obligation of a city or county within the limits of which they may be included.[69]

67—Jewell v. City of Superior, 135 Fed. 19; see, also, Olmstead v. City of Superior, 155 Fed. 172; Hayden v. Douglas County, Wis. 170 Fed. 24.

68—See Sec. 144, ante.

69—Kelly v. City of Minneapolis, 63 Minn. 125. Certificates calling for the payment of money and issued by the park board of the city of Minneapolis were held not an indebtedness of the city within the meaning of the statutory provisions limiting the indebtedness of cities. The certificates were given in payment of the purchase price of land for park purposes and secured by a mortgage on the land purchased, the court said: "The board has no power to make these certificates a lien generally upon all the parks of the city, and the record shows

The purpose of their organization has been well-stated by a recent author.[70] "What may be the necessity for Poor Districts it is hard to see, especially when the divisions are co-extensive with cities or counties. Their existence, especially when they are co-extensive, suggests the circumvention of such laws as those limiting the amount of debt or tax that may be levied by a municipality. The town of 'X' may wish to buy a poor farm, or more probably, build a school, or own waterworks. But the town does not wish to exhibit its true debt for fear of hurting its commercial rating; or it may be prohibited from further debt incurrence by having reached its debt limit. What, then, could be more beautifully simple than to incorporate the same property and population into a Poor, School, or Water District, as the case might be? Not all fiscal sleight-of-hand has been left for private corporations."

§ 370. Duty to levy taxes.

Whether the means of payment are derived from either general or special funds or sources of revenue, the legal duty exists to levy the taxes or assessments provided for and this duty can be enforced in the proper action, a subject to be considered in the following chapter.[71] Neither will the validity of the securities issued

that no attempt has been made to secure their payment by the creation of such a lien. * * * The debt of the city is neither increased or diminished by the transaction. No revenues of the city which must be raised or replaced by taxation are pledged for the payment of the certificates. The statute expressly provides that the park board cannot create any personal or general liability on the part of the city by any certificates they may issue, except to pay such amounts as may be realized from asessments on property benefited on account of the acquisition of the land purchased for park purposes. In no event, nor under any circumstances, is the city liable except as a trustee, to pay over to the certificate holder the amount actually realized from the assessments." See, also cases cited in note—in the preceding section. Daviess v. Des Moines, 75 Iowa 500.

70—Chamberlain Principles of Bond Investment.

71—Sisk v. Cargile (Ala.), 33 So.

be impaired or destroyed by the failure of public officials to levy the tax or make the assessments authorized by law for the purpose of making the payment due. The payment of bonds when their validity is established is obligatory upon the corporation and its officers and where discretionary powers are not vested in the officials either as to the time or the manner of payment if there are revenues which can be devoted to the purpose such officials cannot refuse payment. Mandamus will invariably lie against them in case of refusal to enforce the performance of non-discretionary duties imposed upon them by law. So far as the means of payment is concerned, the courts will not consent to a willful and dishonest repudiation of legal or even moral obligations and a failure on the part of public officials to provide for the payment of either the principal or interest of a debt is no defense in an action brought by security holder to enforce such obligations. The corporation can

114. An act authorizing an extra levy of taxes for the payment of road bonds it to be distinguished from an act providing for "the assessment and collection thereof" and therefore does not contravene Const., Sec. 104, Subd. 15, prohibiting the legislature from passing special laws regulating the assessment or collection of taxes. Mather v. City and County of San Francisco, 115 Fed. 37.

Union Trust Co. of San Francisco v. State (Calif.), 99 Pac. 183. The failure of the board of public works to levy and collect assessments provided for the payment of street improvement bonds as required by the act authorizing their issue is the default of officers in administering governmental functions for which the state is not liable, the only remedy of the injured person being to compel the board to perform its duty.

Berky v. Board of Com'rs of Pueblo County (Colo.), 110 Pac. 197, construing certain legislation relative to the time of the levy and collection of taxes for the payment of county railroad aid bonds. Basnett v. Jacksonville, 19 Fla. 664.

Buck v. People, 78 Ill. 560, construing order of Board of Sup'rs for levy of taxes.

People v. Chicago, etc. R. R. Co. (Ill.), 93 N. E. 410. Under Const. Art. IX, Sec. 12, requiring provision to be made for a direct annual tax for the payment of bonds, the voters after authorizing the issue have no further authority in respect to the levy of taxes. Murdock v. Aiken, 29 Barb. (N. Y.) 59; Mc-

not be released from its liability by failure to provide a means of payment when such is within its power.[72]

§ 371. Diversion of funds.

In the preceding sections, attention has been called to public securities, provision for the payment of which has been made by special tax levies or the creation of special funds or sources of revenue. The courts invariably hold that the legality of the securities cannot be affected and neither can creditors be deprived of their sources of payment by the diversion of money from such funds or the failure to levy and collect the taxes which the corporation may be legally authorized to do in this behalf.[73]

Cless v. Meekins, 117 N. C. 34, 23 S. E. 99; City of Austin v. Cahill (Tex.), 88 S. W. 542.

72—See Sec. 418, et seq., post; Denny v. City of Spokane, 79 Fed. 719 C. C. A.; Shepard v. Tulare Irrigation District, 94 Fed. 1; Farson v. Sioux City, 106 Fed. 278; Mather v. City and County of San Francisco, 115 Fed. 37; Meyer v. City and County of San Francisco (Calif.), 88 Pac. 722; Gray v. State, 72 Ind. 567; Little River Twp. v. Reno County Com'rs, 65 Kan. 9, 68 Pac. 1105; Elliott County v. Kitchen, 4 Bush (Ky.), 289; McMullen v. Person, 102 Mich. 608; Hammond v. Place, 116 Mich. 628; Town of Pontotoc v. Fulton, 79 Miss. 511, 31 So. 102; Kemp v. Hazlehurst, 80 Miss. 443, 39 So. 908; Marsh v. Town of Little Valley, 64 N. Y. 112; Territory v. Hopkins, 9 Okla. 133; Dime Deposit & Discount Bank v. City of Scranton, 208 Pa. 383, 57 Atl. 770; City of Memphis v. Memphis Savings Bank, 99 Tenn. 104, 42 S. W. Thornburgh v. City of Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054; City of Tyler v. L. L. Jester & Co. (Tex.), 74 S. W. 359, affirmed 78 S. W. 1058; City of Austin v. Cahill (Tex.), 88 S. W. 542; but see Jewell v. City of Superior, 135 Fed. 19.

73—Fazende v. City of Houston, 34 Fed. 94. A municipal corporation under an ordinance authorized by its charter, issued bonds to provide a fund for building a market house. By their terms the revenue of the market was to be devoted to the payment of the interest on the bonds and to the formation of a sinking fund to redeem them. "As the ordinance was authorized by the charter and therefore valid, it constituted a contract between the holders of the bonds and the city and subsequent ordinances making other disposition of the market revenue were void and so much of a charter granted the city after the issue of the bonds as authorized the city council to divert any of such revenue from the special fund created in the ordinance under which the bonds were issued was in-

Security holders who are entitled to have the amount owing them paid from revenues collected in this way usually have the right to compel an accounting of the funds in the case of a wrongful diversion and to maintain proceedings against the city or public officials where through such action they have suffered an injury. Their rights cannot be defeated by the illegal acts of public officials appropriating and using these funds for other purposes.[74]

operative, as impairing the obligation of a contract in violation of the constitution." White v. City of Decatur (Ala.), 23 So. 9999; City of Anniston v. Hurt (Ala.), 37 So. 220; City of Ensley v. Simpson (Ala.), 52 So. 61; Lee County v. Robertson, 66 Ark. 82, 48 S. W. 901.

Keech v. Joplin (Calif.), 106 Pac. 222. But the entire tax collection cannot be arbitrarily transferred by a treasurer to the bond fund where the amount collected includes a certain rate of tax for the bond fund and an additional rate for the general fund.

Butts County v. Jackson Banking Co. (Ga.), 71 S. E. 1065. A surplus may be applied to any legitimate county liability; State v. Board of Liquidation (La.), 4 So. 122; Bobo v. Board of Levee Com'rs (Miss.), 46 So. 819.

In re Village of Kenmore, 110 N. Y. S. 1008. A village can be restrained from using a local assessment fund for any purpose except for the retirement of bonds. Ulster County v. State, 177 N. Y. 189, 69 N. E. 370.

Brockenborough v. Board of Water Com'rs of City of Charlotte (N. C.), 46 S. E. 28. Facts examined and held not to constitute a diversion of funds. Southern Ry. Co. v. Board of Com'rs of Mecklenburg County (N. C.), 61 S. E. 690; Freeport v. Marks, 59 Pa. St. 253;

Bailey v. City of Philadelphia, 184 Pa. St. 594, 39 Atl. 494, 39 L. R. A. 837. Facts examined and held not sufficient to hold that a special fund had been created. Wolff Chemical Co. v. City of Philadelphia (Pa.), 66 Atl. 344.

State v. Cardozo, 8 S. C. 71. When the state borrows money on bonds issued by it for that purpose, and pledges a certain fund for the payment of the interest to accrue thereon, such pledge is a part of the contract with the holders of the bonds, and the state has no right, under Article I, Sec. 10 of the Constitution of the United States to impair the obligation of the contract by diverting the fund to other purposes. City of Houston v. Vorhees (Tex.), 8 S. W. 109; Morrill v. Smith Co. (Tex.), 36 S. W. 56; City of Austin v. Cahill (Tex.), 88 S. W. 536.

74—City of New Orleans v. Fisher, 91 Fed. 574 C. C. A.

Vickrey v. City of Sioux City et al., 104 Fed. 164 C. C. A. This was a case involving the collection of special assessments for street improvements where the bill al-

The courts hold further and to the effect that if through a willful or otherwise diversion of special funds to other uses there has been created a deficiency in them for the purpose for which created, this deficit can be collected by the security holder from the corporation to be paid by it from its general funds or revenues.

leged mis-application of funds raised for the special purpose of paying street improvement bonds. The court held "that the bill resented a case properly cognizable by the court, that the city was charged with the duty of levying and collecting the assessments and making proper payment thereof to bond holders which duty amounted to a trust and that the bond holders had a right to call the city to account for the manner in which that trust had been performed." Farson v. Sioux City, 106 Fed. 278; Village of Kent v. United States, 113 Fed. 232; Olmstead v. City of Superior, 155 Fed. 172.

Hayden v. Douglas County (Wis.), 170 Fed. 24 C. C. A. The court here held that a holder of improvement bonds was entitled to maintain a suit in equity against a county to require it to account for special assessments levied to pay bonds and collected by its treasurer on the delinquent tax list. Bates v. Post, 74 Calif. 224, 15 Pac. 732.

Barton v. Minnie Creek Drainage District, 112 Ill. App. 640. Where moneys have been expended for other purposes the remedy of a bond holder is upon the bonds of the officials who have wrongfully appropriated moneys properly applicable to the payment of drainage bonds to other purposes. People v. Hummel (Ill.), 74 Ill. 78.

City of Atchison v. Friend (Kan.), 96 Pac. 348. Where a city purchased a lot which had theretofore been assessed for street improvement and against which special assessment bonds had been issued it became liable to the bondholders for the amount which would otherwise have been a lien upon the lots.

Worth v. City of Paducah (Ky.), 76 S. W. 143. Where moneys have been raised to pay bonds by the collection of taxes it does not constitute a trust fund for the payment of the bonds, suit on which is barred by a statute of limitations. Owensboro Water Works v. City of Owensboro (Ky.), 96 S. W. 867; Hope v. Board of Liquidation (La.), 9 So. 754.

Town of Walton v. Adair, 89 N. Y. S. 230. A town entitled to certain special funds available for the payment of bonds is entitled to recover the same from the county treasurer unless it had received the profit thereof. See, also, People v. Slayton (Ky.), 108 S. W. 903.

State ex rel. v. Board of Liquidation, etc. (La.), 51 So. 283. Facts considered and held not to constitute a depletion of special fund.

§ 372. Moneys appropriated for current expenses not available.

In some cases, however, the rule has been applied that where a special tax levy for the payment of interest and the establishment of a sinking fund is limited and the amount of the general tax levy is also limited that the holder of bonds cannot insist upon the application of more than the amount provided by law to the payment of his interest although this be insufficient, from the general funds of the city raised by the levy of the maximum rate for all purposes allowed.

The court in one case,[76] held that it could not control the general expenditures of a city so as to establish a surplus fund in excess of the amount allowed by law for the payment of interest and the establishment of a sinking fund for the payment of certain bonds outstanding. The court in its opinion, said: "But the question, what expenditures are proper and necessary for the municipal administration is not judicial. It is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion much less to usurp and supersede it." There are other cases, however, holding to the contrary under certain circumstances on this proposition and these will be noted in a subsequent section on the subject of mandamus when issued to enforce tax levy.

§ 373. Payment of securities by sinking fund provisions.

The charter of a particular municipality, the statutes or constitution of the state may provide that before a public corporation can incur an indebtness either evidenced by an issue of negotiable securities or otherwise,

76—East St. Louis et al. v. United States ex rel. Zebley, 110 U. S. 321.

it must provide for the ultimate payment of the principal or a portion of it through the creation of a sinking fund, so-termed. This fund to be raised by the imposition of a certain annual tax either general in its character or levied upon specific property the accumulations of which it is calculated will at the time the indebtedness falls due be sufficient to either partially or wholly liquidate the debt. In theory a sinking fund is based upon sound economic principles and represents an admirable financial policy. As a matter of fact, however, sinking funds are often used for purposes other than that intended and legal requirements for the same should be so worded as to prevent a use of the funds for any purpose other than the payment of the debt it was intended to accomplish. The safer method to accomplish the purpose of sinking fund requirements would be the issue of serial bonds, the payment of a certain proportion of which would be obligatory from year to year. It has been said that "if a sinking fund is invested in the debtor's own bonds or obligations, its existence is not of the least advantage to the creditor. It gives him no additional security, legal, equitable or honorary. It is a worthless device so far as he is concerned,[77] and the same author also states that "the creditors legal rights are very little if at all strengthened by a sinking fund invested in outside securities so long as they remain under the control of the debtor himself or within reach of his general creditors." So far as the investment of the sinking fund is concerned, following the same idea, a recent author,[78] has said: "If

77—Browne. The Sinking Fund.

78—Chamberlain on Principles of Bond Investment.

See also McGinnis v. Board of Trustees, 108 S. W. 289. Trustees are authorized to provide out of the sinking funds for the redemption of bonds instead of investing it at interest as it accumulates.

E. T. Lewis Co. v. City of Winchester, 140 Ky. 244, 130 S. W. 1094. Any deficiency arising in a sinking fund on account of losses or otherwise will not affect the validity of bonds.

City of Austin v. Cahill (Tex.), 88 S. W. 542. Legal title to a sinking fund is in the city raising the

the object of a sinking fund is to lay aside money year by year toward the payment of a debt at some future time, the money in the sinking fund is more safely disposed for accumulation until that time and the creditors are best secured by disbursing it in the purchase of various strong securities which to the least possible extent are subject to the control of the debtor corporation." The same author is also of the opinion that a public corporation should not be permitted to purchase its own securities with proceeds of a sinking fund tax. "For a municipality to sell its bonds to the sinking fund is the same thing as for the municipality to borrow money from the sinking fund." In Minnesota it was held in a comparatively recent case that a city could not sell its bonds to a board of sinking fund commissioners although no statute prohibited it. The court in its opinion saying that "such a purpose is so radically inconsistent with a sinking fund and so destructive of the purposes to be conserved by its maintenance that it must be held that the prohibition is implied." [79]

§ 374. Provisions for payment at time debt was incurred.

This subject has already been fully considered in previous sections and references there made to constitutional provisions found in various states which provide that before a debt can be incurred or securities issued the public corporations issuing them must make provision for the payment of the accruing interest and the ultimate payment of the principal or a portion of it by the levy

same which has the right to manage and invest it and defend for the bond holders against any attempted depletion of the fund.

Murphy v. City of Spokane (Wash.), 117 Pac. 478. That portion of a proposed issue of bonds to be used as a sinking fund for the retirement of the whole is invalid.

79—Kelly v. City of Minneapolis, 63 Minn. 125, 135, 65 N. W. 115.

of a tax or other means sufficient in amount to accomplish this purpose.[80]

§ 375. Constitutional provisions when self-executing.

The difference between a constitutional provision which is self-executing and one which requires legislative action in order that its provisions may be effective is well understood. The question of whether constitu-

80—See Sec. 120, et seq., ante.

Com'rs of Sinking Fund of Louisville v. Zimmerman (Ky.), 41 S. W. 428. The constitutional provision, Sec. 159, will apply to refunding bonds issued under legislative grant of authority.

O'Bryan v. Owensboro (Ky.), 68 S. W. 858. The council of a city of the third class has statutory authority to create the sinking fund required by Const., Sec. 159.

E. T. Lewis Co. v. City of Winchester, 140 Ky. 244, 130 S. W. 1094. The sinking fund required by Const., Sec. 159, provided for the benefit of the bond holders.

Walters v. Dorian (Ky.), 129 S. W. 92. Passing upon the proper method of handling and transferring sinking funds.

Muskegon Traction & Light Company v. City of Muskegon (Mich.), 132 N. W. 1060. Action of the city council of Muskegon under its charter in creating a sinking fund in excess of its requirements held not irregular.

City of Rome v. Whitestown Water Works Co. (N. Y.), 80 N. E. 1106, New York Const., Art. VIII, Sec. 10; does not apply where the ten per cent. limit of indebtedness fixed by the constitution has not been reached.

McDermott v. Sinking Fund Com'rs of Jersey City (N. J.), 55 Atl. 37. A sinking fund of Jersey City is not pledged to the redemption of any specific bonds.

City of Cincinnati v. Ferguson, 11 Ohio S. & C. P. Decs. 101. An issue of bonds for terminal facilities for a railroad owned by a city with provisions for sinking fund should be submitted to the people for approval. State v. Millar (Okla.), 96 Pac. 747; Grennan v. Carson (Okla.), 107 Pac. 925.

Galbreath v. Board of Alderman of Knoxville (Tenn.), 59 S. W. 178. Denial in an answer of sinking fund for a particular bond does not estop the city to deny the issuance of that particular bond.

Conklin v. City of El Paso (Tex.), 44 S. W. 879. The provisions of the charter of the city of El Paso relative to the establishment of sinking fund and Texas constitutional provision to the same effect construed together.

City of Austin v. McCall (Tex.), 68 S. W. 791, reversing 67 S. W. 191. A contract by which the city agrees to pay a certain sum for a water plant creates a debt, provision for the payment of which must be made by the establishment of a sinking fund as required by Texas Const., Art. XI, Sec. 5.

tional provisions relative to the levy of taxes for the payment of the interest on public securities and the creation of a sinking fund looking to the ultimate payment of the principal are self-executing has been raised in a number of cases. The tendency of the Federal decisions which is in conformity with their avowed policy of sustaining the validity of public securities is to hold constitutional provisions of the nature suggested self-executing. On this point a case in the Supreme Court of the United States construing a provision of the Illinois Constitution well illustrates the doctrine followed by the Federal courts.[81] A judgment had been recovered against the City of East St. Louis on certain of its outstanding bonds and the judgment creditors prayed for a writ of mandamus requiring the levy and the collection of a tax to pay the same. The question involved was the amount of tax the city council was authorized to levy for the payment of the judgment. The court held that the constitutional provision gave the city authority to levy and collect a sufficient tax to pay the accruing interest and the principal within twenty years. The constitutional provision upon which this decision was passed was to the following effect, that "any county, city," etc., incurring indebtness must at the time of so doing "provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." The court said in support of its decision above noted: "In this case the Constitution limited the power of the legislature of Illinois in respect to the grant of authority to municipal corporations to incur debts, but it declared in express terms that, if a debt was incurred under such authority, the corporation should provide for its payment by the levy and collection

81—East St. Louis v. Amy, 120 U. S. 600.

of a direct annual tax sufficient for that purpose. Under this provision of the Constitution, no municipal corporation could incur a debt without legislative authority, express or implied, but the grant of authority carried with it the constitutional obligation to levy and collect a sufficient annual tax to pay the interest as it matured and the principal within twenty years. This provision for the tax was written by the Constitution into every law passed thereafter by the legislature allowing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay debts thereafter incurred under old authority which were inconsistent with its requirements. It was made by the people a part of the fundamental law of the State that every debt incurred thereafter by a municipal corporation, under the authority of law, should carry with it the constitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment." This rule has also been followed in other cases.[82]

These provisions are sometimes held mandatory in their character so far as the levying of the sinking fund tax depends upon the independent action of subordinate officials from time to time. A failure to follow the plain provisions of the law in this respect it is held will render the securities invalid.[83]

§ 376. Securities when not held void.

The better authorities hold contrary to the rule just stated and announce the doctrine that the fact of a fail-

82—People v. Chicago, B. & Q. R. R. Co. (Ill.), 93 N. E. 410; Appeal of City of Wilkesbarre (Pa.), 9 Atl. 308.

83—Quaker City National Bank v. Nolan County, 59 Fed. 660, affirmed 66 Fed. 883, C. C. A.; Knox v. Baton Rouge, 36 La. 427.

See also Millsaps v. City of Terrell, 60 Fed. 193, C. C. A., citing and following Texas decisions including Citizens Bank v. City of Terrell, 78 Texas 450, 14 S. W. 1003; Biddle v. City of Terrell, 82 Tex. 335, 18 S. W. 690; Nolan County v. State, 83 Tex. 182, 17 S. W. 823.

ure to follow a constitutional or statutory provision which may require the levy of a tax to pay the accruing interest and provide a sinking fund for the ultimate retirement of the securities will not necessarily affect the validity of the bonds or of the securities issued. In a recent case in the Supreme Court of the United States,[84] the court in sustaining the validity of bonds held that in determining what laws of a state would be regarded as rules of decision that it would look not only to its constitution and statutes but at the decisions of its highest court giving construction to them and that if there was any inconsistency in the opinion of such highest court the United States Supreme Court would follow the latest settled adjudications in preference to earlier ones unless such earlier decisions sustained the validity of bonds while later ones declared them invalid in which case the earlier decisions would be followed. The Supreme Court announced its readiness to follow that line of decisions sustaining the validity of the bonds irrespective of the time rendered. The court also held that it would follow the law of Texas as settled by the decisions of its Supreme Court that the provisions of the State Constitution, Article XI Section 7, to the effect that "no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and to provide at least two per cent as a sinking fund," are complied with as to bonds issued by a county under the authority of an act of the legislature which by its provisions also imposed the duty on the county authorities of levying and collecting an annual tax sufficient to pay the interest on such bonds and to create a sinking fund of

84—Wade v. Travis County, 174 U. S. 499, reversing 72 Fed. 985 and 81 Fed. 742, C. C. A. Citing and referring to the Texas cases involving the application of the constitutional provision referred to.

not less than four per cent of the full sum for which bonds have been issued and further that the actual levy by the county of the required tax at the time a contract for a bridge to be paid for in bonds is entered into is not essential to their validity. The decision held quoting with approval from a Texas case,[85] "we understand that the provision required by the Constitution means such fixed and definite arrangements for the levying and collecting of such tax as will become a legal right in favor of the bond holders of the bonds issued thereon or in favor of any person to whom such debt might be payable." In a case from the Eighth Circuit,[86] where the claim was made that the bonds were void because the maker failed to comply with that section of the South Dakota Constitution which states that provision must be made for the collection of an annual tax sufficient to pay the interest and also the principal of the debt at the time that it is incurred, the court conceded without deciding that this provision was both self-executory and mandatory, and held the bonds valid saying in the opinion on the point involved: "An ordinance or resolution of this board passed at or before the issuance of the bonds providing for the collection of such an annual tax until the bonds and coupons are paid would have complied with the provision of the Constitution. If this was not passed it was not for lack of power in the board but from a failure on its part to exercise the power with which it was vested in the manner provided by the Constitution." This case illustrates and states well the principle that securities issued under constitutional or statutory provisions to the effect noted and legal in other respects can-

85—Mitchell County v. City National Bank of Paducah, 91 Tex. 361.

86—National Life Ins. Co. of Montpelier v. Board of Education of the City of Huron (S. D.), 62 Fed. 778, C. C. A.

not be rendered void by the neglect of the public duty devolving upon the officials of public corporations.

§ 377. Duty to levy sinking fund taxes.

The duty of levying sinking funds taxes or a general tax for the payment of bonds may be compelled by the proper writ directed against the proper officials,[87] though this right on the part of a bond holder except in the case of constitutional provisions for sinking funds will be restricted by statutory limitations on the power to

87—County of Galena v. Amy, 5 Wall. 705.

Haumeister v. Porter (Calif.), 16 Pac. 187, following Bates v. Porter, 15 Pac. 732, construing California Act of 1858, Sec. 35, which provides that the city and county of Sacramento shall set apart fifty-five per cent of the revenue derived from water rents to an interest and sinking fund which shall be applied to the payment of the annual interest and the final redemption of bonds issued—determining especially the meaning of the word "revenue" as used in that act.

Wilkins v. City of Waynesboro (Ga.), 42 S. E. 767, Georgia Const., Art. VII, Sec. 7, Par. 2, controls provisions for sinking fund. A special act in contravention of this is void.

Wooley v. City of Louisville (Ky.), 71 S. W. 893. Sinking fund commissioners should certify to tax levying body any insufficiency in sinking funds, and the validity of taxes levied pursuant to such modification is not affected by the fact that they were made payable to the sinking fund commission. Morgan v. Board of Councilmen of City of Frankfort (Ky.), 121 S. W. 1033.

E. T. Lewis Co. v. City of Winchester, 140 Ky. 244, 130 S. W. 1094. The amount of the tax required by Const., Sec. 159, should take into consideration the accumulations on the sinking fund by reason of interest earned, it being assumed that the fund will be invested in some safe way—so as to produce a return in order to lessen the burden of the tax payers.

State ex rel. City of Carthage v. Gordon (Mo.), 116 S. W. 1099. A tax levy providing for the payment of semi-annual interest on water works bonds and a semi-annual portion of the sinking fund does not invalidate the bonds since the levy required under the sinking fund provisions of the Const., Art. X, Sec. 12a, may be made at any time.

Hightower v. City of Raleigh (N. C.), 65 S. E. 279. Legislative authority is necessary for the levy of a special tax to create a sinking fund for municipal indebtedness. Appeal of City of Wilkesbarre (Pa.), 9 Atl. 308.

Barr v. City of Philadelphia, 8 Pa. Dist. Reps. 19. A city incurring

tax.[88] A provision for the establishment and maintenance of a sinking fund has been held to constitute a contract between the bond holder as a creditor and the public corporation, and one which cannot be impaired or destroyed by subsequent legislation or municipal action. It is a contract within the meaning of that term as used in the Federal constitution.[89]

§ 378. What constitutes a sufficient provision.

The question of the sufficiency of legislative or municipal action in respect to the creation of the sinking fund where such is required by a constitutional provision has been raised in a number of cases.

The case of Wade v. Travis County, cited above, considers and discusses this question. The Supreme Court of Texas held in an early case,[90] that the language and purpose of the constitution were satisfied by an order for the annual collection by taxation of a "sufficient sum to pay the interest thereon and create a sinking fund," etc., although it did not fix the rate or per cent of taxation for each year by which the sum was to be collected but left

indebtedness is to determine what tax shall be sufficient to satisfy interest and sinking fund obligations.

Chicago & N. W. Ry. Co. v. Faulk County (S. D.), 90 N. W. 149. A sinking fund tax authorized by laws of 1897, Chap. 28, Sec. 71, does not apply to ordinary county warrants.

Fremont, etc. R. R. Co. v. Pennington County (S. D.), 116 N. W. 75. County tax rate fixed by Laws of 1899, Chap. 41, includes sinking fund levies.

88—See Sec. 418, et seq., post, on right of bondholder to compel by writ of mandamus the levy of taxes.

89—Von Hoffman v. City of Quincy, 4 Wall. 535; State v. Cardozo, 8 S. C. 71; see, also, authorities cited under Sec. 362, ante.

90—Bassett v. City of El Paso, 88 Tex. 168, 30 S. W. 893; see, also, 28 S. W. 554; see, also, Wade v. Travis County, 174 U. S. 499, 43 L. Ed. 1060, reversing 72 Fed. 985; Howland v. San Joaquin County, 109 Calif. 152, 41 Pac. 864.

Boise City v. Union Bank & Trust Company, 7 Ida. 342, 63 Pac. 107. It was here held a sufficient compliance with a constitutional provision where the levy of the tax was made to commence ten years after the issue of the bonds.

the fixing of such rate for each successive year to the commissioners' court or to the city council. The contention was made in this case that the ordinance which provided for the issue of water works bonds was void because it did not levy the tax but delegated to the assessing and collecting officers the power to make such levy from year to year. The contention was not sustained but the court held as above stated.[91]

This case also held that the city ordinance which authorized the issue of bonds payable in thirty years and which provided for the collection by taxation annually of a sinking fund equal to one-thirtieth of the principal and the amount of the annual interest sufficiently complied with the requirements of the Texas Constitution, Article XI, Sections 5 and 7.

In a later case in the same court,[92] it was held that a Texas law of 1887 which provided after authorizing the issuance of bonds that the commissioners court should levy an annual ad valorem tax "not to exceed fifteen cents on the hundred dollars valuation" sufficient to pay the interest on and create a sinking fund for the redemption of said bonds "and that the sinking fund herein provided for shall be not less than four per cent on the full sum for which the bonds are issued" sufficiently complied with the provision of the Texas Constitution. That this law had been enacted for the purpose of putting into force that provision and that it was the duty of the courts

91—See, also, Pettibone v. West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387; State ex rel. Columbia v. Allen, 183 Mo. 283, 82 S. W. 103.

92—Mitchell County v. City National Bank of Paducah, 91 Tex. 361, 43 S. W. 880, reversing 39 S. W. 628. The actual rate considered and decided which should be levied, in order to comply with the constitutional provision, under General Laws of 1881, p. 5, which authorizes bonds for the erection of court houses and which provides in section 2 that "the commissioners' court of the county shall levy an annual ad valorem tax * * * and create a sinking fund for the redemption of such bonds not to exceed one-fourth of one per cent for one year."

to so construe it as to make it valid and give it effect. The court came to the conclusion that this law would make such provision for the levying and collecting of a tax as was required by the constitution and that in case the court had refused to levy the tax after the bonds were issued and sold, the bond holders would have been entitled to a mandamus to compel the commissioner's court to levy such tax as a purely ministerial duty.

§ 379. Debts to which sinking fund provisions apply.

Sinking fund provisions whether statutory or constitutional do not as a rule apply to debts incurred for the payment of ordinary expenses and which are to be liquidated from current revenues.[93] They ordinarily apply to debts imposed by contract obligations outside of the current expenses for the year and especially to obligations represented by long term bonds, although in some cases even as to the latter the provisions do not apply to all classes of public corporations or those not having an indebtedness in excess of a specified amount.[94]

§ 380. The rule as to the payment of void bonds.

When public securities are held void either for want of authority or some other reasons, the corporation issuing them may be released from the obligation to pay according to their terms. This condition, however, does not relieve it from its obligation to pay the debt which may arise through the transaction. The authorities are substantially unanimous in holding that where bonds have been issued, sold and the proceeds arising from such sales appropriated by the public corporation to its

93—City of Tyler v. L. L. Jester & Co. (Tex.), 74 S. W. 359, 78 S. W. 1058.

94—McNeal v. City of Waco, 89 Tex. 83; Howard v. Smith, 91 Tex. 8; Austin v. McCall, 95 Tex. 565, 68 S. W. 791; Sweet v. City of Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; Cahill v. Hogan, 180 N. Y. 304, 73 N. E. 39.

proper purposes, there exists a debt or obligation due and owing from the corporation to the party advancing the moneys (by paying for the void bonds) which can be enforced generally in an action for money had and received.[95]

This principle is based upon a fundamental rule or principle of equity and right dealing. The subject has already been considered at length in previous sections upon the implied power of the state to compel the payment of a debt technically illegal by the corporation.[96]

The doctrine was clearly stated by Judge Field when on the Supreme bench of the state of California,[97] in the following language: "The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the

95—Marsh v. Fulton County, 10 Wall. 676; Draper v. Springport, 104 U. S. 501, 26 L. Ed. 812; Chapman v. Douglas County, 107 U. S. 348, 27 L. Ed. 378; Wood v. Louisiana, 5 Dill. 122; Bangor Savings Bank v. City of Stillwater, 49 Fed. 721; Pacific Imp. Co. v. City of Clarksdale, C. C. A. 74 Fed. 528; Fernald v. Town of Gilman, 123 Fed. 797; Chelsea Savings Bank v. City of Ironwood, 130 Fed. 410, C. C. A.; Incorporated Town of Gilman v. Fernald, 141 Fed. 941, C. C. A.; Allen v. Intendant of Lafayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497; San Francisco Gas Company v. City of San Francisco, 9 Calif. 453; Jefferson County v. Hawkins, 23 Fla. 223, 2 So. 362; Butts County v. Jackson Banking Co. (Ga.), 60 S. E. 149; White River School Twp. of Johnson County v. Caxton County (Ind.), 72 N. E. 185; Reynolds v. Lyon County (Ia.), 96 N. W. 1096.

Martin Strelau Co. v. City of Dubuque (Ia.), 127 N. W. 1013. Ordinary indebtedness.

City of Bardwell v. Southern Engineering & Boiler Works (Ky.), 113 S. W. 97. The vendor of an engine sold the city has a lien on the same for deferred payments and can enforce it. People ex rel. v. Porter & Calvin Twps., 18 Mich. 101; State v. Dickerman (Mont.), 40 Pac. 698; City of Plattsmouth v. Fitzgerald, 10 Nebr. 401; Borough of Rainsburgh v. Ryan, 127 Pa. St. 74, 17 Atl. 678, 4 L. R. A. 336; Livingston v. School District No. 7 (S. D.), 76 N. W. 201; Paul v. City of Kenosha, 22 Wis. 666; see, also, 60, ante.

96—See Sec. 60, ante.

97—Argenti v. City of San Francisco, 16 Calif. 25; San Francisco Gas Company v. City of San Francisco, 9 Calif. 453, 470.

obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law, which always intends justice, implies one; * * *."

In an early case in the Supreme Court of the United States,[98] the City of Louisiana having legal authority to issue bonds issued and sold securities which were invalid because antedated to avoid compliance with a law recently passed requiring registration. The purchaser was a bona fide holder, he offered to return the bonds and demanded re-payment of the money paid for them. The court held that he was entitled to recover and said by Waite, Chief Justice: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other.

"It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on

98—City of Louisiana v. Wood,
102 U. S. 294.

their credit. The city could lawfully borrow. The objection goes only to the way it was done. * * * While, therefore, the bonds cannot be enforced because defectively executed, the money paid for them may be recovered back."

In another case from the Eighth Circuit in the United States Court of Appeals, the court held that there could be a recovery for money loaned when the bonds received were void and it expressed its opinion in the following vigorous language: "We think the case under consideration has now been reduced to about the following proposition: Can the school district, which had ample power to create a general indebtedness for the purpose of erecting school houses, which exercised the power, by voting at an election duly called, to create such indebtedness in the sum of $10,000, which borrowed the money for the purpose of erecting, and with the money so borrowed actually erected, the school house, which it has ever since used and enjoyed, escape payment of the same because, forsooth, it persuaded the lender to unwittingly accept void bonds therefor? In our opinion, it cannot. Any other conclusion would be a sad commentary on the efficiency of courts of justice to do justice. The authorities, in our opinion, fully sustain this conclusion."[99]

And in another case in which the opinion was written by Judge Thayer,[1] it was held that where negotiable instruments are issued by a municipal corporation without authority of law and are void as negotiable instruments that a suit could not be maintained upon them as non-negotiable instruments, citing several cases.[2] But he added: "They show, no doubt, that when a municipal

99—Geer v. School District No. 11, 111 Fed. 682, C. C. A.

1—Dodge v. City of Memphis, 51 Fed. 165.

2—Mayor of Nashville v. Ray, 19 Wall. 468; Hitchcock v. City of Galveston, 96 U. S. 350; Town of Little Rock v. Merchants National Bank, 98 U. S. 308; Hill v. City of Memphis, 134 U. S. 198; Merrill v. Monticello, 138 U. S. 673.

corporation sells bonds which are void, and received the money, it may be compelled to restore it in an action for money had and received. So when a municipal corporation is authorized to purchase property for any purpose, or to contract for the erection of public buildings or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done in negotiable securities which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. In no case, however, does it appear that a suit has been sustained on a void bond, treating it as non-negotiable, and as something entirely different from what the parties intended it should be. As the court understands the cases, suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void."

The same rule obtains in the state courts. In a case from Kansas,[3] it was said: "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either

3—Brown v. City of Atchison, 39 Kan. 37.

rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received, for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit."

In a New York case,[4] bonds were issued payable in twenty years instead of thirty as provided by statute, it was held: "That the bonds were void as such but as the commissioners had the authority to borrow the money which the bonds were meant to secure, they, by doing so, bound the town to repay it; and it appearing that the parties, both borrower and lender, acted in good faith and with the intention to comply with the statute, a provision on the part of the town to repay the loan at the time and in the manner prescribed by the statute would be implied and an action thereon against the town was maintainable."

In several cases, where the courts held the bonds void and refused enforcement of the obligation, it was expressly stated that the question of the bonds was the only one involved in the case and that the security holder unquestionably had a right of recovery against the public corporation for the moneys advanced upon the doctrine stated in this section.

In Norton v. Shelby County,[5] where the bonds were held void for want of the authority in the county officials to issue them, the court proceeded to say: "The original invalidity of the acts of the commissioners has never been subsequently cured. It may be, as alleged, that the stock of the railroad company, for which they subscribed, is still held by the county. If so, the county may, by proper proceedings, be required to surrender it

4—Hoag v. Town of Greenwich, 133 N. Y. 152, 30 N. E. 842, modifying 15 N. Y. S. 743.

5—118 U. S. 425.

to the company, or to pay its value; for, independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit."

§ 381. City of Litchfield v. Ballou to the contrary.

In this case,[6] the bonds were issued by the city of Litchfield for a legal purpose but in excess of the constitutional limitation. It was held, therefore, that they were invalid. The claim was also made in that case that a recovery could be had on the ground of an implied contract to repay the money. The court said on this proposition: "But there is no more reason for a recovery on the implied contract to repay the money, than on the express contract found in the bonds. The language of the Constitution is that no city, etc., '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 its taxable property.' It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court

6—City of Litchfield v. Ballou, 114 U. S. 190.

of law." This decision is one of the few which holds contrary to the rule first stated in the preceding section.[7]

§ 382. Recovery not allowed; continued.

Attention should be called to another case,[8] in which no recovery was allowed upon void bonds. The case involved the question of whether a bona fide holder of negotiable bonds issued by a municipal corporation to a railroad company to which it had no power to issue them in payment of an unauthorized subscription to that company's stock could recover from the municipal corporation the money paid by him in the open market for the bonds on the ground that the amount had been expended in conferring upon the city the benefit of the railroad and the depot constructed by the railroad company. The court held that the question should be answered in the negative. The cause of action was for money had and received to the use of the city.

The court said: "Such an action is based not on an express or implied contract, but on an obligation which the law supplies from the circumstances, because, ex æquo et bono, the defendant should pay for the benefit which he has derived at the expense of the plaintiff. It is an obligation which the law supplies because otherwise, it would result in the unjust enrichment of the defendant

7—Norton v. Dyersburg, 127 U. S. 160, 8 Sup. Ct. Rep. 1111, 32 L. Ed. 85; Morton v. City of Nevada, 41 Fed. 582, affirmed 52 Fed. 350.

F. C. Austin Mfg. Co. v. Smithfield Twp., 52 N. E. 1011. Question of negotiable bonds not involved in the case.

Swanson v. City of Ottumwa (Ia.), 106 N. W. 9. The rule in the text followed and the court also further held that where negotiable municipal bonds were void for want of power a recovery could not be had thereon as non-negotiable instruments.

McCurdy v. Shiawasse County (Mich.), 118 N. W. 625. Money borrowed without authority cannot be recovered in an action for money had and received. Town of Milan v. Tenu. Central R. R. Co., 79 Tenn. 329.

8—Travellers Insurance Company v. Mayor, et al., 99 Fed. 663, C. C. A., 49 L. R. A. 123.

at the cost of the plaintiff. It is an obligation which arises only when the defendant has received money or property from the plaintiff and appropriated the same to his own use, either when he might have elected not to take it, or, having the power to do so, might return the benefit thus conferred to the plaintiff, and fails to do so. * * * The other benefits said to have been conferred upon the city were the construction of the railroad and the building of the depot. As the railroad and the depot were constructed on the land of the railroad company, they did not go into the possession of the city as its property. Had the railroad company, without any subscription by the city, built its railroad through the city, and erected its station there, it certainly could not be claimed that this would have given the railroad company a right of action against the city for the value of the benefits conferred on the city by such construction, however great those benefits might have been in adding to the prosperity of the city and its inhabitants. In the absence of an express agreement to pay for such a benefit, no tacit agreement to do so can be inferred. Where the conferring of the benefits was induced by an express agreement which is void, the law will not supply an obligation to pay on the ground of unjust enrichment as a quasi-contract, unless, in the absence of the express agreement, a real, but tacit, contract could have been inferred from the circumstances. The benefit indirectly conferred on one man's property by the improvement of the land of another is not an unjust enrichment of the other. Hence, ex æquo et bono, no obligation in law to pay it arises."

§ 383. Statute of limitations on implied promise to repay money received for void bonds.

The City of Nevada, Missouri, issued bonds which were afterwards by decision of the Supreme Court of the United States held void as violating that clause of the

Missouri Constitution of 1865, Article XI, Section 14, which provided that the General Assembly should not authorize any city to loan its credit to any corporation unless two-thirds of the qualified voters assented thereto. The plaintiff brought an action for money had and received to recover the amount paid to the city for the bonds. The Circuit Court held [9] that the plaintiff could not recover. It also held that though the illegal bonds of city be regarded as voidable only at the will of the city an action for money had and received was barred by Revised Statutes of Missouri, Section 3980, limiting actions on implied promises to five years. The present action was barred by that statute. And, further, that an action upon an implied promise by a city to re-pay money received for void bonds accrues at the time the payment was made not from the time that the bonds were adjudged void or from the discovery of its mistake by plaintiff in the absence of fraudulent concealment by defendant or from the time of demand. This decision was affirmed in 52 Fed. 350, Judge Caldwell in writing the opinion said that it was not necessary to consider in this case the question of the liability of the defendant to the plaintiff for money received for the void bonds as the statute of limitations prevented any recovery.

9—Morton v. City of Nevada, 41 Fed. 585, following City of Litchfield v. Ballou, 114 U. S. 190.

See, also, Aetna Life Ins. Co. v. Lyon County, 82 Fed. 929. Where in an action brought to recover money paid to the county for certain of its refunding bonds alleged to be invalid it was held that the statute of limitations did not begin to run as to the principal until the date fixed in the bonds for their payment.

CHAPTER XV

ACTIONS ON PUBLIC SECURITIES

§ 384. Jurisdiction of Federal courts.

The bona fide holder of valid public securities, negotiable in their character has the unquestioned right to maintain an action against the corporation issuing them upon its failure to comply with the terms of the contract they contain. Such an action may be brought at the option of the plaintiff in state courts where jurisdiction of the defendant can be acquired or in the Federal courts when that court has jurisdiction of the cause of action by reason of some one or more of the conditions named in the Constitution of the United States or various Acts of Congress conferring jurisdiction on them. One of the conditions giving to litigants the right of trial in the Federal courts is that based upon diversity of citizenship and residence. Owing to the fact that bond holders as a rule are citizens of and residing in some one or more of the Eastern states and that the public corporations issuing securities are located in other sections of this country, the great bulk of the litigation involving public securities has been decided and determined in the Federal courts. Another reason also appears for this in that these courts have been uniformly favorable to the policy of sustaining the validity of the public securities and if conditions required for jurisdiction of the parties exist the bondholder naturally favors those courts which do not favor repudiation and where the substantial equities are with the investor. It is not to be inferred, however, from this statement that all of the state courts counten-

ance municipal dishonesty, some equally with the Federal courts seek to protect the innocent purchaser of public securities. Where a state court has rendered a final judgment if a Federal question is involved under the Federal Judiciary Acts the case can be removed to the Supreme Court of the United States by writ of error when the decision of the state court is against the plaintiff in error. In order that a writ of error will lie it is necessary that a Federal question must have been presented and decided adversely as above noted. In case of the insufficiency of presentation of a Federal question, the Supreme Court of the United States,[1] held: "It is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment and it is not sufficient to show that a question might have arisen or been applicable to the case unless it is further shown on the record that it would arise, and was also applied by the state court to the case."

The jurisdiction of the Federal courts cannot be impaired or annulled by state laws where under the constitution of the United States or Acts of Congress that jurisdiction is clearly established in favor of the litigants. The Supreme Court of the United States in a recent case,[2] said on this point: "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases State laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the

1—New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18; see, also, Spencer v. Merchant, 125 U. S. 345.

2—Chicot County v. Sherwood, 148 U. S. 529.

States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." This case also held that Federal courts have jurisdiction of any action which by the law obtaining in a state can be maintained in a state court if the jurisdictional facts in respect to citizenship exist.

In Andes v. Ely,[3] the jurisdiction of the trial court was challenged on the ground that by Act of Congress of March 3, 1887, Chapter 374, 24 Stats. at Large, 552; as amended a subsequent holder of negotiable paper payable to the bearer could not invoke the jurisdiction of the Federal courts unless the original holder was also entitled to sue thereon. This statute excepted from its provisions instruments made by a corporation and the court held that a town under the laws of the state of New York is a corporation so far as the making of contracts is concerned and the right to sue and the liability to be sued.

The Federal courts have jurisdiction of an action against a county on its warrants by the assignee when a non-resident of the state in which the county is situated, the warrants being made payable to the persons therein named or bearer.[4]

In a California case,[5] it was held that the owner of municipal bonds containing a direct promise to pay could maintain an action at law in a Federal court to recover

3—158 U. S. 312.

4—Board of Com'rs of Kearney County v. McMaster, 68 Fed. 177, C. C. A.; see, also, Chickaming v. Carpenter, 106 U. S. 603, 27 L. Ed. 307.

See, also, on the question of a right of the assignee to sue in the federal courts: New Providence v. Halsey, 117 U. S. 326, 29 L. Ed. 904; Lyon County v. Keene Five-Cent Savings Bank, 100 Fed. 337, C. C. A.; Independent School District of Sioux City v. Rew, 111 Fed. 1.

5—City of Santa Cruz v. Waite, 98 Fed. 387, C. C. A.

a judgment thereon where the requisite jurisdictional facts appeared although under the laws of the state the bonds or coupons are payable only out of a special fund which the statute requires the officers of the defendant to create by the levy of taxes for that purpose.

The jurisdiction of the Federal courts under the acts of Congress depends upon the amount involved in the action as well as other conditions and in a recent case on county bonds it was held that the amount claimed in the declaration and not the amount of the recovery was the test of jurisdiction and although the judgment was less than the jurisdictional amount where the amount claimed was in excess the jurisdiction of the Federal courts would be sustained.[6] It has also been held that the joining of nonjurisdictional causes of action with those of which the Federal courts have jurisdiction does not deprive the court of its right to try the action if the claim is sufficient in amount and other jurisdictional facts exist.[7] Where the jurisdiction prima facie conferred by a statute was invoked by a county, the court held that it was not in a position to maintain its lack of jurisdiction because the statute was unconstitutional.[8]

§ 385. Removal of cases to Federal courts.

The removal of cases from state to Federal courts depends upon the existence of the jurisdictional facts and where the question of the residence of parties was somewhat involved the court in maintaining jurisdiction said: "He, alone of all the parties, is in a legal sense, interested in the enforcement of the liability upon the township. It is therefore a suit in which there is a single controversy

6—Washington County v. Williams, 111 Fed. 801, C. C. A.

7—Independent School District of Sioux City v. Rew, 111 Fed. 1 C. C. A.

8—Skinner v. Franklin County, 179 Fed. 862.

embracing the whole suit, between citizens of different states, one side of which is represented alone by Kernochan, a citizen of Massachusetts and the other by citizens of Illinois."[9] Original jurisdiction cannot be acquired by a Federal court merely by removal of the cause to that court from the state courts.[10] In Chickaming v. Carpenter,[11] it was held that municipal corporations of Michigan could be sued in an action at law in the Circuit Court of the United States for that district.

§ 386. Equitable relief; when afforded.

The right of a holder of public securities to equitable relief in the Federal courts has been raised in a number of cases.

Void bonds. In Parkersburg v. Brown,[12] the city of Parkersburg issued its bonds under an unconstitutional act to aid the establishment of manufacturing concerns which were loaned to one of them, the city taking mortgage security for their payment. This concern failed and in a suit in equity between the holders of the bonds against the city, the manufacturing concern and others, it was held that the holders were entitled to have the mortgaged property subjected to the payment of their bonds and that they and the city respectively were entitled to rents, etc.

Reformation of bonds. In another case,[13] bond holders prosecuted a suit in equity for the reformation of bonds issued by the defendant township to which no seal had been affixed. Bonds belonging to other persons

9—Removal Cases, 100 U. S. 457; Harter v. Kernochan, 103 U. S. 562, 26 L. Ed. 411; Wilson v. Oswego Twp., 151 U. S. 56, 38 L. Ed. 70.

10—Rosenbaum v. San Francisco, 120 U. S. 450.

11—106 U. S. 663, 27 L. Ed. 307; see, also, Lincoln County v. Luning, 133 U. S. 529, 33 L. Ed. 766.

12—106 U. S. 487; see, also, Board of Com'rs of Kearney County v. Irvine, 126 Fed. 689, C. C. A.

13—Bernard's Twp. v. Stebbins, 109 U. S. 341.

who could not have invoked the jurisdiction of the Federal court and which had been assigned to the plaintiff for purpose of collection were also included. The court held that those bond holders who resided outside of New Jersey and were citizens of other states could maintain the suit, others could not.

Collection of assessments. The courts have held in a number of cases that where a city has chosen to undertake the improvement of its streets through the sale of improvement bonds which are to be paid from assessments levied upon property benefited that it thereby obligates itself to impose, collect and disburse the taxes provided for in the transaction for the benefit of the persons purchasing the bonds, and a trust relation thus existing the equitable jurisdiction of the courts cannot be questioned to afford the creditor relief.[14] See also, Burlington Savings Bank v. City of Clinton,[15] which holds that a bill in equity will lie to enforce the collection of assessments after the consolidation of two cities.

The same rule will apply in respect to a fund received by a city and in which bond holders claim an equitable interest,[16] but the equitable relief may be denied where bond holders have been guilty of laches in enforcing their claims.[17]

§ 387. Equitable relief denied.

The right of a holder of public securities or a judgment creditor to equitable relief as against a public corporation has been denied in a number of cases and under interesting conditions.

14—Farson, Leach & Co. v. City of Sioux City, 105 Fed. 278; see. also, Secs. 363, et seq., and 371, ante.

15—106 Fed. 269.

16—Chelsea Savings Bank v. City of Ironwood, 130 Fed. 410.

17—Eddy v. City and County of San Francisco, 148 Fed. 272.

That mandamus futile no ground for equitable relief. The city of Watertown, Illinois, issued its securities under due authority of law and then repudiated. Several judgments were recovered by the plaintiff in error against the city upon which executions were issued and returned wholly unsatisfied. He obtained from the court in which the judgments were rendered writs of mandamus from time to time directed to the proper city officials and commanding the levy of taxes for the payment of the judgments. A constant succession of resignations occurred and these various writs proved ineffectual to secure a levy of taxes. In the present case,[18] the aid of the court was asked to subject the taxable property of the city to the payment of its judgments and that the marshal of the district might be empowered to seize and sell so much of it as might be necessary and to pay over to him the proceeds of such sale. The court denied the relief.

In another case,[19] the court said: "The appropriate remedy of the plaintiff was and is a writ of mandamus. This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing and the prospect of its future success is, perhaps, not flattering.. However, this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present."

Receiver not appointed. In several cases where the appointment of a receiver has been prayed for to take charge of the collection of the taxes when writs of mandamus have proved unavailing, relief has been denied. In Thompson v. Allen,[20] the court held that where on account of the hostility of citizens and the inability to find

18—Rees v. City of Watertown, 19 Wall. 107.

19—Heine v. Levee Com'rs, 19 Wall. 655, 22 L. Ed. 223.

20—115 U. S. 550.

any one who would perform the duty of collector, the levy and collection of taxes to pay a judgment recovered on an issue of railroad aid bonds was impossible even after the issuance of writs of mandamus, a court of equity was without power to grant relief to the complainant through the appointment of a receiver with power to levy and collect taxes with which to pay the existing judgment.

An irrigation district duly organized, issued and sold bonds under California Act of March 7, 1887, p. 29, Chapter 34, as amended, which provided for the organization of irrigation districts and authorized them to issue bonds for the construction of necessary works, funds for the payment of which and the accruing interest were to be derived from annual assessments upon the real property of the district. A bond holder recovered judgment against an irrigation district and upon a writ of execution unsatisfied against the property of the district asked for the appointment of a receiver to aid him in the collection of his judgment. This relief was denied and the court held that his proper remedy was by writ of mandamus to levy an assessment against the property of the district as provided by law.[21]

In Litchfield v. Ballou,[22] the city of Litchfield issued bonds to construct water works which were invalid because in excess of the constitutional limitation of indebtedness. Ballou, the owner of certain of these bonds, brought a suit in equity alleging that the proceeds of the bonds had been used by the city in the construction of its water works and praying for a decree against the city for the amount of his claim and further that if not paid asking that the water works be sold to satisfy the debt on the ground that the city was bound in equity and good faith to return the money it had received for them

21—Marra v. San Jacinto & P. V. Irrigation Dist., 131 Fed. 780; see, also, Boskowitz v. Thompson (Calif.), 78 Pac. 290.

22—114 U. S. 190, 29 L. Ed. 132.

although the bonds were void. The court denied the relief prayed for, for want of equitable jurisdiction and further held that the plaintiff could not recover under any circumstances. This case has already been referred to and a quotation made in a previous section.[23]

Scaling down of excess issue. In the case of Hedges v. Dixon County,[24] an attempt was made through equitable proceedings to have the excess issue of bonds held void in Dixon County v. Field (Ill. U. S., 83), scaled down and that portion within the constitutional limit held good and separated from that portion in excess. The court denied the relief and said: "Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."

§ 388. Equitable subrogation.

Involving the doctrine of equitable subrogation the Supreme Court of the United States,[25] denied relief where aid bonds had been issued by the Town of Middleport, and which were subsequently held void, to a railroad company which in turn sold them to the plaintiff in error.

23—Sec. 381 ante.

24—150 U. S. 192; see, also. Wade v. Travis County, 81 Fed. 742, C. C. A. However, this case was reversed in Wade v. Travis, 174 U. S. 499, 43 L. Ed. 1066; see, also, Washington County v. Williams, 111 Fed. 801, C. C. A.

25—Aetna Life Ins. Co. v. Town of Middleport, 124 U. S. 534, 31 L. Ed. 537.

While the bonds were held void in the state court the validity of an appropriation by the town was impliedly admitted. The contention was made in favor of the Insurance Company that when it purchased the bonds it thereby paid the debt of the Town of Middleport to the Railroad Company as voted by it and that because it paid its money to that company on bonds which were void it should be subrogated to the right of the company against the town. An extended discussion of the doctrine will be found in the opinion.

In another case,[26] involving the application of the same doctrine where the relief was denied when invalid bonds of a county were voluntarily paid by it from the proceeds of other invalid bonds which were subsequently repudiated, the court held that no equities thereby arose in favor of the holders of the latter issue of bonds entitling them to subrogation to the equities of the holders of the former so voluntarily paid off.

§ 389. Right of action on each separate bond and coupon.

The doctrine is well established that a right of action accrues to the holder of each separate bond and coupon since each is regarded as a separate and independent promise to pay the obligation according to its terms. The subject of a right of recovery on coupons has been considered in a preceding section. In a late case in the Supreme Court of the United States,[27] it was held that bonds and coupons were capable of separate ownership and of separate suits. That a suit on coupons and a suit on bonds are based on different causes of action and further that judgment might be rendered on coupons without producing the bonds to which they were originally attached. The court in its opinion by Mr. Justice

26—Lyons County v. Ashuelot National Bank of Keene, 87 Fed. 137, C. C. A.

27—County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58; see, Sec. 193, ante.

Harlan said, quoting from Nesbitt v. Independent District of Riverside (144 U. S. 610; 36 L. Ed.562): "Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond as though the two promises were placed in different instruments, upon different paper."

This right of action is so unquestioned that the citation of any authorities is unnecessary.[28]

§ 390. Right of bondholder to maintain action.

A bond holder is not limited to the remedy provided by statute authorizing the issue of bonds but may maintain an action at law to determine the liability of the maker of the negotiable security and to ascertain the amount due him,[29] although it has been held,[30] that the omission from county bonds purporting to be issued under a specific act of the Kentucky Legislature of a stipulation in respect to certain extraordinary remedies for their collection would deprive the holder of his right to take advantage of them.

A bond holder is not required to present either the bonds or coupons thereto attached when due to the

28—Edwards v. Bates County, 163 U. S. 269, 41 L. Ed. 155; Eleanor Nesbitt v. Independent District of Riverside, 144 U. S. 610.

29—Town of Queensbury v. Culver, 19 Wall. 83.

30—Hubbert v. Campbellsville Lumber Co, 191 U. S. 70, affirming Campbellsville Lumber Co. v. Hubbert, 112 Fed. 718.

court of county commissioners in Alabama before commencing suit to enforce their payment.[31]

Rights of action existing at the time of the issuance of the securities cannot be impaired by subsequent legislation,[32] and where the obligation to pay is unconditional an action can be maintained although the statute may provide that the bonds can be made payable through the agency of certain state officials.[33]

It is not necessary that holders of public securities resort to mandamus to compel the levy of assessments or taxes to pay them as they become due but an action may be maintained to recover judgment for the amount due.[34] It has been, however, held that under the Missouri laws, townships not being incorporated and bonds having been issued in aid of railroads in the name of a county on behalf of the township voting the aid that the owner of the bonds thus issued has no remedy by action against the township or the taxable inhabitants therein but must resort to mandamus to the county court to levy the tax as a means of payment or that the owner could sue the county and recover judgment.[35] The acceptance of interest represented by a coupon has been held no bar to the prosecution of an action then pending for the principal of a bond; the right of action for the principal arising on a clause contained in the bond which authorized the holder on default in interest to sue for the principal. It is not necessary that negotiable instruments be pre-

31—Greene County v. Daniel, 102 U. S. 187; Hughes County v. Livingston, 104 Fed. 306.

32—Bates v. Gregory (Calif.), 22 Pac. 683.

33—Toothaker v. City of Boulder (Colo.), 22 Pac. 468.

34—Hammond v. Place (Mich.), 74 N. W. 100; Marsh v. Little Valley, 64 N. Y. 112.

Waite v. City of Santa Cruz, 79 Fed. 967. Where it was held that a holder of municipal bonds was not prevented from maintaining an action at law to enforce their collection although they were payable out of a special fund.

35—Jordan v. Cass County, 3 Dill. 185.

sented for audit or allowance before a right of action will accrue.[36]

§ 391. Questions raised.

The doctrine of estoppel by recitals and otherwise has been fully considered in preceding sections and the effect of its application is to prevent the public corporation from raising many questions in actions brought on public securities which otherwise could be presented as a defense. This rule especially applies to recitals in bonds and its efficacious and complete operation is indicated by a reference to the many cases cited under that subject. In a leading case,[37] it was said: "Recitals are such a decision; and beyond those a bona fide purchaser is not bound to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact the decision of which by the law confided to others—to those most competent to decide it—and to which the purchaser is in general in no position to decide for himself."

Questions of form merely or irregularities or fraud or misconduct on the part of the agents of public corporations cannot ordinarily be considered in a suit by a bona fide holder against it to recover on bonds or coupons.[38]

The doctrine of estoppel by recitals, it will be remembered, from the many cases previously cited will not apply where the face of the bonds discloses their invalidity.[39] It has also been held that a county can not plead

36—Martin County v. Gillespie County (Tex.), 71 S. W. 421.

37—Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; see, also, Millar v. Town of Berlin, 13 Blatchf. 245; Independent School District of Sioux City v. Rew, 111 Fed. 1.

38—Town of East Lincoln v. Davenport, 94 U. S. 801.

39—McClure v. Township of Oxford, 94 U. S. 429, 24 L. Ed. 129; see, also, Sec. 261, ante.

that to pay the bonds an assessment would have to be levied greater than that permitted by the constitution although this holding is contrary to the general rule.[40] The question of set-off arising through the reception of misappropriated funds in violation of law can be raised in an action on the bonds where there has been a payment of interest though none could be recovered.[41]

In an action on railroad aid bonds the question of whether the railroad company has a valid legal existence cannot be raised. This fact can only be tested in quo warranto proceedings on the part of the state.[42]

Where bonds are issued to refund outstanding indebtedness, the audit and allowance of the indebtedness as legal by duly authorized officials will prevent the question of validity as bearing upon the consideration for the bonds from being raised,[43] and a tax payer sued for taxes levied to pay water works bonds cannot set up as a defense irregularities in their issue.[44]

§ 392. Parties plaintiff.

Negotiable securities made payable to bearer or to order and duly authorized are transferred by delivery and an action may be maintained thereon in the name of the holder.[45] The holder by such a delivery becomes the legal owner of the bonds and coupons and is entitled to maintain an action upon them irrespective of the consideration passing between himself and his vendor holding them; by legal transfer from the former bona fide

40—Moultrie County v. Fairfield, 105 U. S. 370.

41—Packard v. City of Mobile (Ala.), 43 So. 963.

42—Smith v. County of Clark, 54 Mo. 58; see, Sec. 266, ante.

43—Flagg v. School Dist. No. 70 (N. D.), 58 N. W. 499.

44—City of Tyler v. Tyler Bldg. & Loan Assoc'n (Tex.), 81 S. W. 2.

45—Roberts v. Bolles, 101 U. S. 119, 25 L. Ed. 880; City of Ottawa v. National Bank, 105 U. S. 342, 26 L. Ed. 1024; Augusta Bank v. Augusta, 49 Me. 507; Bank of United States v. McAllister, 9 Pa. St. 475; see Chapter X, ante.

holders for value he succeeds to all the rights of the former holders.[46]

Bonds payable to blank or order are in legal effect payable to the holder or bearer. They have every attribute of that class of commercial paper which the bearer can enforce in the Federal courts without proof that his assignor could have done so and he can maintain an action upon them irrespective of the rights of his assignor in this particular.[47]

In the Rew case just cited, the court after referring to Act of Congress of August 13, 1888, 25 Stats. at Large, 434, relative to the jurisdiction of the Federal courts in respect to actions on promissory notes, etc., said: "Under this statute an action can not be maintained in the circuit court upon an assigned instrument made by a corporation, which is not payable to bearer, unless such an action could have been maintained by the assignor. If, however, the assigned instrument is payable to the bearer, the assignee may recover in the federal court, whether his assignor could have done so or not. In the case now in hand the bonds were payable to the order of a citizen of the state of the defendant, and, because he could not have maintained an action in the federal court, no subsequent holder could do so. But the coupons, on the other hand, were payable to bearer, and were made by a municipal corporation, so that they fell within the express terms of the exception to the prohibition of the statute; and any holder of them who was a citizen of a different state from that of the plaintiff in error could lawfully maintain his action upon them in the national courts."

46—Dudley v. Board of Com'rs of Lake County (Colo.), 80 Fed. 672 C. C. A.

47—New Providence v. Halsey, 117 U. S. 336, 29 L. Ed. 904; Lyon County v. Keene Five-Cent Savings Bank, 100 Fed. 337 C. C. A. Independent School District of Sioux City v. Rew, 111 Fed. 1.

§ 393. Bonds transferred for collection only.

Where bonds or coupons have been transferred to one for the purposes of collection only, in so far as it involves the jurisdiction of United States courts the cases hold that if the true owner of the bonds could not maintain his action in the Federal courts neither can the one to whom the bonds have been transferred for collection so far as the particular bonds or coupons are concerned. This rule applies either to actions for their collection or for their reformation.[48]

§ 394. Bonds transferred; when action may be maintained.

Where the question of jurisdiction of the Federal courts is not involved the cases are uniform in holding that a transfer of bonds or coupons for purposes of collection gives to the transferree full right of action, that he can sue in his own name and maintain his litigation to the same extent as if he were both the legal and equitable owner although the equitable ownership remains elsewhere though the same defenses are admissible against him as would be admissible against the true owner.[49]

§ 395. Injunction as bar to right of action.

In Hawley v. Fairbanks,[50] it was held that the relator in mandamus proceedings having for their purpose the levy of a tax for the payment of a judgment secured was not barred from bringing these proceedings because of an injunction rendered in another suit to which

48—Bernard's Twp. v. Stebbins, 109 U. S. 341, 27 L. Ed. 957; New Providence v. Halsey, 117 U. S. 336, 39 L. Ed. 904; Farmington v. Pilsbury, 114 U. S. 138, 29 L. Ed. 114.

49—Village of Kent v. Dana, 100 Fed. 56 C. C. A.; Carpenter v. Greene County (Ala.), 29 So. 194; Jennings Banking & Trust Co. v. City of Jefferson (Tex.), 70 S. W. 1005; see, also, Chapman v. City of Charleston, 30 S. C. 549, 9 S. E. 591.

50—108 U. S. 543, 27 L. Ed. 820.

he was not a party although involving the identical issue of bonds.

§ 396. Parties defendant.

In Nebraska where under the law boards of county commissioners can issue bonds on behalf of a precinct of the county to aid in the construction of railroads, an action to recover on these bonds is properly brought against the county and not the precinct,[51] and the same rule obtains in Missouri where bonds have been issued by the county court on behalf of a township of the county, townships not constituting corporate bodies under the laws of that state.[52]

§ 397. Bonds payable from specific taxes or property.

The discussion in a previous section will be remembered relative to the obligation of a public corporation to pay bonds issued generally for local improvements and which by their terms are payable by special tax levies or from specific property set aside as a source or means of payment and the further discussion relative as to whether such securities are to be regarded as a general obligation of the corporation issuing them or whether the bond holder is limited in his recovery to the special sources set aside and provided. The principles applying to these questions vary as noted in different states based upon specific statutory provisions or the language of the securities issued. Where actions are brought upon such securities or proceedings commenced to compel the levy of the special taxes or assessments the question of proper parties defendant depends upon the principles already referred to and discussed.[53]

51—Davenport v. Dodge County, 105 U. S. 237; Blair v. Cumming County, 111 U. S. 363, 28 L. Ed. 457; Nehama County v. Frank, 120 U. S. 41, 30 L. Ed. 584.

52—County of Cass v. Johnson, 95 U. S. 360, 24 L. Ed. 419.

53—See Sec. 363, et seq., ante.

In Iowa, for illustration,[54] it was held that the property owners of the city of Lyons (consolidated with the City of Clinton) on whose property the taxes were to be assessed for the payment of the debts were not necessary parties. And in California, it has also been held,[55] that a plaintiff is not required to join as defendants the owners of property upon which the taxes for the payment of bonds are required to be levied, although it was held in this state in an action in the state courts,[56] that where judgments had been obtained by the owners of property against which a special tax was levied perpetually enjoining the tax collector of the city from collecting the tax levied, in a subsequent action against the city to enforce the payment of the bonds payable out of these special tax levies the question of the binding effect of the judgments obtained upon the city and the bond holders neither of whom were parties to the action in which the judgments were rendered could not be decided except when the owners of the property affected by the judgments were made parties. In Indiana,[57] it was held that under the Indiana statutes relative to the issue of street improvement bonds the collection of assessments for the payment thereof and the lien thereon on the property affected, a holder of bonds cannot make the town a party defendant, it not being in any sense the owner of the property affected by the assessment. In Texas it is held that in a suit for taxes a tax payer may defend on the ground of invalidity of the bonds without making the bond hold-

54—Burlington Savings Bank v. City of Clinton, 106 Fed. 269; see, also, Town of Kettle River v. Town of Bruno (Minn.), 118 N. W. 63, construing General Laws of 1895, Chap. 227, relative to the enforcement of liabilities upon a division of a town.

Southold Savings Bank v. Board of Education, etc., 89 N. Y. S. 714, relative to proper parties defendant in case of a division of corporate organizations.

55—Mather v. City of San Francisco, 115 Fed. 7 C. C. A.

56—Meyer v. City and County of San Francisco (Calif.), 88 Pac. 722.

57—Town of Windfall City v. First National Bank (Ind.), 87 N. E. 984.

ers parties.[58] And the holders of refunding bonds are not necessarily parties in mandamus proceedings to compel a city to enforce and apply the provisions of Texas statutes relative to sinking funds.[59]

§ 398. Pleadings.

The consideration of the subject of pleadings in actions brought upon public securities necessarily must be brief as the scope of this work does not include even a casual treatment of questions relating to pleading and practice. In an action on negotiable securities issued by a public corporation in pursuance of legal authority, it is not necessary to plead as a rule the performance by the corporation of all precedent conditions and this unquestionably holds true where the securities issued contain full recitals in respect to matters in pais, as the court said in one case: "The township had authority by law to issue its bonds by way of donation to a railroad. It did issue its bonds. They got into circulation as commercial securities, and were purchased by the plaintiff. All the plaintiff had to do in case of nonpayment was simply to sue on the bonds. If there was any defense to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it was for the defendant to show it. A bond, especially a negotiable bond, is a prima facie obligation of the obligor, if he has capacity to make it; and is binding according to the terms and conditions apparent on its face until the contrary be shown. Whether an alleged defense, when set up, is or is not good against the particular holder, it is to be determined by the court in each case." [60]

58—City of Tyler v. Tyler Bldg. & Loan Association (Tex.), 82 S. W. 1066.

59—City of Austin v. Cahill (Tex.), 88 S. W. 542.

60—Lincoln v. Iron County, 103 U. S. 412, 28 L. Ed. 518.

Board of Education of Ridgefield Twp. v. Board of Education, etc. (N. J.), 53 Atl. 1124. No aver-

The pleader should aver the preliminary facts requisite to the exercise of the power granted by the legislator and if there is no general authority to issue negotiable securities the special authority relied upon by the plaintiff should be shown in the declaration.[61]

If there is any defect in the steps preliminary to the exercise of the power granted it is for the defendant to plead and show such irregularity in the performance or non-performance of acts requisite to the valid exercise of the power. These are matters of defense.[62]

A declaration need not allege especially that in issuing bonds there was a compliance with the constitutional provision limiting the amount of indebtedness which the municipality could incur. An excessive issue of bonds is a matter of defense.[63]

If by statute or rule of the court, the plaintiff in a suit is required to file with his declaration a copy of the instrument sued upon this must be done and the bonds then become a part of the pleadings in the case,[64] and if the copy of the bonds as set out in the declaration with all the recitals show that the bonds were irregularly issued and not binding upon a township, it follows that the declaration does not set forth a good cause of action against the defendant and a demurrer is properly sustained.[65]

In a petition to enforce taxes for the payment of the bonds of a school district, an allegation that the Board of

ments are necessary in respect to the authority of the agents of the municipal corporations issuing the bonds.

McCless v. Meekins, 117 N. C. 34, 23 S. E. 99. An allegation that bonds issued were "valid and overdue" is sufficient without stating that they were issued for debts incurred for necessary expenses.

61—Kennard v. Cass County, 3 Dill. 147; Breckenridge County v. McCracken et al., 61 Fed. 191 C. C. A.; Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336.

Hopper v. Covington, 118 U. S. 148.

62—Breckenridge County v. McCracken et al., 61 Fed. 191 C. C. A.

63—Brown v. Town of Point Pleasant (W. Va.), 15 S. E. 209.

64—Nauvoo v. Ritter, 97 U. S. 389.

65—McClure v. Township of Oxford, 94 U. S. 429, 24 L. Ed. 129.

Trustees "in conformity with the provisions and conditions of the said act" levied the tax is insufficient. The detailed steps of the levy must be set forth as well as the proceedings leading to the authorization of the bonds.[66]

§ 399. Demurrers.

Objections to pleadings on the ground of lack of explicitness must be made by special demurrer and cannot be raised subsequently.[67] A demurrer filed by defendant to a petition will be waived by proceeding to trial with an answer on the merits.[68] The demurrer only admits matters of fact well pleaded not conclusions of law.[69]

Demurrer; when sustained. In Nauvoo v. Ritter,[70] the bonds upon their face referred to the ordinance of the city council authorizing their issue printed on the back. This ordinance distinctly recited that the election required by law was held pursuant to notice given in accordance with the provisions of the act authorizing a subscription and that upon a canvass of the votes it appeared a large majority of the votes of said city had been cast in favor of the proposition and a much larger vote than required by the act to authorize it. The court held that it was proper to sustain a demurrer to pleadings which simply tendered an issue as to the authority of the city to issue the bonds.

In another case,[71] the plaintiff alleged that the defendant had issued certain bonds which recited that they were issued pursuant to an order of the county court made on a date named pursuant to legislative authority (named) and that he was the owner for value of the coupons of said bonds and entitled to recover thereon.

66—Commonwealth v. Louisville & Nash. R. R. Co. (Ky.), 33 S. W. 204.

67—Lippitt v. City of Albany (Ga.), 63 S. E. 33.

68—Hopper v. Covington, 118 U. S. 148; Board of Com'rs of Hamilton County v. Sherwood, 64 Fed. 103 C. C. A.

69—Chicot County v. Sherwood, 148 U. S. 529.

70—97 U. S. 389, 24 L. Ed. 1050.

71—County of Dallas v. McKenzie, 94 U. S. 660, 24 L. Ed. 182.

The answer denied the promise to pay the coupons or bonds and that the plaintiff was the owner for value. It further alleged that no order for their issuance was made by the county board but that two of the members of that court fraudulently and corruptly made the orders set forth and upon conditions that were not complied with. A general demurrer was filed to this answer. The court held this was in effect an admission that the county court had never exercised its power. The court below sustained the demurrer and judgment was rendered for the plaintiff. The Supreme Court reversed the judgment with directions to enter judgment upon the demurrer for the defendant below unless the plaintiff below should withdraw his demurrer and proceed to trial within such time and upon such terms as the Circuit Court might direct. The court in discussing the effect of the demurrer upon the complaint and answer, said: "The plaintiff's case is not aided by the allegation that he is a holder for value of the coupons. A holder for value is not affected by any irregularities or frauds or unfounded assumption of authority on the part of the agents of the town or county. But good faith is unavailing where there is an entire want of authority in those who profess to act. If A forge the name of B to a promissory note, or without any authority A signs a note as his agent, and there be no ratification, no amount of good faith in the holder will enable him to recover upon it. Good faith to the person who does not authorize the use of his name requires that he should be protected against a holder who pays his money for a forged or unauthorized note. And again, the answer expressly denies that the plaintiff is a holder for value of the coupons. The language is, that it 'denies that plaintiff was at the institution of this action, or now is, the owner for value of any of the bonds or coupons in said petition declared on.' Instead of meeting this allegation by an issue of fact, the plaintiff by

demurring admits its truth; and we do not see how, upon the pleadings, he can be deemed a holder for value."

In another case,[72] the Supreme Court of the United States held that a court will not by mandamus compel the county officers of the state to do what they were not authorized to do by the laws of the state and that in mandamus proceedings to compel the levy of taxes if from the answer to the alternative writ it appears that the county is not in default on demurrer to the answer, this was admitted and the peremptory writ would be denied. The court, however, say: "In thus deciding we are not to be understood as maintaining all that is averred in the defendant's writ to the alternative writ. We do not assert that the relator is without remedy against the county or that his remedy is restricted to a resort to the proceeds of a special tax. It is enough for this case that the judgment of the Circuit Court was correct on the pleadings."

§ 400. Burden of proof.

Assuming the existence of authority to issue the securities in connection with the condition that they do not show upon their face facts sufficient to charge the holder with notice of their invalidity or of irregularities in their issue, the possession of negotiable securities then in due form establishes in favor of the holder a prima facie case in an action upon them and throws the burden of proof upon the one attacking their validity in respect to ownership, bona fide holding, consideration, proper execution, notice and the existence of all conditions necessary to enable him to maintain the action. This rule does not dispense with all evidence but upon the production of the bonds or coupons and proof of authority to issue the

72—United States v. Clark County, 95 U. S. 769, 24 L. Ed. 545.

plaintiffs case is established.[73] The rule has been well stated in a leading text book on negotiable instruments,[74] in the following language: "The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports prima facie that he acquired it bona fide for full value, in the usual course of business before maturity, and without notice of any circumstances impeaching its validity; and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where indeed such proof is necessary), prima facie establishes his case; and he may there rest it. Bills and notes payable to bearer do not in this respect differ from others, and the bearer is entitled to all the presumptions that apply to an indorsee in his favor. But the presumption of bona fide ownership does not apply where the instrument is not payable to bearer, unless it be indorsed specially to holder, or in blank."

This rule has been repeatedly stated by the courts and it is intimately involved in the discussion of the presumption which arises in favor of the validity of negotiable securities to be found in the chapter on that topic,[75] and

73—County of Chambers v. Clews et al., 21 Wall. 317, 22 L. Ed. 517.

74—Daniel, 5th Ed., Sec. 812.

75—Chapter X, ante; see, also, Anderson County Com'rs v. Beal, 113 U. S. 227, 28 L. Ed. 966.

Edwards v. Bates County, 99 Fed. 905. The bonds and coupons were payable to bearer and at the trial the plaintiff produced and read them in evidence. Possession of commercial securities is evidence of ownership and the production of these bonds and coupons by the plaintiff at the trial was sufficient proof in the absence of countervailing evidence to determine this issue in his favor. Grattan Twp. v. Chilton, 97 Fed. 145 C. C. A.; Board of Com'rs of Lake County (Colo.), 68 Pac. 839; Thompson v. Village of Mecosta (Mich.), 104 N. W. 694; Town of Ontario v. Union Bank of Rochester, 47 N. Y. S. 927; Second National Bank v. School District of Connellsville, 23 Pa. County Ct. Reps. 636.

City of Jefferson v. Jennings Bank & Trust Co. (Tex.), 79 S. W.

also that part of this work relating to the subject of coupons and the right of the holder to maintain an action upon them.[76]

In respect to bona fide holding, the doctrine will be remembered,[77] that although securities may be invalid as between the maker and the original holder a subsequent bona fide purchaser without notice or one deriving title through him can maintain an action upon them. The plaintiff fulfills all the requirements of the law by showing that either he or some person through whom he derives title was a bona fide purchaser for value without notice.[78] In speaking of coupons as prima facie evidence of their own validity the United States Circuit Court of Appeals held in a comparatively recent case,[79] that coupons were prima facie evidence of their own validity and required no proof aliunde to sustain it. If they were void because of the failure to comply with conditions or for other reasons, this would be an affirmative defense incumbent upon the defendant to plead and prove. That contracts of public corporations formally executed will in the absence of proof to the contrary be presumed to be valid and to have been made with due authority. If acts were required to be done or conditions required to exist before valid contracts of the character noted could be made the contracts themselves raise

876. Evidence in respect to consideration received as sufficient.

But see Venice v. Breed, 65 Barb. (N. Y.), 597, as to application of Sub-div. 5, Sec. 19, N. Y. Code in an action by a town to compel surrender and cancellation of bonds issued by it.

76—See Chapter VIII, ante; see, also, Board of Com'rs of Lake County v. Platt, 79 Fed. 567 C. C. A.

77—See Sec. 223, ante.

78—Lytle v. Lansing, 147 U. S. 59, 37 S. E. 78, citing Douglas County Com'rs v. Bolles, 94 U. S. 104; Montclair v. Ramsdell, 107 U. S. 147; Scotland County v. Hill, 132 U. S. 107; see, also, Rathbone v. Board of Com'rs of Kiowa County, 83 Fed. 125 C. C. A.; Board of Com'rs of Haskell County v. National Life Insurance Co., 90 Fed. 228 C. C. A.; Hughes County (S. D.) v. Livingston, 104 Fed. 306 C. C. A.

79—Grattan Twp. v. Chilton, 97 Fed. 145 C. C. A.

the presumption and present the evidence that such acts were performed and such conditions existed. Acts done or contracts made by a public corporation which presupposes the existence of other acts or conditions in order to make them valid and legally operative are presumptive proof of the latter.

It is not necessary for the plaintiff to negative the existence of facts limiting a liability imposed by statute or otherwise in an action on public securities,[80] and neither is it necessary to introduce proof of the due execution of the securities unless this question is put in issue.[81] Neither is proof of bona fides necessary where an allegation to this effect is not denied by the answer and even in such cases the courts have held that such proof is unnecessary on account of the presumption of law already stated but if offered, it is clearly competent.[82]

§ 401. Issues raised by general denial.

An answer containing a general denial in substance or form in addition to affirmative matters of defense puts upon the plaintiff the proof of every fact necessary to

80—United States v. Saunders, 124 Fed. 124.

81—Chambers v. Clews et al., 21 Wall. 317, 22 L. Ed. 517. On the trial the plaintiffs produced the bonds and coupons and offered to read the same in evidence. To this the defendants objected, for the reason that there was no evidence that the bonds were authorized to be issued by the defendants, and that there was no evidence that the seal annexed was the seal of the probate judge, or of the defendants. We have already considered this point, and have shown that the objection was not valid for either of the reasons mentioned. There was no issue upon the execution of the bonds. County of Ralls v. Douglas, 105 U. S. 728, 20 L. Ed. 957.

82—County of Macon v. Shores, 97 U. S. 272.

Buchanan v. Litchfield, 102 U. S. 278, 26 L. Ed. 138. Under an allegation of ownership evidence of bona fides is admissible. County of Ralls v. Douglas, 105 U. S. 728, 26 L. Ed. 957; Anderson County Com'rs v. Beal, 113 U. S. 227, 28 L. Ed. 966.

constitute the cause of action set out in his complaint including the validity and legality of the bonds and the lawfulness of their issue and delivery. It requires him to show by competent proof that he is the owner of the securities sued on, that they are in fact executed by the defendant issued in accordance with law and delivered to a party competent to receive the title. A general denial permits proof on the part of the defendant of every fact which tends to establish the illegality of the securities. But the rule as to the presumption of validity stated in section 265 still operates and the burden of proof is not shifted.[83]

In County of Chambers v. Clews, et al,[84] which was an action at law brought to compel the payment of three hundred seventy-two coupons attached to bonds issued by the County of Chambers, the defendants pleaded the general issue and two special pleas. Special demurrers were interposed to the special pleas and the demurrers were sustained. The cause was then tried on the general issue, a verdict rendered and judgment given for the plaintiffs to the amount of their claim. On the question of proof the court held that the issue of bona fides and notice was presented by the special pleas as well as the general issue tendered, and said as to the procedure upon trial after holding that in assumpsit any matter which shows that the plaintiff never had a cause of action may be proved under the general issue. "The logical and orderly mode of a trial, where it was intended to investigate the issue we have been considering, would be this: to sustain their claim the plaintiffs produce the bonds and coupons. The execution not being put in issue, this establishes the plaintiff's case, and establishes presumptively that they are holders for value before maturity

83—Smith v. Sac County, 11 Wall. 139, 20 L. Ed. 102; County of Nehama v. Frank, 120 U. S. 41, 30 L. Ed. 584.

84—21 Wall. 317, 22 L. Ed. 517.

without notice (citing many cases). The defendant then produces such proof as it may possess that the plaintiffs were not holders for value, or that they received the coupons after maturity, or that they had notice of the defects alleged. If it establishes either of these points the question of authority in the agent is open.

"The question and the order of proof in these respects would be the same, whether the trial was had upon the general issue or upon the special plea. It seems quite clear that the judgment upon the demurrer to this plea worked no harm to the defendant."

§ 402. Effect of recitals: affirmative defenses.

The securities may contain recitals in respect to the performance of conditions and the existence of facts necessary to the validity of the securities and which will estop the maker from setting up as a defense irregularities and informalities in connection with their issue and even in some cases the failure to comply with constitutional provisions. This subject has been thoroughly treated in preceding sections.[85] In the absence of recitals the question may arise of the extent of proof necessary to establish the right of action. In a case decided by the Supreme Court of the United States,[86] where the question of ratification of a subscription to railroad stock and the issue of bonds by the tax payers was raised the objection was made that the proof offered was insufficient to establish the fact of such ratification by a majority of the tax payers of the city, the official records of the election not showing the character of the voters as tax payers or otherwise. The court said that the objection could not be sustained, that to allow it to prevail would require the plaintiff not only

85—See Sec. 276, et seq., ante.

86—Hannibal v. Fauntleroy, 105 U. S. 408, 26 L. Ed. 1103.

to show that the persons failing to ratify the stock subscriptions were all tax payers but also that they had all the other requisite qualifications of persons entitled by law to vote.

"In our opinion, the law imposes no such unreasonable burden upon the owner of such bonds. He is bound to show, in the absence of recitals that prevent its denial. that the corporation issued them, in the exercise of a power conferred by law; and where that can arise only in consequence of the performance of a condition precedent, such as the result of an election by a public vote, he has the burden of proof to show the fact. That fact, as in the present case, is fully proven by an exhibition of the record, which shows on its face the result claimed. He is not bound to sustain the truth of the record, as if it were the case of a contested election, and prove that the majority, on the existence of which his rights rest, consisted of persons, all of whom possessed the qualification of voters."

In County of Macon v. Shores it was held,[87] that proof, that the proposed railroad enterprise was of a wild and visionary character and of meetings of tax payers denouncing the issue of bonds, was clearly incompetent for any purpose in the case.

The official book of record of ordinances of the city is competent evidence in respect to the fact of the passage of an ordinance when put in issue.[88]

Affirmative defenses. Where bonds create a debt in excess of the constitutional limitation it is an affirmative defense and the burden of proof is on the public corporation claiming this condition to plead and prove it by a preponderance of the evidence.[89]

87—97 U. S. 222, 24 L. Ed. 889.

88—Hinkley v. City of Arkansas City, 69 Fed. 768 C. C. A.

89—Lyon County v. Keene Five-Cent Savings Bank et al., 100 Fed. 337 C. C. A.

§ 403. Burden when shifted.

Proof of irregularity or fraud in the inception of negotiable paper shifts the burden of proof upon the holder to establish his bona fide holding. The mere possession of the paper under such circumstances is not enough. While bonds and coupons payable to bearer or endorsed in blank or to holder are negotiable paper and protected to the fullest extent the circumstances noted will throw upon the holder the burden of proof to establish that he acquired them for a consideration before maturity and without notice.[90] In one case the court said: "The bonds are negotiable though the name of the payee, and the word 'order' or 'bearer' are left in blank, * * * having been fraudulently issued though they were negotiable, the burden is upon the complainant to show that he is a bona fide holder thereof for value before due without notice of any informality therein or that the persons from whom he obtained them was such a holder." Parol evidence is inadmissible to show fraudulent conspiracy between the mayor of a city and certain trustees in pursuance of which bonds were issued where it was admitted that the plaintiff was a bona fide purchaser, of the coupons cut from them, in open market and without any knowledge of invalidity except such as appeared on the records of the towns which disclosed no facts tending to show a conspiracy or any fraudulent act done in connection with the execution and delivery of the bonds.[91]

Murray v. Lardner. The conditions have been noted in a preceding paragraph which occasion a shifting in

90—Smith v. County of Sac, 11 Wall. 139, 20 L. Ed. 102; Collins v. Gilbert, 94 U. S. 758, 24 L. Ed. 170; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866; Salmon v. Rural Independent School District of Allison, 125 Fed. 235; Gamble v. Independent School Dist. of Allison, 132 Fed. 514; but, see, Id. 146 Fed. 113; Daniel on Negotiable Instruments, 5th Ed., Sec. 815.

91—Town of Fletcher v. Hickman, 136 Fed. 568.

the burden of proof. In the case cited,[92] where the question of ownership of a negotiable instrument was involved, the court said on the question of "burden of proof" and the evidence necessary to shift this in cases of fraud: "The possession of such paper carries the title with it to the holder: The possession and title are one and inseparable. The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud, there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder."

§ 404. Illinois cases.

The Constitution of 1870, prohibited the granting of municipal aid to corporations except in those cases where the aid had been authorized under existing laws by a vote of the people of the municipality prior to its adoption. The cases hold in this state that where railroad aid bonds

92—Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857.

were issued subsequent to the adoption of the Constitution in 1870, the burden of proof is upon the party asserting the validity of bonds to show not only the fact that such an election or vote was had as required by the exception in the Constitution but also the legality of that election.[93]

§ 405. Findings of fact.

Special findings of fact are like a special verdict or an agreed statement of facts when considered on appeal. These should not be a mere recital of the testimony on which the ultimate findings to be based nor leave a part of the material issues of fact raised by the pleadings undecided. They should be so framed as to indicate clearly that the trial court intended them not merely as an opinion containing a decision on questions of law and fact but as a special finding embodying his ultimate opinions on mooted questions of fact only.[94] In the case just cited, the court in its opinion said: "Plaintiffs purchased these bonds from Spitzer & Co. who were innocent holders and all the rights passed to plaintiffs (citing cases). Plaintiffs are therefore entitled to all the protection which the law gives to holders of this class of securities who purchased them without notice and for value." The appellate court held that this was not a special finding of fact which it could accept and be governed by as such. The court added: "In legal contemplation a special finding of fact as distinguished from a general finding is one in which the trial judge states succinctly his ultimate conclusion upon each material issue of facts raised by the pleadings." A special finding should not be embodied in

93—Town of Middleport v. Aetna Life Ins. Co., 82 Ill. 562; Lemont v. Singer & Talcott Stone Co., 98 Ill. 96; Lippincott v. Pana Town, 92 Ill. 24; Town of Prairie v. Lloyd, 97 Ill. 179; Sampson v. People (Ill.), 30 N. E. 781; see, also, Jeffries v. Lawrence, 42 Ia. 498; Thornburgh v. School District No. 3 (Mo.), 75 S. W. 81.

94—Hinkley v. City of Arkansas City, 69 Fed. 768.

a bill of exceptions but is like a verdict or general finding a part of the record and should be complete in itself unaided by references to bills of exceptions though documents set out in the pleadings or otherwise in the record may be referred to without re-copying.[95] They are not open to dispute by an appellate court, must be accepted as conclusive.[96]

§ 406. Practice; when jury unnecessary.

If no material facts are at issue or where they are admitted in the pleadings and on trial in the court below a jury is unnecessary[97] a jury may be waived and where a general finding is made by the lower court no errors in giving or refusing instructions asked for with a view to controlling such general finding can be reviewed by the appellate court.[98]

Charge to jury. If the testimony is all one way and conclusive in its effect, a party has no right to ask a charge which assumes that it is otherwise. It would tend to create a doubt where none existed or ought to exist and might mislead the jury.[99]

§ 407. Directed verdict.

It is well settled that if the facts are clearly established and undisputed it is competent for the court to direct a verdict. The practice has been commended and in one case it was remarked that "it gives the certainty of applying the science of law to the results of judicial investigation."[1] And in another case it was held that "Judges

95—Wesson v. Saline County, 73 Fed. 917 C. C. A.

96—Lamprecht Bros. Co. v. City of South St. Paul, 80 Fed. 449 C. C. A.

97—Marion County et al. v. Coler et al., 75 Fed. 352 C. C. A.

98—Board of Com'rs of Kearney County v. McMaster, 68 Fed. 177 C. C. A.

99—Orleans v. Platt, 99 U. S. 676, 25 L. Ed. 404.

1—Orleans v. Platt, 99 U. S. 676, 25 L. Ed. 404; Stewart v. Lansing,

are no longer required to submit a case to the jury merely because some evidence has been introduced by some party having the burden of proof unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence."[2] However on the question of directed verdict a rule obtains that it is only when the evidence is free from conflict or so clear and convincing that all reasonable men who exercise an honest judgment upon it are compelled to reach the same conclusion that the court is justified in withdrawing a question from the jury.[3] But the Supreme Court of the United States in an early case,[4] said, quoting from Herbert v. Butler (97 U. S. 319): "Although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render. It is true that, in the above cases, the verdict was directed for the defendant. But where the question, after all the evidence is in, is one entirely of law, a verdict may, at the trial, be directed for the plaintiff, and, where the bill of exceptions, as here, sets forth all the evidence in the case, this court, if concurring with the court below in its views on the questions of law presented by the bill of exceptions and the record, will affirm the judgment."

§ 408. Errors on trial.

A reviewing court will not reverse a judgment for technical errors of the trial court when they are not prejudicial to the party complaining.[5] On the exclusion of

104 U. S. 505, 26 L. Ed. 866; County of Ralls v. Douglas, 105 U. S. 728, 26 L. Ed. 975.

2—Com'rs of Marion County v. Clark, 94 U. S. 278, 24 L. Ed. 59.

3—Speer v. Board of County Com'rs of Kearney County, 88 Fed. 749 C. C. A.

4—Com'rs of Anderson County v. Beal, 113 U. S. 227, 28 L. Ed. 966.

5—Grand Chute v. Winegar, 15 Wall. 355, 21 L. Ed. 170.

evidence as an error in Orleans v. Platt,[6] the proceedings of the county judge in respect to the issue of bonds and the bonds themselves were sought to be excluded. The court held that this was a misconception of the law of evidence that the plaintiff had a right to exhibit his case and that this evidence according to his view were links in his chain of title to recover. To shut them out would have been to condemn him unheard and would be to give a judgment against him without trial. The admissibility of testimony under such circumstances and its effect if it is admitted and all the other evidence in are very different questions.

§ 409. Appeal; bill of exceptions.

A ruling in the Circuit Court in sustaining or overruling a demurrer to a declaration and rendering judgment for the wrong party may be examined in an appellate court by a writ of error without any formal bill of exceptions. The reason for the rule as stated by the Supreme Court is that the error is apparent on the record and it is generally true that where this condition exists a bill of exceptions is unnecessary.[7]

In Walnut v. Wade,[8] it was held that under Section 700 of the Revised Statutes in force at the time the decision was rendered the only use of a bill of exceptions when there was a special finding of facts was to present the rulings of the court in the progress of the trial upon questions of law. If a bill of exceptions fails to disclose that it contains all the evidence the action of the lower court in directing a verdict cannot be reviewed nor can exceptions be taken to a charge which although somewhat

6—99 U. S. 576, 25 L. Ed. 404.

7—Rogers v. Burlington, 3 Wall. 654, 18 L. Ed. 79, followed in Mitchell v. Burlington, 4 Wall. 270, 18 L. Ed. 350.

8—103 U. S. 683, 26 L. Ed. 526.

lengthy was in effect a peremptory direction to the jury to return a verdict for the defendant.[9]

§ 410. Review on appeal.

A review on appeal of findings of fact is permitted under Section 649 of the United States Revised Statutes as in force at the time of this decision, for this section declares that the effect of a finding whether general or special is the same as that of the verdict of a jury,[10] but in a later case,[11] it was said that "there is no special findings of facts; and the general finding of the issues for the plaintiff is not open to review by this court."[12]

When a case is tried by a Federal court without a jury and the resulting judgment is brought by writ of error to an appellate court for revision, it is only the rulings of the court in the progress of the trial of the case and the sufficiency of the facts found to support the judgment that can be reviewed.[13] When a trial court to which a cause has been submitted makes a special finding of facts, the appellate court has no authority to inquire whether the evidence supports the findings but only whether the facts found support the judgment.[14]

§ 411. Scope of inquiry on appeal.

On appeal to the Supreme Court of the United States from a lower Federal court the appellate court is not confined in its review of the decision of the lower court within the same limits that it would be if the case had

9—E. H. Rollins & Sons v. Board of Com'rs of Gunnison County (Colo.), 80 Fed. 692 C. C. A.

10—Walnut v. Wade, 103 U. S. 683, 26 L. Ed. 526.

11—Santa Anna v. Frank, 113 U. S. 339, 28 L. Ed. 978.

12—U. S. Rev. Stats., Sec. 700, 1899.

13—Grattan Twp. v. Chilton, 97 Fed. 145 C. C. A.; Syracuse Twp., Hamilton County, Kan. v. Rollins, 104 Fed. 958 C. C. A.

14—Syracuse Twp. v. Rollins, 104 Fed. 958 C. C. A.

been brought to that court on error from the judgment of a state court.[15] The appellate court is limited in its inquiry on review to errors assigned. The plaintiff in error cannot be permitted to present for the first time in an appellate court questions to which no objections were made on the trial or which are not raised by assignment of error.[16] So also held in respect to pleadings not filed in compliance with Equity Rule 31.

Exceptions must be taken to adverse rulings in order that they may be considered by the appellate court. In a late case,[17] the records disclosed that certain assessment lists were objected to purely for immateriality when they were offered but as no exception was saved when they were admitted, for this reason the objection to them was waived and could not be noticed on review by the appellate court.

In an action at law the appellate court is one for the correction of the errors of the court below exclusively. Questions therefore which were not presented to or decided by that court are not open for review because, as it has been said, the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called,[18] and in a later case than the one just cited,[19] on the same point, the United States Circuit Court of Appeals said: "No objection to the sufficiency of the petition was taken by demurrer or otherwise in the court below, and the answer of the defendants did not deny the allegation of the petition that

15—Fall Brook Irrigation District v. Bradley, 164 U. S. 112, 41 L. Ed. 369.

16—Hinkley v. City of Arkansas City, 69 Fed. 768 C. C. A.; Speer v. Board of County Com'rs of Kearney County, 88 Fed. 789 C. C. A.; Brazoria County v. Youngstown Bridge Co., 87 Fed. 10 C. C. A.

17—E. H. Rollins & Sons v. Board of Com'rs of Gunnison County, 80 Fed. 692 C. C. A.

18—Board of Com'rs of Lake County, Colo. v. Sutliff, 97 Fed. 270 C. C. A.

19—Mayor, etc. of the City of Helena v. United States ex rel. Helena Water Works Co., 104 Fed. 113 C. C. A.

the relator was the owner and holder of the judgment. The objection that the relator does not show title by assignment, not having been made in the court below, cannot be taken here. To hold otherwise would involve the exercise of original instead of appellate jurisdiction. This is not permitted to us."

§ 412. Judgment; necessity for.

The general rule obtains that in case of non-payment of negotiable securities a mandamus will lie against a state court to compel the assessment and levy of the necessary taxes to pay them or interest due. The holder who resorts to the United States Courts must have reduced his claim either upon the bonds or the coupons to a judgment before he is entitled to that remedy.[20]

The appropriate proceeding, so it has been held repeatedly, is to sue at law and by judgment of the court establish the validity of the claim and the amount due and then by the return of an ordinary execution ascertain that no property of the corporation can be found liable to such execution and sufficient to satisfy the judgment; then if the corporation has the authority to levy and collect taxes for the payment of that debt a mandamus will issue to compel it to raise by taxation within its authorized limitations, if such exist, the amount necessary to satisfy the debt.[21]

20—County of Greene v. Daniel, 102 U. S. 187, 26 L. Ed. 99.

County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 283. So here, the court will grant the relief which the complainants, under their contracts, are entitled to have, if such relief can be obtained from the county; but if by reason of intervening obstacles since the contract was made whether arising from laches or default of its officials or repealing legislation, this cannot be secured, an alternative and compensatory decree, that is, one for a money equivalent in the form of damages, will be directed.

21—Heine v. Levee Com'rs, 19 Wall. 655, 22 L. Ed. 223; Shepard v. Tulare Irrigation Dist. 94 Fed. 1.

§ 413. Amount of judgment.

The extent of recovery has been considered at length in other sections,[22] and the amount of the judgment will depend in some instances, it has been held upon the terms of the contract embodied in the bonds. In a Nebraska case,[23] where negotiable bonds were payable from annual levies of taxes at a definite rate, the county issuing them repudiated and refused to make further levies or payments after making such levies and applying the proceeds to the payment of the obligations for a series of years. The court held that the holder of the bonds could not maintain an action at law to recover a judgment against the county for the full amount and interest but only for that sum which was due according to the terms of the bond.

§ 414. Collection of judgment.

A judgment has the effect of a judicial determination of the validity of a demand and of the amount that is due but ordinarily it gives the judgment creditor no additional rights of taxation which he did not have before he secured his judgment. It gives him no new rights in respect to the means of payment,[24] but where statutes have been passed conferring powers and imposing duties on public officials to levy taxes to pay judgments they

22—See Sec. 351, ante.

Pfirman v. Dist. of Clifton (Ky.), 96 S. W. 810. See this case as to interest to be included in judgment against property owners when sued for delinquent taxes levied to pay street improvement bonds.

23—Washington County v. Williams, 111 Fed. 801 C. C. A.; see, also City if Asutin v. Cahill (Tex.), 88 S. W. 542.

24—United States v. County of Macon, 95 U. S. 582, 25 L. Ed. 331; Stryker v. Board of Com'rs of Grand County (Colo.), 77 Fed. 567 C. C. A.

United States v. King, 74 Fed. 493. A holder of warrants entitled to payment from a special fund, it was held in this case, did not lose through reducing them to a judgment the special remedy incidental to them.

supersede statutory powers in respect to the levy of taxes less extensive in their character existing at the time when the latter legislation was passed.[25]

§ 415. Discretionary power to order judgment paid in installments.

A number of cases are to be found in which the question suggested by the title of this section has been raised and involving the discretionary powers of the courts to require a judgment to be paid all at once or in installments. It seems to be the rule that this lies within the discretion of the court. In an early case in the Supreme Court of the United States,[26] on an application for a writ of mandamus to compel the city of East St. Louis, to levy and collect a tax with which to pay a judgment obtained by the relator on bonds and interest coupons issued by that city; the objection was made that the city could not levy and collect a tax sufficient in amount to pay the entire judgment at once. The court held for the reasons stated in its opinion that this should not be done in this case but suggested that it was at one time a question resting in the sound discretion of the court in ordering the collection.

The court in its opinion by Chief Justice Waite, said:

"The judgment is for interest in arrears and a small amount of principal. The law required a tax to be levied annually sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of a debt which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neg-

25—United States v. Saunders, 124 Fed. 124 C. C. A.

26—East St. Louis v. Amy, 120 U. S. 600, 30 L. Ed. 798.

lect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment which was all for past due obligations. Whether such a tax would be so oppressive as to make it proper not to have it all collected at one time was a question resting in the sound discretion of the court in ordering the collection. There is nothing here to show that there ought to have been a division."

In other cases it has been held that the court might exercise a sound discretion in the matter and require full satisfaction to be made by a levy for one year when within statutory or constitutional limitations or to distribute the burden over a reasonable number of years.[27]

§ 415a. Judgment as affecting character of debt or special remedy.

Where interest coupons, bonds or warrants are reduced to judgment, this fact does not affect the character of the debt,[28] and it has also been held that where warrants were entitled to payment from first moneys accruing from special taxes that the subsequent reduction of them

27—United States ex rel. Baer v. City of Key West, 78 Fed. 88 C. C. A.

City of Little Rock v. United States ex rel. etc., 103 Fed. 418 C. C. A. The number of the warants that should be issued, their respective amounts, and the time when they should be sent forth, were matters intrusted to the legal discretion of the court below. It was undoubtedly the duty of that court so to exercise that discretion that the right of the relator to the warrants should not be denied or impaired, and that no disturbance in the administration of the financial affairs of the city should be caused which was not necessary to the protection and enforcement of the right of the relator. The direction to issue numerous warrants in convenient amounts, instead of one warrant for the entire amount, was a wise and salutary exercise of the discretion of the court. It made the remedy it administered more efficient and helpful to the relator, without loss, injury or inconvenience to the city or its officers.

28—Ward v. Piper (Kan.), 77 Pac. 699.

to a judgment will not deprive the holder of the special remedy incidental to the debt.[29]

§416. Interference by state courts.

A state court cannot by injunction, nor can a state by action, legislative or otherwise, prevent the Federal courts from executing their processes or enforcing their judgments by mandamus for their payment.[30]

In Riggs v. County of Johnson, cited above, a judgment was rendered by the Federal courts upon certain bonds held invalid by decisions of the Supreme Court of the State of Iowa. In one of the state courts at the suit of tax payer, an injunction was issued perpetually enjoining the corporation issuing the bonds from levying the special tax provided for payment of the bonds. Mr. Justice Clifford in delivering the opinion of the court said: "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment otherwise the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution. * * * Authority of the Circuit courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law is beyond question and the power so conferred cannot be controlled either by the process of the state courts or by any act of the state legislature." * * * And after discussing the powers of the Federal courts to issue writs of mandamus under the conditions as found in the case, he proceeded to say: "Repeated decisions of this court have also determined that state laws whether general or enacted for the par-

29—United States v. King, 74 Fed. 493; but see State ex rel. Hopper v. Cottengin (Mo.), 72 S. W. 498.

30—Riggs v. County of Johnson, 6 Wall. 166; Sup'rs, etc. v. Durant, 9 Wall. 415; Hawley v. Fairbanks, 108 U. S. 543; Holt County v. National Life Ins. Co. of Montpelier (Vt.), 80 Fed. 686.

ticular case cannot in any manner limit or affect the operation of the process or proceedings in the Federal courts. The Constitution, itself, becomes a mockery if the state legislatures may at will annul the judgments of the Federal courts and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals. State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts."

§ 417. Inquiry into previous judgment.

This subject has already been considered and the leading cases referred to.[31]

It may not be inappropriate, however, to refer again to the case of Brownsville Taxing District v. Loague,[32] where it was held that in mandamus proceedings to compel the levy of a tax to pay a judgment rendered on bonds, the basis of the original judgment could be inquired into and if the bonds were void the court would consider this fact in determining the rights of the parties in the mandamus proceedings, the court said: "The power invoked is not the power to tax to pay judgments but the power to tax to pay bonds considered as direct and independent, and therefore when the relator is obliged to go behind his judgments as money judgments merely to obtain the remedy pertaining to the bonds the court cannot decline to take cognizance of the fact that the bonds are void and that no such remedy exists."

Dissolution of public corporation. The rights of creditors on the division or dissolution of public corporations in respect to the payment of existing obligations, has already been considered at length in preceding sec-

31—See Secs. 315, et seq., ante.

32—129 U. S. 493; see, also, Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611.

tions, [33] as well as a full discussion of sources of payment and the rights of the judgment creditor to seize the property of public corporations upon execution.[34]

§ 418. Mandamus as a remedy.

The modern writ of mandamus has been defined by a well-known author,[35] as "a command issuing from a common law court of competent jurisdiction in the name of the state or sovereign directed to some corporation officer or inferior court requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed or from operation of law." The same author in stating the specific relief which it affords says that a mandamus operates much in the nature of a bill in Chancery for specific performance, the principal difference being that the latter remedy is used for the redress of purely private wrongs or for the enforcement of contract rights, while the former generally has for its object the performance of obligations arising out of official station or specially imposed by law upon the respondent. It is not a preventative remedy like injunction but a remedial one. It is used to compel action and to coerce the performance of a pre-existing duty.[36] It can only issue when there is a clear and undoubted legal right to be enforced or a duty which can be performed and where there is no other specific and adequate remedy. The Supreme Court of the United States in an early case,[37] in holding that a writ of mandamus would lie to enforce an existing official

33—See Sec. 917, et seq., ante.

34—See Sec. 343, et seq., ante.

35—High Extraordinary Legal Remedies, Section 1.

36—High Extraordinary Legal Remedies, Sec. 1, et seq.

37—Board of Sup'rs of Carroll County v. United States, ex rel. etc., 18 Wall. 71, 21 L. Ed. 771.

duty, said: "It is very plain that a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. And it may be observed that the office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it, then, the duty of the board of supervisors of a county in the State of Iowa to levy a special tax, in addition to a county tax of four mills upon the dollar, to satisfy a judgment recovered against the county for its ordinary indebtedness? The question can be answered only by reference to the statutes of the State." The language of this decision has been repeatedly used. "Mandamus lies to compel a party to do that which it is his duty to do without it; it confers no new authority and the party to be coerced must have the power to perform the act."[38]

38—Com'rs of Taxing District of Brownsville v. League, 129 U. S. 493, 32 L. Ed. 780.

Stryker v. Board of Com'rs of Grand County (Colo.), 77 Fed. 567 C. C. A. Equally well settled is the further proposition that a writ of mandamus will not be issued requiring a state officer to levy a tax or to do any other specific act, unless authority for the doing of that act can be found either in the express or implied provisions of some local statute. As was said in substance, by the Supreme Court in * * * state officers have no powers except such as have been conferred upon them by the laws of the state. They cannot be armed by the mandate of any court with an authority which they do not already possess; and no court, state or federal, can compel a municipal corporation to levy a tax which the laws of the state do not authorize it to levy. Moreover, it is not the office of a writ of mandamus to create rights or impose duties; its sole function is to compel the performance of those duties which already exist. City of Little Rock v. United States, 103 Fed. 419.

§ 419. Mandamus not available to control judgment or discretion.

The writ cannot issue in a case where discretion and judgment are to be exercised by the one to whom it is directed for it is well settled "that in all matters requiring the exercise of official judgment or resting in the sound discretion of a person to whom a duty is confided by law mandamus will not lie either to control the exercise of that discretion or to determine the decision which shall be finally given." It is elementary law that a writ will only lie to enforce a ministerial duty as contradistinguished from a duty which is purely discretionary.[39]

§ 420. Available as a remedy for the enforcement of a judgment or to compel the payment of corporate bonds.

Where there has been a failure to levy taxes as required by law for the payment of the interest or principal of negotiable securities, or where there has been a judgment rendered in cases of default in payment of either principal or interest, the authorities are uniform in holding that the appropriate remedy against a public corporation is a writ of mandamus to compel the levy and collection of a tax and the appropriation of the proceeds in liquidation of the established claim.[40]

39—Board of Com'rs of Grand County v. King, 67 Fed. 202; Heine v. Board of County Com'rs, 19 Wall. 655; High Extraordinary Legal Remedies, Sec. 42 and cases cited; Stryker v. Board of Com'rs of Grand County, 77 Fed. 567 C. C. A.

40—Von Hoffman v. City of Quincy, 4 Wall. 535; 18 L. Ed. 403; United States ex rel. Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; Walkley v. City of Muscatine, 6 Wall. 481, 18 L. Ed. 930; Washington County v. United States ex rel. etc., 9 Wall. 415, 19 L. Ed. 732; United States ex rel. Butz v. Muscatine, 8 Wall. 575, 19 L. Ed. 490; Rees v. City of Watertown, 19 Wall. 107, 22 L. Ed. 72; United States ex rel. Johnston v. County Court of Clark County, 95 U. S. 769, 24 L. Ed. 545; Davenport v. County of Dodge, 105 U. S. 237, 26 L. Ed. 1018; United States ex rel. Chandler v. County Com'rs of Dodge

In an early case in the Supreme Court of the United States,[41] the court held that this was the proper remedy and that the Federal courts had jurisdiction to issue the writ. The county of Knox in Indiana had issued bonds under authority of an act which made it the duty of the county board to assess a special tax each year to realize the amount of the interest upon the bonds to be paid for that year. The board had not only failed in this duty but also refused to perform it. The Supreme Court held as above stated that a writ of mandamus was the proper remedy to compel performance of the clear and unquestioned duty resting upon the county board.

County, 110 U. S. 156, 28 L. Ed. 103; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 20 L. Ed. 574; New Orleans Board of Liquidation v. Hart, 118 U. S. 136, 30 L. Ed. 65; East St. Louis v. Amy, 120 U. S. 600, 30 L. Ed. 798; Rogers v. Keokuk, 154 U. S. 546, 18 L. Ed. 74; United States ex rel. v. Lincoln County, 5 Dill. 184; United States ex rel. Baer v. City of Key West, 78 Fed. 88, C. C. A.

Holt County v. National Life Ins. Co., 80 Fed. 886, C. C. A. A determination in a final mandamus proceeding is conclusive. Fleming v. Trowsdale, 85 Fed. 190, C. C. A.; Little Rock v. United States, 103 Fed. 425, C. C. A.; Cleveland v. United States, 111 Fed. 347, C. C. A.; Washington County v. Williams, 111 Fed. 812, C. C. A.; Thompson v. Perris Irrigation District, 116 Fed. 770; United States ex rel. etc., v. Saunder, 124 Fed. 124, C. C. A.; Marra v. San Jacinto, etc., Irrigation Dist., 131 Fed. 780; Miller v. McWilliams, 50 Ala. 429; Vance v. Little Rock, 30 Ark. 441.

Board of Com'rs of Gunnison County v. Sims (Colo.), 74 Pac. 457. It is here held that under the provisions of Mills Annotated Stats., Sec. 941, the appropriate remedy of a bond holder to enforce the payment of interest is by mandamus against the proper officials to compel the levy of the tax, provided an action for money judgment will not lie. Columbia County v. King, 13 Fla. 447; People v. C., B. & Q. R. R. Co. (Ill.), 93 N. E. 410; Badger v. New Orleans, 49 La. Ann. 839, 21 So. 870, 37 L. R. A. 554; Darling v. Baltimore, 51 Md. 15; State v. Thorn, 9 Nebr. 458; Atlantic City Water Works v. Read, 50 N. J. L. 672, 15 Atl. 10; Theis v. Washita County, 9 Okla. 653, 60 Pac. 505; Commonwealth ex rel. Whelan, Pittsburg, 88 Pa. 83.

Cass County v. Wilbarger County (Tex.), 60 S. W. 988. Sufficiency of tax considered. Gay v. New Whatcom, 26 Wash. 396, 67 Pac. 88; Wells v. Mason, 23 W. Va. 459; State ex rel. Pfister v. Manitowoc County, 52 Wis. 428, 9 N. W. 607.

41—Com'rs of Knox County v. Aspinwall, 24 How. 376, 16 L. Ed. 735.

The court said: "Now, it is not alleged nor pretended but that, if this judgment had been obtained against the corporation in a State court, the remedy now sought could have been obtained; for it must be admitted, that, according to the well-established principles and usage of the common law, the writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. That this case comes completely within the category is too clear for argument; for, even assuming that a general law of Indiana permits the public property of the county to be levied on and sold for the ordinary indebtedness of the county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated. It is especially incorporated into the contract, that this corporation shall assess a tax for the special purpose of paying the interest on these coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of mandamus."

The question then was considered of the right of the Federal courts to issue the writ, and after an examination of the various statutes relative to the powers and jurisdiction of these courts, the opinion recited that "the jurisdiction of the court to give the judgment in this case was not disputed nor can it be denied that by the Constitution, Congress has the power to make laws necessary for carrying into execution all its judgments."

§ 421. What petition for mandamus should show.

Where the question of the repeal of a statute as affecting the right to levy a tax is involved, the petition should show the nature of the judgment upon which the writ of mandamus is based so that it can be determined whether a contract obligation has been impaired.[42]

A provision for the payment of the principal and interest on duly authorized public securities becomes a part of the contract on the issuance of the bonds which cannot be impaired by any subsequent legislation, and notwithstanding the attempted repeal of the provisions for payment by the legislature a Federal court which has rendered a judgment on the bonds or the coupons may compel the levy of a tax for its payment by mandamus.[43]

The case of Padgett v. Post, just cited, in stating the doctrine of the impairment of a contract obligation, as noted in the preceding paragraph, further and decisively held that the fact that subsequent legislation had been passed depriving the public corporation of its power to levy certain taxes could not be urged as a defense in the mandamus proceedings in the Federal courts.

§ 422. Rights of parties.

The rights of creditors not before the court cannot be considered in mandamus proceedings to compel the levy and collection of taxes. The claim in one case,[44] that the city owed a large amount of other debts and that if the tax sought to be collected in the present proceedings were

42—Brownsville Taxing Dist. v. League, 129 U. S. 493; Board of Com'rs of Grand County v. King, 67 Fed. 202, C. C. A.

43—Hicks v. Cleveland, 106 Fed. 459; Padgett v. Post, 106 Fed. 600, C. C. A.; see, also, Sec. 362, ante.

44—City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; see, also, Mayor, etc., of New Orleans v. United States ex rel. Stewart, 49 Fed. 40, C. C. A.

so collected that the other creditors would be entitled to share in the distribution of the proceeds was not held tenable; the court said: "When any other creditor complains in a proper proceeding and asks that the funds be marshaled, it will be time enough to consider the subject."

If the parties in mandamus proceedings are entitled to relief they are clearly entitled to that action by the officials which will set in motion all of the machinery necessary for the levy, the assessment and the collection of the taxes sought to be levied and collected.

Bonds and coupons are entitled to payment out of the general funds of the town and county raised for general use, after exhausting a special fund directed to be levied for their payment, and if the power to levy a tax sufficient to pay the debt exists the town may be compelled to do so by writ of mandamus,[45] and it has also been held that where a municipality and its officers have the power to pay a judgment against the city by the issue to the owner of the judgment of city warrants which are receivable for city taxes and have no other way to pay it, it is their duty to issue the warrants and a writ of mandamus will be issued to compel them to discharge that duty.[46]

Necessity for demand. Where the duty of a municipality in respect to the levy of taxes to pay bonds is unconditional, a specific demand and refusal by the city is not necessary to entitle a holder to the issuance of a writ of mandamus compelling the city officials to make the levy required.[47]

Since a writ of mandamus is based upon a default of

45—Town of Darlington v. Atlantic Trust Co., 78 Fed. 596, C. C. A.; Sibley v. Mobile, 4 Am. Law Times N. S. 226.

46—City of Little Rock v. United States ex rel., etc., 103 Fed. 418.

47—City of Austin v. Cahill (Tex.), 88 S. W. 542.

duty the levy of taxes, the time for which has not yet arrived, cannot be directed.[48]

§ 423. Mandamus as an ancillary remedy.

The writ of mandamus is considered in the nature of an execution and its object is to enforce the payment in some way provided by law of the judgment which has been recovered. It is ordinarily not an original action in the Federal courts but a writ issued in aid of already acquired jurisdiction, and in such cases becomes the substitute for the ordinary process of execution to enforce the judgment.[49]

§ 424. Right of Federal courts to issue writ.

It was early urged in connection with bond litigation that the Federal courts had no right to entertain applications for a writ of mandamus, and this point was made with special force in some states where by the laws of the state such applications could only be made before state courts. It was early settled, however, in respect to this contention that the Federal courts might issue writs of mandamus to compel the levy of taxes to pay judgments on public securities rendered against public corporations, when by the laws of the state it either expressly or impliedly was made the duty of designated public officials to make provision for the payment of such obligations or of such judgments by the exercise of the power of taxation. Of the existence of the right of the Federal court to issue the writ, as said in one case, "At

48—City of Austin v. Cahill (Tex.), 88 S. W. 542.

49—United States ex rel. Riggs v. Johnson County, 6 Wall. 166; Weber v. Lee County, 6 Wall. 210; Bath County v. Amy, 13 Wall. 244; Ralls County Court v. United States, 105 U. S. 733, 25 L. Ed. 723; Stryker v. Board of Com'rs of Grand County (Colo.), 77 Fed. 567, C. C. A.; Lafayette County Co. v. Wunderlich, 92 Fed. 313, C. C. A.; City of Santa Cruz v. Waite, 98 Fed. 387, C. C. A.

the present time there can be no reasonable doubt."[50] The jurisdiction of the Federal courts in respect to the issue of the writ of mandamus necessarily cannot be regulated or affected by state statutes.[51] All the questions arising in mandamus proceedings as to the issue of the writ and the practice to be followed as involving a process of the Federal courts is peculiarly within the province of these courts to decide.[52]

Injunction by state court. In United States ex rel. Riggs v. Johnson County,[53] it was held in most emphatic terms that a state court could not issue an injunction perpetually enjoining a public corporation from levying special taxes devoted to the payment of bonds and coupons which could control in any way the coercive effect of a writ of mandamus issued by the Federal courts. Any proceeding of this kind is necessarily futile in respect to an action in the national courts against a debtor by holders of bonds or against a mandamus to enforce a judgment rendered in such an action.[54]

In the Riggs case, there was suggested on behalf of the defendants that if the writ of mandamus should issue and they should obey its commands they would be exposed to suit for damages or to attachment for con-

50—Von Hoffman v. City of Quincy, 4 Wall. 535; United States ex rel. Riggs v. County of Johnson, 6 Wall. 166; Butz v. City of Muscatine, 8 Wall. 575; United States ex rel. etc. v. Clarke County, 96 U. S. 216; Wolff v. New Orleans, 103 U. S. 358; Stryker v. Board of Com'rs of Grant County, Colo., 77 Fed. 567; Duell County, Nebr. v. First National Bank of Buchanan County (Mo.), 86 Fed. 263, C. C. A.

51—United States ex rel. Riggs v. Johnson County, 6 Wall. 167, 18 L. Ed. 768; Rosenbaum v. Bauer, 120 U. S. 450, 30 L. Ed. 743; Board of Liquidation v. United States ex rel., 108 Fed. 689, C. C. A.

52—Butz v. City of Muscatine, 8 Wall. 575, 18 L. Ed. 490.

53—6 Wall. 166.

54—See also United States ex rel. Webber v. Lee County, 6 Wall. 210, 18 L. Ed. 781. State courts cannot enjoin the process of proceedings in the Circuit courts; not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action. Clapp v. Otoe County (Nebr.), 104 Fed. 473, C. C. A.

tempt or imprisonment, having violated the terms of the injunction issued by the state courts. The court in that case said on this point: "No such apprehensions are entertained by the court, as all experience shows that the state courts at all times have readily acquiesced in the judgments of this court in all cases confided to its determination under the Constitution and laws of Congress. Guided by the experience of the past, our just expectations of the future are that the same just views will prevail. Should it be otherwise, however, the defendants will find the most ample means of protection at hand. The proper course for them to pursue, in case they are sued for damages, is to plead the commands of the writ in bar of the suit, and if their defence is overruled, and judgment is rendered against them a writ of error will lie to the judgment under the twenty-fifth section of the Judiciary Act."

§ 425. Parties in mandamus proceedings.

In determining the proper parties in mandamus proceedings to compel the levy of taxes for the payment of a judgment on bonds or coupons or their direct payment and to whom the writ should be directed, it is necessary to consider the nature of the writ and the official duties which are required of the persons through whom the writ is sought. The writ should be directed to those officials who are by law charged with the performance of the duty sought to be required of them. The question is also involved of whether the relator has a legal right to its performance from them either by virtue of a judgment he has already obtained or through his ownership of the bonds and coupons. If such officials have the legal duty to perform which is required of them and the relator has the legal right to its performance from them, he is clearly entitled to the writ,[55] and it is not necessary that

55—Heine v. Levee Com'rs, 19 Wall. 655, 22 L. Ed. 223; Rees v. City of Watertown, 19 Wall. 107, 22 L. Ed. 72; Labette County

they or any of them be parties to any of the original proceedings, or that they should have been filling the official positions at the time when the public corporation through its legal representatives first failed in the performance of the legal duty required of it.[56]

It has also been held that the relator is entitled to an effective writ and if he can have it only by joining in its commands, all those whose coercion is by law required, even though it be by separate and successive steps in the performance of those legal duties which are necessary to secure to him his legal right, all these officials are proper parties, otherwise, it was held in a case in the Supreme Court of the United States that the whole proceeding is liable to be rendered nugatory and abortive.[57]

Where the boundaries of a county were changed so as to place a township which had issued railroad aid bonds within the limits of another county, the officials of this county upon whom devolved the duty of levying and collecting taxes for the payment of them, were proper parties defendant in mandamus proceedings.[58]

Under the decision of Labelle County Commissioners v. United States ex rel., etc., cited above, it is proper to direct a writ of mandamus not only to existing officials, but also to their successors.[59]

In Quincy v. Jackson,[60] the court in considering the question of to whom the writ should be directed, said: "We have only to inquire whether the corporate authorities of the city have the power under the laws of Illinois to levy and collect such a tax," and further held

Com'rs v. United States ex rel. Moulton, 112 U. S. 217, 28 L. Ed. 698; Guthrie v. Sparks, 131 Fed. 443, C. C. A.; Fleming v. Trousdale, 85 Fed. 189, C. C. A.

56—Board of Liquidation v. United States ex rel., etc., 108 Fed. 689, C. C. A.

57—La Belle County Com'rs v. United States ex rel. Moulton, 112 U. S. 217, 28 L. Ed. 698.

58—Folsom v. Greenwood County, 137 Fed. 449, C. C. A., reversing 130 Fed. 730.

59—Hicks County Auditor et al. v. Cleveland, 106 Fed. 459.

60—113 U. S. 332; 28 L. Ed. 1001.

that when the legislature of Illinois granted the power to the City of Quincy to subscribe to the stock of certain railroads and issue bonds in payment, the implied authority was given to levy taxes for their payment and "in giving authority to incur obligations for such extraordinary expenses the legislature did not restrict its corporate authority to the limit of taxation provided for ordinary debts and expenses." In Board of County Commissioners, Leavenworth County v. Sellew,[61] it was held by Chief Justice Waite that in the State of Kansas, counties are bodies corporate and politic, capable of suing and being sued. Their powers are exercised by boards of county commissioners chosen by the electors. The name by which they can sue or be sued is the board of county commissioners of the county of ————. Under the Kansas statutes in legal proceedings process is served on the clerk of the board and when a copy of a writ of mandamus is served on the clerk of the board, it is service on the corporation and equivalent to a command that the persons who may be members of the board should do what is required. A peremptory writ of mandamus is properly directed to the board in its corporate capacity "if the members failed to obey, those guilty of disobedience may, if necessary, be punished for contempt."

Where it was made to appear that the office of president of a township issuing bonds and on which a judgment had been obtained was vacant when the judgment was rendered and had been continuously so since that time, the Supreme Court of the United States held that the relator was entitled to a writ of mandamus directing the county to levy a tax upon the taxable property of the township for the payment of the judgment.[62]

61—99 U. S. 624, 25 L. Ed. 333.

62—County Com'rs of Cherokee County v. Wilson, 109 U. S. 621, 27 L. Ed. 1053.

§ 426. Mandamus not a creative writ.

Mandamus, as already suggested, is not a creative writ. Its office is not to create new duties nor powers but to compel the discharge of those already imposed by the law of the state and the exercise of those already existing. This principle has been stated by a distinguished legal author as follows,[63] "An important feature of the writ of mandamus, and one which distinguishes it from many other remedial writs, is that it is used merely to compel action and to coerce the performance of a pre-existing duty. In no case does it have the effect of creating any new authority, or of conferring power which did not previously exist, its proper function being to set in motion and to compel action with reference to previously existing and clearly defined duties. It is therefore in no sense a creative remedy, and it is used only to compel persons to act when it is their plain duty to act without its agency." A writ therefore cannot be awarded to compel a public corporation to levy any taxes which are not authorized by law;[64] and the fact that in past years a city has failed to make the maximum levy authorized by its charter will not justify a levy in any year in excess of its charter limitations. The remedy afforded by the writ of mandamus is prospective.[65]

In a case from Colorado,[66] on this point the court said: "A court has no taxing powers, and can impart none to the county authorities. It has no jurisdiction to coerce

63—High Extraordinary Legal Remedies, Sec. 7.

64—Sup'rs, etc., v. United States, 18 Wall. 71, 21 L. Ed. 771; City of Cleveland v. United States, 111 Fed. 341; Ralls County Court v. United States, 105 U. S. 733, 26 L. Ed. 1220.

United States ex rel., etc., v. County of Macon, 99 U. S. 582. We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.

65—City of Cleveland v. United States ex rel., etc., 111 Fed. 341.

66—Board of Com'rs of Grant County v. King, 67 Fed. 202, C. C. A.

the levy of a tax except where the law has made it the clear and absolute duty of the proper authorities of the county to levy such a tax. When the law has made it the duty of the levying court or board to levy a tax to pay a specified class of indebtedness, the Federal court in which a judgment has been rendered on that class of indebtedness may, by mandamus, compel the assessment, levy, and collection of a tax to pay such judgment; but this, say the Supreme Court, is the limit of its power." If the power, however, exists to levy taxes at the time bonds were issued the corporate authorities can be required to levy taxes for the payment of a judgment rendered on the bonds although legislation has been subsequently passed attempting to repeal the power to tax as originally conferred.[67] The power to levy taxes for the payment of bonds or of judgments necessarily depends in many instances upon the grant of special authority, and the bond holder or judgment creditor may be limited in his right to compel the levy of taxes by the special authority thus conferred.[68]

Heine v. Board of Levee Commissioners. This was a suit in Chancery, [69] brought by the holders of certain levee bonds issued by a quasi-corporation, under the laws of the State of Louisiana, a Board of Levee Commissioners, having the power to issue bonds and provide for the payment of interest and principal by taxes, to be levied upon the taxable property within the levee district. The bill alleged failure to levy the taxes to pay the interest and further that the persons duly appointed as levee commissioners had pretended to resign their offices for the purpose of evading the duty of levying taxes for the

67—Von Hoffman v. City of Quincy, 4 Wall. 535, 18 L. Ed. 403; Ralls County Court v. United States ex rel., etc., 105 U. S. 733, 26 L. Ed. 1220; see, also, Sec. 358, et seq., ante.

68—United States ex rel, etc., v. County of Macon, 99 U. S. 582, 25 L. Ed. 331.

69—Heine v. Levee Com'rs, 19 Wall. 655; 22 L. Ed. 223.

payment of the bonds in question and the interest. The relief sought was that the levee commissioners be required to assess and collect the taxes necessary to pay the bonds and interest and if after a reasonable time they should fail to do so that the district judge be authorized to do the same. No judgment had been recovered at law on the bonds or any of them, nor had any attempt been made to collect the money due by action in the common law courts. A demurrer to this bill was sustained in the Circuit Court and the plaintiffs appealed from the decree of dismissal rendered on that demurrer. The decree of the Circuit Court was affirmed. The court in its opinion by Mr. Justice Miller in part said: "The question thus presented by the present case is not a new one in this court. It has been decided in numerous cases, founded on the refusal to pay corporation bonds, that the appropriate proceeding was to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt."

And on the rights of the Federal Courts in respect to the exercise of the power of taxation the court further said: "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National. In the case before us the National sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other

tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

§ 427. Same subject; writ denied.

The writ will therefore be denied as indicated in the cases cited under the preceding section where the authority to tax does not exist either because in excess of a constitutional or statutory limit or because conferred by an unconstitutional law.[70]

A public corporation cannot be compelled to levy a tax in excess of the limit prescribed by legal authority, and if the respondent in mandamus proceedings has exercised the full power conferred upon it by the statutes in force when the relator's bonds were issued and its power has not been enlarged by subsequent statutes the writ must be denied.[71]

§ 428. Control of municipal discretion.

It frequently happens that the amount of taxes authorized for public purposes is limited by law and the appropriation or use of the proceeds has been committed by law to public officials to be disbursed in their discretion

70—O'Brien et al. v. Wheelock, et al., 95 Fed. 883 C. C. A.; Territory v. Board of Com'rs of Santa Fe County (N. Mex.), 89 Pac. 252; United States v. Macon County Court, 35 Fed. 483; State v. Shortridge, 56 Mo. 129.

71—United States ex rel. Spitzer v. Town of Cicero, 50 Fed. 147.

in the payment of current expenses of the corporation and for other purposes. The question of the extent to which a court will attempt to interfere or control this discretion has been raised in a number of cases. In some it has been held that the courts will not control such discretion except to the extent of compelling the appropriation of any surplus that may remain after the payment of current expenses to the payment of the judgment.[72]

In one case,[73] an attempt was made to compel the appropriation of moneys from a fund raised for general purposes to the payment of a judgment, in addition to the funds derived from a special tax authorized for the purpose of paying interest on bonds and providing a sinking fund to liquidate the same, the court held that this could not be done and said: "That fund (provided for general expenses), by the terms of the charter of the city, under which the bonds were issued, is authorized for the purpose of paying the necessary current expenses of administration, not including payments on account of the bonds of the municipal corporation. And admitting that any surplus of such fund, in any year, remaining after payment of such expenses, ought to be applied to the payment of the interest and principal of the bonds, that could only be required when such surplus should have been ascertained to exist. In the present judgment the court has undertaken to foresee it, and by mandamus to compel the city, by limiting its expenditures for its general purposes, to create the surplus which it appro-

72—Butz v. City of Muscatine, 8 Wall. 575; Clay County v. McAleer, 115 U. S. 616; 29 L. Ed. 482; City of Cleveland v. United States ex rel. etc., 111 Fed. 341 C. C. A.; Boskowitz v. Thompson (Calif.), 78 Pac. 290. The court here held, however, that while a Board of Directors of an election district had a certain discretion in determining the amount of assessment necessary to raise the interest on its outstanding bonds, its action was subject to the control of the judiciary in case of an abuse of that discretion. Moore v. New Orleans, 32 La. Ann. 726; State v. Trammel (Mo.), 11 S. W. 747.

73—East St. Louis et al. v. United States ex rel. Zebley, 110 U. S. 321, 28 L. Ed. 162.

priates. But the question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it."

§ 429. When courts will control discretion in respect to current expenses.

While the general rule in respect to the control by the courts of municipal discretion in expenditures for the payment of current expenses is as stated in the preceding section, yet in some instances the courts have held that the authorities of public corporations do not possess an unlimited discretion in respect to municipal expenses as against creditors. In one case it was decided that it was an entirely just and reasonable view that boards of county commissioners under the laws of Nebraska were not vested with such an absolute control over the disposition of the county revenues as would enable them to defeat the claims of judgment creditors by swelling the estimate for county expenses to such a sum as would exhaust the entire county revenue for a given year or for a series of years, that a board of commissioners should make a fair effort to pay a judgment by cutting down to some extent the outlay for current expenses. The court said: "Such expenses by judicious management are usually capable of being reduced to some extent without injury to the public service; and when they can be so reduced and a portion of the current revenues applied to the payment of judgment creditors that course should be pursued and the courts may properly require that it should be pursued,"[74] and in another case where it was claimed that the entire revenues of the city had been

74—Duell County, Nebr. v. First National Bank of Buchanan County, Mo., 86 Fed. 264 C. C. A.

appropriated and were necessary for the running expenses, the court held that while it was not within its province to interfere with the distribution of the revenues of a city when the plain duties of its officers are performed, yet it was vested with the power to examine a budget when made and to determine therefrom the compliance or non-compliance with a plain and positive duty in respect to the payment of a judgment,[75] and that it was not within the discretion of the city council to exhaust the entire revenue with one class of disbursements and leave the other to accumulate. The court said: "In truth it seems to be the plainly expressed intention of both the legislative and judicial branches of the government to protect the city of New Orleans from the shoals and quicksands of financial embarrassment on account of any further accumulation of unfunded indebtedness."

§ 430. Mandamus; defenses.

The absence of authority to levy taxes has been considered in previous sections and the rule there stated that it is a sufficient defense in mandamus proceedings. The fact that a judgment has become not only dormant but dead affords a defense and no suit can be maintained upon it where a writ of mandamus was issued and served but no other steps were taken for more than six years. The court held that it could not be said that a mandamus suit was pending during that time within the rule that the statute of limitations does not run against a party while he has a suit pending to enforce his claim.[76]

Distress to debtor, no defense. The right of a creditor to the payment of the debt and the enforcement of that payment by all the legal remedies which the law gives

75—Mayor etc. of New Orleans v. United States ex rel. Stewart, 49 Fed. 40 C. C. A.

76—Dempsey v. Twp. of Oswego, 51 Fed. 97 C. C. A.

him cannot be stricken down or impaired because the enforcement of the writ may embarrass the debtor. Mandamus will not be refused therefore on account of diminished resources, or distress of debtor.[77]

§ 431. Failure to perform duty no defense.

The fact that there has been a default in the payment of the interest will not serve as a defense [78] to excuse the payment of interest, otherwise because it was not paid at the proper time would enable a public corporation to profit by its own wrong.

In general, the failure of public officials to levy and collect taxes or to make reports required of them by law as a basis for a tax assessment cannot be urged as a valid defense.[79]

§ 432. Statutes of limitation as a defense.

The provisions of a statute of limitations may be pleaded as a bar to an action brought on negotiable securities or on coupons which may be attached to them. The questions involved in an action on coupons have been fully considered in previous sections.[80] Such provisions vary in the different states and an examination of the particular statutes will be necessary to establish the time within which the action can be commenced.[81]

77—City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Rees v. City of Watertown, 19 Wall. 107; 22 L. Ed. 72; City of Little Rock v. United States ex rel., etc., 103 Fed. 418.

78—Hicks County Auditor et al. v. Cleveland, 106 Fed. 459; Padgett et al. v. Post, 106 Fed. 600.

79—Hawley v. Fairbanks, 108 U. S. 543, 27 L. Ed. 820; Sibley v. Mobile, 4 Am. Law Times N. S. 226; Denny v. City of Spokane, 79 Fed. 719 C. C. A.

80—See Sec. 194, et seq., ante.

81—Tipton v. Smythe (Ark.), 94 S. W. 678; Coquard v. Village of Oquawka (Ill.), 61 N. E. 660.

Davis v. Board of Com'rs of Lincoln County (Nev.), 45 Pac. 982. Bonds payable from special fund. Gould v. City of Paris (Tex.), 4 S. W. 650; Thornburgh v. City of Tyler (Tex.), 43 S. W. 1054; City of

The fact that a tax has never been levied for the payment of bonds will not prevent such a plea.[82] Where bonds have been held invalid an action brought on an implied obligation is properly commenced within the statutory period after the repudiation of the securities,[83] and where warrants were exchanged for void county bonds, it was held that the statute of limitations did not begin to run against an action by a holder of the bonds to rescind the transaction and enforce the warrants until the bonds are repudiated by the county.[84] Limiting provisions will not be given a retroactive effect.[85] It is entirely competent however, for a legislature to pass a statute reducing the time for the commencement of action from that period which applied at the time the liability was incurred or the contract was made. This power, however, is subject to the fundamental condition that a reasonable time, taking all of the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. Under this rule a state legislature was held authorized to reduce a statute limitation on an existing obligation from twenty to six years.[86] A legislature may pass a law providing that municipal indebtedness shall be valid notwithstanding the date of issue. Such a law would operate to validate securities theretofore issued and upon which an action was barred by existing statute of limitations,[87] and the running of a statute of limitations upon

Tyler v. L. L. Jester & Co., 77 S. W. 1058.

But see Brown v. Milliken, 42 Kan. 769, 23 Pac. 167. As to effect of mutual mistake in respect to failure to levy taxes before due.

82—Robertson v. Blaine County, 85 Fed. 735.

83—Geer v. School District, 111 Fed. 682 C. C. A.

84—Board of Com'rs of Kearney County v. Irvine, 126 Fed. 689 C. C. A.

85—Waples v. City of Dubuque (Ia.), 89 N. W. 194.

86—Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886.

87—O'Neil v. City of Hoboken (N. J.), 63 Atl. 986.

public securities may be suspended by acts of the corporation in recognizing the debt.[88]

§ 433. Creditor's remedy, change of.

The rule has already been stated that remedies for the collection of a debt are essential parts of the contract of indebtedness and those in existence at the time it is incurred must be substantially preserved to the creditor.[89]

In a leading case in the Supreme Court of United States,[90] a statute was passed which prohibited the courts of that state to issue a mandamus for the levy of a tax for the payment of the interest or principal of any bonds except those issued under a premium bond plan. This, it was held, was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds involved in the case, and therefore null and void. When the contract was made the court held the writ of mandamus was the usual and the only effective means to compel the city authorities to do their duty in respect to the levy of taxes in case of their failure to provide in other ways the required funds. There was no other adequate and complete remedy. "The only ground on which a change of remedy, existing when a contract was made, is permissible without impairment of the contract, is that a new and adequate and efficacious remedy be substituted for that which is superseded. Here, no remedy whatever is substituted for that of mandamus, the holders are denied all remedy." The court further held in this case that an act requiring judgments

88—Underhill v. Sonora, 17 Calif. 173.

89—City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Rees v. City of Watertown, 19 Wall. 107, 22 L. Ed. 72; see Secs. 37 and 362, ante.

90—Louisiana v. Pilsbury, 105 U. S. 278; 26 L. Ed. 1090; see, also, Louisiana v. New Orleans, 102 U. S. 203, 207; Chicot County v. Sherwood, 148 U. S. 529, 37 L. Ed. 546.

to be registered with the city comptroller before being paid was not an impairment of the creditor's remedy, as "we are not able to see anything in the requirement which impedes the collection of the relator's judgments or prevents his resort to other remedies if their payment be not obtained."

CHAPTER XVI

VALIDITY OF LEGISLATION; TAXATION OF SECURITIES

§ 434. General observations.

To the law-making branch of a state government has been committed under our universally adopted system of a three-fold division of the powers of government the sole power and authority of making laws. Legislative authority is necessary in all instances for the incurring of debt by public corporations or the issue of their securities, negotiable or otherwise. Constitutional provisions restricting the incurring of a debt or the issuance of securities do not confer authority. Affirmative action is necessary by the legislature as the law-making body to accomplish this purpose. Since legislative action is essential it follows that the validity of an act under which the power to incur indebtedness or to issue securities is claimed must first be established from the standpoint of its validity as a law. If void as such it cannot confer the power claimed although if passed in proper form, in so far as the particular subject-matter involved is concerned, it would be valid.

No attempt will be made to discuss or to suggest in detail, the various points to be considered and investigated to establish the validity of a particular act as a law. The reader is necessarily referred on account of the limited scope of this work to the authorities on constitutional law and statutory construction. Some few suggestions however, will be made merely to serve as a reference to subjects for investigation.

§ 435. Validity of legislation.

The validity of an act extending railway aid or authorizing an issue of bonds may be also affected by constitutional provisions establishing a special procedure for the passage of such legislation. Requirements of this character are based upon the subject of the legislation and afford another illustration of the restrictions which are constantly imposed, for the purpose of limiting the incurring of indebtedness by public corporations and especially that of the character noted.[1]

Presumption of validity. The presumption of law exists in favor of right acting and right thinking. This principle in criminal law finds expression in the familiar phrase that one is presumed innocent until he is proven guilty. In corporation law the courts adopt the principle that an act of an incorporated body is presumed to be within its legal powers until its character to the contrary is established. The burden of proof ordinarily is upon the one who attacks the validity of a contract and this doctrine of presumption operates in the determination of nearly every legal question. The courts apply the same doctrine to the acts of law making bodies and the presumption exists in favor of their validity and the regularity of their proceedings. It applies to the manner in which their meetings are called, the time and place of meeting, character of the business transacted and the particular manner in which the business may have been transacted as affected by the existence of rules of order, provisions for a quorum and mode of passage and the like. All required formalities are presumed to have been complied with in the passage of the

1—Render v. City of Louisville, 142 Ky. 409, 134 S. W. 458; Com'rs of Buncombe County v. Payne, 123 N. C. 432, 31 S. E. 711.

Wittkowsky v. Board of Com'rs of Jensen County (N. C.), 63 S. E. 275. Constitutional provisions relative to the passage of acts allowing counties to issue bonds are mandatory.

law, and further that it is legal in respect to both its form, subject-matter and general characteristics. The burden of proof therefore is shifted to the one attacking the validity of a law.[2]

§ 436. Legality of legislative body; meetings, quorum, etc.

In order that the acts of a legislative body operate as authority it must have been regularly and legally constituted and elected pursuant to constitutional and statutory provisions. Its meetings must have been called by notice pursuant to legal authority and under the regulations and provisions of the law with respect to them. They must be held at the place designated by law and at regular or stated intervals and cannot be secret either as to time or place. If not prohibited by law adjournments can be taken from time to time and the power of the legislative body at the adjourned meetings will be full and ample to accomplish the work or transact the business, which could legally have been done at the meeting from which the adjournment was taken.[3]

The power to legislate at a special session or meeting may be limited by constitutional provisions and it follows that action other than that authorized will be void.[4]

2—Keene v. Jefferson County (Ala.), 33 So. 435; Ex parte Haskell, 112 Calif. 416, 32 L. R. A. 527; Parker v. Catholic Bishop of Chicago, 146 Ill. 158; 34 N. E. 473; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246; Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532; City of Lead v. Clatt, 13 S. D. 140; Stafford v. Chippewa Valley Electric Ry. Co., 111 Wis. 331; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

Abbott's Munic. Corps., pp. 1293, 1315, cases cited; Cooley Constitutional Limitations, 7th Ed., pp. 195, 236, 237, and cases cited; Lewis' Sutherland Stat. Construction, 2nd Ed., Sec. 497. Every presumption is in favor of the validity of legislative acts and they are to be upheld unless there is a substantial departure from the organic law, citing many cases.

3—State v. Smith, 22 Minn. 218; State v. Rogers, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520; Stockton v. Powell, 29 Fla. 1, 15 L. R. A. 42.

4—Rylands v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; Walker

To prevent hasty or corrupt action, constitutional provisions may require the presence of a required number of the total members of the body, and further the affirmative action of a designated number of either the whole body or those present. This number is commonly designated a quorum.[5]

A legislative body must act in the passage of legislation as such, it must have met in its legal capacity and transacted business in that capacity and according to law.

§ 437. Form of law.

The form of a legislative act, unless prescribed by the constitution or the general laws of a state, may take any phraseology or form which the experience or the taste of the writer may determine. The technical essentials of a law as provided in some states and as commonly held by the courts include a title, an enacting clause, the body or the substance of the law, a repealing clause, the operative clause and the proper and necessary signatures and approvals, although the repealing clause is frequently omitted.[6]

It is not necessary, ordinarily, to recite the authority for its passage or the reason for the passage of the act in question.

v. Inhabitants of West Boylston, 128 Mass. 550; Smith v. Tobenor, 32 Mo. App. 601; In re City of Pittsburgh (Pa.), 66 Atl. 348.

5—People v. Harrington, 63 Calif. 257; City of Chariton v. Holliday, 60 Ia. 391; Cascaden v. City of Waterloo, 106 Ia. 673; Pence v. City of Frankfort, 101 Ky. 534; Fournier v. West Bay City, 94 Mich. 463; Hutchinson v. Borough of Belmar, 61 N. J. L. 443, 39 Atl. 643; State v. Orr, 61 Ohio St. 394; Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 80; Cooley Const. Limitations, 2nd Ed. p. 201.

6—Aikins v. Phillips, 26 Fla. 281, 10 L. R. A. 158.

Hamilton v. State, 61 Md. 14. The great seal of the state is necessary to the authenticity of a bill.

Pope v. Town of Union, 32 N. J. L. 343; Galveston, etc. R. R. Co. v. Harris (Tex.), 36 S. W. 776; State v. Fountain, 14 Wash. 236; 44 Pac. 270; State v. Nohl, 113 Wis. 15, 88 N. W. 1004.

§ 438. The title.

To prevent ill-considered or corrupt measures, the constitutions of nearly all states contain numerous provisions relative to both the form and mode of passage of a law, its general characteristics, and the subject matter capable of enactment.

A constitutional provision most frequently found in respect to the legislation of state legislative bodies is, that no law shall deal with more than one subject, which shall be expressed in its title. Such a requirement has for its purpose the prevention of legislation as introduced from dealing with more than one subject, while the title refers to one alone, a serious reflection upon the care and attention which legislators give to those matters upon which their action is expected.[7]

This constitutional provision has also for its purpose the simplification of legislation by preventing incongruous and many subjects to be regulated or dealt with in the same bill, and it also operates in preventing members of legislative bodies and the people from being misled upon reading the title.[8]

7—Beard v. Wilson, 52 Ark. 290; Village of Hinsdale v. Shannon, 182 Ill. 312; City of Tarkio v. Cook, 120 Mo. 1.

8—Louisiana v. Pilsbury, 105 U. S. 278; 26 L. Ed. 1090. Its object is to prevent the practice common in all legislative bodies where no such provision exists of embracing in the same bill incongruous matters having no relation to each other or to the subject specified in the title by which measures are often adopted without attracting attention, but which, if noticed, would have been resisted and defeated. It thus serves to prevent surprises in legislation; Ackley School District v. Hall, 113 U. S. 135, 28 L. Ed. 954; Carter County v. Sinton, 120 U. S. 517, 30 L. Ed. 701; West Plains Twp., Meade County v. Sage et al., 69 Fed. 943.

Andrews v. Board of Com'rs of Ada County (Ida.), 63 Pac. 592. An act authorizing the construction of bridges but which was entitled "An Act providing for the issuance of negotiable coupon bonds," etc., held void as not expressing the subject of legislation contained in the act. Walker v. Caldwell, 4 La. Ann. 298; People v. Mahaney, 13 Mich. 481; Sun Mutual Insurance Co. v. Mayor, etc., of New York, 8 N. Y. 239; State v. County Debt of Davis

The language of the Minnesota constitution is typical of this class of constitutional provisions: "No law shall embrace more than one subject which shall be expressed in its title."[9]

The purpose of a constitutional provision of this character has been briefly noted above. In Cooley's Constitutional Limitations,[10] that author said: "It may therefore be assumed as settled that the purpose of these provisions was: first, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire."

It is not necessary that the title should specify in detail all of its sections or provisions, but it should contain sufficient to comply with the rule as fixed in the constitution of a particular state. If the title fairly describes the general purposes of the act it is ordinarily held sufficient. In the notes are cited cases involving the validity of an issuance of securities or the incurring of a debt, depending upon the validity of a law considered from the effect of this constitutional provision upon it.[11]

County, 2 Ia. 280; City of Chester v. Bullock, 187 Pa. 544; Yesler v. City of Seattle, 1 Wash. State, 308.

9—Article IV, Section 27.

10—Seventh Edition, p. 205.

11—San Antonio v. Mehaffy, 96 U. S. 312, 24 L. Ed. 816; Unity v. Burrage, 103 U. S. 447, 26 L. Ed. 405.

Montclair v. Ramsdell, 107 U. S. 147, 27 L. Ed. 431. It is not intended by the Constitution of New Jersey that the title of an act should embody a detailed statement, it need not be an index or abstract of its contents. Jonesboro City v. Cairo & St. Louis R. R. Co., 110 U. S. 192, 28 L. Ed. 116; Otoe County

The title as expressing the object of the act, it has been held, embraces and expresses any lawful means to achieve the object.[12]

v. Baldwin, 111 U. S. 1, 28 L. Ed. 331.

Carter County v. Sinton, 120 U. S. 517, 30 L. Ed. 701. This provision should receive a reasonable and not a technical construction; and looking to the evil intended to be remedied it should be applied to such acts of the legislature alone as are obviously within its spirit and meaning.

Geer v. Board of Com'rs of Ouray County, 97 Fed. 435. A bill which provided for the refunding of county debts evidenced by bonds and also the refunding of county debts evidenced by judgments was here held not to violate the constitutional provision. The court said: "The deliberate enactments of legislatures cannot be whistled down the wind on such frivolous pin points as this. The object of this constitutional provision was two-fold. It was to prevent surreptitious legislation, the insertion of enactments in bills which were not indicated by their titles, and to forbid the treatment of incongruous subjects in the same act. It never was intended to prevent the legislature from treating all of the various branches of the same general subject in one law, or from inserting in a single act all the legislation germane to its principal subject." Citing many cases. School District No. 11, Dakota County v. Chapman, 152 Fed. 887 C. C. A.; Chostkov et al. v. City of Pittsburgh, 177 Fed. 936.

Alabama Great Southern R. R. Co. v. Reed (Ala.), 27 So. 19. Constitution, Art. IV, Sec. 32, relative to appropriation bills applies only to legislative appropriations from the state treasury, not to acts authorizing the issue of bonds. The section requires appropriations to be made by separate bills each embracing a single subject. City Council of Montgomery v. Moore (Ala.), 37 So. 291.

City of Los Angeles v. Hance (Calif.), 54 Pac. 387. Under the constitutional provision an act may be void in part only.

Hayes v. Walker (Fla.), 44 So. 1147. An act entitled "An Act to extend the corporate limits of the city of Tampa" included a provision that added territory should not be liable for nor taxed to pay any existing indebtedness of the city of Tampa. It was held that this was germane to the subject expressed in the title. Smith v. City of Macon (Ga.), 58 S. E. 713; White v. City of Atlanta (Ga.), 68 S. E. 103.

Beaner v. Lucas (Kan.), 112 N. W. 772. An act authorizing certain designated cities "to erect a city hall," etc., held sufficiently broad to include provisions for an issue of bonds in anticipation of taxes. Board of Education of City

12—Antonio v. Mehaffy, 96 U. S. 212, 24 L. Ed. 816; Louisiana v. Pilsbury, 105 U. S. 278; Mahomet v. Quackenbush, 117 U. S. 508, 29 L. Ed. 982.

§ 439. Subject matter.

The legislative act must also be valid having in view constitutional provisions relative to its subject-matter, its general characteristics and its uniformity of operation throughout the state. In many of the states constitutional provisions are to be found, which require that all laws passed shall have a uniform and general operation. "All such laws shall be uniform in their operation throughout the state," "Laws of a general nature shall have a uniform operation throughout the state," and "All laws shall be general and of a uniform operation," are phrases which are constantly found in state constitutions. It follows necessarily that if in the passage of a law authorizing an issue of public securities such a constitutional provision has been violated, the power attempted to be conferred will not become operative.[13]

Provisions relative to uniformity in operation are coupled in many instances with a positive prohibition against

of Iola v. Fronk, 82 Kans. 782, 109 Pac. 415.

State v. Gunn (Minn.), 100 N. W. 97. An act authorizing county commissioners to issue certificates of indebtedness held valid.

City of Elmira v. Seymour, 97 N. Y. S. 623. Legislation authorizing the construction of bridges and the issuance of bonds held not to conflict with constitutional provision that no private or local bill shall embrace more than two subjects which shall be expressed in its title.

Buist v. City Council of Charleston, 77 S. C. 260, 57 S. E. 862. Act authorizing the city of Charleston to issue bonds to pay maturing bonded debt held constitutional.

City of Knoxville v. Gas (Tenn.), 104 S. W. 1084. Authority for an issue of bonds for various purposes held not unconstitutional under Constitution, Article II, Section 17, which provides that no bill shall embrace more than one subject. Ransom v. Rutherford County (Tenn.), 130 S. W. 1057; see, also, Abbott Municipal Corps., Sec. 523; Gray's Limitations of Taxing Power, Sec. 1815, et seq.; Cooley's Constitutional Limitations, 7th Ed., pp. 202-214; Lewis' Sutherland Stat. Construction, 2nd Ed., Chapter 4.

13—Wagner v. Milwaukee County (Wis.), 88 N. W. 577. An act authorizing the building of viaducts and the issue of bonds held not to violate Constitution, Article IV, Sec. 18, which provides that no local bill shall embrace more than one subject which shall be expressed in its title. City of Belleville v. Wells (Kan.), 88 Pac. 47; State v. Lytton (Nev.), 99 Pac. 855.

the passage of so-called special legislation. The cases involved under this subject have been generally referred to and discussed in a previous section,[14] upon the limitations on the power of the legislature to regulate and control public corporations and the subject of classification of cities or towns has been also previously considered.[15]

§ 440. Introduction of bills; form and mode of passage.

Many of the state constitutions also contain provisions relative to the introduction of bills and limiting in some instances the time within which they can be introduced before the end of the session.[16]

It is a customary provision also that revenue bills shall originate in the House of Representatives.[17] That a bill must be read a certain number of times, usually three, and on different days, is also a common requirement.[18]

14—See sec. 33, ante.

15—See sec. 33, ante. See, also, Waite v. City of Santa Cruz, 89 Fed. 619; Alexander v. City of Duluth (Minn.), 80 N. W. 623; Thomas v. City of St. Cloud (Minn.), 97 N. W. 125; Dickinson v. Board of Chosen Freeholders of Hudson County (N. J.), 58 Atl. 182; Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462.

16—Cox v. Com'rs of Pitt County (N. C.), 60 S. E. 516.

Baltimore & D. P. R. R. Co. v. Pumphrey (Md.), 21 Atl. 599. That provision of the Maryland Constitution, Art. III, Sec. 54, is mandatory which provides that the act of assembly which authorizes railroad aid "shall be published for two months before the next election for members of the House of Delegates in the newspapers published in said counties." Keene v. Jefferson County (Ala.), 33 So. 435; Sackrider v. Board of Sup'rs of Saginaw County, 79 Mich. 59.

17—Board of Com'rs of Ouray County, 97 Fed. 435 C. C. A. The Act of the Colorado legislature of April 17, 1869, authorizing counties to refund their judgment and bonded debts is not one for raising revenue within the meaning of that provision of the Colorado Constitution requiring that such bills shall originate in the house. Its validity is not therefore affected by the fact that it originated in the Senate.

18—Weill v. Canfield, 54 Calif. 111; Weyand v. Stoner, 35 Kan. 545; People v. McElroy, 72 Mich. 446; Chatham County Com'rs v. F. M. Stafford & Co. (N. C.), 50 S. E. 862; Miller v. Town of Pulaski (Va.), 63 S. E. 880; Cooley Constitutional Limitations, 7th Ed., pp. 116-117; Lewis' Sutherland Stat. Construction, 2nd Ed., Secs. 54-55.

The calling of the ayes and nays and a record of the vote or an entry of it upon the legislative journal is another provision frequently found.[20]

In the case of South Ottawa v. Perkins,[21] just cited, the bonds in question were held void because of the invalidity of the act under which authority to issue was claimed, as based upon a constitutional provision of Illinois, to the effect that "on the final passage of all bills the votes shall be by ayes and noes and shall be entered on the journal; and no bill shall become a law without a concurrence of a majority of all of the members elect in each House." The bill was not passed in the manner required and was therefore held unconstitutional.

§ 441. Publication and record.

It is a just and salutary principle that requires the legislative action of a law-making body to be promulgated or published in some manner before it can become effective. The principle requires not only that this should be done but also that the publication shall be made in that manner which shall best bring it to the attention of those whose actions and property it is designed to control or affect. The time therefore of publication may be material equally with the fact of publication itself, the language and medium. English is the official and national language in this country and it is scarcely neces-

20—Lutterloh v. City of Fayetteville (N. C.), 62 S. E. 758; Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154.

Board of Com'rs of Stanley County et al. v. Coler et al., 96 Fed. 284 C. C. A. This case followed the decisions of the Supreme Court of North Carolina which held that where the journals of the two houses did not show affirmatively that the yeas and nays on the second and third readings of said bill had been entered, the bill did not become a law.

21—94 U. S. 260, 24 L. Ed. 154; see, also, Ameskeag v. Town of South Ottawa, 105 U. S. 667, 26 L. Ed. 1024. Whether a seeming act of the legislature is, or is not, a law, is a judicial question to be determined by the court and not a question of fact to be tried by a jury.

sary to add that a law published in a language other than this will not be binding. General laws or constitutional provisions designate usually the requirements in respect to these matters.[22]

Record of proceedings. It is common for all law-making bodies to keep a full and complete record of their proceedings, including necessarily the various steps taken and which may be essential to the passage of a valid law, and containing a recital of all the facts and acts which are necessary to constitute legal action by them. A failure to properly record and enter as required by constitution or statutory provisions, or by the rules which a legislative body may have adopted for its own government, may invalidate a law.

The question has frequently arisen of the presumptive or conclusive effect of the record of the passage of a law as officially made by a legislative body. The presumption exists that the records are correct and state accurately and truthfully the facts therein recited.[23]

22—Baltimore & D. P. R. R. Co. v. Pumphrey (Md.), 21 Atl. 599. Act providing for railroad aid must be published two months before next election for members of the house of delegates in the newspapers published in the counties proposing to extend aid. National Bank of Commerce v. Town of Granada, 54 Fed. 100 C. C. A.

23—Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154. The Constitution requires each house to keep a journal and declares that certain facts made essential to the passage of a law, shall be stated therein. If those facts are not set forth the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. Marshall Field & Co. v. Clark, Collector, 143 U. S. 649; 36 L. Ed. 294; Lyons v. Wood, 153 U. S. 649; Wilkes County v. Coler, 180 U. S. 506, 45 L. Ed. 642; County of Yolo v. Coglan, 132 Calif. 265, 64 Pac. 403; Evans v. Brown, 30 Ind. 514; Honey v. State, 119 Ind. 395; Lafferty v. Huffman, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203; Weeks v. Smith, 81 Me. 538; Carr v. Coke, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737; Cox v. Com'rs of Pitt

But this presumption is not conclusive and it has been held in many cases that questions of fact relating to the entry of certain acts may be inquired into by the courts for the purpose of determining the truth.[24]

There are cases, however, which hold that the certificate of legislative officers that a law was regularly passed is conclusive upon the courts in respect to statutory or constitutional requirements.

In a New Jersey case, it was said: "My conclusion then is that, both on the ground of public policy and upon the ancient and well-settled rules of law, the copy of the bill attested in the manner mentioned and filed in the office of the secretary of state is the conclusive proof of the enactment and contents of a statute of this state and that such attested copy cannot be contradicted by the legislative journals or in any other mode."[25]

And in another case from Pennsylvania, it was said: "If every law could be contested on the ground of informality in its enactment the flood gates of litigation would be opened so widely that society would be deluged in the flood."[26]

In another case from the Supreme Court of the United States, the question was exhaustively considered and in the brief of the Attorney General as found on pages 298-301 of Book 36, Lawyer's Edition, is a complete reference

County (N. C.), 60 S. E. 516; Portland v. Yick, 44 Ore. 439, 75 Pac. 706; State v. Bacon, 14 S. E. 394, 85 N. W. 605; see, also, Gray's Limitations of Taxing Power, Sec. 1804, et seq.

24—Walnut v. Wade, 103 U. S. 683, 26 L. Ed. 525. A mere clerical error in keeping the journal, held not to invalidate a bill authorizing a grant of railway aid. Montgomery Beer Bottling Works v. Gaston, 126 Ala. 425, 28 So. 497; Clydewell v. Martin, 51 Ark. 559, 11 S. W. 882; People v. Stern, 35 Ill. 121; Koehler v. Hill, 60 Ia. 543, 14 N. W. 738; Balt. & D. P. R. R. Co. v. Pumphrey (Md.), 21 Atl. 599; People v. Sup'rs of Chenango, 8 N. Y. 317; Rodman v. Town of Washington, 122 N. C. 39, 30 S. E. 118; Com'rs of Buncombe County v. Payne, 123 N. C. 432, 31 S. E. 711; State v. Swan, 7 Wyo. 166, 51 Pac. 209, 40 L. R. A. 195.

25—Pangborn v. Joving, 32 N. J. L. 29.

26—Kilgore v. Magee, 85 Pa. 401.

in detail to the decisions and holdings of the courts of the different states of the Union bearing upon point involved. The case involved the validity of certain portions of the tariff act of October 1st, 1890; the court held that the signing by the Speaker of House of Representatives and by the President of the Senate in open session of the enrolled bill is an official attestation by the two houses, that such bill has passed Congress and when the bill thus attested receives the approval of the President and is deposited in the public archives, its authentication as a bill that has passed Congress is complete and unimpeachable. An enrolled act thus authenticated is sufficient evidence of itself that it has passed Congress. The court said: "As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to co-equal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act so authenticated, is in conformity with the constitution." The objection was further urged in this case that the bill in question could not be regarded as a law of the United States if the journal of either House failed to show that it was passed in the precise form in which it was signed by the presiding officers of the two Houses and approved by the President. The court said on this point: "The evils that may result from the recognition of the principle that an

enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them."[27]

§ 442. Repeal of prior legislation.

The validity of an act conferring authority to issue negotiable securities may be dependent upon the repeal of prior legislation and the general rule obtains that a repeal to be effective should be made directly and in express terms,[28] for while the power to legislate carries with it by implication, except as especially prohibited, the right to repeal or amend such legislation by subsequent action of the same body, the courts are disinclined to effect a repeal by implication, and unless it clearly appears, from the attendant circumstances and conditions that it was the intent of the legislative body to amend or repeal, or unless the legislation is so clearly inconsistent or repugnant that all cannot stand, the doctrine of repeal by implication will not be applied.[29]

27—Marshall Field & Co. v. Clark, Collector, 143 U. S. 649, 36 L. Ed. 294.

28—City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560. Repeal by implication when the prior and later act can consistently stand together is never admitted. Red Rock v. Henry, 106 U. S. 596, 27 L. Ed. 251; Board of Com'rs of Kingman County v. Cornell Univ., 57 Fed. 149 C. C. A.; Board of Com'rs of Pratt County, Kan. v. Society for Savings, 90 Fed. 233; Sisk v. Cargile (Ala.), 35 So. 114; Snell v. Bridgewater, etc., 41 Mass. 296.

Molyneaux v. City of Minneapolis (Minn.), 31 N. W. 1015. Certain acts authorizing cities of first-class to sell bonds for park purposes held cumulative. State ex rel. Chillicothe v. Gordon (Mo.), 135 S. W. 929; Town of Waynesville v. Satterthwait (N. C.), 48 S. E. 661.

29—City of Savannah v. Kelly, 108 U. S. 184, 27 L. Ed. 696; City

§ 443. Ordinances as legislation.

An ordinance passed by the legislative body of some municipal corporation is regarded universally as a law although limited in its scope and operation; though local in its effects it is nevertheless a law. The general requirements therefore in respect to the authority to pass, the mode and form of passage and the subject-matter and general characteristics of a law will equally apply to this special form of a law. Ordinances passed pursuant to legislative authority and which confer or deal with the issue of public securities must be tested, so far as their validity is concerned, by the requirements above noted in respect to general legislation. The subordinate local legislative body must have authority in the first place to deal with the subject-matter of the ordinance in question.[30]

The ordinance or resolution must comply with charter and general requirements as to form;[31] it must have

of Gladstone v. Throop, 71 Fed. 341 C. C. A.; Board of Com'rs of Pratt County, Kans. v. Society for Savings, 90 Fed. 233; Town of Mill Valley v. House (Calif.), 76 Pac. 658; Wichman v. City of Placerville (Calif.), 81 Pac. 537; Monical v. Heise (Ind.), 94 N. E. 232.

30—State v. Salt Lake City (Utah), 99 Pac. 255; Abbott Munic. Corps. Secs. 513, et seq.

31—City of Santa Barbara v. Davis (Calif.), 92 Pac. 308. Sufficiency of resolution calling special election considered.

City of San Diego v. Potter (Calif.), 95 Pac. 146. Sufficiency of ordinance calling election for issue of bonds passed upon.

Corker v. Village of Mountain Home (Ind.), 116 Pac. 108. Ordinance and notice held to state properly the purpose of proposed bond issue.

State ex rel. City of Chillicothe, v. Gordon (Mo.), 135 S. W. 929. The city was authorized by a statute to erect an electric lighting plant. The ordinance providing for the issuance of bonds used the word "construct" instead of "erect," held an immaterial variation. Carlson v. City of Helena (Mont.), 102 Pac. 39; Bew v. Ventnor City (N. J.), 80 Atl. 28; Village of Canandaigua v. Hayes, 85 N. Y. 488.

Stern v. City of Fargo (N. D.), 122 N. W. 403. A resolution providing for the issuance of bonds should state the amount to be voted upon as required by revised codes of 1905, otherwise the proceedings are invalidated. The purpose for which the bonds are to be issued

been passed in the mode prescribed in its charter, and must be regularly signed and approved,[32] and published in the manner designated by law.[33]

A proper consideration of these details as affecting the legality of a particular issue of securities or the incurring of indebtedness will depend upon the charter provisions of different and numberless public corporations and no consideration of the subject in detail would be of service owing to the great variety and difference of provisions and the constant change in them.

§ 444. Taxation.

The power of a public corporation to tax the securities issued by it or those of other organizations exists in all

must also be stated in the resolution.

Heffner v. City of Toledo (Ohio), 80 N. E. 8. An ordinance should comply with the statutory provision that no ordinance shall contain more than one subject which shall be expressed in its title. Conklin v. City of El Paso (Tex.), 44 S. W. 879.

City of Cheyenne v. State (Wyo.), 96 Pac. 244. Provision as to interest rate, held sufficient.

Hansard v. Green (Wash.), 103 Pac. 40. Ordinance held insufficient.

32—German Insurance Co. of Freeport v. Manning, 95 Fed. 597; Ryan v. Mayor, etc., of Tuscaloosa (Ala.), 46 So. 638; Goodyear Rubber Co. v. City of Eureka, 135 Calif. 613, 67 Pac. 1043.

Chase v. Trout (Calif.), 80 Pac. 81. Power to act at adjourned meeting involved.

Wrought-Iron Bridge Co. v. City of Arkansas City (Kan.), 52 Pac. 869; Fiscal Court of Breckinridge County v. Board of Trustees, etc. (Ky.), 118 S. W. 298; Vossen v. City of St. Clair (Mich.), 112 N. W. 746; State ex rel. Town of Canton v. Allen (Mo.), 77 S. W. 868; Board of Com'rs of Town of Salem v. Wachovia Loan & Trust Co. (N. C.), 55 S. E. 442.

Shattuck v. Smith (N. D.), 69 N. W. 5. Not necessary to call yeas and nays. Heffner v. City of Toledo (Ohio), 80 N. E. 8; see, also, Abbott Munic. Corps., Secs. 525-6.

33—Amey v. Mayor, etc. of Alleghany City, 24 How. 364. Publication of ordinance unnecessary when not required by statute. National Bank of Commerce v. Town of Granada, 54 Fed. 100 C. C. A.

Iglehart v. City of Dawson Springs, 143 Ky. 140, 136 S. W. 210. Publication of an ordinance before the bonds are issued is insufficient; Chamberlain v. City of Hoboken, 38 N. J. L. 110.

Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364. The provisions for the publication of an ordinance at a stated time is mandatory. See, also, Abbott Munic. Corps., Sec. 528, et seq., with many cases cited.

cases except where by statutory or constitutional provisions or the special terms of a particular contract they are made exempt.[34]

Negotiable securities are uniformly regarded as personal property and the place of taxation is dependent upon the legal residence of the owner as established by the general statutes of a particular state or locality.[35]

In a leading case in the Supreme Court of the United States,[36] the court held that public securities might be separated from the domicile of the owner and taxed as property where actually located, and said: "It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will in many cases determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former by general usage, have acquired the character of and are treated as property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners."

34—People v. Home Insurance Co., 29 Calif. 533. As to the power of a municipal corporation to tax state securities, see, Miller v. Wilson, 60 Ga. 505; City Council of Augusta v. Dunbar, 50 Ga. 387; see the following section for some special exemptions.

35—Matter of Bronson, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238; C., P. & A. R. R. Co. v. Commonwealth of Pennsylvania, 15 Wall. 300, 21 L. E. 179.

36—Cleveland, Paynesville & Ashtabula R. R. Co. v. Pa., 15 Wall. 300, 21 L. E. 179; see, also Scottish Union & National Insurance Co. v. Bowland as Treasurer, etc., 196 U. S. 611, 49 L. Ed. 619; State v. Fidelity, etc. Co. (Tex.), 80 S. W. 544.

Where bonds or securities are in the hands of an executor or an administrator for administration pursuant to legal appointment their situs for taxation is usually held to be the place where the administration proceedings are pending, although their actual physical location may be elsewhere.[37]

The securities of the Federal government and of the territories are exempt from taxation by the different states or any of their subordinate civil subdivisions. No special exemption is necessary as this rule is based upon well-known constitutional principles.[38]

A recent case in Minnesota, however, holds that bonds issued by a municipal corporation organized under the laws of a Territory are subject to taxation in the hands of a savings bank when located within the state of Minnesota.[39]

In an early case in the Supreme Court of the United States,[40] it was held in an action brought by the owner of certain interest coupons to recover their full value from the city that no municipality could by its own ordinances under the guise of taxation relieve itself from performing to the letter all that it has expressly promised to its creditors; that any attempt as in the case in question to deduct from the amount due on an interest coupon a certain sum for taxes was an impairment of a

37—Gray's Limitations of Taxing Power, Sec. 109, et seq.

38—McCullough v. Maryland, 4 Wheat. 316; Osborn v. Bank, 9 Wheat. 738; National Bank v. Yankton, 101 U. S. 129; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429.

Shively v. Bowlby, 152 U. S. 1. A treasury check for the payment of interest on bonds may be taxed. Hibernian Savings & Loan Assoc. v. City and County of San Francisco, 200 U. S. 310, 50 L. Ed. 495; Grether v. Wright, 75 Fed. 742 C. C. A.; Howard Savings Inst. v. Ulwark, 63 N. J. L. 547, aff. 139 Calif. 205, rev. 63 N. J. L. 65.

Rhode Island Hospital Trust Co. v. Armington, 21 R. I. 33, 41 Atl. 570. Construing Act of Congress of July 14, 1870, Chap. 256.

39—State of Minnesota v. Farmers and Mechanics Savings Bank (Minn.), 130 N. W. 445.

40—Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.

contract obligation and therefore unconstitutional and void. If the property in question was subject to taxation, that power must be exercised in the usual way upon the property within the jurisdiction of the city for purposes of taxation and not in the manner attempted.

§ 445. Special state exemptions.

In Arizona bonds issued by the state and its subdivisions are exempt from taxation.[41]

In California an amendment was adopted to the state Constitution in 1902 which provided that all bonds hereafter issued by the State of California or by any county, city and county, municipal corporation or district, including school, reclamation and irrigation districts within said state, should be free and exempt from taxation.[42]

In Connecticut exemption from taxation has been accorded by general statutes to certain bonds issued by cities and towns to aid in the construction of certain named railroads and the exemption is extended to refunding or renewal bonds issued for the purpose of redeeming those issues. These bonds, however, are not exempt from taxation under Revised Statutes, Chapter 147, Section 2424, the tax being paid by the railroads.[43]

In Indiana by legislation passed in 1903 and 1911, it was provided that all bonds, notes and other evidences of indebtedness thereafter issued by the state of Indiana or by municipal corporations within the state upon which the said state or said municipal corporations pay interest, should be exempt from taxation. The legislation of 1911 provided that bonds thereafter authorized by any county or township for the purpose of building, constructing and paying for the construction of, any free gravel, macad-

41—Const. adopted 1910, Art. IX, Sec. 2.

42—Art. 13, Sec. 1, ¾. Henning, Gen. Laws Calif., p. xcviii.

43—Revised Stats., 1902, pp. 600-2, Chap. 144, Sec. 2315; see, also, p. 628, Sec. 2424.

amized or other improved roads should be exempt from taxation, provided said bonds should not bear a greater rate of interest than four and one-half per cent per annum payable semi-annually.[44]

In Iowa in 1909, the legislature passed an act providing for the exemption from taxation of municipal, school and drainage bonds or certificates thereafter issued.[45]

In Kansas by a law passed in 1907, all bonds or other evidences of indebtedness thereafter issued by the state or any county, city or school district within the state were made exempt from taxation.[46]

In 1909, in Maine, the legislature passed an act exempting from taxation all bonds issued after February 1st, 1909, by the state or any county, municipality, village corporation or water district therein. Banks and trust companies were by the same law allowed to deduct the bonds made exempt from the assessment of their shares.[47]

In Massachusetts in 1909, the following securities were made exempt from taxation: "Bonds or certificates of indebtedness of the commonwealth issued since the first day of January in the year nineteen hundred and six and bonds, notes and certificates of indebtedness of any county, fire district, water supply district, city or town in the commonwealth which may be issued on or after the first day of May in the year nineteen hundred and eight, stating on their face that they are exempt from taxation in Massachusetts." [48]

May 13th, 1909, the legislature of Michigan passed an act that bonds thereafter issued by any county, township, city, village or school district in the State of Michigan should be exempt from all taxation.[49]

44—Laws of 1903, p. 179; Laws, 1911, p. 337, Chap. 138.

45—Laws 1909, p. 75, Chap. 81, amending, Sec. 1304 of Code Supp. 1907.

46—Chap. 408, Sec. 15, Laws of 1907.

47—Laws 1909, p. 51, Chap. 49.

48—Acts of 1909, p. 542-3, Chap. 490, Part 1, Sec. 5, Clause 15.

49—Laws 1909, p. 167, No. 88.

In 1911 the Minnesota legislature passed an act by which bonds and certificates of indebtedness thereafter to be issued by the State of Minnesota or by any county, city or village of said state or any township, or any common or independent school district of said state, or any governmental board of said state or county, city or village thereof, were made exempt from all taxation, except the inheritance tax provided by law.[50]

In Mississippi an act was passed in 1908 by the legislature providing that in addition to the property already exempt from taxation the bonds of drainage districts of the State of Mississippi should be exempt from taxes of any character whatever.[51]

In New Hampshire the sanitarium bonds of 1909, the highway bonds of 1909 and 1911, the hospital bonds of 1907, 1909 and 1911 are exempt from taxation on individual holders and bond issues bearing three and one-half per cent and under are also exempt when held by savings banks.[52]

In 1903 in New Jersey, a general statute was passed which rendered exempt from taxation bonds, securities and other evidences of indebtedness of municipal corporations. The statute covered not only bonds to be thereafter but also those that had been previously issued.[53]

In New York under the Consolidated Laws of 1909,[55] certain state and municipal bonds are made exempt from taxation and in 1911, the legislature of New York also passed a bill providing for a tax of one-half of one per cent on bonds and other obligations secured by property

50—Laws of Minnesota, 1911, Chap. 242, p. 340.

51—Laws of 1908, Chap. 141.

52—Laws 1907, p. 60, Chap. 61; Laws 1909, p. 404, Chap. 101; p. 507, Chap. 133; p. 535, Chap. 155; p. 544, Chap. 161; Laws 1911, p. 249, Chap. 189. See, also, Laws 1907, Chap. 55, p. 54, providing that cities, etc., in issuing bonds may arrange for a tax exemption when owned by a citizen of that city, etc.

53—Compiled Stat. New Jersey, 1910, Sec. 3, p. 5077.

55—Chapter 60, Art. 1, Sec. 4, Clause 6.

located outside of the state, and also unsecured debts of the same character and for the exemption of the same from the annual tax in New York State on personal property.[56]

In Ohio by constitutional amendment adopted in 1905, which took effect January 1st, 1906, municipal bonds were exempted from taxation.[57]

In Pennsylvania by a law passed in 1911, school districts were required to deduct the amount of the tax on their local school district bonds from the remittance of interest, putting these corporations in the same position with municipalities and counties. The holder of these securities is therefore not required to make any return or payment of taxes to local assessors. If bonds are issued tax free by a school district it pays the tax.[58]

In South Carolina an act was approved February 14, 1908, which exempted from taxation all bonds thereafter issued by school districts for the erection of school buildings their equipment or maintenance or for paying the indebtedness of such districts.[59]

In Texas bonds issued by cities and towns are exempt from taxes levied by such cities or towns.[60]

In Vermont a law was passed in 1908, that notes, bonds or orders issued after February 1, 1907, as evidences of obligations for money loaned to a town, village, incorporated school or fire district at a rate of interest not exceeding four per cent per annum for the purpose of constructing, purchasing or repairing water, sewer or lighting systems, permanent highways, bridges, works, or public buildings or for the purpose of refunding a debt contracted for any of the foregoing purposes, should be exempt from taxation.[61]

56—Laws 1911, p. 2121, Chap. 802.

57—Constitution, Art. XI, Sec. 2, as amended.

58—Laws 1911, p. 236.

59—Laws 1908, p. 1051, No. 473.

60—Sayles Tex. Civil Stat. 1898, Art. 473.

61—Public Statutes, 1906, Sec. 496, Subd. 12, as Amended by Laws of 1908, Act 23, p. 21.

In Washington the legislature of 1907 amended the laws relating to revenues and taxation by exempting municipal securities from all taxation as personal property. The constitutionality of this act was sustained by the state supreme court in 1908.[62]

In Wisconsin by a law passed in 1911, bonds thereafter issued by municipalities were made exempt from taxation.[63]

In Wyoming in 1905, by an act of the legislature, coupon and registered interest bearing bonds issued by the State of Wyoming or by any county, school district or municipality of the state, were made exempt from taxation when owned by actual residents of the state. It was provided further in the law that the owner or owners of such securities should list the same annually on their assessment schedule, describing such bonds and the amount thereof and marking opposite thereto on such schedule the word 'exempt.' "[64]

In Porto Rico, all public bonds are exempt from the insular and municipal taxes of the island, and under various acts of Congress certain land purchase and public improvement bonds issued by the Philippine Islands and all issues of the government of the Philippine Islands or those made under its authority are exempt from all taxation in the Islands or in the United States.[65]

62—Laws 1907, p. 69, Chap. 48; State ex rel. Wolfe v. Parmenter, 50 Wash. 164.

63—Laws 1911, p. 629, Chap. 516.

64—Laws of 1905, Chap. 17, Wyo. Comp. Stat. 1910, Sec. 2323, p. 614.

65—Act of Congress of July 1, 1902, Secs. 64 and 67.

CHAPTER XVII

WARRANTS AND MISCELLANEOUS EVIDENCES OF INDEBTEDNESS

§ 446. Warrants: Definition; by whom drawn.

A public corporation may contract an indebtedness, which either at the time of its incurment or upon the making of an appropriation for its payment, is evidenced by an obligation or written promise to pay, commonly called a warrant. This is an instrument in writing executed by the proper officers acknowledging the debt and directing the officials in charge of the fund from which it is payable to pay the same on demand or at some specified date.[1]

The grant of authority to make a contract, it has been held, carries with it the implied power to issue warrants

1—City Council of Nashville v. Ray, 86 U. S. (19 Wall.) 468; City of Little Rock v. United States (C. C. A.), 103 Fed. 418; People v. Munroe (Calif.), 33 Pac. 776; City of Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Shawnee County Com'rs v. Carter, 2 Kan. 109.

Burrton v. Harvey County Sav. Bank, 28 Kan. 390. Cities of the third class may anticipate the revenues of the year, and in payment of a debt, whether antecedent or one presently contracted, issue time warrants, payable at such time during the current year as the revenues may reasonably be expected to be collected. City of Alpena v. Kelley, 97 Mich. 550; Warren County Sup'rs v. Klein, 51 Miss. 807; Aull Sav. Bank v. City of Lexington, 74 Mo. 104; Slingerland v. City of Newark, 54 N. J. Law, 62; State v. Parkinson, 5 Nev. 15; City of Terrell v. Dessaint, 71 Tex. 770.

Daggett v. Lynch, 18 Utah, 49. But there is an implied power to issue interest-bearing warrants. Ivinson v. Hance, 1 Wyo. 270.

Heffleman v. Pennington County, 3 S. D. 162. The warrant is a formal and deliberate acknowledgment by the county of such indebtedness.

or orders in payment of its obligations.[2] The power to issue in anticipation of revenues for the necessary corporate expenses is usually implied,[3] this is not so when issued in anticipation of taxes levied but uncollected and where the expenses are of such a character as to be considered under the circumstances, a "debt" or "indebtedness." The issue of warrants is the method by which the ordinary and current expenses of a public corporation are paid from current revenues; funds for their payment are usually immediately available; they are commonly drawn pursuant to direct charter or statutory authority, which may or may not specify the required details preliminary to their issue. Without such charter or statutory provisions it is clear that public officials have no power to bind their principal in this respect.[4]

2—Kearney County Com'rs v. McMaster (C. C. A.), 68 Fed. 177; Speer v. Kearney County Com'rs (C. C. A.), 88 Fed. 749; Allen v. Town of Lafayette, 89 Ala. 641, 9 L. R. A. 497; Town of Cicero v. Grisko (Ill.), 88 N. E. 878; People v. Coolley, 146 Ill. App. 113; Heal v. Jefferson Tp., 15 Ind. 431; Clayton v. McWilliams, 49 Miss. 311; and San Patricio County v. McClane, 58 Tex. 243.

3—Thomas v. City of Richmond, 79 U. S. (12 Wall.) 349; Brown v. Sherman County Com'rs, 5 Fed. 274; Bangor Sav. Bank v. City of Stillwater, 46 Fed. 899; Allen v. Town of La Fayette, 89 Ala. 641, 9 L. R. A. 497; Lindsey v. Rottaken, 32 Ark. 619; Cothran v. City of Rome, 77 Ga. 582; Fuller v. City of Chicago, 89 Ill. 282; Fuller v. Heath, 89 Ill. 296; Gray v. Board of School Inspectors of Peoria, 231 Ill. 63, 83 N. E. 95; Dively v. City of Cedar Falls, 21 Iowa, 565; Long v. Boone County, 32 Iowa 181; Hooper v. Ely, 46 Mo. 505; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Corpus Christi v. Weossner, 58 Tex. 462.

4—City of New Orleans v. Warner, 180 U. S. 199, 45 L. Ed. 493, affirming 101 Fed. 1005.

Bangor Savings Bank v. City of Stillwater, 46 Fed. 899. In the absence of special statutory authority a city has no right to issue certificates of indebtedness in negotiable form. Vale v. Buchanan (Ark.), 135 S. W. 848; People v. El Dorado County Sup'rs, 11 Cal. 170; Stratton v. Green, 45 Cal. 149; People v. Canty, 55 Ill. 33; First Nat. Bank v. Van Buren School Trustee, Daviess County (Ind.), 93 N. E. 863; Horne v. Mehler, 23 Ky. L. R. 1176, 64 S. W. 918; Flagg v. Parish of St. Charles, 27 La. Ann. 319.

Hooper v. Ely, 46 Mo. 505. A county warrant cannot be issued to reimburse sureties for moneys expended by them in bringing back a defaulting and absconding county

Public corporations exercise their powers by and through agents of limited or special authority authorized to act for and on their behalf, only concerning those matters which by some express provision of the law have been given to them to transact. That a warrant be valid, it is necessary then that it shall be issued or drawn by the proper official,[5] and authorized, audited or allowed by that administrative body or official, to whom is delegated by law this particular duty.[6] This authority may

treasurer. Aull Sav. Bank v. City of Lexington, 74 Mo. 104; Markey v. School Dist. No. 18 (Nebr.), 78 N. W. 932; In re Opinion of Justices (N. H.), 75 Atl. 99.

Hart v. Village of Wyndmere (N. D.), 131 N. W. 271. The payment of a village obligation by its legal warrant is sufficient.

Eidenmiller v. City of Tacoma (Wash.), 44 Pac. 877. Payment of monthly salaries may be made by the issue of warrants.

5—See secs. 52 and 65, et seq., ante; Kearney County Com'rs v. McMaster (C. C. A.), 68 Fed. 177.

Connor v. Morris, 23 Cal. 447. The auditor of the county is the mere clerk of the board of supervisors; and he has no power or authority to draw his warrant on the county treasurer for the payment of a claim unless the board of supervisors have made an express order that it be paid. Stoddard v. Benton, 6 Colo. 508; Clark v. City of Des Moines, 19 Iowa 199; Clark v. Polk County, 19 Iowa, 248; Tippecanoe County Com'rs v. Cox, 6 Ind. 402; Leavenworth County Com'rs v. Keller, 6 Kan. 510; McDonald's Admstr. v. Franklin County (Ky.), 100 S. W. 861; Alberts v. Torrent, 98 Mich. 512; Bailey v. City of Philadelphia, 167 Pa. St. 569, 31 Atl. 925; Dennis v. Table Mountain Water Co., 10 Cal. 369; Newgass v. City of New Orleans, 42 La. Ann. 163; Hull v. Inhabitants of Berkshire, 26 Mass. (9 Pick.) 553; Saline County v. Wilson, 61 Mo. 237; State v. Collins, 21 Mont. 448, 53 Pac. 1114; Oakley v. Valley County, 40 Neb. 900, following Walsh v. Rogers, 15 Neb. 309; Halstead v. City of New York, 5 Barb. (N. Y.) 218; Bailey v. City of Philadelphia, 167 Pa. 569.

Merchants' Nat. Bank v. McKinney, 2 S. D. 106, 48 N. W. 841. To sustain the validity of warrants drawn under the authority of law, it is not necessary that they shall be signed by officials de jure; if they are de facto merely, it is sufficient. Stephens v. City of Spokane, 11 Wash. 41, 39 Pac. 266; Ivinson v. Hance, 1 Wyo. 270; Hubbard v. Town of Lyndon, 28 Wis. 675.

6—People v. Fogg, 11 Cal. 351; State v. Atkinson, 25 Wash. 283, 65 Pac. 531; Clark County Sup'rs v. Lawrence, 63 Ill. 32; Clark v. City of Des Moines, 19 Iowa 199; Polk County v. Sherman, 99 Iowa, 60, 68 N. W. 562; Capmartin v. Police Jury, 19 La. Ann. 448; Saline County v. Wilson, 61 Mo. 237; People v. Booth, 49 Barb. (N. Y.) 31; People v. Roberts, 45 App. Div. 145,

be granted to some special officer to whom discretionary powers are given to pass upon the legality of the claim or indebtedness to liquidate which the warrant is drawn, or upon the sufficiency of the warrant itself. The duties then performed are quasi judicial in character, subject to the usual rules of law which govern and control the performance of duties of that nature.[7]

The law, however, may impose upon such officials the ministerial duty merely of drawing the warrant upon the presentation to them of a claim or charge audited or allowed by certain designated officers. Here the duty is obligatory and the official is given no discretionary powers in the matter; it may then become his duty to draw such warrant, even without request of the party, in whose favor it is to be issued.[8] If he neglect or refuse

61 N. Y. Supp. 148; Ex parte Florence Graded School Com'rs, 43 S. C. 11, 20 S. E. 794; Hubbard v. Town of Lyndon, 28 Wis. 674.

7—Henderson v. People, 17 Colo. 587; Carlile v. Hurd, 3 Colo. App. 11, 31 Pac. 952; Ward v. Cook, 78 Ill. App. 111; Norman v. Kentucky Board of Managers of World's Columbian Exposition, 14 Ky. L. R. 529, 20 S. W. 901; State v. Hallock, 16 Nev. 373; People v. Wood, 35 Barb. (N. Y.) 653; People v. Booth, 49 Barb. (N. Y.) 31; People v. Green, 56 N. Y. 476; Commercial & Farmers' Bank v. Worth, 117 N. C. 146, 23 S. E. 160, 30 L. R. A. 261; Naylor v. McColloch (Ore.), 103 Pac. 68; Kensington Elec. Co. v. City of Philadelphia, 187 Pa. 446; In re Statehouse Commission (R. I.), 33 Atl. 453; City of Columbia v. Spigener (S. C.), 67 S. E. 552; State v. Lindsley, 3 Wash. St. 125.

8—Wilson v. Neal, 23 Fed. 129; Board of Liquidation of Louisiana v. McComb, 92 U. S. 531; Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576; Babcock v. Goodrich, 47 Cal. 488; Sehorn v. Williams, 110 Cal. 621; McMurray v. Hayden, 13 Colo. App. 51, 56 Pac. 206; State v. Buckles, 39 Ind. 272; Prime v. McCarthy, 92 Iowa, 569, 61 N. W. 220; Alberts v. Torrent, 98 Mich. 512; State v. Kenney, 10 Mont. 496, 26 Pac. 388; State v. Smith, 5 Mo. App. 427.

State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L. R. A. 774. A state auditor has no power to question the validity of an act or to inquire whether a certain amount appropriated is excessive where the legislature has in the proper manner made an appropriation for such purpose. Hayes v. Davis, 23 Nev. 318, 46 Pac. 888; People v. Flagg, 16 Barb. (N. Y.) 503; People v. Haws, 36 Barb. (N. Y.) 59; Cunningham v. Mitchell, 67 Pa. 78; Pace v. Ortiz, 72 Tex. 437.

to perform the duty, its performance can be compelled by mandamus directed against him.[9]

Where the law specifies the manner of allowance and audit of claims preliminary to the drawing of a warrant for their payment, such provisions are usually considered mandatory in their character, necessary to be followed even to the slightest detail in order that there exist a legal authority for the warrant.[10] The reason for this ruling is apparent.

Unless the law otherwise provides, it is not necessary that there should be funds available for the payment of the warrant immediately upon its issue. The warrant is simply written evidence of an acknowledged legal claim against the public corporation; the time of its payment does not affect or determine the question of its validity.[11]

9—Wilson v. Neal, 23 Fed. 129; Keller v. Hyde, 20 Cal. 594; Babcock v. Goodrich, 47 Cal. 488; Ray v. Wilson, 29 Fla. 342, 10 So. 613.

Johns v. Orange County Com'rs, 28 Fla. 626. An officer cannot be compelled, by mandamus, to issue a warrant until the required action has been taken in respect to the allowance and certification of the claim where this is necessary. Rice v. Gwinn, 5 Idaho, 394, 49 Pac. 412; People v. Hastings, 5 Ill. App. 436; Campbell v. Polk County, 3 Iowa, 467; Evans v. McCarthy, 42 Kan. 426; State v. Clinton, 28 La. Ann. 47; Trustees of Paris Tp. v. Cherry, 8 Ohio St. 565; Merkel v. Berks County, 81½ Pa. 505; Callaghan v. Salliway, 5 Tex. Civ. App. 239; State v. Headlee, 19 Wash. 477, 53 Pac. 948. See, also, authorities cited under preceding note. But see Land v. Allen, 65 Miss. 455.

10—Murphy v. Garland County (Ark.), 137 S. W. 813. A Circuit Court judgment disallowing a claim precludes a new order by the County Court and a re-issue of warrants thereon. Flagg v. Parish of St. Charles, 27 La. Ann. 319.

State v. McIlraith (Minn.), 129 N. W. 377. The approval or allowance of accounts authorized by the water, light and building commission is not necessary under Laws of 1907, Chap. 412; Allan v. Kennard (Nebr.), 116 N. W. 63.

Burke v. Gormley (N. J.), 80 Atl. 483. The audit of a claim by a city board is not final, but their action may be rescinded.

11—Speer v. Kearney County Com'rs (C. C. A.), 88 Fed. 749. The fact that no levy of taxes has been made for the purpose of paying warrants issued by county commissioners in payment of indebtedness does not invalidate them. City of Little Rock v. United States (C. C. A.), 103 Fed. 418; State v. Sherman, 46 Iowa, 415; Evans v. McCarthy, 42 Kan. 426, 22 Pac. 631; State v. Kenney, 10 Mont. 496, 26 Pac. 388.

In some states the making of an appropriation for the payment of a claim is necessary to the issuance of a warrant for that purpose, and the authorities then hold that no matter how just or equitable the claim may be, no obligation rests on the public officials upon whom the duty ordinarily devolves to issue a warrant for the liquidation of such claim until an appropriation is made by the proper body for its payment unless there are moneys in the treasury available for such purpose.[12]

§ 447. Fund from which payable.

The usual method for the payment of the ordinary current expenses of a corporation is through the appropriation of moneys by a duly authorized body for this purpose. The appropriation may be effected through a formal direction by the proper officials to pay, either from a fund raised or set aside especially for the settlement of specified claims or from the general revenues.[13]

But see State ex rel. Edmunds v. Capdevielle (La.), 49 So. 1006; Whitney v. Parish of Vernon (La.), 52 So. 176; Niles Bryant School of Piano Tuning v. Bailey (Mich.), 126 N. W. 116.

12—Goyne v. Ashley County, 31 Ark. 552. The fact that warrants are selling at a discount cannot be considered in making the appropriation for a certain purpose resulting in an increase of the appropriation. Cramer v. City & County of Sacramento Sup'rs, 18 Cal. 384; In re Appropriation by General Assembly, 13 Colo. 316; Henderson v. People, 17 Colo. 587; Collier & C. Lithographing Co. v. Henderson, 18 Colo. 259; Goodykoontz v. Acker, 19 Colo. 360, 35 Pac. 911; Goodykoontz v. People, 20 Colo. 374, 38 Pac. 473; Cook County v. Lowe, 23 Ill. App. 649.

Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52. The statute of limitations will not start to run in favor of a city on its outstanding warrants until it has money in its treasury to satisfy such obligations. Snelling v. Joffrion, 42 La. Ann. 886; State v. Seibert, 99 Mo. 122; State v. Kenney, 9 Mont. 389, 24 Pac. 96; State v. Kenney, 10 Mont. 496, 26 Pac. 388; State v. Hickman, 11 Mont. 541, 29 Pac. 92; Niles Bryant School of Piano Tuning v. Bailey (Mich.), 126 N. W. 116.

Ballard v. Cerney (Nebr.), 120 N. W. 151. The rule stated in the text, however, does not apply to the payment of interest on public debts including outstanding warrants. State v. Lindsley, 3 Wash. St. 125.

13—Carter v. Tilghman, 119 Cal. 104; Stevens v. Truman, 127 Cal.

Where an appropriation is made for payment from a specific fund, the warrant can be drawn on and is payable only from such fund.[14] If there are no moneys

155; Campbell v. Polk County, 3 Iowa, 467; Warren County Sup'rs v. Klein, 51 Miss. 807.

State v. Clark (Nebr.), 112 N. W. 857. A warrant may be payable out of a general fund of a special year only.

Rogers v. City of Omaha (Nebr.), 117 N. W. 119. A city warrant is not invalidated by a recital not contemplated by statute in respect to the fund from which it is payable. See, also, on this point, Abrahams v. City of Omaha (Nebr.), 114 N. W. 161; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971.

City of Sherman v. Smith (Tex.), 35 S. W. 294. The funds for the payment of a special warrant may be limited by the amount of taxes which can be legally levied. School District No. 3 v. Western Tube Co. (Wyo.), 80 Pac. 155.

14—Peake v. City of New Orleans, 38 Fed. 779; Rose v. Estudillo, 39 Cal. 270; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Jordan v. Hubert, 54 Cal. 260; Travelers' Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556; Nance v. Stuart, 12 Colo. App. 125, 54 Pac. 867; Park v. Candler, 113 Ga. 647, 39 S. E. 89; Fuller v. Heath, 1 Ill. App. 118; Village of Marysville v. Schoonover, 78 Ill. App. 189; Union County Com'rs v. Mason, 9 Ind. 97; Phillips v. Reed, 107 Iowa, 331, 77 N. W. 1031, 44 L. R. A. 131, modifying judgment in 76 N. W. 850.

City of Atchison v. Leu, 48 Kan. 138, 29 Pac. 467. A city of the first class under the Kansas statutes is liable on warrants issued to pay for curbing and guttering a street although the money due it from special assessments levied for such purpose may not have been received. Labatt v. City of New Orleans, 38 La. Ann. 283; Abascal v. City of New Orleans, 48 La. Ann. 565; People v. Treasurer of Merritt Tp., 38 Mich. 243.

State v. Bartley, 41 Neb. 277, 59 N. W. 907. The holder of a general fund warrant may refuse to receive in payment moneys belonging to another fund the diversion of which to the settlement of his claim is unconstitutional. Kingsberry v. Pettis County, 48 Mo. 207; Campbell v. Polk County Ct., 76 Mo. 57; Moody v. Cass County, 85 Mo. 477; Morrow v. Surber, 97 Mo. 155; State v. Wright, 17 Mont. 565, 44 Pac. 89; State v. Cook, 13 Mont. 465, 34 Pac. 770; People v. Lathrop, 19 How. Pr. (N. Y.) 358; People v. Wood, 71 N. Y. 371; Hall v. State, 54 Neb. 280; Redmon v. Chacey, 7 N. D. 231; Theis v. Washita County Com'rs, 9 Okl. 643, 60 Pac. 505; Diggs v. Lobsitz, 4 Okl. 232, 43 Pac. 1069; Jones v. City of Portland, 35 Or. 512; Northup v. Hoyt, 31 Or. 524, 49 Pac. 754; La France Fire Engine Co. v. Davis, 9 Wash. 600.

Potter v. Black, 15 Wash. 186. If there is not sufficient money in a particular fund to pay the whole of a warrant presented and chargeable against such fund, its payment in part can be compelled. Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 384, 1080; Kenyon v. City of Spokane, 17 Wash. 57, 48 Pac. 783; Wilson v. City of Aberdeen, 19

available at the time of issue, payment is necessarily deferred until sufficient funds accumulate with which to discharge the particular obligation.[15] The form of the warrant will determine the application of the rule above stated in respect to its payment. If the language is ambiguous or by its terms made payable first from a special fund and where moneys are not available in that fund, then from the general revenues, the warrant may be payable from any available source. The discussion upon this point in respect to negotiable securities will be re-

Wash. 89; **Townsend Gas & Elec.** Light Co. v. Hill, 24 Wash. 469, 64 Pac. 778; Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197; Montague v. Horton, 12 Wis. 599; Pauly Jail Bldg. & Mfg. Co. v. Jefferson County, 160 Fed. 866; Allen v. Watts, 88 Ala. 497, 7 So. 190; Mobile County v. Powers (Ala.), 15 So. 642; **Morrison v. Austin State** Bank, 213 Ill. 472, 72 N. E. 1109; Miller v. Hinkle (Iowa), 113 N. W. 325.

Dime Savings Institution v. Hoboken, 42 N. J. L. 283. The duty to pay an improvement certificate out of general funds arises if the assessment legally levied is inadequate to meet the certificate. State v. Moss. (Wash.), 86 Pac. 1129.

Jurey v. City of Seattle (Wash.), 97 Pac. 107. Special assessment warrants issued by the city of Seattle are not obligations of the city, but the holders are required to look solely to the special fund for their payment. State v. Lamprey (Wash.), 106 Pac. 501. But see Neal Loan & Banking Co. v. Chastain (Ga.), 49 S. E. 618; Butts County v. Jackson Banking Co. (Ga.), 60 S. E. 149.

15—Scruggs v. Underwood, 54 Ala. 186; Day v. Callow, 39 Cal. 593; State v. State Treasurer, 32 La. Ann. 177; Wilson v. Knox County, 132 Mo. 387, 34 S. W. 45, 477; Andrew County v. Schell, 135 Mo. 37, 36 S. W. 206; Campbell v. Polk County, 49 Mo. 214; State v. Johnson, 162 Mo. 621, 63 S. W. 390.

State v. Wilson, 71 Tex. 291, 9 S. W. 155. A state is not liable for the loss sustained by a warrant holder obliged to sell at a discount for lack of funds.

But see Potter v. Black, 15 Wash. 186, where it is held that part of a warrant must be paid when there are insufficient moneys to pay the whole of it. Forbes v. Board of Com'rs of Grand County, 23 Colo. 344, 47 Pac. 388.

Board of Education v. Foley, 88 Ill. App. 470. The burden of proof is on plaintiff to show that there was sufficient money in the appropriate fund to pay the warrant at the time it was drawn. Adams v. Com'rs of Highway of Town of South Otter, 151 Ill. App. 68; State v. Rickards, 17 Mont. 440, 43 Pac. 504; Bacon v. Dawes County (Nebr.), 92 N. W. 213; Stewart v. Custer County (S. D.), 84 N. W. 764.

membered,[16] and the same general principles will control the payment of warrants as stated in that discussion. Fiscal authorities cannot be compelled to pay warrants drawn against a special fund by appropriation from the general revenues.[17]

Although a public corporation by drawing a warrant against a particular fund does not guarantee the existence of such a fund, it does guarantee the moneys in that fund legally belonging to it, and if there has been a diversion or misappropriation of such moneys for other purposes, the corporation is liable from its general revenues to that extent.[18] There are many cases which hold to a general liability on the part of the public corporation, where it has neglected to collect or create a special fund designated for the payment of the warrants.[19] A war-

16—See Sec. 363, et seq., ante.

17—Wilder v. City of New Orleans, 87 Fed. 843. Warrants when reduced to judgment become a charge upon all drainage taxes collected by the city. First National Bank v. Martin (Kan.), 52 Pac. 580; Klein v. Piper, 43 La. Ann. 362, 8 So. 927; Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197. See, also, Ex parte Board of Com'rs of Florence Graded Schools, (S. C.), 20 S. E. 794.

18—Peake v. City of New Orleans, 38 Fed. 779; Wilder v. City of New Orleans (C. C. A.), 87 Fed. 843; Hockaday v. Chaffee County Com'rs, 1 Colo. App. 362; Shotwell v. City of New Orleans, 36 La. Ann. 938; Valleau v. Newton County, 72 Mo. 593; McGlue v. City of Philadelphia, 10 Phila. (Pa.) 348; Potter v. City of New Whatcom, 20 Wash. 589; Warner v. City of New Orleans, 87 Fed. 829; Pauly Jail & Mfg. Co. v. Jefferson County, 160 Fed. 866; Butts County v. Jackson Banking Co. (Ga.), 71 S. E. 1065; Ayres v. Thurston County (Nebr.), 88 N. W. 178; Thurston County v. McIntyre (Nebr.), 106 N. W. 217; Blackman v. City of Hot Springs (S. D.), 85 N. W. 996; City of San Antonio v. Alamo National Bank (Tex.), 114 S. W. 909; State Savings Bank v. Davis, 22 Wash. 406, 61 Pac. 43; Quaker City National Bank v. City of Tacoma (Wash.), 67 Pac. 710; Northwestern Lmbr. Co. v. City of Aberdeen (Wash.), 77 Pac. 1063; Hemen v. City of Ballard (Wash.), 82 Pac. 277. See, also, cases cited in sec. 371, ante. But see Schulenburg v. Boeckler Lmbr. Co. v. City of East St. Louis, 63 Ill. App. 214; Ames v. City of Seattle (Wash.), 1104 Pac. 109.

19—Warner v. City of New Orleans, 167 U. S. 467, affirming 87 Fed. 829; City of New Orleans v. Warner, 175 U. S. 120; Denny v. City of Spokane, 79 Fed. 719; Mills County Nat. Bank v. Mills County, 67 Iowa, 697; Reilly v. City of Al-

rant for the payment of a specific claim may be held invalid where it is general in its terms, but the authority for its payment is special. The party to whom such a warrant has been issued is usually held charged with knowledge of the provisions of the law allowing the claim and making the special appropriation.[20]

Where taxes and special assessments have been levied for the specific purpose of paying for a local improvement, a city cannot justify its refusal to redeem warrants issued for such work on the ground that such assessments were invalid.[21]

§ 448. Formal issue and sale.

In common with other evidences of indebtedness, a warrant is not issued until it is delivered and this involves the question of its issue and delivery to the proper person.[22]

Statutory provisions forbidding the purchase of war-

bany, 112 N. Y. 30, 2 L. R. A. 648; Commercial Nat. Bank v. City of Portland, 24 Or. 188; Jones v. City of Portland, 35 Or. 512; Bank of British Columbia v. City of Port Townsend, 16 Wash. 450. But see Stephens v. City of Spokane, 11 Wash. 41; and McEwan v. City of Spokane, 16 Wash. 212.

20—Sutro v. Dunn, 74 Calif. 593, 16 Pac. 505; City of New Orleans v. City Hotel, 28 La. Ann. 423; Soule v. Town of Ocosta (Wash.), 95 Pac. 1083. See, also, State v. Farmer (Wash.), 88 Pac. 321.

21—Red River Valley National Bank v. City of Fargo (N. D.), 103 N. W. 390.

22—Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576.

Cooper v. Roland (Ark.), 130 S. W. 559. An issue of scrip to the wrong person may be restrained. San Juan County Com'rs v. Oliver, 7 Colo. App. 515; State v. Miller, 145 Ind. 598.

State v. Pierce, 52 Kan. 521. To issue county warrants or orders means "to send out to deliver, or to put into circulation." Craig v. Mason, 64 Mo. App. 342; State v. Lewis, 6 Ohio Dec. 198.

Clark County Sup'rs v. Lawrence, 63 Ill. 32. It is not necessary to the validity of a warrant that it be delivered in the county in which it is issued.

Tandy v. Norman (Ky.), 27 S. W. 861. Warrants cannot be issued before the expenses or liabilities are actually incurred. American Bridge Co. v. Wheeler (Wash.), 76 Pac. 534.

rants by scrip or other evidences of indebtedness at a discount by county officers are construed strictly.[23]

One who sells village warrants for value impliedly warrants them to be genuine and not to his knowledge subject to any counterclaims.[24]

§ 449. Audit and allowance of claims as preliminary to issuance.

The audit and allowance of a claim is a recognition of its existence as a valid outstanding indebtedness and where the law provides for such action, if not done, warrants although drawn by the proper officials cannot legally be paid.[25]

After the issuance of a warrant upon an audit and allowance, the public corporation is estopped to set up as a defense, in an action upon it, irregularities in the audit or allowance; to illustrate, the audit and allowance at a special instead of a regular meeting of the board upon whom such duty rests.[26]

§ 450. Their legal character.

Warrants issued by public corporations, purchased before maturity and for value, are subject to all defenses or equities, although in contradiction to their recitals, which may exist between the parties to the transaction

23—Harrison County v. Ogden (Ia.), 108 N. W. 451.

See, also, State v. Kelly (Kan.), 96 Pac. 40, in respect to sale before time authorized by law.

24—Hart v. Village of Wyndmere (N. D.), 131 N. W. 271; Giblin v. North Wisconsin Lumber Co. (Wis.), 111 N. W. 499.

25—Keller v. Hyde, 20 Cal. 594; Sawyer v. Colgan (Cal.), 33 Pac. 911; Young v. Parish of East Baton Rouge (La.), 36 So. 547; Capmartin v. Police Jury of Natchitoches, 19 La. Ann. 448; State v. City of New Orleans, 50 La. Ann. 880; Wilson v. State, 53 Neb. 113, 73 N. W. 456; State v. Hallock, 20 Nev. 326, 22 Pac. 123; In re Statehouse Bills, 19 R. I. 390, 35 Atl. 212.

26—Warner v. City of New Orleans (C. C. A.), 87 Fed. 829; Speer v. Kearney County Com'rs (C. C. A.), 88 Fed. 749; Los Angeles County v. Lankershim, 100 Cal. 525.

whether such bona fide holder is the original payee or a subsequent purchaser for value.[27]

In this respect they differ radically from negotiable bonds or securities issued by public corporations. The rules of law concerning the issue of warrants are applied with less strictness than in the case of negotiable bonds for this reason. The courts will imply authority to issue, when under the same circumstances no such authority would be implied with respect to negotiable securities, and they will overlook irregularities in the form or manner of issue when such irregularities would render negotiable bonds absolutely void even in the hands of bona fide holders.[28]

Warrants are not negotiable instruments in the full sense of the term as used by the law-merchant. They are non-negotiable and merely prima facie evidence of a valid claim against the corporation issuing them.[29]

27—School Dist. Tp. v. Lombard, 2 Dill. 493, Fed. Cas. No. 12,478; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Watson v. City of Huron (C. C. A.), 97 Fed. 449.

28—Young v. Camden County, 19 Mo. 309. Sections of an act prescribing a form for county warrants are merely directory and a departure from the form prescribed is no defense to an action on the warrant. The court say: "The provisions of the act which have been relied upon by the counsel for the county, are directory to the county courts in issuing warrants, and the chief design of those enactments was, to prevent the making of paper by county courts which could be used as a circulating medium having the appearance of ordinary bank paper. * * * "When a party like the present plaintiff, has performed labor, or rendered services to the county, and holds a warrant issued upon the treasury of the county by the county court, his claim to the money is not affected by the taste of the court in ornamenting their warrants, although they are forbidden to use such ornaments by the county. The words of the warrant have the same meaning, and import the same obligation whether the ends of the paper upon which it is printed have ornaments or not."

29—Thompson v. Searcy County (C. C. A.) 57 Fed. 1030; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Lake County Com'rs v. Keene Five-Cent Sav. Bank (C. C. A.) 108 Fed. 505; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Crawford County v. Wilson, 7 Ark. 214; Police Jury of Tensas v. Britton, 82 U. S. (15 Wall.) 566; Hill v. City of Memphis, 134 U. S. 198; Shirk v. Pulaski County,

In a leading case in the Supreme Court of the United States [30] the court considered in an exhaustive opinion the implied power of a public corporation to issue negotiable securities and compared its power in this respect with that of its capacity to issue warrants and other non-negotiable evidences of indebtedness. In speaking of the latter, the court in its opinion said: "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregularly or

4 Dill. 209, Fed. Cas. No. 12,794; People v. El Dorado County Sup'rs, 11 Cal. 170; Pacific Pav. Co. v. Mowbray, 127 Cal. 1; Ray v. Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; Delfosse v. Metropolitan Nat. Bank, 98 Ill. App. 123; People v. Johnson, 100 Ill. 537; Davis v. Steuben School Tp., 19 Ind. 694, 50 N. E. 1; Clark v. City of Des Moines, 19 Iowa 199; Walnut Tp. v. Jordan, 38 Kan. 562, 16 Pac. 812; Garfield Tp. v. Crocker, 63 Kan. 272, 65 Pac. 273; Sturtevant v. Inhabitants of Liberty, 46 Me. 457; Emery v. Inhabitants of Mariaville, 56 Me. 315; Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938; Matthis v. Inhabitants of Cameron, 62 Mo. 504; International Bank of St. Louis v. Franklin County, 65 Mo. 105, overruling Howell v. Reynolds County, 51 Mo. 154; Chandler v. City of Bay St. Louis, 57 Miss. 326; Great Falls Bank v. Farmington, 41 N. H. 32; State v. Cook, 43 Neb. 318; D County Com'rs v. Sauer, 8 Okl. 235; Borough of Port Royal v. Graham, 84 Pa. 426; East Union Tp. v. Ryan, 86 Pa. 459; Hyde v. County of Franklin, 27 Vt. 185; Bardsley v. Sternberg, 18 Wash. 612; West Philadelphia Title & Trust Co. v. City of Olympia, 19 Wash. 150, 52 Pac. 1015. See, also, many authorities collected in 21 Am. & Eng. Enc. Law (2d Ed.), p. 26, note to par. 12; Watson v. City of Huron C. C. A. 97 Fed. 449; First National Bank v. Whisenhunt (Ark.), 127 S. W. 968; Vale v. Buchanan (Ark.), 135 S. W. 848; Gray v. Board of School Inspectors, etc., 231 Ill. 63, 83 N. E. 95; Bull v. Sims, 23 N. Y. 570.

30—City of Nashville v. Ray, 86 U. S. (19 Wall.) 468.

fraudulently issued, is an abuse of their true character and purpose."

In another case in the same court where the same subject was considered,[31] the court said: "The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law-merchant, so that, when held by bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them, in the hands of such payee.

"There has been a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere prima facie and not conclusive evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims; and when this is conceded, the instruments conclude nothing as to other demands between the parties."

The court also in speaking of the decision in Crawford County v. Wilson, 7 Ark. (2 Eng.) 214, said: "This case in the supreme court of Arkansas is cited as showing that a different rule prevails in that state. The language of the opinion, that county warrants are endowed with the properties of negotiable instruments, must be read in connection with the point involved, which was whether county warrants were transferable by mere delivery, so as to vest the legal interest in the holder. To this extent they may be called negotiable, but no

31—Wall v. County of Monroe, 103 U. S. 74, 26 L. Ed. 430.

court of Arkansas has held that they were negotiable in the sense of the law-merchant, so as to shut out, in the hands of a bona fide purchaser, inquiries as to their validity or preclude defenses which could be made to them in the hands of the original parties. The law is not different there from that which obtains in other states."

They are negotiable only so far that, when endorsed, they become transferable by delivery and the holder may maintain an action thereon in his own name. But in such action, whether brought by the original payee or a subsequent purchaser for value, all irregularities in the manner of issue, lack of authority or the purpose for which the funds were used, are available as defenses.[32]

32—Wall v. Monroe County, 103 U. S. 74; Ouachita County v. Wolcott, 103 U. S. 559; Watson v. City of Huron (C. C. A.) 97 Fed. 449; Crawford County v. Wilson, 7 Ark. 214; Apache County v. Barth (Ariz.), 53 Pac. 187; People v. Gray, 23 Cal. 125; Jones v. Smith, 64 Ga. 711; People v. Rio Grande County Com'rs, 11 Colo. App. 124, 52 Pac. 748; Goodwin v. Town of East Hartford, 70 Conn. 18; Newell v. School Directors of Dist. No. 1, 68 Ill. 514; City of Hammond v. Evans, 23 Ind. App. 501; Davis v. Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1; Clark v. City of Des Moines, 19 Iowa 199; Clark v. Polk County, 19 Iowa 248; Long v. McDowell, 107 Ky. 14, 52 N. W. 812; Klein v. Pipes, 43 La. Ann. 359; Emery v. Inhabitants of Mariaville, 56 Me. 315; School Dist. No. 2 v. Stough, 4 Neb. 357; State v. Cook, 43 Neb. 318; Smith v. Town of Epping, 69 N. H. 558, 45 Atl. 415; McPeeters v. Blankenship, 123 N. C. 651; Gilman v. Gilby Tp., 8 N. D. 627; Capital Bank of St. Paul v. School Dist. No. 53, 1 N. D. 479; Crawford v. Noble County Com'rs, 8 Okl. 450; National Surety Co. v. State Savings Bank, 156 Fed. 21 C. C. A.; Perry County v. Eversole (Ky.), 98 S. W. 1019; State v. Melcher (Nebr.), 127 N. W. 241; Smith v. Polk County (Ore.), 112 Pac. 715; Stratton v. Com'rs Court of Kinney County (Tex.), 137 S. W. 1170; State v. Lewis (Wash.), 113 Pac. 629.

But see Snyder Tp. v. Bovaird, 122 Pa. 442, 15 Atl. 910, as holding that a blank assignment does not vest in the holder of a township warrant the right to maintain an action in his own name against the township. Hubbell v. Town of Custer City, 15 S. D. 55, 87 N. W. 520; Lane v. Hunt County, 13 Tex. Civ. App. 315, 35 S. W. 10; Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499; West Philadelphia Title & Trust Co. v. City of Olympia, 19 Wash. 150, 52 Pac. 1015; Chehalis County v. Hutcheson, 21 Wash. 82, 57 Pac. 341. See, also, authorities cited in preceding note.

This rule was well stated in an early Kansas case,[33] where the court said: "Such paper (commercial) is made free from defenses in the hands of such holders in order to facilitate the circulation thereof, and thereby promote the transaction of business. But paper non-negotiable for any reason is not thus protected. The very fact of its being non-negotiable is a sign of warning to the prospective purchaser and places him on his guard. Municipal warrants though negotiable in form, are non-negotiable in fact; hence they are not within the protection of the rule which guards commercial paper. The warrant in question being such an instrument, it was thereby, in the eye of the law, non-negotiable, though as to form and in other respects of a negotiable character. It therefore took its place in the list of non-negotiable paper for all purposes. In other words, an instrument non-negotiable between the original parties remains non-negotiable through successive transfers. The bank, knowing that it was non-negotiable, must take and hold it as it would any other non-negotiable paper."

Some authorities hold that an executive warrant directing the payment of money in pursuance of an appropriation made by law does not partake of the nature of a contract but is merely a license of power and revocable so long as the payment authorized is not made.[34]

§ 451. Form of warrant.

A public corporation transacts its business, exercises all its powers and performs all its duties through its duly

33—First National Bank of Arkansas City v. Gates, 66 Kan. 505, 72 Pac. 207. See, also, Watson v. City of Huron, 97 Fed. 449 C. C. A. They were in form negotiable and transferable by delivery so far as to authorize the holder to maintain in his own name an action on them, but they were not negotiable instruments in the sense of the law merchant so that when held by a bona fide purchaser evidence of their invalidity or defenses available against the original payee would be excluded.

34—Fletcher v. Renfroe, 56 Ga. 674.

appointed or elected agents. To protect the corporation, therefore, there are well defined and established rules of law controlling and regulating the manner in which, and the acts that may be done by such agents for and in behalf of their principal. This is especially true of action by or through which a pecuniary responsibility or obligation is imposed upon a public corporation. Legal requirements or established custom and usage may require warrants in their form to be phrased in a certain manner,[35] signed by certain officials, endorsed by others,[36] and sealed with the seal of the corporation, if any.[37]

Where a warrant in its mechanical execution does not

35—Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599; Witter v. Bachman, 117 Cal. 318, 49 Pac. 202; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; State v. Pilsbury, 29 La. Ann. 787; Taylor v. Chickasaw County Sup'rs, 74 Miss. 23, 19 So. 834; Callaghan v. Salliway, 5 Tex. Civ. App. 239; Minor v. Loggins, 14 Tex. Civ. App. 15, 37 S. W. 1086.

36—Apache County v. Barth (Ariz.), 53 Pac. 187; National Bank of D. O. Mills & Co. v. Herold, 74 Cal. 603, 16 Pac. 507, the omission of an official designation not material; First Nat. Bank v. Shewalter (Mo.), 134 S. W. 42; State v. Dickerman, 16 Mont. 278, 40 Pac. 698.

State v. Morton, 51 S. C. 323, 28 S. E. 945. It is not necessary that each member of the board of trustees of a school district sign a warrant to render it valid. Stevens v. City of Spokane (Wash.), 39 Pac. 266.

Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499. A city is not liable for a fraudulent re-issue of warrants by its treasurer in payment of the orlginal indebtedness.

37—Smeltzer v. White, 92 U. S. 390; Springer v. Clay County, 35 Iowa 241.

Thompson v. Fellows, 21 N. H. (1 Fost.) 425. A warrant issued by selectmen need not be under seal. State v. Morton, 51 S. C. 323, 28 S. E. 945.

Heffleman v. Pennington County, 3 S. D. 162. The statute is very explicit as to how a claim against a county shall be presented and passed upon by its board of county commissioners. The duty of the board is to judicially investigate the validity and justice of the claim, and to allow or disallow the same in whole or in part, as to such board shall appear just or lawful. While the immediate purpose of the warrant is to enable the claimant to whom it is delivered to draw from the county treasury the amount of money therein named, yet it rests upon, and its issue and payment could only be justified upon, the theory that after a full investigation the county had found itself to be so indebted; so that the warrant is a formal and deliberate acknowledgement by the county of such indebtedness.

comply with such reasonable requirements of the law, it may be considered invalid and the official to whom it is directed and whose duty it is to pay valid warrants only, can properly refuse to recognize it.[38] It has been held, however, in some cases that statutory provisions fixing the form of warrants are directory and that the addition of other words does not necessarily destroy their legal character or affect their validity.[39]

To refuse payment may be not only a discretionary matter with such official but an imperative duty; the right to refuse payment may also exist where the appropriation has been made to a certain individual for a specific purpose and the warrant as drawn is to another individual and without specifying the purpose. No rule of universal applicability, however, can be given but charter or statutory provisions must be consulted to determine the validity of the warrant in this respect.

§ 452. Phraseology of warrant.

Provisions that a warrant shall show upon its face the purpose for which it is drawn are usually considered mandatory and in the absence of such recital, no recov-

38—Hamilton County Com'rs v. Sherwood (C. C. A.) 64 Fed. 103. A county warrant regular in its form but issued for an account which was not verified as required by Gen. St. Kan. 1889, Chap. 25, Sec. 28, is not utterly void, unless issued fraudulently without consideration or authority. Bingham County v. First Nat. Bank, 122 Fed. 16.

Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260. The failure of a city treasurer to record, as required by law, warrants presented, does not defeat the right of a warrant holder to enforce it. Harrison v. Logan County (Ky.), 110 S. W. 377.

School Dist. No. 3 Carbon County v. Western Tube Co. (Wyo.), 80 Pac. 155. A school district warrant is not rendered invalid by the failure of the district clerk to number it as other warrants are numbered and to note its issuance in his warrant stub book.

39—City of Burrton v. Harvey County Sav. Bank, 28 Kan. 390; and Young v. Camden County, 19 Mo. 309.

ery can be had even by a bona fide purchaser.[40] A substantial compliance, however, with charter or statutory provisions, satisfies legal requirements and payment can then be enforced.[41]

Where they are issued containing certain recitals and the law in full under which they are issued, subsequent legislation cannot be passed which changes or affects the terms or conditions upon which they are payable. Such legislation will be considered an impairment of the obligation of the contract between the holder and the maker.[42]

The party to whom payable is usually determined by law. Ordinarily, a warrant is only valid when issued in favor of the one so designated. This principle has been applied in the issue of a warrant to the assignee of one holding the original claim and invalidating it.[43] But the authorities are not unanimous on this point.[44]

40—Bingham County v. First Nat. Bank, 122 Fed. 16; Raymond v. People, 2 Colo. App. 329, 30 Pac. 504, following Traveler's Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556; San Juan County Com'rs v. Oliver, 7 Colo. App. 515, 44 Pac. 362.

McNutt v. Lemhi County (Ida.), 84 Pac. 1054. For cases passing upon questions relative to the phraseology or ornamentation of warrants, see Foote v. City of Salem, 96 Mass. (14 Allen) 87; Young v. Camden County, 19 Mo. 309; and Kenyon v. City of Spokane, 17 Wash. 57.

41—Goldsmith v. Stewart, 45 Ark. 149; San Juan County Com'rs v. Oliver, 7 Colo. App. 515, 44 Pac. 362; Ray v. Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; City of East St. Louis v. Flannigen, 36 Ill. App. 50.

42—Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; Wabash & E. Canal Co. v. Beers, 2 Black (U. S.) 448.

43—Sheerer v. Edgar, 76 Calif. 569.

44—Hadley v. Dague, 130 Cal. 207, 62 Pac. 500. The contract was originally awarded to John T. Long and before its completion was assigned to the Western Contracting and Construction Company. The warrant issued with the assessment was in favor of "the Western Contracting and Construction Company, assignee of John T. Long, agents or assigns." The appellant contends that the warrant should have been issued in the name of the original contractor, and that its issuance in favor of his assignee was unauthorized. The form of warrant which is prescribed in the street improvement act in terms authorizes and empowers the contractor, his agents or assigns to demand and receive the several assessments, and the act declares that the warrant to be

§ 453. Validity; in general.

There does not exist usually an implied authority on the part of public corporations to issue warrants. The power must be found in some provision of the law of the state or charter of the municipality before it can be exercised. To be valid, there must exist the legal authority for their issue assuming the absence of irregularities in other respects.[45]

In a case involving the validity of warrants which a school board had issued to pay for a school house site,[46] the court said: "The fact that the legislature has in no place, nor under any circumstances, clothed the district board with power to create debts that should be binding obligations upon the district, except by and with the

issued shall be "substantially" in this form. The right of the contractor to assign the contract prior to the completion of the work is recognized in many portions of the act and has been recognized by this court.

Anderson v. De Urioste, 96 Cal. 404. After he has ceased to have any interest in the contract, or in the assessment therefor, there would seem to be no reason for the issuance of the warrant in his name especially since the statute does not specifically require it. Sections 9 and 10 of the act designated the assignee as the proper person to whom the warrant and assignment are to be delivered. We hold therefore, that a warrant in favor of one who is therein named as the assignee of the original contractor, whose name is also given, is "substantially" in the form prescribed in the act. Berkeley Development Co. v. Marx (Calif.), 102 Pac. 278; see, also, Travelers' Ins. Co. v. City of Denver, 11 Colo. 434; International Bank of St. Louis v. Franklin County, 65 Mo. 105.

45—City of Little Rock v. United States, 103 Fed. 418; Clark v. City of Des Moines, 19 Iowa 199; Jefferson County Sup'rs v. Arrighi, 54 Miss. 668; Trask v. Livingston County (Mo.), 109 S. W. 656; Andrew v. School Dist. of McCook, 49 Neb. 420, 35 L. R. A. 444; Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932, following Pomerene v. School Dist. No. 56, 56 Neb. 126, 76 N. W. 414; State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319.

Board of Chosen Freeholders v. Buck (N. J.), 16 Atl. 698. An act purporting to grant authority for issuing state certificates of indebtedness may be unconstitutional as violating Art. IV, Sec. 7, Par. 11 of the constitution.

Nelson v. Harrison, 102 N. W. 197. Validity of warrant cannot be determined in an action to which the holder of the warrant is not a party.

46—Farmers' & M. Nat. Bank v. School Dist. No. 53, 6 Dak. 255.

consent of the inhabitants of the district, is sufficient evidence that it supposed the authority to incur obligations would be more wisely exercised by those who had them to pay than by a board which peradventure might in that regard be moved by some ulterior purpose. In any event, the legislature, within the statutory limitations has left the matter entirely with the inhabitants of the district and empowered the district board to act only in consonance with the will of the voters of the district, as expressed at the district meetings. The district board in issuing these orders acted without any authority whatever and such orders are therefore, invalid for any purpose."

The presumption of law is, however, in favor of the legality of warrants, orders or other like evidences of indebtedness and the burden of proof is upon the party denying such validity.[47]

The rule of law which applies to the issue of negotiable bonds or the incurring of indebtedness by a de facto corporation is applicable to the validity of warrants issued by a de facto organization. These are, if otherwise valid, held good in the hands of third parties to

47—Wall v. Monroe County, 103 U. S. 74; George D. Barnard & Co. v. Knox County, 37 Fed. 563, 2 L. R. A. 426; Aylesworth v. Gratiot County, 43 Fed. 350; Speer v. Kearney County Com'rs (C. C. A), 88 Fed. 749; Seward County Com'rs v. Aetna Life Ins. Co. (C. C. A.), 90 Fed. 222; Rollins v. Rio Grande County Com'rs (C. C. A.), 90 Fed. 575; Board of Com'rs of Kearney County v. Irvine, 126 Fed. 689; Grayson v. Latham, 84 Ala. 546; Lusk v. Perkins, 48 Ark. 238; Apache County v. Barth (Ariz.), 53 Pac. 187; San Juan County Com'rs v. Oliver, 7 Colo. App. 515; Lake County Com'rs v. Standley, 24 Colo. 1; Ray v. Wilson, 29 Fla. 342, 14 L. R. A. 773; People v. Johnson, 100 Ill. 537; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Hospers v. Wyatt, 63 Iowa 264; Leavenworth County Com'rs v. Keller, 6 Kan. 510; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Mountain Grove Bank v. Douglas County, 146 Mo. 42; Custer County Com'rs v. De Lana, 8 Okl. 213; Edinburg American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593, 12 L. R. A. 705; Chehalis County v. Hutcheson, 21 Wash. 82; Brown v. School Directors of Jacobs, 77 Wis. 27.

whom they have been sold. Obligations incurred by the inhabitants of a certain district as a rule cannot be avoided by the tax-paying interests of that territory. The obligation exists not against the individuals but against the district and the property within it.[48]

The rule has also been applied where the de facto corporation existed under a law subsequently declared unconstitutional. In a case decided by the United States Circuit Court of Appeals for the Eighth Circuit,[49] the validity of certain warrants issued was contested and the defense urged that they were invalid because the law under which they were given was unconstitutional; the court said: "Such a law passes the scrutiny and receives the approval of the attorney general, of the lawyers who compose the judiciary committees of the legislative bodies, of the legislature and of the governor before it reaches the statute book. * * * Courts declare its invalidity with hesitation and after long deliberation and much consideration, even when its violation of the organic law is clear and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract, on the presumption that it is valid and where before such declaration is made,

48—Board of Education of Atchison v. De Kay, 148 U. S. 591.

Merchants' Nat. Bank v. McKinney, 2 S. D. 106, 48 N. W. 841. The payment of warrants was sought to be avoided on the ground that there were no county officers and therefore no county. The court said: "So we say here the county existed from the moment it was segregated from the other portions of the territory, its boundaries defined, and its name given to it, and all the offices provided by law existed. They were vacant, it is true, but they nevertheless existed, ready to be filled whenever certain conditions should exist. * * * We conclude therefore, that there were de jure county offices existing in Douglas county to be filled and that, when filled, the officers were at least, de facto officers and their acts good as to third persons and the public; and that the board of county commissioners of said Douglas county in issuing the warrants in controversy, constituted a de facto board and the warrants issued by it are prima facie valid and binding upon the county." See, also, Sec. 266, ante.

49—Speer v. Kearney County Com'rs, 88 Fed. 749, C. C. A.

their acts and contracts have affected public interest or private rights, they must be treated as valid and lawful. The acts of a de facto corporation or officer under an unconstitutional law before its invalidity is challenged in or declared by the judicial department of the government cannot be avoided as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity by any ex post facto declaration or decision that the law under which they acted was void."

§ 453a. Validity as affected by debt limitations.

In preceding sections the power to incur indebtedness by public corporations has been discussed, whether such indebtedness is to be evidenced by negotiable securities or otherwise, and in this connection attention has been called to the constitutional or statutory provisions found in every state and which limit the amount of indebtedness that can be legally incurred by them. Obligations assumed in excess of such limitations are usually held void and not capable of enforcement.[50]

50—See Secs. 99, 100, ante.

Farmers' & M. Nat. Bank v. School Dist. No. 53, 6 Dak. 255. We think it was the purpose of the legislature to restrict within the limits specified by the statute, the amount of actual expenditures which could be made by the district in any one year. Any other construction of this statute would be equivalent to holding that it has no force or effect and that school districts or school boards may incur any amount of indebtedness and bind the district with its immediate payment.

Andrew County v. Schell, 135 Mo. 31, 36 S. W. 206; Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944; D County Com'rs v. Sauer, 8 Okl. 235; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; City of Sherman v. Smith, 12 Tex. Civ. App. 580, 35 S. W. 294; Baker v. City of Seattle, 2 Wash. St. 576. Invalid warrants, however, can be validated under legislative authority.

Duryee v. Friars, 18 Wash. 55. The constitutional limitation does not apply to obligations incurred in matters essential to governmental maintenance and therefore warrants issued after such limitation had been reached are prima facie valid.

Roe v. Town of Philippi, 45 W. Va. 785, 32 S. E. 224. The fact of a debt in excess of a constitutional limitation must, however, clearly appear. Kane v. School Dist., 52 Wis. 502.

Coffin v. Board of Com'rs of Kearney County, 114 Fed. 518; Hen-

Whether warrants as ordinarily issued constitute an "indebtedness" within the meaning of such constitutional or statutory phrases depends upon the decisions of a particular state following what might be termed a local public policy,[51] or upon the construction given by some courts to such instruments that if drawn against a tax levy or funds already within the control and possession of the corporation they do not constitute an indebtedness.[52]

In an Iowa case[53] it was said: "If it appeared that the indebtedness to the payment of which the satisfaction of plaintiff's warrant is sought to be postponed was incurred in excess of the prescribed limit * * * the decision of this case would be a matter of no difficulty. It is true, the petition alleges that at the times when this indebtedness was contracted the city was in debt to the limit of the amount allowed. But it does not follow from

derson v. People, 17 Colo. 587, 31 Pac. 334; McNutt v. Lemhi County (Ida.), 84 Pac. 1054; People v. Toledo, etc., R. R. Co., 229 Ill. 327, 82 N. E. 420.

Harrison County v. Ogden (Ia.), 110 N. W. 32. County supervisors have no authority to create an indebtedness payable in the future. Warrants issued for purchase of road machine held void. Merchants National Bank v. City of East Grand Forks (Minn.), 102 N. W. 703; National Life Insurance Co. v. Dawes County (Nebr.), 93 N. W. 187; Burgin v. Smith (N. C.), 66 S. E. 607.

Darling v. Taylor (N. D.), 75 N. W. 766. Construing constitution Secs. 183 and 187 relative to limit of indebtedness.

51—George D. Barnard & Co. v. Knox County, 37 Fed. 563, 2 L. R. A. 426, following Potter v. Douglas County, 87 Mo. 240; Koppikus v. State Capitol Com'rs, 16 Cal. 248; Henderson v. People, 17 Colo. 587. Every appropriation in excess of the constitutional limitation should be regarded as void. City of Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Fuller v. City of Chicago, 89 Ill. 282; In re State Warrants, 25 Neb. 659; State v. Parkinson, 5 Nev. 15; Lorence v. Bean, 18 Wash. 36.

School Dist. No. 3 v. Western Tube Co., 5 Wyo. 185, and Fenton v. Blair, 11 Utah 78, hold warrants void issued in excess of the Federal limitation on indebtedness.

52—Fuller v. Heath, 89 Ill. 296; Darling v. Taylor, 7 N. D. 538, 75 N. W. 766; Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598; Lawrence County v. Meade County, 10 S. D. 175, 72 N. W. 405.

53—Phillips v. Reed, 107 Ia. 331.

this that the indebtedness as represented by these warrants was necessarily invalid. If the city had on hand or in prospect, at the time these warrants were issued, funds with which to meet them without trenching upon the rights of creditors, for current expenses of the city, then the warrants were valid, although such funds may have been thereafter wrongfully applied to other purposes."

Those provisions which require, before an indebtedness can be legally incurred, the affirmative vote of the electors, must be followed where warrants are regarded as an indebtedness, and if issued without are invalid.[54]

In some states the necessity for affirmative action by the electors in respect to the incurring of indebtedness or the expenditures of public moneys has not been held to apply to warrants even in excess of a constitutional limitation when issued in the payment of so-called compulsory obligations. Previous discussion of this subject will be remembered.[55]

In a case from Washington, it was held that the cost of constructing a courthouse and the salaries of county officials were to be regarded as obligations of this character;[56] it was contended that warrants issued after a county had reached its limit of indebtedness were illegal. The court held the disbursement a compulsory one and said: "At the time the court house was erected such a county building was absolutely necessary for county officers and a proper care of the county records. Republic, the county seat, was a new mining camp and but a short time before had been destroyed by fire. Most of the buildings were small frame cabins, none of them being suitable places to deposit the county records or to accommodate the county offices. While, ordinarily, warrants issued in payment of money expended in building a court

54—State ex rel. Egger v. Payne (Mo.), 52 S. W. 412.

55—See Sec. 71, et seq., ante.

56—Farquharson v. Yeargin, 24 Wash. 549, 64 Pac. 717; see, also, Rauch v. Chapman, 16 Wash. 568, 36 L. R. A. 407.

house would not fall under the class of compulsory obligations, the conditions existing in Republic at the time of the erection of the court house were such as to bring the warrants for the erection of this particular court house within the rule * * * because it may be fairly inferred that no other building could be had for the purpose, owing to the destruction of the town by fire."

§ 454. Warrants invalid because of purpose for which issued.

Again a warrant may be invalid because issued for a purpose which is not considered or regarded by the courts as a public one; the basis of all legal expenditure of public moneys by public corporations is the fact of the disbursement for some purpose germane to their organization and the transaction of public business by them. Clearly, therefore, if warrants are issued by public corporations, although regular in their form, for a purpose not public in its character, they will be regarded as illegal, and not being considered negotiable in their character, this question can be raised even where they have passed into the hands of bona fide holders for value and before maturity.[57]

57—See Sec. 101, et seq., ante, as to what is a public purpose. First Nat. Bank of Lansdale v. Wyandotte County Com'rs (C. C. A.), 68 Fed. 878; Watson v. City of Huron, 97 Fed. 449; Littler v. Jayne, 124 Ill. 123, 16 N. E. 374.

Long v. Boone County, 32 Iowa 181. Warrants valid issued in payment of a contract for grading and improving the public roads of a county.

Salamanca Tp. v. Jasper County Bank, 22 Kan. 696.

Board of Police, etc., v. City of Biddeford (Me.), 72 Atl. 740. A municipality is not obliged to pay a negotiable order of the board of police which does not show on its face or by the accompanying papers for what expenses the order is drawn. D County Com'rs v. Sauer, 8 Okl. 235.

Custer County Com'rs v. De Lana, 8 Okl. 213, 57 Pac. 162. The presumption, however, exists that such warrants are issued for lawful corporate purpose. Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 62 N. W. 981, 30 L. R. A. 848; King v. Sullivan County, 67 Tenn. (8 Baxt.) 329.

As illustrating the subject of this section in addition to the many cases cited in the section above referred to, a particular reference to a case from the State of Washington [58] will be instructive and illuminating as well in the present days of extravagant municipal expenditure and the inclination on the part of public officials to take pleasure jaunts at the public expense. The expenses of certain city officials while on a trip to various places made for the purpose of investigating municipal affairs were sought to be recovered by them from the City of Seattle. The court held that such expenditures of public moneys would not be for a public purpose and refused to allow the payment of the claims. It said in part: "The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The terms of the trust are fixed by legislation and no expenditure of money belonging to the city can be made without express authority or implied authority by reason of a necessary granted power. Where this authority does not exist the council is without power to authorize the payment of the claim against the city, and upon sound principle it cannot be conceded that the council had the power to authorize the payment of the claim of appellant. * * * Where the council is without power to authorize the payment of the claim, the officer may properly refuse to countersign the warrant directing the payment of such claim."

§ 455. Invalidity resulting from character.

By the Constitution of the United States the states are prohibited from coining money, emitting bills of credit or making anything but gold and silver coin a legal tender in payment of debts. At times states or subordinate municipalities have authorized the issuance of warrants

58—James v. City of Seattle, 22 Wash. 654, 62 Pac. 84.

receivable in payment of taxes, debts, or other obligations due them; the question of their validity has been raised, the contention being made that such warrants are "currency" within the meaning of the Federal Constitution, the emission of which is there prohibited. The decisions, however, have been adverse to such contention.[59]

This subject has been previously fully considered,[60] a reference will, however, again be made to a leading case decided by the Supreme Court of the United States in which it was held that a warrant drawn by state authorities receivable in payment of certain obligations due the state was not a bill of credit or other instrument intended to circulate as money,[61] this court in defining the term "money" said in part: "These warrants were payable to the individual to whom the state was indebted, or to bearer, and were issued to a creditor of the state. That the legislature may have desired to facilitate the use of the warrants by these provisions is perhaps true, but the members of the legislature knew that to issue the warrants to circulate as money would be to condemn them from the start. That the promise should be made to receive them in payment of debts due the state would add to their usefulness and to the willingness of people to take them in payment of debts due them from the state and that while in their hands others might receive them in payment of debts, was a possibility or probability depending upon whether the person taking them had

59—Craig v. Missouri, 4 Pet. (U. S.) 410; Briscoe v. Bank of Kentucky, 11 Pet. (U. S.) 257; Woodruff v. Trapnall, 10 How. (U. S.) 190; Thomas v. City of Richmond, 79 U. S. (12 Wall.) 349; Sprott v. United States, 87 U. S. (20 Wall.) 459; Poindexter v. Greenhow, 114 U. S. 270 (Virginia coupon cases); Baldy v. Hunter, 171 U. S. 388; Lindsey v. Rottaken, 32 Ark. 619; Cothran v. City of Rome, 77 Ga. 582; Dively v. City of Cedar Falls, 21 Iowa, 565; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53.

60—See Secs. 81 et seq., and 348, ante.

61—Houston & T. C. R. R. Co. v. Texas, 177 U. S. 66.

opportunity to use them to pay some of his own debts to the state. That he might on some occasion be able to so use the warrant as to enable him to thereby discharge an obligation from himself to a third person who was willing to accept it, does not bring the warrant so used within the ordinary meaning of the term 'money.' It is not money in that sense."

§ 456. Refunding.

Warrants issued for the refunding of prior obligations partake of the original character of such indebtedness. Void debts cannot be rendered valid by a mere change of form,[62] and the reverse of this rule is also true that indebtedness which is valid and binding cannot be made invalid by the issue of warrants for which there is no authority.[63] As a rule in the absence of authority, warrants outstanding cannot be funded by an issue of negotiable bonds, instruments of a different character and which may increase the debt in excess of a statutory or constitutional limit; and not subject to equitable defenses, such refunding bonds are usually held void.[64]

§ 457. Interest payable.

Warrants are usually non-interest bearing, prima facie evidences of indebtedness. If made payable at a certain

62—Royster v. Granville County Com'rs, 98 N. C. 148; see, also, Secs. 206 and 207, ante.

63—Otis v. Inhabitants of Stockton, 76 Me. 506.

Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173. Neither can a valid debt as evidenced by a warrant be rendered invalid by the issue of either void refunding warrants or bonds. See O'Connor v. Parish of East Baton Rouge, 31 La. Ann. 221; City of Plattsmouth v. Fitzgerald, 10 Neb. 401; see, also, Secs. 206 and 207, ante.

64—See the subject of refunding bonds, Chap. IX, ante. Whitwell v. Pulaski County, 2 Dill. 249, Fed. Cas. No. 17,605; Richards v. Klickitat County, 13 Wash. 509. This can be done, however, if constitutional authority exists.

date, they bear interest from and after that date if presented and payment is refused.[65]

Where statutes prohibit the payment of interest on county warrants or orders it cannot be recovered and there are also authorities which hold that municipal warrants or orders do not bear interest after they have become due and payable or after demand and non-payment for want of funds.[66] A demand is generally necessary

65—City of New Orleans v. Warner, 175 U. S. 120, modifying decree in (C. C. A.) 81 Fed. 645; Marks v. Purdue University, 37 Ind. 155.

Rooney v. Dubuque County, 44 Iowa, 128. An actual tender of an amount due on a warrant, alone can suspend the accumulation of interest. Creole Steam Fire Engine Co. v. City of New Orleans, 39 La. Ann. 981.

State v. Hickman, 11 Mont. 541, 29 Pac. 92. No special appropriation necessary for the payment of interest on outstanding warrants. Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 821. Holding unconstitutional Compiled Statutes, division 5, Sec. 794, relating to the payment of interest on unpaid warrants after demand. Read v. City of Buffalo, 74 N. Y. 463; Shipley v. Hacheney, 34 Or. 303; Seton v. Hoyt, 34 Or. 266, 55 Pac. 967.

Monteith v. Parker, 36 Or. 170, 59 Pac. 192. Where unpaid warrants are funded, the holder is entitled to interest from the date of the original warrant. Davidson County v. Olwill, 72 Tenn. (4 Lea) 28; Gibson County v. Rains, 79 Tenn. (11 Lea) 22; Langdon v. City of Castleton, 30 Vt. 285; Seymour v. City of Spokane, 6 Wash. 362; Alexander v. Oneida County, 76 Wis. 56, 45 N. W. 21; State v. Spinney (Ind.), 76 N. E. 971; State ex rel. Wheeler v. Adams (Mo.), 74 S. W. 497; Elsenhaur v. Barton County (Mo.), 88 S. W. 759; Territory v. Board of Com'rs, 8 Mont. 396, 20 Pac. 809.

State v. Barry (Mont.), 63 Pac. 1030. Where under the statutes warrants when issued are entitled to interest on presentment and failure to pay a subsequent act repealing this statutory provision impairs the obligation of a contract and is void. Shipley v. Hacheney (Ore.), 55 Pac. 971.

Scranton v. Hyde Park Gas Co., 102 Pa. St. 382. Where a municipal ordinance has provided for interest on a city warrant a subsequent repeal of that ordinance cannot relieve the city from liability.

McIntosh v. Salt Lake County, 23 Utah 504, 65 Pac. 483. Special statutory provisions may warrant a reduction of interest. See also on this point, State v. Young, 22 Wash. 547, 61 Pac. 725.

Tacoma Bituminous Paving Co. v. Sternberg (Wash.), 66 Pac. 121. Special contract provision in reference to interest payable on local assessment warrants. State v. Stout (Wash.), 86 Pac. 848.

66—State v. Thompson, 10 Ark. 61. The state is not liable for in-

to start interest running upon them if it is allowed. This rule also applies where they are payable on demand and on presentation, payment is refused.[67] Special statutes of particular states may provide for the payment of interest upon warrants presented for payment, and remaining unpaid for want of funds. Such provisions will, of course, establish rights not otherwise existing.[68]

terest except upon an express contract to pay it. Reed v. Mississippi County (Ark.), 63 S. W. 807.

A. H. Andrews Co. v. Delight Special School District (Ark.), 128 S. W. 361. In the absence of statute authorizing it, schools warrants do not bear interest. National Bank of Jacksonville v. Duval County (Fla.), 34 So. 894; State v. Stewart (Fla.), 38 So. 600; Madison County v. Bartlett, 2 Ill. (1 Scam.) 67; Hardin County v. McFarlan, 82 Ill. 138; City of Chicago v. English, 80 Ill. App. 163; Hall v. Jackson County, 95 Ill. 352; Kline v. Jefferson County (Ky.), 101 S. W. 356; Warren County Sup'rs v. Klein, 51 Miss. 807.

Hotchkiss v. Marion (Mont.), 29 Pac. 821. An act providing that county warrants where not paid upon presentation shall draw interest with certain exception is a special act under the State Constitution prohibiting passage of local or special laws. Com. v. Philadelphia County Com'rs, 4 Serg. & R. (Pa.) 125; Ashe v. Harris County, 55 Tex. 49; Alexander v. Oneida County, 76 Wis. 56. See, also, City of Chicago v. Hurford, 238 Ill. 552, 87 N. E. 325, passing upon the question of when interest ceases on vouchers issued by a city to contractors in connection with the construction of local improvements.

67—City of New Orleans v. Warner, 175 U. S. 120. The commencement of a suit will be sufficient demand to make the warrant carry interest from that time. Ter. v. Cascade County Com'rs, 8 Mont. 396, 7 L. R. A. 105; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971; Monteith v. Parker, 36 Or. 170, 59 Pac. 192.

Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 384, 1080. Interest is not payable on improvement warrants until after the city issuing them is entitled to interest on delinquent taxes due under the assessment forming the fund for the payment of such warrants.

68—Hall v. Jackson County, 95 Ill. 353; Marks v. Purdue University, 37 Ind. 155; Rooney v. Dubuque County, 44 Iowa, 128; Robbins v. Lincoln County Ct., 3 Mo. 57; Skinner v. Platte County, 22 Mo. 437; State v. Trustees of Town of Pacific, 61 Mo. 155; Higgins v. Edwards, 2 Mont. 585; Seton v. Hoyt, 34 Or. 266, 43 L. R. A. 634; Monteith v. Parker, 36 Or. 170, 59 Pac. 192; Freeman v. City of Huron, 10 S. D. 368; Williams v. Shoudy, 12 Wash. 362.

City of New Orleans v. Warner, 175 U. S. 120; but see Jacks & Co. v. Turner, 36 Ark. 89, where such a statute was held unconstitutional being in contravention of the con-

§ 458. Actions on warrants; statute of limitations.

Warrants being non-negotiable and merely a prima facie evidence of indebtedness against the public corporation issuing them are subject to all equities existing between parties even when they are in the hands of a bona fide holder who has purchased the same and paid value therefor before maturity. In an action brought by such a holder against the maker,[69] in case of a refusal to pay, all the defenses available or to which they were subject in the hands of the original payee may be taken advantage of by the defendant.[70] But all conditions which under other circumstances would create an estoppel against one of the parties to the transaction will operate here to the same effect.[71] It is not necessary for the holder to proceed by mandamus against the proper disbursing officer of the corporation, but he may sue it

stitutional provision prohibiting counties from issuing interest-bearing evidences of indebtedness.

69—Ohio County, Ky. v. Baird, 181 Fed. 49 C. C. A. Want of consideration is available as a defense.

Barber Asphalt Paving Co. v. Village of Highland Park (Mich.), 120 N. W. 621. Failure to perform a contract can be urged as a defense in an action brought to collect on a warrant issued in advance of the full completion of the contract work. Klein v. Warren County Sup'rs, 51 Miss. 878. See, also, Klein v. Smith County Sup'rs, 54 Miss. 254.

70—Coffin v. Kearney County Com'rs, 114 Fed. 518. The defense that warrants issued in excess of the statutory limitation as to amount held not available where the fact is undisputed that there has been no assessment upon which to base a determination of what is the statutory amount. Grayson v. Latham, 84 Ala. 546; Pulaski County v. Lincoln, 9 Ark. 320.

Wood v. Bangs, 1 Dak. 179. An action for equitable relief involving the validity of warrants cannot be maintained until the parties are placed in statu quo. Mitchelltree School Twp. v. Carnahan (Ind.), 84 N. E. 520; Polk v. Tunica County Sup'rs, 52 Miss. 422.

Dakota County v. Barlett (Nebr.), 93 N. W. 192. A general admission that county warrants were "issued" prevents a subsequent objection being made as to lack of county seal. Crawford v. Noble County Com'rs, 8 Okl. 450. See, also, Sec. 450, ante.

71—Thompson v. Searcy County (C. C. A.) 57 Fed. 1030, following Fones Hardware Co. v. Erb, 54 Ark. 645, 13 L. R. A. 353.

direct.[72] Mandamus is, however, usually the ordinary and exclusive remedy for the collection of a corporate warrant.[73] If warrants are payable, as stated in a preceding section,[74] from a specific fund or by their terms are made payable from such fund, there is not a general obligation to pay them from revenues or funds raised in any other manner or for any other purpose. The holder of such warrants is limited in his recovery to the fund existing for their payment.[75]

72—Jerome v. Rio Grande County Com'rs, 18 Fed. 873; Thompson v. Searcy County (C. C. A.) 57 Fed. 1030; School Dist. No. 7 v. Reeve, 56 Ark. 68; Travelers' Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556; Cook County v. Schaffner, 46 Ill. App. 611; People v. Clark County Sup'rs, 50 Ill. 213; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Wood v. State, 155 Ind. 1; Campbell v. Polk County, 3 Iowa, 467; Mills County Nat. Bank v. Mills County, 67 Iowa, 697; Benham v. Parish of Carroll, 28 La. Ann. 343; International Bank v. Franklin County, 65 Mo. 105; Knapp v. City of Hoboken, 38 N. J. Law, 371; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898; Goldsmith v. Baker City, 31 Or. 249, 49 Pac. 973; Simmons v. Davis, 18 R. I. 46; Rochford v. School Dist. No. 11 (S. D.), 97 N. W. 747; Alexander v. Oneida County, 76 Wis. 56; Brown v. School Directors of Jacobs, 77 Wis. 27.

73—Davenport v. Dodge County, 105 U. S. 237; Chickaming Tp. v. Carpenter, 106 U. S. 663; Pauly Jail Bldg. & Mfg. Co. v. Jefferson County, 160 Fed. 866; Oliver v. Board of Liquidation (La.), 4 So. 166; State v. Clay County, 46 Mo. 231; Mansfield v. Fuller, 50 Mo. 338; Klein v. Smith County Sup'rs, 58 Miss. 540; Greeley v. Cascade County, 22 Mont. 580; Hopper v. Inhabitants of Union Twp. (N. J.), 24 Atl. 387; Theis v. Board of Board of Comm'rs of Washita County, 9 Okla. 643, 60 Pac. 505; Cloud v. Lawrence County (Wash.), 7 Pac. 741; Abernethy v. Town of Medical Lake, 9 Wash. 112; see, also, Sec. 418, et seq.

74—See Sec. 447, ante.

75—Warner v. City of New Orleans, 167 U. S. 467. Where a municipality issues warrants payable from a certain fund, it is estopped to set up as a defense in an action against it on such warrants that it had discharged claims against such fund in excess of the amount collected; the maintenance of such fund being practically abandoned. City of New Orleans v. Warner, 175 U. S. 120, 44 L. Ed. 96; United States v. King, 74 Fed. 493.

Wilder v. City of New Orleans, 87 Fed. 843. The holders of special drainage warrants not restricted for their payment to the special fund from which they were originally designed to be paid. Bush v. Wolf, 55 Ark. 124; Forbes v. Grand County Com'rs, 23 Colo. 344; Bank of Nacona v. March (Tex. Civ. App.) 51

This principle, however, is not applied to the extent that a public corporation will be justified in refusing to levy or collect the taxes or special assessments with which to create the specified fund. In case of refusal on the part of public officers they can be compelled by mandamus to perform the duties imposed upon them by law in this regard.[76]

Neither will a public corporation be excused, by a plea of lack of funds, from paying warrants drawn upon a special fund where the moneys in this fund have been illegally withdrawn and used for other purposes,[77] or

S. W. 266; Northwestern Lumber Co. v. City of Aberdeen, 22 Wash. 404.

76—United States v. Macon County Ct., 75 Fed. 259; Warner v. City of New Orleans, 87 Fed. 829; City of New Orleans v. Warner, 175 U. S. 120; People v. Opel (Ill.), 91 N. E. 458.

Knapp v. City of Hoboken, 38 N. J. Law, 371. In this case the remedy of the warrant holder was held to be by action of debt not by mandamus to compel the enforcement of assessments. Theis v. Washita County Com'rs, 9 Okla. 643, 60 Pac. 505.

Turner v. City of Guthrie (Okla.), 73 Pac. 283. The proceeding by mandamus may be the proper one authorized by law and holders of warrants may not have the option to proceed in any other manner to enforce their obligations against the corporation. Citing Knox County Com'rs v. Aspinwall, 24 How. (U. S.) 376; Rock Island County Sup'rs v. United States, 71 U. S. (4 Wall.) 435; City of Davenport v. Lord, 76 U. S. (9 Wall.) 409; Washington County Sup'rs v. Durant, 76 U. S. (9 Wall.) 415; Riggs v. Johnson County, 73 U. S. (6 Wall.) 166; Elliott County v. Kitchen, 77 Ky. (14 Bush) 289; Limestone County Com'rs Ct. v. Rather, 48 Ala. 434; Diggs v. Lobsitz, 4 Okl. 232; Com. v. Select & Common Councils of Pittsburgh, 34 Pa. 496; Bank of British Columbia v. City of Port Townsend, 16 Wash. 450; Sharp v. City of Mauston, 92 Wis. 629. See, also, First National Bank of Central City v. City of Port Townsend (Wash.), 184 Fed. 574; but, see, Board of Com'rs of Grand County v. King, 67 Fed. 202. In most of the states the law authorizing the issue of county warrants contemplates that they will be satisfied from the ordinary county revenue or be absorbed in the payment of the county taxes. * * * Under the statutes of Iowa a mandamus could not issue to compel the county authorities to levy a special tax to pay a judgment rendered on county warrants.

77—Hockaday v. Chaffee County Com'rs, 1 Colo. App. 362, 29 Pac. 287; Schulenburg & Boeckler Lumber Co. v. City of East St. Louis, 63 Ill. App. 214.

Valleau v. Newton County, 72 Mo. 593. The rule in the text, however, does not apply to warrants issued

where the public corporation has rendered itself incapable of creating such fund in the manner originally intended.[78]

When there is a lack of the necessary moneys in the proper fund, no right of action will accrue against the public corporation where the taxes or assessments have been properly levied and collected or remain partially uncollected. It is generally optional with the holder of warrants in case of a refusal to levy taxes for their payment to compel by mandamus the officials to perform their duties or to sue the public corporation.[79]

without authority, and for a debt which the city could not legally contract. Pollock v. Stanton County, 57 Neb. 399; Ayres v. Thurston County, 63 Neb. 96, 88 N. W. 178; Brewer v. Otoe County, 1 Neb. 373; Red River Valley National Bank v. City of Fargo (N. D.), 103 N. W. 390; Blackman v. City of Hot Springs, 14 S. D. 497, 85 N. W. 996; Jennings v. Taylor (Va.), 45 S. E. 913; State Sav. Bank v. Davis, 22 Wash. 406.

New York Security & Trust Co. v. City of Tacoma, 21 Wash. 303, 57 Pac. 810. The rule applies where funds applicable to the payment of certain warrants have been placed for deposit in banks subsequently becoming insolvent with a resultant loss of such moneys.

Quaker City Nat. Bank v. City of Tacoma, 27 Wash. 259, 67 Pac. 710. The city held not generally liable, the remedy of the warrant holder being an action in damages for the misappropriation; see Sec. 371, ante.

78—City of New Orleans v. Warner, 175 U. S. 120, 44 L. Ed. 96; Warner v. City of New Orleans, 87 Fed. 829 C. C. A.; Louisiana Nat. Bank v. Board of Liquidation, 30 La. Ann. 1356.

79—Board of Improvement v. McManus, 54 Ark. 446.

Mills County Nat. Bank v. Mills County, 67 Iowa, 697. The question is, how is the owner of the warrants to enforce payment? There is no such privity between him and the taxpayers that any action or proceeding can be maintained against them. It is claimed that a demand should be made on the board of supervisors to levy a tax and that no suit can be maintained without such demand. This position cannot be maintained. It is the duty of the county to make the levy without a demand. It might with the same propriety, be claimed that the holder of any other warrant upon the county must make a demand that a tax be levied to pay his warrant before he can maintain an action. The county has an undoubted right to make any proper and lawful defense to these warrants. If it has no defense, the plaintiff is entitled to judgment and to the enforcement of payment by the levy of a tax in obedience to the requirements of the statute. * * * The law contemplates that the owners of property benefited by the ditch must pay the cost of its con-

The legal character of different classes or kinds of warrants as bringing them within the operation of the statutes of limitation depends entirely upon the construction given them by the courts of a state.[80]

Ordinarily, the statute of limitations will not begin to run until after funds have been accumulated for the payment of the warrant and there has been a failure on the part of the holder to present them and demand payment.[81] Although some cases hold that the statute commences to run from the date of delivery when the warrants are made payable on demand,[82] and in a special case where an order was made that all warrants not registered under a certain act of the legislature should not be paid, the absence of knowledge of this order on the part of a warrant holder it was held would not bar him from a recovery.[83]

In actions against public corporations on warrants valid on their face, the presumption of law exists that they were lawfully and legally issued and the burden of establishing their illegality or the fraudulent and il-

struction and if the plaintiff obtains judgment upon the warrants, the method of raising means for its payment is plainly pointed out by statute. Knapp v. Mayor, etc. of Hoboken, 38 N. J. L. 371; Hunter v. Mobley, 26 S. C. 192.

80—Knox County v. Morton (C. C. A.) 68 Fed. 787, construing Rev. St. Mo. 1889, Sec. 3195, relating to county warrants. Hintrager v. Richter, 85 Iowa, 222, 52 N. W. 188; Wilson v. Knox County, 132 Mo. 387, 34 S. W. 45, 477; Borough of Port Royal v. Graham, 84 Pa. 426; Leach v. Wilson County, 68 Tex. 353.

81—King Iron Bridge & Mfg. Co. v. Otoe County, 124 U. S. 459, 8 Sup. Ct. Rep. 582, 31 L. Ed. 514; Knox County v. Morton, 68 Fed. 787 C. C. A.; Apache County v. Barth (Ariz.), 53 Pac. 187; Hubbell v. City of South Hutchinson (Kan.), 68 Pac. 52; Board of Com'rs of Seward County v. Shepard (Kan.), 80 Pac. 36; Wilson v. Knox County (Mo.), 34 S. W. 45; Barnes v. Turner (Okla.), 78 Pac. 108.

82—Condon v. City of Eureka Springs, 135 Fed. 566; People v. Twp. Board of Lincoln, 41 Mich. 415, 49 N. W. 925; Wilson v. Knox County (Mo.), 28 S. W. 896.

83—Leach v. County of Wilson (Tex.), 4 S. W. 613.

legal character of the claims upon which they were based is on the defendant.[84]

§ 459. Payment of warrants.

Where the power to audit, allow and authorize the issuance of warrants is by law placed in the hands of certain designated officials of the public corporation upon the presentation of a warrant duly issued, other officials have no discretion in regard to its payment; this exists as an imperative duty capable of enforcement if there are sufficient funds.[85] Ordinarily where a warrant is defective in form or invalid it does not become the personal obligation of the officials executing it, where it clearly appears it was not intended to be a personal obligation, and where a warrant valid on its face is paid the

84—See Sec. 265, ante. San Juan County Com'rs v. Oliver, 7 Colo. App. 515, 44 Pac. 362; Adams v. Com'rs of Highways of Town of South Otter, 151 Ill. App. 68; Everts v. District Tp. of Rose Grove, 77 Iowa, 37; Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944; Taylor v. Chickasaw County Sup'rs, 74 Miss. 23, 19 So. 834; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260; Taylor v. County Court of Braxton County (W. Va.), 50 S. E. 720; Scott v. School Directors of Armstrong, 103 Wis. 280, 79 N. W. 239.

85—Keller v. Hyde, 20 Cal. 593; Von Schmidt v. Widber, 105 Cal. 151; Gamble v. Clark (Ga.), 19 S. E. 54; Park v. Chandler (Ga.), 39 S. E. 89.

Wood v. State (Ind.), 55 N. E. 959. Action to compel county treasurer to pay an order which theretofore had been duly stamped 'paid'; Nelson v. Harrison County (Ia.), 102 N. W. 197; State ex rel. Wheeler v. Adams (Mo.), 74 S. W. 497. A county treasurer who refuses to pay a warrant which it is his duty to pay is liable to the payee in damages. Bank of Staten Island v. City of New York, 68 App. Div. 231, 74 N. Y. Supp. 284; Martin v. Clark (N. C.), 47 S. E. 397; Southern Audit Co. v. McKenzie (N. C.), 61 S. E. 283; Culberson v. Gilmer Bank (Tex.), 50 S. W. 195; Bush v. Geisy, 16 Or. 355, 19 Pac. 123; Simmons v. Davis 18 R. I. 46; Culberson v. Gilmer Bank, 20 Tex. Civ. App. 565, 50 S. W. 195; Collier v. Peacock, 93 Tex. 255, 54 S. W. 1025.

Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451. If a payment of warrants is marked by haste and with apparent collusion in face of lack of funds to meet them, the officers paying them may be personally liable for the repayment of the money disbursed.

official will be protected unless he is a party to or has knowledge of its illegality.[86] The fact that the corporation issuing the warrant may be its owner is ordinarily no ground for the refusal of a subordinate board or official to refuse payment.[87] Where warrants are authorized under law to be issued by a certain designated official body, an order for payment of a certain claim by another court predicated upon a judgment rendered by it will be sufficient authority for the payment of a warrant issued upon such judgment.[88]

When refunding bonds have been issued to take up outstanding warrants and the bonds are subsequently established as void, the warrants in the meantime having been destroyed, this does not give a holder of such warrants any right of action for damages against the corporation for the destruction; he can recover, however, the full value of the warrants,[89] and this is true where the same state of facts exist except the destruction of warrants and the question of damages.[90]

The payment of warrants issued in settlement of a claim subsequently held invalid or of like warrants can be prohibited and all officials will be bound by orders of the proper authorities to this effect.[91]

86—First National Bank v. Whisenhunt (Ark.), 127 S. W. 968; Germania Bank v. Trapnell (Ga.), 45 S. E. 466; Harrison v. Logan County (Ky.), 110 S. W. 377; Bailey v. Tompkins (Mich.), 86 N. W. 400; People v. Neff, 106 N. Y. S. 746.

Bechtel v. Frye, 217 Pa. 591, 66 Atl. 992. A county treasurer knowing of the illegality of a warrant should refuse to pay the same although it has been approved by the county comptroller. But see Town of Buick v. Buick (Minn.), 127 N. W. 452. The rule is different where the officer paying the warrants is familiar with the illegality of the claims upon which they are based. See, also, Merkel v. Berks County, 81 Pa. St. 505.

87—Louisiana Nat. Bank v. Board of Liquidation, 30 La. Ann. 1356.

88—United States v. King, 74 Fed. 493.

89—O'Connor v. Parish of East Baton Rouge, 31 La. Ann. 221.

90—Gause v. City of Clarksville, 1 McCrary, 78, 1 Fed. 353; Deyo v. Otoe County, 37 Fed. 247; Coffin v. Kearney County Com'rs, 114 Fed. 518; City of Plattsmouth v. Fitzgerald, 10 Neb. 401.

91—Polk County v. Sherman, 99

The payment of warrants illegally drawn or issued may be enjoined and the warrants directed cancelled by a court of equity upon the complaint of a taxpayer, or one entitled to such relief.[92] Where the law contains provisions for their registration or record by certain officials, a failure to properly record or register them does not invalidate the warrants; their validity cannot be destroyed by such failure or neglect. In a South Dakota case,[93] the court said: "The city treasurer is an officer of the city, over whom the warrant holder has no control and for whose neglect to perform his duty he is not responsible. If, therefore, the books of the treasurer were not properly kept and the proper entries made therein, the failure is the failure of the city by its officers, and it cannot take advantage of such omission as against a warrant holder who has done all that the law requires him to do, namely to

Iowa, 60; Taylor v. Chickasaw County Sup'rs, 74 Miss. 23; Hayes v. Davis, 23 Nev. 318; Ter. v. Browne, 7 N. M. 568; Frankel v. Bailey, 31 Or. 285, 50 Pac. 186; State v. Walker (Tenn.), 47 S. W. 417; Lane v. Hunt County, 13 Tex. Civ. App. 315.

92—Andrews v. Pratt, 44 Cal. 309; Ackerman v. Thummel, 40 Neb. 95; Crawford v. Noble County Com'rs, 8 Okl. 450; Dorothy v. Pierce, 27 Or. 373; State v. Metschan, 32 Or. 372, 53 Pac. 1071, 41 L. R. A. 692; Savage v. Sternberg, 19 Wash. 679; Webster v. Douglas County, 102 Wis. 181. Converse Bridge Co. v. Geneva County (Ala.), 53 So. 196; Pulaski County v. Lincoln, 9 Ark. 320; Lainhart v. Burr (Fla.), 38 So. 711; Littler v. Jayne (Ill.), 16 N. E. 374.

McDonald's Admnstr. v. Franklin County (Ky.), 100 S. W. 861. Money paid on an illegal warrant can be recovered by the county.

Zerwekh v. Thornburg (Ia.), 98 N. W. 769. Complaint in suit to restrain payment of alleged illegal warrants held insufficient. Carr v. Dist. Court of Van Buren County (Ia.), 126 N. W. 791; Frankel v. Bailey (Ore.), 50 Pac. 186.

Multnomah County v. White (Ore.), 85 Pac. 778. Moneys paid on void county warrants can be recovered by the county. State v. Walker (Tenn.), 47 S. W. 417.

Criswell v. Board of Directors (Wash.), 75 Pac. 984. Attorneys fee cannot be collected by taxpayer in an action to restrain collection of school warrants. See also City of San Diego v. Dauer (Calif.), 32 Pac. 561. In respect to proper parties entitled to relief; Noonan v. People, 221 Ill. 567, 77 N. E. 930.

93—Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260.

present his warrant for payment and have it registered for payment. As it was in fact registered, the court will presume that he paid or tendered the required fee, or that payment of the same was waived by the treasurer."

§ 460. Presentation for payment.

As a rule, warrants must be presented to and demand made for payment of the proper disbursing officer of the corporation. This is necessary that the holder may proceed by mandamus against the official to compel a payment or to bring an action based upon them and that interest may commence to run.[94]

§ 461. Payment; the amount.

Public officers have no authority to bind their principal for the payment of more than the face of a warrant

94—Warner v. City of New Orleans, 87 Fed. 829; Grayson v. Latham, 84 Ala. 546.

Apache County v. Barth (Ariz.), 53 Pac. 187. The statute of limitation does not commence to run on county warrants until there is a fund in the treasury for their payment. City of Central v. Wilcoxen, 3 Colo. 566; Johnson v. Wakulla County, 28 Fla. 720, 9 So. 690; Bodman v. Johnson County, 115 Iowa, 296, 88 N. W. 331; Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52; Oliver v. Board of Liquidation, 40 La. Ann. 321, 4 So. 166; State v. Board of Liquidation, 31 La. Ann. 273; Varner v. Inhabitants of Nobleborough, 2 Me. (2 Greenl.) 121; Ferguson v. City of St. Louis, 6 Mo. 499; Wilson v. Knox County (Mo.), 28 S. W. 896; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971.

Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260. The next contention of appellants we shall notice is that the court erred in allowing interest on these warrants from the date of their presentation and registration. In this we think the court ruled correctly. The warrants were payable upon presentation for payment; and payment being refused for want of funds, the holder was thereafter entitled to interest under the provision of Secs. 3721, 4746 Comp. Laws, until the treasurer set apart funds to pay them, as provided by section 1674, Comp. Laws. This and the preceding section clearly assume that such warrants bear interest after presentation and registration. San Patricio County v. McClane, 58 Tex. 243; Bardsley v. Sternberg, 18 Wash. 612; State v. Young, 22 Wash. 547.

City of New Orleans v. Warner, 175 U. S. 120, 44 L. Ed. 96, modify-

although it may be at a discount and the sum realized from its sale at the discount price will bring to the holder a sum less than the bill or account rendered by him which has been approved, audited and allowed by the proper authorities.[95] A warrant issued either by fraud or mistake for an amount in excess of the sum actually due on the account or bill rendered and to pay which it was intended, is valid only for the amount for which it should have been properly issued.[96]

In some cases it has been held that the amount of taxes due from the holder of a warrant or other indebtedness owing the municipality issuing the warrant can be arbitrarily deducted from the amount due on the warrant

ing decree in 81 Fed. 645. Commencement of a suit is a sufficient demand to make a warrant carry interest at a specified rate.

Condon v. City of Eureka Springs, 135 Fed. 566. A holder of warrants cannot be compelled to present them when issued prior to a law providing for the calling in of outstanding warrants by order for cancellation and reissue. Valley Bank v. Brodie (Ariz.), 76 Pac. 617.

Yell County v. Wills (Ark.), 103 S. W. 618. Passing upon the question of sufficient publication of a notice for presentation and re-issue of county warrants. South Yuba Water Co. v. City of Auburn (Calif.), 118 Pac. 101.

Ray v. Wilson (Fla.), 10 So. 613. Repudiation of warrants not presented for re-examination cannot be authorized. Farmers Bank of Wycliffe v. City of Wycliffe (Ky.), 112 S. W. 835. See also Payne v. Baehr (Calif.), 95 Pac. 895; but see Speer v. Board of County Com'rs of Kearney County, 88 Fed. 749 C. C. A. Presentation of county warrants for payment is not necessary to maintain an action thereon.

95—Morgan v. District of Columbia, 19 Ct. Cl. 156; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Dorsey County v. Whitehead, 47 Ark. 205; Foster v. Coleman, 10 Cal. 278; Clark v. City of Des Moines, 19 Iowa, 199; Leavenworth County Com'rs v. Keller, 6 Kan. 510; Bauer v. Franklin County, 51 Mo. 205; Cleveland County Com'rs v. Seawell, 3 Okl. 281; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; State v. Wilson (Tex.), 9 S. W. 155; Arnott v. City of Spokane, 6 Wash. 442; Million v. Soule, 15 Wash. 261.

96—Foster v. Coleman, 10 Cal. 278; People v. State Treasurer, 40 Mich. 320; Chandler v. City of Bay St. Louis, 57 Miss. 326; Erskine v. Steele County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645; Arnott v. City of Spokane, 6 Wash. 442, 33 Pac. 1063.

with accrued interest, if any, or stated in another way, the payment of a warrant in full cannot be compelled where the owner is indebted to the maker.[97]

Where warrants have been fraudulently raised after issuance the corporation is not liable for their increased face value.[98]

§ 462. Manner of payment.

In the absence of restrictive legislation, a public corporation or the state may issue its warrants payable in gold coin of the United States or other legal tender. It may also make its warrants as well as other due bills or orders receivable by the public corporation issuing them in payments of debts due such corporation.[99]

Pursuant, therefore, to such provisions, the holder of warrants may insist upon their payment in the manner and mode prescribed or may compel an acceptance, in accordance with their terms by the public officials, in payment of taxes,[1] or other obligations due from him to

97—Funk v. State (Ind.), 77 N. E. 854; Long v. McDowell (Ky.), 52 S. W. 812; State v. Melton (W. Va.), 57 S. E. 729; but see Alberts v. Torrent, 98 Mich. 512, 57 N. W. 569.

98—Chandler v. Bay St. Louis, 57 Miss. 326.

99—White v. State (Ark.), 11 S. W. 765; State v. Miller, 145 Ind. 598, 44 N. E. 309.

Kentucky Chair Co. v. Com., 20 Ky. L. R. 1279, 49 S. W. 197. State treasury warrants not available for the payment of a debt due the state. Long v. McDowell, 21 Ky. L. R. 605, 52 S. W. 812.

Alberts v. Torrent, 98 Mich. 512. A mayor has no authority to deduct from a valid warrant due an individual a sum illegally received by him from the city.

Clayton v. McWilliams, 49 Miss. 311. In Mississippi during the rebellion the payment in Confederate money is sufficient. Raton Waterworks v. Town of Raton, 9 N. M. 70, 49 Pac. 898; Lee v. Roberts, 3 Okl. 106; Kenyon v. City of Spokane (Wash.), 48 Pac. 78; see also cases cited in Sec. 82, et seq., and 191, ante; but, see, Kentucky Chair Co. v. Commonwealth (Ky.), 49 S. W. 197, where it was held that a tender of state treasury warrants in payment of a debt due the state is not good.

1—State v. Rives, 12 Ark. 721; Hill v. Logan County, 57 Ark. 400, 21 S. W. 1063; McKibben v. State,

the corporation. On the point that payment can be compelled in the manner provided by law the court in a South Dakota case,[2] said: "A city undoubtedly may, for its own convenience, make an estimate of the money it may require for each particular city purpose; but when it makes its levy, all those various sums must be aggregated, and the levy made for the total amount required for general municipal purposes. Of course, if the city makes any levy for bonded indebtedness, for interest, for the payment of any judgments or for any other special purpose authorized by law, the levy may be special as to those purposes. Its general municipal expenses cannot, however, be divided and subdivided and appropriations made for specific purposes in advance, so as to cut off the rights of holders of warrants on its general fund, as was attempted to be done in the case at bar. Such a system, if permitted, would in a great measure, repeal the laws of the state. * * * Holders of valid

31 Ark. 46; Lindsey v. Rottaken, 32 Ark. 619, to the contrary, Loftin v. Watson, 32 Ark. 414; Fry v. Reynolds, 33 Ark. 450; Howell v. Hoggins, 37 Ark. 110; Thorpe v. Cochran, 7 Kan. App. 726, 52 Pac. 107.

State v. Payne, 151 Mo. 663, 52 S. W. 412. County warrants made by statutory provision receivable in payment of taxes are not so receivable for any year other than that for which they were issued. Sheridan v. City of Rahway, 44 N. J. Law, 587; Town of Marinette v. Oconto County Sup'rs, 47 Wis. 216.

St. Louis National Bank v. Marion County (Ark.), 79 S. W. 791. The fact that a county is largely indebted is not a sufficient reason for refusing to order warrants issued receivable for taxes under the statute.

Ex parte Willis (Ark.), 86 S. W. 300. The legal effect of a warrant receivable for taxes cannot be changed by an attempted agreement.

Stillwell v. Jackson (Ark.), 93 S. W. 371. Warrants are receivable in discharge of special taxes for the construction of a court house.

Vale v. Buchanan (Ark.), 135 S. W. 848. The provisions of a statute with respect to the issue of warrants must be complied with before they are receivable for county taxes. New Orleans v. City Hotel, 28 La. Ann. 423; State v. Pilsbury, 29 La. Ann. 787.

Miller v. Lynchburg, 20 Gratt. (Va.), 330. The right to pay taxes by warrants must be exercised within the time provided by the statute granting it.

2—Western Town Lot Co. v. Lane, 7 S. D. 1, 62 N. W. 982.

city warrants have vested rights that cannot be ignored. Payment of such warrants in the manner provided by the law cannot be suspended at the mere will and pleasure of the city council."

Usually a public corporation where warrants are at a discount, does not possess the power to issue them at such a rate as to make them a cash equivalent.[3]

The liquidation of an outstanding warrant by a check on an insolvent bank does not constitute a payment and the full amount of the original debt with accrued interest can be recovered from the county issuing the same.[4]

§ 463. Time of payment.

Warrants where not otherwise provided are usually payable on presentation and demand.[5] Payment may also

3—Clayton v. McWilliams, 49 Miss. 311; Bauer v. Franklin County, 51 Mo. 205; see the preceding section.

4—Chambers v. Custer County (Ida.), 71 Pac. 113.

5—Shelley v. St. Charles County Ct., 21 Fed. 699; United States v. King, 74 Fed. 493; United States v. Macon County Ct., 75 Fed. 259; People v. Austin, 11 Colo. 134, 17 Pac. 485; McDonald v. Bird, 18 Cal. 195; Shaw v. Statler, 74 Cal. 258; Thorpe v. Cochran, 7 Kan. App. 726, 52 Pac. 107.

State v. Burke, 35 La. Ann. 457. Warrants issued in favor of the Louisiana University take precedence of all others drawn on the general fund except those in favor of officers whose salaries are fixed by the constitution; this case also holds that warrants issued by the Louisiana board of health are not entitled to preference of payment out of the general fund, and Klein v. Pipes, 43 La. Ann. 362, holds that warrants issued for the support of the University for the Education of Negroes should not in payment take precedence. State v. Johnson, 162 Mo. 621, 63 S. W. 390; Morrow v. Surber, 97 Mo. 155; Andrew County v. Schell, 135 Mo. 31; State v. Horstman, 149 Mo. 290; State v. Allison, 155 Mo. 326; Greeley v. Cascade County, 22 Mont. 580, 57 Pac. 274; Esser v. Spaulding, 17 Nev. 289; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; Shannon v. City of Huron, 9 S. D. 356; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260; La France Fire-Engine Co. v. Davis, 9 Wash. 600.

Lorence v. Bean, 18 Wash. 36. A warrant issued in payment of a judgment should not be postponed in favor of other claims or necessary expenses. Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251; Long Beach School District v. Lutge, 129 Calif. 409, 62 Pac. 36.

First National Bank v. Arthur (Colo.), 50 Pac. 738. A court may

be due at a date specified,[6] in the order of their registration with designated public officials,[7] or in the order of their issuance by number or date.[8]

direct the order of payment of city warrants.

Phillips v. Reed, 109 Ia. 188, 80 N. W. 347. If when warrants were issued they were payable in their order of presentation, a subsequent statute changing this will be void if impairing the contract of precedence established. State ex rel. Kirtley v. Shell (Mo.), 36 S. W. 306; Red River Valley National Bank v. City of Fargo (N. D.), 103 N. W. 390; State v. Melton (W. Va.), 57 S. E. 729; Smith v. Polk County (Ore.), 112 Pac. 715.

6—Frankford Real-Estate, Trust & Safe-Deposit Co. v. Jackson County (C. C. A.), 98 Fed. 942; Miller County v. Gazola, 65 Ark. 353, 46 S. W. 423.

Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932. The contract and order in question each required the amount therein specified to be paid at a date which had not then arrived. School district officers can contract for the furnishing of school houses only with reference to money on hand and at the time available for that purpose. The officers of the school district possessed no authority to make a contract or give a district order payable at a future time. This principle has been frequently stated and applied by this court. Citing School Dist. No. 2 v. Stough, 4 Neb. 360; State v. Sabin, 39 Neb. 570; A. H. Andrews & Co. v. School Dist. of McCook, 49 Neb. 420.

7—United States v. Macon County Court, 75 Fed. 259; Taylor v. Brooks, 5 Cal. 332; McCall v. Harris, 6 Cal. 281; La Forge v. Magee, 6 Cal. 285; First Nat. Bank of Northampton v. Arthur, 10 Colo. App. 283, 50 Pac. 738; Shepherd v. Helmers, 23 Kan. 504; First Nat. Bank of Garden City v. Morton County Com'rs, 7 Kan. App. 739, 52 Pac. 580; Monroe v. Crawford, 9 Kan. App. 749, 58 Pac. 232; State v. Allison, 155 Mo. 325; State v. Gardner (Nebr.), 112 N. W. 373; Raton Waterworks Co. v. Town of Raton (N. Mex.), 49 Pac. 898; O'Donnell v. City of Philadelphia, 2 Brewst. (Pa.) 481.

State v. Campbell, 7 S. D. 568, 64 N. W. 1125. In this case the court prepared the following syllabus: "Every lawfully issued and valid municipal warrant should be paid in the order of its registration for payment, although the same was issued in payment of an indebtedness of a prior year." Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260; Stewart v. Custer County, 14 S. D. 155, 84 N. W. 764.

8—McCall v. Harris, 6 Cal. 281; Mitchell v. Speer, 39 Ga. 56.

Thorpe v. Cochran (Kan.), 52 Pac. 187. The priority of payment may be established by general statutes. La France Fire Engine Co. v. Davis, 9 Wash. 600; Munson v. Mudgett, 15 Wash. 321; Bardsley v. Sternberg, 18 Wash. 612; Potter v. City of New Whatcom, 20 Wash. 589; Eidemiller v. City of Tacoma, 14 Wash. 376, 44 Pac. 877; Hull v. Ames, 26 Wash. 272, 66 Pac. 391.

Under special statutory provisions outstanding warrants may be called for cancellation or re-issue,[9] or provision may be made for their refunding.[10]

The weight of authority is to the effect that after issue they become a prima facie evidence of indebtedness which cannot be affected by subsequent legislation either as to the time, the mode or manner of payment.[11]

If a certain provision is made or a certain fund is raised for the payment of specific indebtedness represented by them, it is usually not necessary that the fund or provision should be available as an entirety before payment can be commenced. A distribution or payment should be made immediately upon any of the funds becoming available for such purpose provided payment can be properly demanded at such time.[12]

9—Parsel v. Barnes, 25 Ark. 261; Frye v. Reynolds, 22 Ark. 450.

Thompson v. Scanlan (Ark.), 16 S. W. 197. Statutory provisions with respect to publication of notice of call for cancellation and re-issue must be complied with otherwise the order calling in outstanding warrants or scrip will be void. Miller County v. Gazola (Ark.), 46 S. W. 423; Nevada County v. Williams (Ark.), 81 S. W. 384; Yell County v. Will (Ark.), 103 S. W. 618; State ex rel. Kirtley v. Shell (Mo.), 36 S. W. 206.

Smith v. Polk County (Ore.), 112 Pac. 715. A statute which authorizes the publication of a notice that unpaid county warrants which have been issued for more than seven years must be presented for payment within sixty days or they will be cancelled creates a special limitation which does not begin to run until the publication has been made.

10—State v. Funding Board (La.), 1 So. 910.

11—United States v. Macon County Ct., 45 Fed. 400; Read v. Mississippi County, 69 Ark. 365, 63 S. W. 807; State v. Barret, 25 Mont. 112, 63 Pac. 1030; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971.

12—United States v. Macon County Ct., 75 Fed. 259; Beals v. Evans, 10 Cal. 459.

Day v. Callow, 39 Cal. 593. A judgment authorizing a county treasurer to satisfy warrants partially paid out of a special fund from moneys that might thereafter come into such fund is to this extent erroneous. Jordan v. Hulbert, 54 Cal. 260; First Nat. Bank of Northampton v. Arthur, 10 Colo. App. 283, 50 Pac. 738; Butts County v. Jackson Banking Co. (Ga.), 60 S. E. 149; State v. Windle, 156 Ind. 648, 59 N. E. 276; Klein v. Pipes, 43 La. Ann. 362; Sheidley v. Lynch, 95 Mo. 487, 8 S. W. 434.

State v. Gardner (Nebr.), 112 N. W. 373. The payment of school district warrants in full cannot be com-

This rule is applied to avoid the payment of interest upon warrants demanded and payment of which is refused, although there may be funds to pay on account.

§ 464. To whom payable.

Warrants although not considered negotiable instruments according to the common rules of law are usually assignable, and when properly assigned and endorsed they become, in the hands of the holder, subject to prior equities, an enforceable demand by him against the corporation.[13]

On this point the quotation from Mayor, etc., of Nashville v. Ray,[14] in a previous section [15] should be noted, and the court in a California case,[16] in its opinion in part said: "County warrants acquire no greater validity in

pelled where this would result in closing the schools, but a part payment can be made. Haydon v. Ormsby County Sup'rs, 2 Nev. 371.

State v. Grant, 31 Or. 370, 49 Pac. 855. A partial payment of a warrant cannot be compelled.

13—City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Ouachita County v. Wolcott, 103 U. S. 559; Watson v. City of Huron (C. C. A.), 97 Fed. 449; Bayerque v. City of San Francisco, McAll. 175, Fed. Cas. No. 1,137; Crawford County v. Wilson, 7 Ark. 214; Tippecanoe County Com'rs v. Cox, 6 Ind. 403; Thayer v. City of Boston, 36 Mass. (19 Pick.) 511; Hyde v. Franklin County, 27 Vt. 185; Averett's Adm'r v. Booker, 15 Grat. (Va.) 163; People v. Hall, 8 Colo. 485; Cook County v. Lowe, 23 Ill. App. 649. County warrants drawn contrary to Starr & C. Ann. St. Ill. p. 2460, held void. Garvin v. Wiswell, 83 Ill. 215; McCormick v. Grundy County, 24 Iowa, 382; Crawford v. Noble County Com'rs, 8 Okl. 450; Heffleman v. Pennington County, 3 S. D. 162; Gibson County v. Rain, 79 Tenn. (11 Lea) 20; Leach v. Wilson County, 62 Tex. 331; Brown v. School-Directors of Jacobs, 77 Wis. 27; Butts County v. Jackson Banking Co. (Ga.), 60 S. E. 149; Newell v. School Directors, 68 Ill. 614; Sheffield School Twp. v. Andress, 56 Ind. 157; Long v. McDowell (Ky.), 52 S. W. 812; some cases, however, hold to the contrary.

See Savage v. Mathews, 98 Ala. 535; Dana v. City and County of San Francisco, 19 Calif. 486.

Holtsclaw v. State (Ind.), 92 N. E. 121. A warrant drawn in favor of the town treasurer cannot be assigned by him. State v. Omaha National Bank (Nebr.), 81 N. W. 319 and East Union Twp. v. Ryan, 86 Pa. 459.

14—19 Wall. 468.

15—See Sec. 450, ante.

16—People v. El Dorado County Sup'rs, 11 Calif. 170.

the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred or in what faith they may have been taken. If illegal when issued, they are illegal for all time. The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of county warrants. Were this otherwise, it is easy to se that the county would be entirely at the mercy of the board."

And in an early case in Iowa, the court in discussing the nature of warrants as non-negotiable instruments, said: "On the contrary if such warrants are held non-negotiable, it is completely in the power of all persons to protect themselves from loss, since the law and the public records necesarily afford to every person the means of ascertaining the facts as to the legality and validity of every warrant issued, so, that, by such non-negotiability, both the counties and individuals are abundantly and fully protected. There is no validity or force in the assumption that by such ruling the credit of the counties would be impaired and their necessary municipal operations be impeded. No honest person would refuse to labor or furnish material to a county because he could only receive a fair and just compensation, nor because by judicial construction, it was furnished with a coat of mail guarding it against the assaults and machinations of the dishonest. A warrant properly issued, if not as readily sold, would yield more value to the seller when sold. In view of this concurrence of principle, authority and public policy we have no hesitation in holding that county warrants are not negotiable at the law-merchant. They are, of course, assignable under our statute, and suit may be brought thereon in the name of the assignee, but subject to any defense which might be made as against the

payee."[17] The assignee of a warrant may demand and sue upon refusal to pay.[18]

The manner in which the transfer must be made to give the transferee the privileges and rights of his transferor depends largely upon statutory provisions prescribing the manner in which this shall be done;[19] otherwise, if the transfer is made in the customary manner for the sale and assignment of commercial paper or instruments of like character, it will be sufficient.[20] Public officials cannot draw warrants for the payment of their salaries or personal claims which they may have against the corporation.[21]

In an action brought by the holder of a warrant whether the original payee, his assignees or bearer, its presentation and possession by plaintiff at the time of trial is prima facie evidence of his ownership though it is denied in the pleadings.[22] This rule is but a re-statement of that

17—Clark v. Polk County, 19 Iowa, 248.

18—Laughlin v. District of Columbia, 116 U. S. 485; Beals v. Evans, 10 Cal. 459; Marshall v. Platte County, 12 Mo. 88.

State v. Barret, 25 Mont. 112, 63 Pac. 1030. An assignee of state warrants succeeds to all the rights of his assignor, including that of demanding and receiving interest. State v. Van Wyck, 20 Wash. 39, 54 Pac. 768; Webster v. Douglas County, 102 Wis, 181, 77 N. W. 885, 78 N. W. 451; Hook v. German-American Bank, 129 N. Y. S. 491; Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251; Hart v. Village of Wyndmere (N. D.), 131 N. W. 271; Bank of Springfield City v. Rhea County (Tenn.), 59 S. W. 442; Shock v. Colorado County (Tex.), 115 S. W. 61; but see Twp. of Snyder v. Bovaird (Pa.), 15 Atl. 910.

19—Savage v. Mathews, 98 Ala. 535; Martin v. City & County of San Francisco, 16 Cal. 285; People v. Gray, 23 Cal. 125; State ex rel. Livesay v. Harrison (Mo.), 72 S. W. 469.

20—Watson v. City of Huron (C. C. A.), 97 Fed. 449; Crawford County v. Wilson, 7 Ark. 215; Sweet v. Carver County Com'rs, 16 Minn. 106 (Gil. 96).

Board of Com'rs of Ramsey County v. Elmund (Minn.), 102 N. W. 719. Neither a county treasurer nor his sureties are liable on his bond because of the forgery of an order or of the endorsement of the payee's name. Crawford v. Noble County Com'rs, 8 Okl. 450.

21—Cricket v. State, 18 Ohio St. 9.

22—Heffleman v. Pennington County, 3 S. Dak. 162.

which applies to the validity of negotiable securities which has been considered in previous sections.[23]

The rule as to warrants was well stated in Heffleman v. Pennington County,[24] where the court said: "Appellant's remaining point is that, having in his answer denied the alleged transfer to an ownership by the respondent, the mere possession of and presentation by respondent at the trial was not sufficient evidence of the assignment and ownership. There being no other evidence as to ownership, there is here no question of preponderance, but simply, did possession of and dominion over these warrants tend to prove title? As possession is usually an incident of ownership, unexplained possession is always some evidence of ownership. It may be very slight, and easily overcome but actual possession is a fact, and, in the absence of other facts, it will be presumed to be rightful. These warrants were in form payable to bearer. They were in the possession of and presented by respondent and were received from him without objection. In the absence of any evidence whatever tending to question respondent's ownership, or tending to show that his absolute possession ought not to support the usual presumption, we think his ownership was sufficiently maintained until attacked by some evidence."

§ 465. Miscellaneous forms of indebtedness.

A public corporation may, under authority of law, issue, as evidence of an indebtedness legally incurred, orders,[25] negotiable certificates,[26] school orders,[27] or other

23—See Secs. 265 and 400, et seq., ante.

24—3 S. D. 162.

25—McCutchen v. Town of Freedom, 15 Minn. 217 (Gil. 169.); State v. Corzilius, 35 Ohio St. 69; Stoll v. Johnson County Com'rs, 6 Wyo. 231.

26—Brown v. Town of Canton, 4 Lans (N. Y.) 409.

27—Whitney v. Inhabitants of Stow, 111 Mass. 368; Edinburg American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593.

acknowledgments of a similar character.[28] These miscellaneous forms of indebtedness when issued without authority are invalid;[29] but if the corporation had the power to make the contract creating the indebtedness, the payee may then maintain an action for money or things had and received or services rendered.[30]

In a leading case in the Supreme Court of the United States,[31] Justice Strong in the opinion, said: "It is enough for them (the plaintiffs) that the city council have power to enter into a contract for the improvement

28—Bloomfield v. Charter Oak Bank, 121 U. S. 121; Parsel v. Barnes, 25 Ark. 261; In re Certificates of Indebtedness, 18 Colo. 566.

Lincoln School Twp. v. Union Trust Co. (Ind.), 73 N. E. 623. A note. Foote v. City of Salem, 96 Mass. (14 Allen) 87; Richardson v. City of Brooklyn, 31 Barb. (N. Y.) 152.

Burgin v. Smith (N. C.), 66 S. E. 607. The phrase "county scrip" means notes or evidences of debts other than coupon bonds.

29—Bloomfield v. Charter Oak Bank, 121 U. S. 121; Scott's Ex'rs v. City of Shreveport, 20 Fed. 714.

Bangor Sav. Bank v. City of Stillwater, 46 Fed. 899. In the absence of special statutory authority, a city has no right to issue certificates of indebtedness in negotiable form, even in payment for property which it has authority to buy. City of Lockport v. Gaylord, 61 Ill. 276.

Sullivan v. Highway Com'rs, 114 Ill. 262. Highway commissioners have no power to issue, under the statute, interest-bearing orders. Citizens' Bank v. Police Jury of Parish of Concordia, 28 La. Ann. 263; Smith v. Madison Parish, 30 La. Ann. 461; Parsons v. Inhabitants of Monmouth, 70 Me. 262; Abbott v. Inhabitants of North Andover, 145 Mass. 484; Smallwood v. Lafayette County, 75 Mo. 450; Andrews v. School District of City of McCook, 49 Nebr. 420, 68 N. W. 631; Town of Hackettstown v. Swackhamer, 37 N. J. Law, 191; Chosen Freeholders of Hudson County v. Buck, 51 N. J. Law, 155; Smith v. Epping, 69 N. H. 558; Stewart v. Otoe County, 2 Neb. 177; Parker v. Saratoga County Sup'rs, 106 N. Y. 392; Loan & Exch. Bank v. Shealey, 62 S. C. 337; Biddle v. City of Terrell, 82 Tex. 335; Exchange Bank of Virginia v. Lewis County, 28 W. Va. 273.

30—Bangor Savings Bank v. City of Stillwater, 49 Fed. 721; Watson v. City of Huron, 97 Fed. 449; Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610; Milliken v. George L. Gillen & Son (Ky.), 122 S. W. 151; Morgan v. Town of Guttenberg, 40 N. J. L. 394; Ford v. Washington Twp., Burgin County (N. J.), 58 Atl. 79; but see Crawford v. Board of Com'rs of Noble County, 8 Okla. 450, 58 Pac. 616.

See, also, Secs. 31, 32 and 380 et seq., ante.

31—Hitchcock v. City of Galveston, 96 U. S. 341.

of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all.''

Municipal evidences of indebtedness may be divided into two classes, based upon legal character and characteristics as affected by or depending for validity, in the hands of the original payee or a bona fide holder for value, on the availability, as a defense in an action upon the indebtedness, of equities existing between the payee and the public corporation. These two classes as suggested are, first, negotiable bonds or securities, and second, warrants or other evidences of a similar character. In the case of negotiable bonds and securities, the rule of law is clearly established that in the hands of a bona fide purchaser for value, equities between original parties are not available as a defense. Warrants, as stated in a preceding section,[32] and all other evidences of a similar character are merely prima facie evidences of indebtedness and at no time can the maker of them be prevented from setting up as a defense equities that may have originally existed.[33]

32—See Secs. 446 and 450, ante.

33—Newell v. School Directors, 68 Ill. 514 (School order); Hall v. Jackson County, 95 Ill. 352; Farmers' Bank of Frankfort v. Orr, 25 Ind. App. 71, 55 N. E. 35; Wood v. State, 155 Ind. 1; Sheffield School Tp. v. Andress, 56 Ind. 157 (School district promissory note); Abaseal v. City of New Orleans, 48 La. Ann. 565 (Floating debt certificate); Emery v. Inhabitants of Mariaville, 56 Me. 315 (Town orders); School Dist. No. 2 v. Stough, 4 Neb. 359 (School district orders); Rensselaer County Sup'rs v. Weed, 35 Barb.

The miscellaneous forms of indebtedness considered in this section are subject to the rules of law, in regard to their issue, their form and their payment, applying to warrants and discussed in preceding sections.[34] As a matter of convenience the authorities relating to special forms of indebtedness as distinguished by specific names are collected here.

The weight of authority is to the effect that the power to issue an evidence of indebtedness, negotiable in its character, cannot be implied but must be expressly given in some charter, statutory or constitutional provision. Under this ruling the making of a promissory note by the officials of a public corporation has been held unauthorized even where the indebtedness is one that the public corporation could legally incur.[35]

(N. Y.) 136 (Draft drawn upon county treasurer); Loan & Exch. Bank v. Shealey, 62 S. C. 337 (School warrant); Texas Transp. Co. v. Boyd, 67 Tex. 153.

Cheeney v. Inhabitants of Brookfield, 60 Mo. 53. Although a warrant if signed by the proper officers prima facie imports validity, its issuance may be shown to be ultra vires. Warrants issued to workmen in payment of wages for engraving illegal scrip are void.

34—People v. Munroe, 100 Cal. 664. A writing purporting to be a sale or assignment of the unearned salary of a public school teacher is the subject of forgery. Clark County Sup'rs v. Lawrence, 63 Ill. 32; Kelley v. City of Brooklyn, 4 Hill (N. Y.) 263; Brown v. Town of Jacobs, 77 Wis. 29; Strong v. District of Columbia, 4 Mackey (D. C.) 242.

35—City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Merrill v. Town of Monticello, 138 U. S. 673; Chisholm v. City of Montgomery, 2 Woods, 584, Fed. Cas. No. 2,686; White v. City of Rahway, 11 Fed. 853.

Bangor Sav. Bank v. City of Stillwater, 49 Fed. 721. Where negotiable certificates of indebtedness issued by a city, and sued upon by the payee have been declared invalid, the payee may maintain an action for money had and received, provided the city had power to make the contract out of which the indebtedness arose. Ladd v Town of Franklin, 37 Conn. 53; Bourdeaux v. Coquard, 47 Ill. App. 254; Coquard v. Village of Oquawka, 192 Ill. 355, affirming 91 Ill. App. 648; Craig School Tp. v. Scott, 124 Ind. 72.

Carter v. City of Dubuque, 35 Iowa, 416. A contract of guaranty is not negotiable and the power of a city to sell negotiable paper held by it does not carry with it as an incident the power to execute a guaranty thereof. Capmartin v. Police

It is considered desirable to avoid the granting of a power to public corporations which will enable them to issue valid securities or evidences of indebtedness not subject to defense or an investigation of equities which may exist between the parties. The subject of the implied power of the public corporation to issue negotiable instruments has been fully considered in previous sections.[36]

Jury, 23 La. Ann. 190; Breaux v. Iberville Parish, 23 La. Ann. 232; Flagg v. Parish of St. Charles, 27 La. Ann. 319; State v. Fisher, 30 La. Ann. 514.

Neugass v. City of New Orleans, 42 La. Ann. 163. In the absence of express legislative authority, a municipal corporation has no power to utter unconstitutional obligations to pay money. Parsons v. Inhabitants of Monmouth, 70 Me. 262; Robbins v School Dist. No. 1, 10 Minn. 340 (Gil. 268); Atlantic City Waterworks Co. v. Smith, 47 N. J. Law, 473; Halstead v. City of New York, 5 Barb. (N. Y.) 218; Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; Clark v. Saratoga County Sup'rs, 107 N. Y. 553; Vaughn v. Forsyth County Com'rs, 117 N. C. 429; Stewart v. Otoe County, 2 Neb. 177.

In West v. Town of Errol, 58 N. H. 233, it is held that the selectmen may without vote of the town negotiate promissory notes upon which the town will be liable on a showing that the money went to its use or that the transaction was ratified. In City of Mineral Wells v. Darby (Tex. Civ. App.), 51 S. W. 351, it is held that a municipality may execute its note in payment of a legal obligation.

36—See Secs. 57 et seq. and 84 et seq., ante, and the authorities there cited.

See, also, Police Jury v. Britton, 82 U. S. (15 Wall.) 566; City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; City of Nashville v. Lindsey, 86 U. S. (19 Wall.) 485; Claiborne County v. Brooks, 111 U. S. 400; Town of Concord v. Robinson, 121 U. S. 165; Kelley v. Town of Milan, 127 U. S. 139; Norton v. Town of Dyersburg, 127 U. S. 160; Young v. Clarendon Tp., 132 U. S. 340; Hill v. City of Memphis, 134 U. S. 198; Merrill v. Town of Monticello, 138 U. S. 673; Brenham v. German-American Bank, 144 U. S. 173.

See, also, the following authorities: Desmond v. City of Jefferson, 19 Fed. 483; Gause v. City of Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276; Law v. People, 87 Ill. 385; Hewitt v. Board of Education of Normal School Dist., 94 Ill. 528; Miller v. Dearborn County Com'rs, 66 Ind. 162; City of Richmond v. McGirr, 78 Ind. 192; State v. Babcock, 22 Neb. 614; Douglass v. Virginia City, 5 Nev. 147; Town of Hackettstown v. Swackhamer, 37 N. J. Law, 191; Knapp v. City of Hoboken, 39 N. J. Law, 394; Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; Bank of Chillicothe v. Town of Chillicothe, 7 Ohio (pt.

§ 466. The same subject; legal character.

The Federal government has the exclusive power of coining money and issuing currency or certificates constituting a legal tender for the payment of debts. Where public corporations have issued certificates of indebtedness, promissory notes or other instruments either in the similitude of bank notes or other usual forms of currency, such have been held illegal in their character and the corporation held without power or authority to issue them.[37] Securities of any form intended to circulate as money are held invalid. In a case decided by the Supreme Court of the United States,[38] bonds had been issued having the form and appearance of treasury notes, which were afterwards redeemed and legal securities issued in their place, the city failing to pay, a holder brought an action to recover. The city resisted on the ground that the original bonds issued in the form of currency were illegal and that their surrender was not a valuable consideration for the bonds given in lieu thereof, the court said: "It can scarcely be doubted that whoever is capable of entering into an ordinary contract to obtain or receive the means with which to build houses or wharves

2) 31; City of Williamsport v. Com., 84 Pa. 487; City of Waxahachie v. Brown, 67 Tex. 519; Mills v. Gleason, 11 Wis. 470; Jones Ry. Secur. 283; Burroughs, Pub. Secur. p. 185.

37—Thomas v. City of Richmond, 79 U. S. (12 Wall.) 349; City of Little Rock v. Merchants' Nat. Bank, 98 U. S. 308, 5 Dill. 299, Fed. Cas. No. 9,455; Wesley v. Eells, 90 Fed. 151.

Lindsey v. Rottaken, 32 Ark. 619. Where the city has illegally issued "city money," the holder thereof has no remedy. Dively v. City of Cedar Falls, 21 Iowa, 565.

But see the same case, 27 Iowa, 227; Cothran v. City of Rome, 77 Ga. 582; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Allegheny City v. McClurkan, 14 Pa. 81.

State v. Cardozo, 5 S. C. (5 Rich.) 297. Certificates of indebtedness issued by a state treasurer made receivable in payment of taxes or other dues to the state, not held bills of credit within the sense of that term as used in the constitution of the United States.

See, also, authorities cited Sec. 459, ante.

38—City of Little Rock v. Merchants' Nat. Bank, 98 U. S. 308, 5 Dill. 299, Fed. Cas. No. 9,455.

or the like, may, as a general rule, bind himself by an admission of his obligation. The capacity to make contracts is at the basis of the liability. The first liability of the city was disputed by it. It had gone beyond its power, as it said, in making a debt in the form of bank notes. If it had not denied its power, judgment and an execution might have gone against it, and the creditor would have obtained his money. This privilege of nonresistance every person retains, and continues to retain. He can reconsider at any time, and confess and admit what the moment before he denied. In 1874, the City of Little Rock did reconsider. It said: "We will purge the transaction of illegality. We had the authority to accept from you in satisfaction of amounts received by us for legitimate purposes the sums in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debt by cancelling the bank notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection."

Legality based upon purpose for which issued follows the rule of law well settled and constantly referred to. If any such miscellaneous forms of indebtedness are issued as evidence of an indebtedness incurred for a purpose other than that authorized by law since they are subject to all equities, they will be held invalid. Public authorities cannot, by the use of an authorized instrument, create an indebtedness for an illegal purpose which will be binding upon the corporation.[39]

39—Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; Merkel v. Berks County, 81½ Pa. 505; Isaacs v. City of Richmond, 90 Va. 30.

See, also, cases cited in section 101, et seq., ante, where the subject of what is a public purpose for the expenditures of public moneys is fully considered.

§ 467. Form and phraseology.

The law takes into consideration at all times the bona fides of the parties and the relative condition and circumstances attending the character of the corporation and the issuing of the particular indebtedness. Where the public corporation authorized is what may be termed a public quasi corporation and where the officers of such corporation are not presumed to have the same degree or extent of intelligence, experience and learning as that, which it is presumed similar officers of a higher grade of corporations may have acquired or possess, the courts consider such circumstances or conditions and hold an instrument valid issued by them which may be technically defective in its form but which substantially complies with the law authorizing its issue. But the question of the payment aside from mere form or execution of such instruments depends upon the principles considered in preceding sections. At all times, questions based upon equities existing between the original parties can be raised and payment or nonpayment will depend upon their determination.[40]

§ 468. Mode and time of payment.

The place and manner of payment,[41] the time,[42] the

40—Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; City of New Orleans v. Strauss, 25 La. Ann. 50; Chandler v. City of Bay St. Louis, 57 Miss. 326; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Knapp v. City of Hoboken, 38 N. J. Law, 371; Inhabitants of North Bergen v. Eager, 41 N. J. Law, 184.

41—Allen v. McCreary, 101 Ala. 514; Armstrong v. Truitt, 53 Ark. 287; Marshall v. City of San Antonio (Tex. Civ. App.), 63 S. W. 138.

42—Owen v. Lincoln Tp., 41 Mich. 415. Notes issued by a city not having been presented for redemption within the time prescribed by the act, the city is not under any obligation in law or equity to redeem them.

Brewer v. Otoe County, 1 Neb. 373. In Nebraska it has been held that one receiving a warrant in which no time of payment is fixed

fund,[43] from which payable, and the rights of parties holding such instruments whether the original payee or his assignee,[44] all depend upon the principles already sufficiently discussed.

takes it with the expectation, if there are no available funds in the treasury, of waiting until the money can be raised in the ordinary way. Miller v. City of Lynchburgh, 20 Grat. (Va.) 330.

Terry v. City of Milwaukee, 15 Wis. 490. An order drawn on the city treasurer directing him "to pay," no date of payment being mentioned, imports that the order was payable on demand.

Packard v. Town of Bovina, 24 Wis. 382. A town is not liable, on an order drawn against its treasurer, until after demand and refusal of payment.

43—Meath v. Phillips County, 108 U. S. 553; Mobile County v. Powers, 103 Ala. 207; Allen v. Watts, 88 Ala. 497; Mitchell v. Speer, 39 Ga. 56; Gamble v. Clark, 92 Ga. 695; Board of Education v. Foley, 88 Ill. App. 470 (School district warrants); Tobin v. Emmetsburg Tp., 52 Iowa, 81; District Tp. of Coon v. Board of Directors of Providence, 52 Iowa, 287.

Mills County Nat. Bank v. Mills County, 67 Iowa, 697, 25 N. W. 884. Suit may be brought without first requesting the levy of a tax to replenish the particular fund out of which they are payable.

Hopper v. Inhabitants of Union Tp., 54 N. J. Law, 243, 24 Atl. 387. Certificates of indebtedness for local improvements. Wyoming County v. Bardwell, 84 Pa. 104; Bank of Spring City v. Rhea County (Tenn.), 59 S. W. 442.

Terry v. City of Milwaukee, 15 Wis. 490. School orders are evidences of indebtedness, upon which, if payment is refused by the city treasurer for want of funds, an action will lie against the city.

44—Terrell v. Town of Colebrook, 35 Conn. 188. The assignee of an authorized note can recover from the town.

Ladd v. Town of Franklin, 37 Conn. 53. A town promissory note held void in the hands of a purchaser for value who took it after the fact of the failure of the contract had been established. People v. Clark County Com'rs, 50 Ill. 213; National State Bank v. Independent Dist. of Marshall, 39 Iowa, 490; City of Springfield v. Weaver (Mo.), 37 S. W. 509; Flemming v. City of Hoboken, 40 N. J. Law, 270; Eaton v. Manitowoc County Sup'rs, 40 Wis. 668.

CHAPTER XVIII

ABSTRACTS FROM STATE CONSTITUTIONS RELATIVE TO PUBLIC DEBT AND THE POWER OF TAXATION

A valuable compilation of state charters and constitutions has been published by the United States in seven volumes entitled "The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the Several States, Territories and Colonies," compiled and edited by Francis N. Thorpe and printed in the Government Printing Office, Washington, D. C., in 1909.

§ 469. Alabama.

Constitution effective November 28, 1901.

Art. XI, Sec. 213: After the ratification of this Constitution, no new debt shall be created against or incurred by this State, or its authority except to repel invasion or suppress insurrection, and then only by a concurrence of two-thirds of the members of each House of the Legislature, and the vote shall be taken by yeas and nays, and entered on the Journals; and any act creating or incurring any new debt against this State, except as herein provided for, shall be absolutely void; provided, the Governor may be authorized to negotiate temporary loans, never to exceed three hundred thousand dollars, to meet the deficiencies in the treasury, and until the same is paid no new loan shall be negotiated; provided further, that the section shall not be so construed as to prevent the issuance of bonds for the purpose of refunding the existing bonded indebtedness of the State.

Art. XII, Sec. 222: The Legislature, after the ratification of this Constitution, shall have authority to pass general laws authorizing the counties, cities, towns, villages, districts or other political subdivisions of counties to issue bonds, but no bonds shall be issued under authority of a general law unless such isue of bonds be first authorized by a majority vote by ballot of the qualified voters of such county, city, town, village, district, or other political subdivision of a county, voting upon such proposition. (Here follow provisions relative to form of ballot.) This section shall not apply to the renewal, refunding or re-issue of bonds lawfully issued, nor to the issuance of bonds in cases where the same have been authorized by laws enacted prior to the ratification of this Constitution, nor shall this section apply to obligations incurred or bonds to be issued to procure means to pay for street and sidewalk improvements or sanitary or storm water sewers, the cost of which is to be assessed, in whole or in part, against the property abutting said improvements or drained by such sanitary or storm water sewers.

Art. XII, Sec. 224: No county shall become indebted in an amount including present indebtedness, greater than three and one-half per centum of the assessed value of the property therein; provided, this limitation shall not affect any existing indebtedness in excess of such three and one-half per centum, which has already been created or authorized by existing law to be created; provided, that any county which has already incurred a debt exceeding three and one-half per centum of the assessed value of the property therein, shall be authorized to incur an indebtedness of one and a half per centum of the assessed value of such property in addition to the debt already existing. Nothing herein contained shall prevent any county from issuing bonds, or other obligations, to fund or refund any indebtedness now existing or authorized by existing laws to be created.

Art. XII, Sec. 225: No city, town or other municipal corporation having a population of less than six thousand, except as hereafter provided, shall become indebted in an amount, including present indebtedness, exceeding five per centum of the assessed value of the property therein, except for the construction or purchase of water works, gas or electric lighting plants, or sewerage, or for the improvement of streets, for which purposes an additional indebtedness not exceeding three per centum may be created; provided, this limitation shall not affect any debt now authorized by law to be created, nor any temporary loans to be paid within one year, made in anticipation of the collection of taxes, not exceeding one-fourth of the annual revenues of such city or town. All towns and cities having a population of six thousand or more, also Gadsden, Ensley, Decatur, and New Decatur, are hereby authorized to become indebted in an amount including present indebtedness, not exceeding seven per centum of the assessed valuation of the property therein, provided that there shall not be included in the limitation of the indebtedness of such last described cities and towns the following classes of indebtedness, to wit: Temporary loans, to be paid within one year, made in anticipation of the collection of taxes, and not exceeding one-fourth of the general revenues, bonds or other obligations already issued, or which may hereafter be issued for the purpose of acquiring, providing or constructing schoolhouses, water works and sewers; and obligations incurred and bonds issued for street or sidewalk improvements, where the cost of the same, in whole or in part, is to be assessed against the property abutting said improvements; provided, that the proceeds of all obligations issued as herein provided, in excess of said seven per centum shall not be used for any purpose other than that for which said obligations were issued. Nothing contained in this article shall prevent the funding or re-

funding of existing indebtedness. This section shall not apply in the cities of Sheffield and Tuscumbia.

Art. XII, Sec. 226: No city, town or village, whose present indebtedness exceeds the limitation imposed by this Constitution, shall be allowed to become indebted in any further amount, except as otherwise provided in this Constitution, until such indebtedness shall be reduced within such limit; provided, however, that nothing herein contained shall prevent any municipality, except the city of Gadsden, from issuing bonds already authorized by law; provided further, that this section shall not apply to the cities of Sheffield and Tuscumbia.

§ 470. Arkansas.

Constitution effective October 13, 1874.

Art. XII, Sec. 12: Except as herein provided, the State shall never assume or pay the debt or liability of any county, town or city, or other corporation whatever, or any part thereof, unless such debt or liability shall have been created to repel invasion, suppress insurrection, or to provide for the public welfare and defense. Nor shall the indebtedness of any corporation to the State ever be released or in any manner discharged, save by payment into the public treasury.

Art. XVI, Sec. 1: Neither the State, nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or other municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for, and secure the payment of, the present existing indebtedness; and the State shall never issue any interest-bearing treasury warrants or scrip.

In 1907, a constitutional amendment was submitted providing for the issue of bonds by municipalities. It failed by an overwhelming vote. There are, however,

numerous improvement districts which under special acts are allowed to borrow money or issue bonds which it seems do not come clearly under the prohibitory mandate of the Constitution.

§ 471. Arizona.

Constitution effective February 14, 1912.

Art. IX, Sec. 5: The State may contract debts to supply the casual deficits or failure in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more laws, or at different periods of time, shall never exceed the sum of three hundred and fifty thousand dollars; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained or to repay the debts so contracted, and to no other purpose.

In addition to the above limited power to contract debts, the State may borrow money to repel invasion, suppress insurrection or defend the State in time of war; but the money thus raised shall be applied exclusively to the object for which the loan shall have been authorized or to the repayment of the debt thereby created. No money shall be paid out of the State Treasury except in the manner provided by law.

Art. IX, Sec. 7: Neither the State, nor any county, city, town, municipality or other subdivision of the State, shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company or corporation, except as to such ownerships as may accrue to the State by operation or provision of law.

Art. IX, Sec. 8: No county, city, town, school district, or other municipal corporation shall for any purpose

become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and towns assessments shall be taken from the last assessment for city or town purposes; Provided, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional, for supplying such city or town with water, artificial light or sewers, when the works for supplying such water, light or sewers are or shall be owned and controlled by the municipality.

§ 472. California.

Constitution effective May 7, 1879.

Art. IV, Sec. 30: Prohibits the granting of aid in any form, either by the State or any of its subdivisions, for any sectarian purpose.

Art. IV, Sec. 31: The Legislature shall have no power to give or to lend, or to authorize the giving or lending of, the credit of the State, or of any county, city and county, city, township or other political corporation or sub-division of the State now existing, or that may be hereafter established, in aid of or to any person, association or corporation, whether municipal or otherwise, or to pledge the credit thereof in any manner whatever for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift, or authorize the making of any gift, or any public money or thing of value to any

individual, municipal or other corporation whatever; Provided, that nothing in this section shall prevent the Legislature granting aid pursuant to section twenty-two of this Article; and it shall not have power to authorize the State or any political sub-division thereof to subscribe for stock or to become a stockholder in any corporation whatever.

By an amendment adopted Nov. 8, 1910, further provision is made for creating a fund of $5,000,000 for the use, establishment, maintenance and support of the Panama Pacific International Exposition.

Art. XI, Sec. 18: No county, city, town, township, board of education or school district 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, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same; Provided, however, that the City and County of San Francisco may at any time pay the unpaid claims, with interest thereon at the rate of five per cent per annum, for materials furnished to and work done for said city and county during the forty-first, forty-second, forty-third, forty-fourth and fiftieth fiscal years, and for unpaid teachers' salaries for the fiftieth fiscal year, out of the income and revenue of any succeeding year or years, the amount to be paid in full of said claims not to exceed in the aggregate the sum of five hundred thousand dollars, and that no statute of limitations shall apply in any manner to these claims; and provided further, that the City of Vallejo, of Solano

County, may pay its existing indebtedness incurred in the construction of its water-works whenever two-thirds of the electors thereof voting at an election held for that purpose shall so decide, and that no statute of limitations shall apply in any manner. Any indebtedness or liability incurred contrary to this provision, with the exception hereinbefore recited, shall be void.

The City and County of San Francisco, the City of San Jose and the Town of Santa Clara may make provision for a sinking fund, to pay the principal of any indebtedness incurred, or to be hereafter incurred, by it, to commence at a time after the incurring of such indebtedness of not more than a period of one-fourth of the time of maturity of such indebtedness, which shall not exceed seventy-five years from the time of contracting the same. Any indebtedness incurred contrary to any provision of this section shall be void. (As amended in 1900, and again in 1906.)

Art. XII, Sec. 13: The State shall not, in any manner, loan its credit, nor shall it subscribe to or be interested in the stock of any company, association or corporation.

Art. XVI, Sec. 1: The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within seventy-five years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged, and such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring

of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability; but no such law shall take effect until, at a general election, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, or city and county, if one be published therein, throughout the State, for three months next preceding the election at which it is submitted to the people. The Legislature may at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same.[1]

In 1901 a law was passed regulating the incurment of indebtedness for public improvements, section 4 of which established the following limit: "No city, town or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed fifteen per cent of the assessed value of the real and personal property of said city, town or municipal corporation."

§ 473. Colorado.

Constitution ratified July 1, 1876.

Art. XI, Sec. 1: Neither the state, nor any county, city, town, township, or school-district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company, or corporation, public or private, for any amount or for any purpose

1—Pickerdike v. State (Calif.), 78 Pac. 270. Stats. 1891, Chap. 198, creating a coyote bounty of five dollars not in violation of Const. Art. XVI, Sec. 1, and the court further held that where no appropriation was made from the current revenues of the state to pay claims thereunder, they did not constitute debts of the state within the constitutional section noted.

whatever, or become responsible for any debt, contract, or liability of any person, company, or corporation, public or private, in or out of the State.

Art. XI, Sec. 2: Neither the state, nor any county, city, town, township, or school-district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or joint owner with any person, company or corporation, public or private, in or out of the State, except as to such ownership as may accrue to the State by escheat, or by forfeiture, by operation or provision of law; * * * (here follow other exceptions of a similar nature).

Art. XI, Sec. 3: (As amended, Nov. 9, 1910.)

The state shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue, erect public buildings for the use of the State, suppress insurrection, defend the State, or, in time of war, assist in defending the United States; and the amount of the debt contracted in any one year to provide for deficiencies of revenue, shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the State, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation, until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars, and the debt incurred in any one year for erection of public buildings shall not exceed one-half mill on each dollar of said valuation, and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in section five of this article), and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt. Provided, That, in addition to the amount of debt that may be incurred as above, the state may contract a debt by loan for the purpose of paying the principal and accrued interest of all the outstanding

warrants issued by this State during and for the years 1887, 1888, 1889, 1892, 1893, 1894 and 1897; said debt to be evidenced by registered coupon interest-bearing funding bonds to an amount not exceeding $2,115,000, or so much thereof as may be necessary to pay said warrants and interest thereon.

Said funding bonds shall be dated December 1, 1910, shall be payable at the option of the State of Colorado, at any time after ten years from their date, shall be absolutely due and payable fifty (50) years after their date and shall be of the denomination of one hundred ($100.00) dollars each or any multiple thereof. The interest on said bonds shall be payable semi-annually at the office of the state treasurer or at some place in the city of New York, U. S. A., and the principal of said bonds shall be payable at the office of the state treasurer.

No such bonds shall be issued except at par and accrued interest and upon the contemporaneous surrender and cancellation of a like amount of principal and interest of said warrants.

Said bonds to an amount equaling the principal of such warrants now held by the public school fund shall be registered by the state auditor and state treasurer in the name of and for the benefit of and payable only to the said fund and shall not be transferable.

And all such bonds to an amount equaling the interest on said warrants now held in the school fund shall be sold by the state treasurer at not less than par and accrued interest, and the proceeds thereof paid into the school fund and distributed to the several counties and school districts of the state for school purposes in the proportions and in the manner required by law.

See laws 1909, p. 315, chap. 148, submitting the constitutional amendment with the details relative to the issue of the bonds authorized.

See, also, laws 1911, p. 271, chap. 108, submitting a constitutional amendment to be voted for at the next general

election relative to county indebtedness. Const. Art. XI, Sec. 6.

Art. XI, Sec. 4: In no case shall any debt above mentioned in this article be created except by a law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purposes to which the funds so raised shall be applied, and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt, within the time limited by such law for the payment thereof, which in the case of debts contracted for the erection of public buildings and supplying deficiencies of revenue, shall not be less than ten nor more than fifteen years, and the funds arising from the collection of any such tax shall not be applied to any other purpose than that provided in the law levying the same; and when the debt thereby created shall be paid or discharged, such tax shall cease and the balance, if any, to the credit of the fund, shall immediately be placed to the credit of the general fund of the State.

Art. XI, Sec. 5: A debt for the purpose of erecting public buildings may be created by law, as provided for in section four of this article, not exceeding in the aggregate three mills on each dollar of said valuation: Provided, That before going into effect such law shall be ratified by the vote of a majority of such qualified electors of the state as shall vote thereon at a general election, under such regulations as the general assembly may prescribe.

In Article XI, sections 6, 7, 8 and 9 further provisions are found relative to the incurring of debts and the issuing of bonds by a subordinate civil subdivision. Counties are prohibited from contracting debts by law in any form except for public buildings, roads and bridges and such indebtedness is limited by and proportioned to the assessed valuation of the county incurring the debt. The aggregate indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of the

Constitution, shall not exceed twice the amount of the limit fixed unless the question incurring such indebtedness is submitted to and authorized by the qualified tax paying electors. Bonds issued, if any, shall not run less than ten years. School districts cannot incur debt without first submitting the proposition to the tax payers. Cities and towns in contracting debts must first make provision for a tax not exceeding twelve mills on each dollar of valuation for the purpose of paying the annual interest and extinguishing the debt in not less than ten years and within fifteen years. No debt can be created unless the question is first submitted to the tax paying electors and the aggregate of the debt must never exceed 3 per cent of the valuation. Debts contracted for supplying water are exempt from the limit.

§ 474. Connecticut.

Constitution as Amended and in force Jan. 1, 1906.

Art. XXV, adopted as an amendment in 1877, is as follows: No county, city, town, borough or other municipality shall ever subscribe to the capital stock of any railroad corporation, or become the purchaser of the bonds, or make donation to, or loan its credit in aid of, any such corporation; but nothing herein contained shall affect the validity of any bonds or debts incurred under existing laws, nor be construed to prohibit the General Assembly from authorizing any town or city to protect by additional appropriations of money or credit any railroad debt contracted prior to the adoption of this amendment.

Rev. Stats. of 1902, chap 121, sec 1931, provides that "when any town shall have made appropriations or incurred debts, or shall hereafter make appropriations or incur debts exceeding $10,000, it may issue bonds, either registered or with coupons attached, or other obligations, payable at such times and at such annual rate of interest

not exceeding 6 per cent, payable annually or semi-annually, as it shall determine."

§ 475. Delaware.

Constitution adopted June 4, 1897.

Art. VIII, Sec. 3: No money shall be borrowed or debt created by or on behalf of the State but pursuant to an Act of the General Assembly, passed with the concurrence of three-fourths of all the members elected to each House, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the state in war, or pay existing debts; and any law authorizing the borrowing of money by or on behalf of the state shall specify the purpose for which the money is to be borrowed, and the money so borrowed shall be used exclusively for such purpose; but should the money so borrowed or any part thereof be left after the abandonment of such purpose or the accomplishment thereof, such money, or the surplus thereof, may be disposed of according to law.

Art. VIII, Sec. 4: No appropriation of the public money shall be made to, nor the bonds of this State be issued or loaned to any county, municipality or corporation nor shall the credit of the State, by the guarantee or the endorsement of the bonds or other undertakings of any county, municipality or corporation, be pledged otherwise than pursuant to an Act of the General Assembly, passed with the concurrence of three-fourths of all the members elected to each House.

Art VIII, Sec. 8: No county, city, town or other municipality shall lend its credit or appropriate money to, or assume the debt of, or become a shareholder or joint owner in or with any private corporation or any person or company whatever.

§ 476. Florida.

Constitution as framed by Constitutional Convention, Aug. 3, 1885.

Art. IX, Sec. 6: The Legislature shall have power to provide for issuing State bonds only for the purpose of repelling invasion or suppressing insurrection, or for the purpose of redeeming or refunding bonds already issued, at a lower rate of interest.

Art. IX, Sec. 7: No tax shall be levied for the benefit of any chartered company of the State, nor for paying interest on any bonds issued by such chartered companies, or by counties, or by corporations, for the abovementioned purpose.

Art. IX, Sec. 10: The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

Some additional legislative provisions relative to cities, towns and counties are noted as found in the revised statutes of 1906, titles 9 and 10, first division. Section 786 of title 9 provides that counties may issue bonds for highways, buildings and funding purposes, the proposition to issue such bonds, however, must be submitted to and authorized by a majority of the voters. Provision must be made for a sum sufficient to pay the interest and to raise the amount annually required as a sinking fund with which to pay the bonds at maturity. In title 10, cities and towns are prohibited from issuing bonds in excess of 5 per cent of the assessed value of property within their corporate limits. The question of

issuing bonds must be submitted to and approved by two-thirds of the registered voters actually voting. It is also necessary to submit to the voters the amount to be issued. Any city, or town may issue bonds in excess of the 5 per cent limit for gas or electric plants provided the additional amount does not exceed 7 per cent of the total property valuation. The maturity of the bonds is fixed at not to exceed thirty years and the interest rate cannot exceed 7 per cent. Authority for the issue of such bonds must be granted by a majority of the votes cast at an annual or special election to be called for this purpose. Provision for the payment of the interest and the establishment of a sinking fund with which to pay the bonds issued at maturity is also required.

§ 477. Georgia.

Constitution as adopted in 1877.

Art. VII, Sec. 3, Par. 1: No debt shall be contracted by or on behalf of the State, except to supply casual deficiencies of revenue, to repel invasion, suppress insurrection, and defend the State in time of war, or to pay the existing public debt; but the debt created to supply deficiencies in revenue shall not exceed, in the aggregate, two hundred thousand dollars.

Art. VII, Sec. 4, Par. 1: All laws authorizing the borrowing of money by or on behalf of the State shall specify the purposes for which the money is to be used, and the money so obtained shall be used for the purpose specified, and no other.

Art. VII, Sec. 5, Par. 1: The credit of the State shall not be pledged or loaned to any individual, company, corporation or association, and the State shall not become a joint owner or stockholder in any company, association or corporation.

Art. VII, Sec. 6, Par. 1: The General Assembly shall not authorize any county, municipal corporation or po-

litical division of this State to become a stockholder in any company, corporation or association, or to appropriate money for, or to loan its credit to any corporation, company, association, institution or individual, except for purely charitable purposes. This restriction shall not operate to prevent the support of schools by municipal corporations within their respective limits: Provided, That if any municipal corporation shall offer to the State any property for locating or building a capitol, and the State accepts such offer, the corporation may comply with such offer.

Art. VII, Sec. 7, of the Constitution of 1877 was amended on Oct. 5, 1910, to allow the City of Augusta to incur a bonded debt outside the limit then fixed, for the purpose of protection against floods; it now reads as follows:

Par. 1. "The debt hereafter incurred by any county, municipal corporation or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this Constitution may be authorized by law to increase, at any time, the amount of said debt three per centum upon such assessed valuation; except that the City Council of Augusta, from time to time, as necessary, for the purpose of protection against floods, may incur a bonded indebtedness upon its power-producing canal and municipal waterworks, in addition to the debts hereinbefore in this paragraph allowed to be incurred, to an amount in the ag-

gregate not exceeding fifty per centum of the combined value of such properties, the valuation of such properties to be fixed as may be prescribed by law, but said valuation not to exceed a figure five per cent on which shall represent the net revenue per annum produced by the two such properties together at the time of said valuation, and such indebtedness not to be incurred except with the assent of two-thirds of the qualified voters of such city, at an election or elections for that purpose to be held as may be now, or may be hereafter, prescribed by law for the incurring of new debts by said the City Council of Augusta."

Par. 2. "County and city bonds, how paid. Any county, municipal corporation or political division of this State which shall incur any bonded indebtedness under the provisions of this Constitution shall, at or before the time of so doing, provide for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness."

Art. VII, Sec. 8, Par. 1: The State shall not assume the debt, nor any part thereof, of any county, municipal corporation, or political division of the State, unless such debt shall be contracted to enable the State to repel invasion, suppress insurrection or defend itself in time of war.

Art. VII, Sec. 10, Par. 1: Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government.

Art. VII, Sec. 12, Par. 1: The bonded debt of the State shall never be increased, except to repel invasion, suppress insurrection, or defend the State in time of war.

Art. VII, Sec. 16, Par. 1: The General Assembly shall not, by vote, resolution or order, grant any donation, or gratuity, in favor of any person, corporation or association.

§ 478, Idaho.

Constitution adopted 1889.

Art. VII, Sec. 11: No appropriation shall be made, nor any expenditure authorized by the legislature, whereby the expenditure of the State during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislature making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section nine (9) of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the State, or assist in defending the United States in time of war.

Art. VIII, Sec. 1. The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, exclusive of the debt of the territory at the date of its admission as a state, exceed the sum of one and one-half per centum upon the assessed value of the taxable property in the State, except in case of war, to repel an invasion or suppress insurrection, unless the same shall be authorized by law for some single obligation or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due; and also for the payment and discharge of the principal of such debt or liability, within twenty years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until at a general election it shall have been submitted to the people, and shall have received a majority of all votes cast for and against it at such election; and all moneys raised by the authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such

law shall be published in at least one newspaper in each county, or city and county, if one be published therein, throughout the State, for three months next preceding the election at which it is to be submitted to the people. The legislature may, at any time after the approval of such law, by the people, if no debt shall have been contracted in pursuance thereof, repeal the same.[2]

Art. VIII, Sec. 2: The credit of the State shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the State, directly or indirectly, become a stockholder in any association or corporation.

Art. VIII, Sec. 3: No county, city, town, township, board of education or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that 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, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, That this section shall not be construed to apply to the ordinary and

2—Stein v. Morrison (Ida.), 75 Pac. 246. Under Const., Art. VIII, Sec. 1, appropriations of public revenue by the legislature in anticipation of their receipt do not constitute a debt or liability but operate in the nature of a cash transaction as authorized by Art. VII of the Const. relating to the collection of taxes and revenues and the payment of state expenses.

Lewis v. Brady (Ida.), 104 Pac. 900. The provisions of Art. VIII, Sec. 1, relative to the creation of any debt or liability exceeding 1½% of the assessed value of taxable property in the state limits the legislature to the assessed valuation at the time of the passage of any measure creating a debt.

necessary expenses authorized by the general laws of the State.

Art. VIII, Sec. 4: No county, city, town, township, board of education, or school district, or other subdivision, shall lend or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this State.

Art. XII, Sec. 3: The State shall never assume the debts of any county, town, or other municipal corporation, unless such debts shall have been created to repel invasion, suppress insurrection or defend the State in war.

Art. XII, Sec. 4: No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association; Provided, That cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: Provided, That any city or town contracting such indebtedness shall own its just proportion of the property thus created, and receive from any income arising therefrom, its proportion to the whole amount so invested.

§ 479. Illinois.

Constitution in force August 8, 1870.

Art. IV, Sec. 18: * * * Provided, the State may, to meet casual deficits or failures in revenues, contract debts never to exceed in the aggregate $250,000, and moneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created, and to no other purpose; and no other debt

except for the purpose of repelling invasion, suppressing insurrection or defending the state in war (for payment of which the faith of the State shall be pledged), shall be contracted, unless the law authorizing the same shall at a general election have been submitted to the people, and have received a majority of the votes cast for members of the General Assembly at such election. The General Assembly shall provide for the publication of said law for three months at least before the vote of the people shall be taken upon the same; and provision shall be made at the time for the payment of the interest annually as it shall accrue, by a tax levied for the purpose or from other sources of revenue; which law providing for the payment of such interest by such tax shall be irrepealable until such debt be paid; and, Provided, further, that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted.

Art. IV, Sec. 20: The State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of, any public or other corporation, association or individual.

Art. VIII, Sec. 3: Neither the General Assembly nor any county, city, town, township, school district or other public corporation shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State or any such public corporation to any church or for any sectarian purpose.

Art. IX, Sec. 12: 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 5 per cent 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. Any county, city, school district or other municipal corporation incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district or other municipal corporation from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution in pursuance of any law providing therefor.

On November 4, 1890, there was added to Art. VIII. of the Constitution, Sec. 13, which authorized the city of Chicago to issue World's Columbian Exposition Bonds.

The following sections with others were separately submitted to a vote of the people and went into effect as law, July 2, 1870:

Municipal Subscriptions to Railroads or Private Corporations: No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation, Provided, however, that the adoption of this Article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption.

Canal: * * * The General Assembly shall never loan the credit of the state or make appropriations from the treasury thereof in aid of railroads or canals. * * *

§ 480. Indiana.

Constitution as adopted in 1851 with Amendments.

Art. X, Sec. 5: No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the State debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for public defense. [3]

Art. X, Sec. 6: No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscriptions; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company; nor shall the General Assembly ever, on behalf of the State, assume the debts of any county, city, town or township, nor of any corporation whatever.

March 24, 1881, the original of Art. XIII, of the Constitution was stricken out and the following adopted in lieu thereof:

Art. XIII, Sec. 1: 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 2 per cent on the valuation 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; Provided, That in time of war, foreign invasion or other great public calamity, on petition of a majority of the property owners in number and value, within the limits of such corporation, the public authori-

3—The liquidation of an obligation acknowledged to be justly owing for past considerations is not "contracting a debt" within Const., Art. X, Sec. 5, so held in respect to the issue of state bonds under Act 1907, Chap. 244, compromising and adjusting a debt to Vincennes University. Hanley v. Sims, 175 Ind. 345.

ties in their discretion may incur obligations necessary for the public protection and defense to such an amount as may be requested in such petition.

Several laws have been enacted since the foregoing constitutional limit was adopted and bonds have been issued by counties thereunder beyond the two per cent limit for the construction of "free gravel, stone or other macadamized roads." In the case of Strieb v. Cox,[4] the Supreme Court of the State held that gravel road bonds are not properly an indebtedness of a county and therefore did not come within the inhibition of Art. XIII, Sec. 1.

§ 481. Iowa.

Constitution adopted 1857.

Art. VII, Sec. 1: The credit of the State shall not in any manner be given or loaned to, or in aid of, any individual, association or corporation; and the State shall never assume or become responsible for the debts or liabilities of any individual, association or corporation, unless incurred in time of war for the benefit of the State.

Art. VII, Sec. 2: The State may contract debts to supply casual deficits or failures in revenues, or to meet expenses otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more Acts of the General Assembly or at different periods of time, shall never exceed the sum of $250,000; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Art. VII, Sec. 3: All the losses to the Permanent, School, or University fund of this State, which shall have

4—111 Ind. 299, 12 N. E. 481.

been occasioned by the defalcation, mismanagement, or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the State. The amount so audited shall be a permanent funded debt against the State, in favor of the respective fund, sustaining the loss, upon which not less than six per cent annual interest shall be paid. The amount of the liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article.

Art. VII, Sec. 4: In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the the State in war; but the money arising from the debts so contracted shall be applied for the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Art. VII, Sec. 5: Except the debts hereinbefore specified in this article, no debt shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each county, if one is published therein, throughout the State for three months preceding the election at which it is submitted to the people.

Art. VII, Sec. 6: The Legislature may, at any time,

after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may, at any time, forbid the contracting of any further debt, or liability, under such law; but the tax imposed by such law, in proportion to the debt or liability, which may have been contracted in pursuance thereof, shall remain in force and be irrepealable, and be annually collected, until the principal and interest are fully paid.

Art. VIII, Sec. 3: The State shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the State.

Art. VIII, Sec. 4: No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

Art. XI, Sec. 3: No county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding 5 per cent on the value of the taxable property within such county or corporation—to be ascertained by the last State and county tax list previous to the incurring of such indebtedness.

In 1900, the legislature of Iowa passed a bill, chapter 41, fixing the limit of indebtedness of counties and other political subdivisions at one and one-quarter per cent of the actual value of the property therein as rated by the last tax list. This change was made necessary under a revision of the revenue law which went into effect in 1898 by which property was appraised for taxation on a much higher basis than formerly. This act was amended in 1904 and again in 1906, the important sections are as follows: Section 1: That section thirteen hundred and six-b (1306-b) of the supplement to the code and chapter forty-three (43) of the Acts of the 30th General Assembly be and the same are hereby repealed, and the following enacted in lieu thereof:

"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 in the aggregate the amount of one and one-fourth per centum of the actual value of the taxable property within such county or corporation, except that cities and incorporated towns may, for the purpose of purchasing, erecting or maintaining and operating waterworks, electric light and power plants, gas works and heating plants, or of building and constructing sewers, incur an indebtedness not exceeding in the aggregate, added to all other indebtedness, five per centum of the actual value of the taxable property within such city or incorporated town. The amount of such taxable property shall be ascertained by the last State and county tax list previous to the incurring of such indebtedness.

"Section 2: Provided, That before such indebtedness can be contracted in excess of one and one-quarter per centum of the actual value of the taxable property ascertained as above provided in this Act, a petition signed by a majority of the qualified electors of such city or town shall be filed with the Council of such city or town, asking that an election shall be called, stating the purpose for which the money is to be used and that the necessary waterworks, electric light and power plants, gas works, heating plants or sewers, cannot be purchased, erected, built or furnished within the limit of one and one-quarter per centum of the valuation. And Provided, That in cities having a population of more than ten thousand, the petition need not be signed by more than two hundred qualified electors.

§ 482. Kansas.

Constitution ratified October 4, 1851, with subsequent amendments.

Art. XI, Sec. 5: For the purpose of defraying extraordinary expenses and making public improvements, the

State may contract public debts; but such debts shall never, in the aggregate, exceed $1,000,000, except as hereinafter provided. Every such debt shall be authorized by law for some purpose specified therein, and the vote of a majority of all the members elected to each House, to be taken by the yeas and nays, shall be necessary to the passage of such law; and every such law shall provide for levying an annual tax sufficient to pay the annual interest of such debt and the principal thereof when it shall become due; and shall specifically appropriate the proceeds of such taxes to the payment of such principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished until the interest and principal of such debt shall have been wholly paid.

Art. XI, Sec. 6: No debt shall be contracted by the State except as herein provided, unless the proposed law for creating such debt shall first be submitted to a direct vote of the electors of the State at some general election; and if such proposed law shall be ratified by a majority of all the votes cast at such general election, then it shall be the duty of the Legislature next after such election to enact such law and create such debt, subject to all the provisions and restrictions provided in the preceding section of this article.

Art. XI, Sec. 7: The State may borrow money to repel invasion, suppress insurrection or defend the State in time of war; but the money thus raised shall be applied exclusively to the object for which the loan was authorized, or to the repayment of the debt thereby created.

Art. XI, Sec. 8: The State shall never be a party in carrying on any works of internal improvement.

As will be noted, no provision is made in the Constitution restricting municipal indebtedness but the power is delegated to the Legislature by Art. XII, Sec. 5: Provision shall be made by general law for the organization of cities, towns and villages; and their power of tax-

ation, assessment, borrowing money, contracting debts and loaning their credit shall be so restricted as to prevent the abuse of such power.

§ 483. Kentucky.

Constitution adopted September 28, 1891.

Sec. 49: The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed five hundred thousand dollars, and the moneys arising from loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, or to repay such debts: Provided, The General Assembly may contract debts to repel invasion, suppress insurrection, or, if hostilities are threatened, provide for the public defense.

Sec. 50: No Act of the General Assembly shall authorize any debt to be contracted on behalf of the Commonwealth except for the purposes mentioned in Section 49 unless provision be made therein to levy and collect an annual tax sufficient to pay the interest stipulated, and to discharge the debt within thirty years; nor shall such Act take effect until it shall have been submitted to the people at a general election and shall have received a majority of all the votes cast for and against it: Provided, The General Assembly may contract debts by borrowing money to pay any part of the debt of the State without submission to the people and without making provision in the Act authorizing the same for a tax to discharge the debt so contracted or the interest thereon.[5]

Sec. 156 provides for the organization of the cities and

5—James v. State University (Ky.), 114 S. W. 767. Construing the legality of an appropriation for public buildings to be paid in three equal sums for three successive years with reference to Const., Secs. 49 and 50, prohibiting the legislature from contracting debts in excess of the amounts therein named.

towns of the Commonwealth into classes based upon population, those of the same class to possess the same powers and be subject to the same restrictions.

Sec. 157: The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein, viz.: For all towns or cities having a population of fifteen thousand or more, one dollar and fifty cents on the hundred dollars; for all towns or cities having less than fifteen thousand and not less than ten thousand, one dollar on the hundred dollars; for all towns or cities having less than ten thousand, seventy-five cents on the hundred dollars; and for counties and taxing districts fifty cents on the hundred dollars; unless it should be necessary to enable such city, town, county, or taxing district to pay the interest on, and provide a sinking fund for the extinction of indebtedness created before the adoption of this constitution. No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same.

Sec. 158: The respective cities, towns, counties, taxing districts, and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz: Cities of the

first and second classes, and of the third class having a population exceeding fifteen thousand, ten per centum; cities of the third class having a population of less than fifteen thousand, and cities and towns of the fourth class, five per centum; cities and towns of the fifth and sixth classes, three per centum, and counties, taxing districts, and other municipalities, two per centum: Provided, Any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this constitution: And, Provided further, If, at the time of the adoption of this constitution, the aggregate indebtedness, bonded or floating, of any city, town, county, taxing district or other municipality, including that which it has been or may be authorized to contract as herein provided, shall exceed the limit herein prescribed, then no such city or town shall be authorized or permitted to increase its indebtedness in an amount exceeding two per centum, and no such county, taxing district or other municipality, in an amount exceeding one per centum, in the aggregate upon the value of the taxable property therein, to be ascertained as herein provided, until the aggregate of its indebtedness shall have been reduced below the limit herein fixed, and thereafter it shall not exceed the limit, unless in case of emergency, the public health or safety should so require. Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any city, town, county, taxing district or other municipality.

Sec. 159: Whenever any county, city, town, taxing district or other municipality is authorized to contract an indebtedness, it shall be required, at the same time, to provide for the collection of an annual tax sufficient to

pay the interest on said indebtedness, and to create a sinking fund for the payment of the principal thereof, within not more than forty years from the time of contracting the same.

Sec. 176: The Commonwealth shall not asume the debt of any county, municipal corporation or political subdivision of the State, unless such debt shall have been contracted to defend itself in time of war, to repel invasion or to suppress insurrection.

Sec. 177: The credit of the Commonwealth shall not be given, pledged or loaned, to any individual, company, corporation, association, municipality, or political subdivision of the State; nor shall the Commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway.

Sec. 179: The General Assembly shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads; Provided, If any municipal corporation shall offer to the Commonwealth any property or money for locating or building a Capitol, and the Commonwealth accepts such offer, the corporation may comply with the offer.

§ 484. Louisiana.

Constitution adopted in 1898.

Art. 46: The General Assembly shall have no power to contract, or to authorize the contracting, of any debt or liability, on behalf of the State; or to issue bonds or other evidence of indebtedness thereof, except for the

purpose of repelling invasion, or for the suppression of insurrection.[6]

Art. 58: The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private; nor shall the State, nor any political corporation purchase or subscribe to the capital or stock of any corporation or association whatever, for any private enterprise. Nor shall the State, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private or other corporation or association whatsoever; nor shall the State undertake to carry on the business of any such corporation or association, or become a part owner therein; * * * (here follows certain exceptions).

Art. 270: The General Assembly shall have power to enact general laws authorizing the parochial, ward and municipal authorities of the State by a vote of the majority of the property tax-payers in number entitled to vote under the provisions of this Constitution and in value, to levy special taxes in aid of public improvements or railway enterprises; Provided, That such tax shall not exceed the rate of five mills per annum, nor extend for a longer period than ten years; and Provided further, That no taxpayer shall be permitted to vote at such election unless he shall have been assessed in the parish, ward or municipality to be affected for property the year previous.

Art. 281: Relating to the power of cities, parishes, etc., to incur indebtedness and issue bonds was amended

6—See, as determining the validity of bonds issued under the supplemental funding act of 1875. Cecil v. Board of Liquidation, 30 La. Ann. Pt. 1, 34; construing the Louisiana Funding Acts of 1874 and 1875. Hamlin v. Board of Liquidation, 30 La. Ann., Pt. 1, 443; State v. Nichols, 30 La. Ann., Pt. 2, 980, 1217; Forstall v. Board of Liquidation, 30 La. Ann., Pt. 2, 1151 and Charles v. Board of Liquidation, 41 La. Ann, 240, 5 So. 125.

in 1904, 1906, 1908 and again in 1910. As amended in 1910 it is found on pages 332 et seq. of Acts of Louisiana, 1910, regular and extra sessions. The article as amended is lengthy and specific in its details. It provides in substance that municipal corporations, parishes, or school, drainage, subdrainage, road, navigation or sewerage districts except the city of New Orleans, may incur indebtedness and issue bonds under the conditions prescribed. A majority vote is required and provision made for the levy of taxes to pay the indebtedness not exceeding ten mills. Power is given to incur indebtedness and issue bonds for constructing, improving and maintaining public roads and highways, paving and improving streets, roads and alleys, purchasing, or constructing systems of water works, sewerage, drains, navigation, lights, public parks and buildings, together with all the necessary equipment and furnishings, bridges and other works of public improvements. Bonds so issued shall not run a greater length of time than forty years, to be sold at not less than par and to bear not more than five per cent interest. The total issue by any subdivision for all purposes not to exceed ten per cent of the assessed valuation. Sewerage and drainage districts may be created and authority is given to levy an acreage tax not to exceed fifty cents per acre for the payment of bonds issued which when authorized by vote shall not extend beyond forty years, bearing a greater rate of interest than five per cent and be sold at not less than par. Provision is also made for the issue of drainage bonds under certain conditions on petition of the majority of land owners affected. Provision is to be made for a sinking fund by an acreage tax not exceeding $3.50 per acre. Bonds so issued shall not run longer than forty years, not to exceed five per cent interest and be sold at not less than par. Police juries and municipal authorities also have authority to issue bonds for public improvements to bear not more than five per cent interest, not to

be sold for less than par and to extend not more than ten years.

In 1906, 1908 and 1910, various amendments were adopted especially authorizing the state to issue refunding bonds and New Orleans and other cities to incur the indebtedness in the amendment designated.

§ 485. Maine.

Constitution of 1819.

Art. IX, Sec. 14: The credit of the State shall not be directly or indirectly loaned in any case. The Legislature shall not create any debt or debts, liability or liabilities, on behalf of the State, which shall singly or in the aggregate, with previous debts and liabilities hereafter incurred, at any one time exceed $300,000, except to suppress insurrection, to repel invasion, or for purposes of war; but this amendment shall not be construed to refer to any money that has been, or may be, deposited with this State by the Government of the United States, or to any fund to which the State shall hold in trust for any Indian tribe.

Art. IX. Sec. 15: The State is authorized to issue bonds payable within twenty-one years, at a rate of interest not exceeding six per cent. a year, payable semi-annually, which bonds or their proceeds shall be devoted solely towards the reimbursement of the expenditures incurred by the cities, towns and plantations of the state for war purposes during the rebellion, upon the following basis: Each city, town and plantation shall receive from the state one hundred dollars for every man furnished for the military service of the United States under and after the call of July second, eighteen hundred and sixty-two, and accepted by the United States, towards its quota for the term of three years, and in the same proposition for every man so furnished and accepted for any shorter period; and the same shall be

in full payment for any claim upon the state on account of its war debts by any such municipality. A commission appointed by the Governor and Council shall determine the amount to which each city, town and plantation is entitled, to be devoted to such reimbursement, the surplus, if any, to be appropriated to the soldiers who enlisted or were drafted and went at any time during the war, or if deceased, to their legal representatives. The issue of bonds hereby authorized shall not exceed in the aggregate three million five hundred thousand dollars, and this amendment shall not be construed to permit the credit of the state to be directly or indirectly loaned in any other case or for any other purpose.

In 1877, the 22nd amendment to the Constitution of Maine, relative to municipal indebtedness was adopted and subsequently at an election held September 11, 1911, the voters adopted an amendment to this amendment increasing the debt limit of cities of 40,000 or more from five per cent to seven and one-half per cent of the assessed valuation.

Art. XXII as now in force is as follows: No city or town having less than four thousand inhabitants, according to the last Census taken by the United States, shall hereafter create any debt or liability which singly or in the aggregate, with previous debts or liabilities, shall exceed five per centum of the last regular valuation of said city or town, provided however, that cities having a population of forty thousand or more, according to the last Census taken by the United States, may create a debt or liability which, singly or in the aggregate, with previous debts or liabilities, shall equal seven and one-half per centum of the last regular valuation of said city, that cities of forty thousand inhabitants, or over, may, by a vote of their city government, increase the present rate of five per centum by one-fourth of one per centum in any one municipal year, until, in not less than ten years, the maximum rate of seven and one-half per

centum is reached, that any city failing to take the increase in any one municipal year, then the increase for that year is lost and no increase can be made until the next year, as provided above; and provided, further, that the adoption of this article shall not be construed as applying to any fund received in trust by the said city or town, nor to any town for the purpose of renewing existing loans or for war; or to temporary loans to be paid out of money raised by taxation during the year in which they were made.

§ 486. Maryland.

Constitution as ratified Sept. 18, 1867.

Art. III, Sec. 34: No debt shall be hereafter contracted by the General Assembly unless such debt shall be authorized by a law providing for the collection of an annual tax or taxes sufficient to the interest on such debt as it falls due, and also to discharge the principal thereof within fifteen years from the time of contracting the same; and the taxes laid for this purpose shall not be repealed or applied to any other object until the said debt and interest thereon shall be fully discharged. The credit of the State shall not in any manner be given, or loaned to, or in aid of any individual, association or corporation; nor shall the General Assembly have the power in any mode to involve the State in the construction of Works of Internal Improvement, nor in granting any aid thereto, which shall involve the faith or credit of the State; nor make any appropriation therefor except in aid of the construction of Works of Internal Improvement in the counties of St. Mary's, Charles and Calvert, which have had no direct advantage from such works as have been heretofore aided by the State; and provided that such aid, advances or appropriations shall not exceed in the aggregate the sum of five hundred thousand dollars. * * *

Art. III, Sec. 54: No county of this State shall contract any debt, or obligation, in the construction of any Railroad, Canal, or other Work of Internal Improvement, nor give, or loan its credit to or in aid of any association, or corporation, unless authorized by an Act of the General Assembly, which shall be published for two months before the next election for members of the House of Delegates in the newspapers published in such county, and shall also be approved by a majority of all the members elected to each House of the General Assembly, at its next session after said election.

In Art. XI, Sec. 7 of the Constitution, will be found certain special provisions relative to the incurring of debt by the city of Baltimore.

§ 487. Massachusetts.

Constitution of 1780, as amended from time to time.

There seems to be no provision in the Constitution of Massachusetts limiting the power of the legislature to create state indebtedness or limiting its power to authorize municipal indebtedness. Statutes general and special have been passed on this subject with respect to cities and towns. The provisions will be found incorporated in Revised Statutes, 1902, Chapter 27.

§ 488. Michigan.

Constitution as approved Nov. 3, 1908.

Art. X, Sec. 10: The State may contract debts to meet deficits in revenue, but such debts shall not in the aggregate at any one time exceed two hundred and fifty thousand dollars. The State may also contract debts to repel invasion, suppress insurrection, defend the State or aid the United States in time of war. The money so raised shall be applied to the purposes for which it is raised or to the payment of the debts contracted.

Art. X, Sec. 11: No scrip, certificate or other evidence of State indebtedness shall be issued except for such debts as are expressly authorized in the Constitution.

Art. X, Sec. 12: The credit of the State shall not be granted to or in aid of any persons, association or corporation, public or private.

Art. X, Sec. 13: The State shall not subscribe to nor be interested in the stock of any company, association or corporation.

Art. X, Sec. 14: The State shall not be a party to, nor interested in any work of internal improvement, nor engage in carrying on any such work except in the improvement of, or aiding in the improvement of public wagon roads, in the re-forestation and protection of lands owned by the State and in the expenditure of grants to the State of land or other property.

Art. VIII, Sec. 12: No county shall incur any indebtedness which shall increase its total debt beyond three per cent of its assessed valuation except counties having an assessed valuation of five million dollars or less, which counties may increase their total debt to five per cent of their assessed valuation (as amended in 1910).

Cities and villages are left by the 1908 Constitution to the discretion of the Legislature in the matter of restrictions on their borrowing power. The provision which relates to this subject is found in Art. 8, Sec. 20, and is as follows:

The Legislature shall provide by a general law for the incorporation of cities and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes and restrict their powers of borrowing money and contracting debts.

§ 489. Minnesota.

Constitution as adopted in 1857, with amendments.

Art. IX, Sec. 5: For the purpose of defraying extraordinary expenditures, the State may contract public

debts, but such debts shall never, in the aggregate, exceed two hundred and fifty thousand dollars; every such debt shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the Legislature, to be recorded by the yeas and nays on the journals of each House, respectively; and every such law shall levy a tax annually sufficient to pay the annual interest on such debt, and also a tax sufficient to pay the principal of such debt within ten years from the final passage of such law, and shall specially appropriate the proceeds of such taxes to the payment of such principal and interest; and such appropriation and taxes shall not be repealed, postponed, or diminished, until the principal and interest of such debt shall have been wholly paid. The State shall never contract any debts for works of internal improvements, or be a party in carrying on such works, except in cases where grants of land or other property shall have been made to the State, especially dedicated by the grant to specific purposes, and in such cases the State shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion.[7]

Art. IX, Sec. 6: All debts authorized by the preceding section shall be contracted by loan on State bonds of amounts not less than five hundred dollars each on interest, payable within ten years after the final passage of the law authorizing such debt; and such bonds shall not be sold by the State under par. A correct registry of all

7—Brown v. Ringdahl (Minn.), 122 N. W. 469. The certificates of indebtedness authorized by general laws 1909, Chap. 27, Sec. 2, for the construction of a new state's prison do not create a general debt or obligation of the state contrary to Const., Art. IX, Sec. 5, but are payable out of a special fund and are to be regarded only as evidences of the right of the holder to demand and receive from the state treasury the proceeds of the tax authorized by that act to be levied and collected for the "prison building fund."

such bonds shall be kept by the treasurer, in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally made payable.

Art. IX, Sec. 7: The State shall never contract any public debt, unless in time of war, to repel invasion or suppress insurrection, except in the cases and in the manner provided in the fifth and sixth sections of this article.

Art. IX, Sec. 8: The money arising from any loan made, or debt or liability contracted, shall be applied to the object specified in the Act authorizing such debt or liability, or to the repayment of such debt or liability, and to no other purpose whatever.

Art. IX, Sec. 10: The credit of the State shall never be given or loaned in aid of any individual, association or corporation. * * * (Here follow provisions relative to Minnesota State Railroad Bonds.)

Art. IX, Sec. 14a: For the purpose of erecting and completing buildings for a hospital for the insane, a deaf, dumb and blind asylum, and State prison, the Legislature may, by law, increase the public debt of the State, to an amount not exceeding two hundred and fifty thousand dollars, in addition to the public debt already heretofore authorized by the Constitution, and for that purpose may provide by law for issuing and negotiating the bonds of the State, and appropriate the money only for the purpose aforesaid, which bonds shall be payable in not less than ten nor more than thirty years from the date of the same, at the option of the State. (Adopted Nov. 5, 1872.)

Art. IX, Sec. 15: The Legislature shall not authorize any county, township, city or other municipal corporation to issue bonds, or to become indebted in any manner, to aid in the construction or equipment of any or all railroads to an amount that shall exceed five per centum of the value of the taxable property within such county, township, city, or other municipal corporation; the amount of such taxable property to be ascertained and determined by the last assessment of said property made,

for the purpose of State and county taxation, previous to the incurring of such indebtedness. (Adopted March 4, 1879.) Prior to this amendment the percentage was ten instead of five.

§ 490. Mississippi.

Constitution adopted Nov. 1, 1890.

Art. IV, Sec. 66: No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of each branch of the Legislature nor by any vote for sectarian purpose or use.

Art. IV, Sec. 80: Provisions shall be made by general laws to prevent the abuse by cities, towns and other municipal corporations of their powers of assessment, taxation, borrowing money and contracting debts.

Pursuant to the above constitutional provision there was passed in 1910 (Chapter 142, Laws of 1910) an act which fixed a limit upon the debt which might be incurred by municipalities allowing cities having a population of 10,000 or more to become indebted for the purpose of improving streets or acquiring water works, gas or electric plants up to fifteen per cent of their assessed valuation. This law also provided that bonds issued for the construction of provision of water works, gas or electric plants made might be secured through a pledge of the revenue of such plants.

Art. VII, Sec. 183: No county, city, town or other municipal corporation shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association. All authority heretofore conferred for any of the purposes aforesaid by the legislature or by the charter of any corporation, is hereby repealed. Nothing in this section contained shall effect the right of any such corporation, municipality or

county to make such subscription where the same has been authorized under laws existing at the time of the adoption of this constitution, and by a vote of the people thereof, had prior to its adoption, and where the terms of submission and subscription have been or shall be complied with, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the payment or liquidation of such subscription, or of any existing indebtedness.

Art. XIV, Sec. 258: The credit of the State shall not be pledged or loaned in aid of any person, association or corporation; and the State shall not become a stockholder in any corporation or association, nor assume, redeem, secure or pay any indebtedness or pretended indebtedness alleged to be due by the State of Mississippi, to any person, association or corporation whatsoever, claiming the same as owners, holders or assignees of any bond or bonds, now generally known as "Union Bank" bonds and "Planters' Bank" bonds.

§ 491. Missouri.

Constitution effective Nov. 30, 1875, with amendments.

Art. IV, Sec. 44: The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the state, or to issue bonds or other evidences of indebtedness thereof, except in the following cases:

First, In renewal of existing bonds, when they cannot be paid at maturity, out of the sinking fund or other resources.

Second, On the occurring of an unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred, upon the recommendation of the governor first had, shall not exceed the sum of two hundred

and fifty thousand dollars for any one year, to be paid in not more than two years from and after its creation.

Third, On the occurring of any unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred or to be incurred shall exceed the sum of two hundred and fifty thousand dollars for any one year, the General Assembly may submit an act providing for the loan, or for the contracting of the liability, and containing a provision for levying a tax sufficient to pay the interest and principal when they become due (the latter in not more than thirteen years from the date of its creation), to the qualified voters of the state, and when the act so submitted shall have been ratified by a two-thirds majority, at an election held for that purpose, due publication having been made of the provisions of the act for at least three months before such election, the act thus ratified shall be irrepealable until the debt thereby incurred shall be paid, principal and interest.

Art. IV, Sec. 45: The General Assembly shall have no power to give or to lend, or to authorize the giving or lending of the credit of the State in aid of or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association or individuals, municipal or other corporation whatsoever.

This was amended in 1900 by the addition of the following: "Provided, that the General Assembly shall have the power to appropriate from funds in the state sinking fund, being the proceeds of the tax authorized under section 14 of article X of the Constitution, to an amount not exceeding one million dollars for the exhibition of the resources, products and industries of the state in the centennial celebration of the Louisiana purchase in the city of St. Louis."

Art. IV, Sec. 46: The General Assembly shall have no power to make any grant or to authorize the making of

any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, that this shall not be so construed as to prevent the grant of aid in a case of public calamity.

Art. IV, Sec. 47: The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

This section was amended in 1902 by adding an exception relative to pension funds for firemen and their widows and children.

Art. IV, Sec. 49: The General Assembly shall have no power hereafter to subscribe or authorize the subscription of stock on behalf of the State, in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations by the State.

Art. IX, Sec. 6: No county, township city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institute of learning, or other institution, whether created for or to be controlled by the State or others. All authority heretofore conferred for any of the purposes aforesaid by the General Assembly, or by the charter of any corporation, is hereby repealed: Provided, however, that nothing in this Constitution contained shall affect the right of any such municipality to make such subscription, where the same has been authorized under existing laws by a vote of the people of such municipality prior to its adoption, or to

prevent the issue of renewal bonds or the use of such other means as are or may be prescribed by law, for the liquidation or payment of such subscription, or of any existing indebtedness.

Art. IX, Sec. 19: The corporate authorities of any county, city or any other municipal subdivision of this state, having more than two hundred thousand inhabitants, which have already exceeded the limit of indebtedness prescribed in section 12 of article X of this constitution, may, in anticipation of the customary annual revenue thereof, appropriate, during any fiscal year, toward the general governmental expenses thereof, a sum not exceeding seven-eighths of the entire revenue applicable to general governmental expenses (exclusive of the payment of the bonded debt of such county, city or municipality) that was actually raised by taxation alone during the preceding fiscal year; but until such excess of indebtedness cease, no further bonded debt shall be incurred, except for the renewal of other bonds.

Art. X, Sec. 12: As originally adopted, was amended in 1900, and again in 1902 by adding special authority to the cities of St. Louis and Kansas City to issue World's Fair and Water Works bonds, the section excluding these amendments is as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such in-

debtedness: Provided, that with such assent any county may be allowed to become indebted to a larger amount for the erection of a court-house or jail; and Provided further, that any county, city, town, township, school district or other political corporation or subdivision of the State; incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before, or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as its falls due, and also to constitute a sinking fund for payment of the principal thereof within twenty years from the time of contracting the same."

Art. X, Sec. 12a, as adopted Nov. 4, 1902: Any city in the state containing not more than thirty thousand (30,000) nor less than two thousand (2,000) inhabitants, may, with the assent of two-thirds of the voters thereof voting at an election to be held for that purpose be allowed to become indebted in a larger amount than specified in section 12, article ten (X) of the Constitution of the State, not exceeding an additional five (5) per centum on the value of the taxable property therein, for the purpose of purchasing or constructing waterworks, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same: Provided, that any such city incurring any such indebtedness requiring the assent of the voters as aforesaid, shall have the power to provide for, and, before or at the time of incurring such indebtedness, shall provide for the collection of an annual tax in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same, any provision in this constitution to the contrary, notwithstanding.[8]

8—Laws of Missouri, 1905, pp. 313-325.

§ 492. Montana.

Constitution adopted 1889.

Art. V, Sec. 38: The Legislative Assembly shall have no power to pass any law authorizing the State, or any county of the State, to contract any debt or obligation in the construction of any railroad, nor give or loan its credit to or in aid of the construction of the same.

Art. XIII, Sec. 1: Neither the State, nor any county, city, town, municipality, nor other subdivision of the States shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a share holder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the State by operation or provision of law.

Art. XIII, Sec. 2: The Legislative Assembly shall not in any manner create any debt except by law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on and extinguish the principal of such debt within the time limited by such law for the payment thereof; but no debt or liability shall be created which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of one hundred thousand dollars, except in cases of war, to repel invasion or suppress insurrection, unless the law authorizing the same shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it at such election.

Art. XIII, Sec. 3: All moneys borrowed by, or on behalf of the state or any county, city, town, municipality or

other subdivision of the state, shall be used only for the purpose specified in the law authorizing the loan.

Art. XIII, Sec. 4: The state shall not assume the debt, or any part thereof, of any county, city, town or municipal corporation.

Art. XIII, Sec. 5: No county shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five (5) per centum of 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, and all bonds or obligations in excess of such amount given by, or on behalf of such county shall be void. No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law.

Art. XIII, Sec. 6: No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the State and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by, or on behalf of, such city, town, township or school district shall be void; Provided, however, that the Legislative Assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt.

§ 493. Nebraska.

Constitution ratified Oct. 12, 1875, with amendments.

Art. XI, Municipal Corporations, Sec. 1: No city, county, town, precinct, municipality, or other subdivision of the State shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein, of any railroad or private corporation, or association.

Art. XII, Sec. 1: The State may, to meet casual deficits, or failures in the revenues, contract debts never to exceed in the aggregate one hundred thousand dollars; and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war; and provision shall be made for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrepealable until such debt be paid.

Art. XII, Sec. 2: No city, county, town, precinct, municipality, or other subdivision of the State shall ever make donations to any railroad or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law: Provided, That such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such county: Provided, further, That any city or county may, by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent, and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law.

Art. XII, Sec. 3: The credit of the State shall never be

given or loaned in aid of any individual, association or corporation.

§ 494. Nevada.

Constitution adopted 1864, with amendments.

Art. VIII, Sec. 8: The Legislature shall provide for the organization of cities and towns, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, except for procuring supplies of water.

Art. VIII, Sec. 9: The State shall not donate or loan money or its credit, subscribe to or be interested in the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes.

Art. VIII, Sec. 10: No county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation, or association whatever, or loan its credit in aid of any such company, corporation, or association, except railroad corporations, companies, or associations.

Art. IX, Sec. 3: The Legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the State for each fiscal year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Art. IX, Sec. 4: For the purpose of enabling the State to transact its business upon a cash basis from its organization, the state may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of three hundred thousand dollars, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned. Every such debt shall

be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within twenty years from the passage of such law, and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed, nor the taxes be postponed or diminished until the principal and interest of said debts shall have been wholly paid. Every contract of indebtedness entered into or assumed by, or on behalf of, the state, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, suppress insurrection, defend the state in time of war, or, if hostilities be threatened, provide for the public defense.

§ 495. New Hampshire.

Amended Constitution of 1902.

Part 2nd, Art. V (Last Proviso): Provided, That the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds.

The municipal bond act of 1895 controls the subject of bond issue by municipal corporations in detail. Public Statutes of New Hampshire, 1901, pp. 491, et seq.

§ 496. New Jersey.

Constitution as adopted in 1844, with amendments.

Art. I, Sec. 19: No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security

for or be directly or indirectly the owner of any stock or bonds of any association or corporation.

Art. I, Sec. 20: No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association, or corporation whatever.

Art. IV, Sec. 6, subdivisions 3 and 4: 3. The credit of the State shall not be directly or indirectly loaned in any case.

4. The Legislature shall not in any manner create any debt or debts, liability or liabilities of the State, which shall singly or in the aggregate with any previous debts or liabilities at any time exceed one hundred thousand dollars, except for purposes of war, or to repel invasion, or to suppress insurrection, unless the same shall be authorized by a law for some single object of work, to be distinctly specified therein, which law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within thirty-five years from the time of the contracting thereof, and shall be irrepealable until such debt or liability and the interest thereon are fully paid and discharged; and no such law shall take effect until it shall, at a general election, have been submitted to the people, and have received the sanction of a majority of all the votes cast for and against it at such election; and all money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. This section shall not be construed to refer to any money that has been, or may be, deposited with this State by the Government of the United States.

Art. IV, Sec. 7: The Legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: Regulating the internal affairs of

towns and counties. * * * The Legislature shall pass no special act conferring corporate powers. * * *

In 1903 (chapter 168, Laws of 1903, and chapter 103, Laws of 1907) a Referendum Act relating to the government of cities was passed by the Legislature, under the provisions of which, when accepted by the voters of any city, the debt-making power of the municipality is fixed at fifteen per cent of the taxables. Section 73: "The limit of the bonding power in such city is fixed at fifteen per centum of the value of the property therein as rated for taxation, as shown by the last duplicates of assessment for taxes made therein, and such limitation shall in no case be exceeded."

§ 497. New Mexico.

Constitution adopted 1911.

Art. IX, Sec. 1: The State hereby assumes the debts and liabilities of the Territory of New Mexico, and the debts of the counties thereof which were valid and subsisting on June 20, 1910, and pledges its faith and credit for the payment thereof. The Legislature shall, at its first session, provide for the payment or refunding thereof by the issue and sale of bonds, or otherwise.

Art. IX, Sec. 2: No county shall be required to pay any portion of the debt of any other county so assumed by the State, and the bonds of Grant and Santa Fe counties which were validated, approved and confirmed by Act of Congress of Jan. 16, 1897, shall be paid as hereinafter provided.

Art. IX, Sec. 3: The bonds authorized by law to provide for the payment of such indebtedness shall be issued in three series, as follows:

Series A. To provide for the payment of such debts and liabilities of the Territory of New Mexico.

Series B. To provide for the payment of such debts of said counties.

Series C. To provide for the payment of the bonds and accrued interest thereon of Grant and Santa Fe counties which were validated, approved and confirmed by Act of Congress Jan. 16, 1897.

Art. IX, Sec. 7: The State may borrow money not exceeding the sum of $200,000 in the aggregate to meet casual deficits or failure in revenue, or for necessary expenses. The State may also contract debts to suppress insurrection and to provide for the public defense.

Art. IX, Sec. 8: No debt other than those specified in the preceding section shall be contracted by or on behalf of this State, unless authorized by law for some specified work or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall have been submitted to the qualified electors of the State and have received a majority of all the votes cast thereon at a general election; such law shall be published in full in at least one newspaper in each county of the State, if one be published therein, once each week for four successive weeks next preceding such election. No debt shall be so created if the total indebtedness of the State, exclusive of the debts of the Territory and the several counties thereof, assumed by the State, would thereby be made to exceed one per centum of the assessed valuation of all the property subject to taxation in the State, as shown by the preceding general assessment.

Art. IX, Sec. 9: Any money borrowed by the State, or any county, district or municipality thereof, shall be applied to the purpose for which it was obtained, or to repay such loan, and to no other purpose whatever.

Art. IX, Sec. 10: No county shall borrow money except for the purpose of erecting necessary public buildings or constructing or repairing public roads and bridges, and in such cases only after the proposition to

create such debt shall have been submitted to the qualified electors of the county who paid a property tax therein during the preceding year, and approved by a majority of those voting thereon. No bonds issued for such purpose shall run for more than fifty years.

Art. IX, Sec. 11: No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to the qualified electors of the district and approved by a majority of those voting thereon. No school district shall ever become indebted in an amount exceeding six per centum on the assessed valuation of the taxable property within such school district, as shown by the preceding general assessment.

Art. IX, Sec. 12: No city, town or village shall contract any debt except by an ordinance, which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purposes to which the funds to be raised shall be applied, and which shall provide for the levy of a tax not exceeding twelve mills on the dollar, upon all taxable property within such city, town or village, sufficient to pay the interest on and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal. No such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or other officers of such city, town or village, have been submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year, and a majority of those voting on the question, by ballot deposited in a separate ballot box, shall have voted in favor of creating such debt.

Art. IX, Sec. 13: No county, city, town or village shall ever become indebted to an amount in the aggregate, including existing indebtedness, exceeding four per cen-

tum on the value of the taxable property within such county, city, town or village, as shown by the last preceding assessment for State or county taxes; and all bonds or obligations issued in excess of such amount shall be void; Provided, That any city, town or village may contract debts in excess of such limitation for the construction or purchase of a system for supplying water, or of a sewer system, for such town, city or village.

Art. IX, Sec. 14: Neither the State nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the State or any county or municipality from making provision for the care and maintenance of sick and indigent persons.

Art. IX, Sec. 15: Nothing in this article shall be construed to prohibit the issue of bonds for the purpose of paying or refunding any valid State, county, district or municipal bonds, and it shall not be necessary to submit the question of the issue of such bonds to a vote as herein provided.

§ 498. New York.

Constitution, 1894, as amended.

Art. VII, Sec. 1: The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation.

Art. VII, Sec. 2: The State may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed one million of dollars; and the moneys arising from the loans creating such debts shall be applied to the purpose for

which they were obtained, or to repay the debt so contracted and for no other purpose whatever.

Art. VII, Sec. 3: In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Art. VII, Sec. 4: Except the debts specified in sections two and three of this article, no debts shall be hereafter contracted by or in behalf of this State, unless such debt shall be authorized by law, for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the Legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?" The Legislature may at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law; but the tax imposed by such Act, in proportion to the debt and liability which may have been contracted in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt

and liability. The money arising from any loan or stock creating such debt or liability, shall be applied to the work or object specified in the Act authorizing such debt or liability, or for the payment of such debt or liability and for no other purpose whatever. No such law shall be submitted to be voted on, within three months after its passage, or at any general election when any other law, or any bill, shall be submitted to be voted for or against. The Legislature may provide for the issue of bonds of the State to run for a period of not exceeding fifty years in lieu of bonds heretofore authorized but not issued, and shall impose and provide for the collection of a direct annual tax for the payment of the same as hereinbefore required. When any sinking fund created under this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund and the Legislature shall reduce the tax to an amount equal to the accruing interest on such debt.

On Nov. 2, 1909, the following was added to Art. VII, Sec. 4: "The Legislature may from time to time alter the rate of interest to be paid upon any State debt which has been or may be authorized, pursuant to the provisions of this section, or upon any part of such debt, Provided, however, That the rate of interest shall not be altered upon any part of such debt or upon any bond or other evidence thereof, which has been or shall be created or issued before such alteration. In case the Legislature increase the rate of interest upon any such debt or part thereof, it shall impose and provide for the collection of a direct annual tax to pay and sufficient to pay the increased or altered interest on such debt as it falls due, and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof, and shall appropriate annually to the sinking fund moneys in amount sufficient to pay such interest and pay and dis-

charge the principal of such debt when it shall become due and payable."

November, 1905, an entirely new section, i. e., Sec. 12, Art. VII, was adopted, providing for a state debt of not exceeding $50,000,000 for highway purposes.

Art. VIII, Sec. 9: Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes.

Art. VIII, Sec. 10: No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law. No county or 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 cent of the assessed valuation of the real estate of such county or city subject to taxation as it appeared by the assessment rolls of 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 county or city whose present indebtedness exceeds ten per cent 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. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained, or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water; but the term of the bonds issued to provide the supply of water shall not exceed twenty years, and a sinking fund shall be created on the issuing of the said bonds for their redemption, by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity. All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds issued to provide for the supply of water, and any debt hereafter incurred by any portion or part of a city, if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted; except that debts incurred by the City of New York after the first day of January, nineteen hundred and four, and debts incurred by any city of the second class after the first day of January, nineteen hundred and eight, and debts incurred by any city of the third class after the first day of January, nineteen hundred and ten, to provide for the supply of water, shall not be so included; and except further that any debt hereafter incurred by the City of New York for a public improvement owned or to be owned by the city which yields to the city current net revenue, after making any necessary allowance for repairs and maintenance for which the city is liable, in excess of the interest on said debt and of the annual installments necessary for its amortization, may be excluded in ascertaining the power of said city to become otherwise indebted, provided that a sinking fund

for its amortization shall have been established and maintained and that the indebtedness shall not be so excluded during any period of time when the revenue aforesaid shall not be sufficient to equal the said interest and amortization installments, and except further that any indebtedness heretofore incurred by the City of New York for any rapid transit or dock investment may be so excluded proportionately to the extent to which the current net revenue received by said city therefrom shall meet the interest and amortization installments thereof, provided that any increase in the debt-incurring power of the City of New York which shall result from the exclusion of debts heretofore incurred shall be available only for the acquisition or construction of properties to be used for rapid transit or dock purposes. The Legislature shall prescribe the method by which and the terms and conditions under which the amount of any debt to be so excluded shall be determined, and no such debt shall be excluded except in accordance with the determination so prescribed. The Legislature may in its discretion confer appropriate jurisdiction on the Appellate Division of the Supreme Court in the First Judicial Department for the purpose of determining the amount of any debt to be so excluded. No indebtedness of a city valid at the time of its inception shall thereafter become invalid by reason of the operation of any of the provisions of this section. Whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted shall cease, but the debt of the county heretofore existing shall not, for the purposes of this section, be reckoned as a part of the city debt. The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over 100,000 inhabitants, or any such city of this State, in addition to providing for the principal and interest of existing debt, shall not

in the aggregate exceed in any one year two per cent of the assessed valuation of the real and personal estate of such county or city, to be ascertained as prescribed in this section in respect to county or city debt (as amended in 1899, 1905 and 1909).

§ 499. North Carolina.

Constitution of 1868, as amended.

Art. I, Sec. 6: The state shall never assume to pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; nor shall the General Assembly assume or pay, or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred, or issued, by authority of the convention of the year one thousand eight hundred and sixty-eight, nor any debt or bond, incurred or issued by the legislature of the year one thousand eight hundred and sixty-eight, at its special session of the year one thousand eight hundred and sixty-eight, or at its regular sessions of the years one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine and one thousand eight hundred and seventy, except the bonds issued to fund the interest on the old debt of the state, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the state, at a regular election held for that purpose.

Art. V, Sec. 4: Until the bonds of the state shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the state, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually.

And the General Assembly shall have no power to give or lend the credit of the state in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the state, and be approved by the majority of those who shall vote thereon.

Art. VII, Sec. 7: No county, city, town, or other municipal corporation, shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

Art. VII, Sec. 13: No county, city, town, or other municipal corporation shall assume to pay, nor shall any tax be levied or collected for the payment of any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion.

§ 500. North Dakota.

Constitution as adopted Oct. 1, 1889.

Art. VI, Sec. 130: Municipal Corporations. The Legislative Assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes and assessments, borrowing money and contracting debts, and money raised by taxation, loan or assessment for any purpose shall not be diverted to any other purpose except by authority of law.

Art. XII, Sec. 182: The State may, to meet casual deficits or failure in the revenue, or in case of extraordinary emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota at the time of the adoption of this Constitution. Every such debt shall be authorized by law for certain

purposes, to be definitely mentioned therein, and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax discontinued until such debt, both principal and interest, shall have been fully paid. No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the State in time of war, or to provide for public defense in case of threatened hostilities; but the issuing of new bonds to refund existing indebtedness shall not be construed to be any part or portion of said two hundred thousand dollars.[9]

Art. XII, Sec. 183: The debt of any county, township, city, town, school district, or any other political subdivision, shall never exceed five (5) per centum upon the assessed value of the taxable property therein: Provided, That any incorporated city may, by a two-thirds vote, increase such indebtedness three (3) per centum on such assessed value beyond said five (5) per cent limit. In estimating the indebtedness which a city, county, township, school district or any other political subdivision may incur, the entire amount of existing indebtedness, whether contracted prior or subsequent to the adoption of this Constitution shall be included; Provided, further, That any incorporated city may become indebted in any amount not exceeding four (4) per centum on such assessed value without regard to the existing indebtedness of such city, for the purpose of constructing or purchasing water-works for furnishing a supply of water to the

9—State v. McMillan (N. D.), 96 N. W. 310. Bonds issued to procure funds to erect and equip buildings for the State Normal School at Valley City as in excess of the constitutional limit prescribed in Sec. 182, are void.

inhabitants of such city, or for the purpose of constructing sewers and for no other purpose whatever. All bonds or obligations in excess of the amount of indebtedness permitted by this Constitution given by any city, county, township, town, school district, or any other political subdivision, shall be void.

Art. XII, Sec. 184: Any city, county, township, town, school district, or any other political subdivision, incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for the payment of the interest or principal of any debt shall be irrepealable until such debt be paid.

Art. XII, Sec. 185: Neither the State nor any county, city, township, town, school district, or any other political subdivision, shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the State engage in any work of internal improvement unless authorized by a two-thirds vote of the people.

Art. XII, Sec. 187: No bond or evidence of indebtedness of the State shall be valid unless the same shall have endorsed thereon a certificate signed by the Auditor and Secretary of State, showing that the bond or evidence of debt is issued pursuant to law and is within the debt limit. No bond or evidence of debt of any county, or bond of any township or other political subdivision, shall be valid unless the same have endorsed thereon a certificate signed by the County Auditor, or other officer authorized by law to sign such certificate, stating that said bond or evidence of debt is issued pursuant to law and is within the debt limit.

§ 501. Ohio.

Constitution of 1851, as amended.

Art. VIII, Sec. 1: The State may contract debts to supply casual deficits or failures in revenues or to meet expenses not otherwise provided for; but the aggregate amount of such debts direct and contingent, whether contracted by virtue of one or more Acts of the General Assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained or to repay the debts so contracted and to no other purpose whatever.

Art. VIII, Sec. 2: In addition to the above limited power the State may contract debts to repel invasion, suppress insurrection, defend the State in war, or to redeem the present outstanding indebtedness of the State; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised or to repay such debts, and to no other purpose whatever; and all debts incurred to redeem the present outstanding indebtedness of the State shall be so contracted as to be payable by the sinking fund hereinafter provided for as the same shall accumulate.

Art. VIII, Sec. 3: Except the debts above specified in sections 1 and 2 of this article, no debt whatever shall hereafter be created by or on behalf of the State.

Art. VIII, Sec. 4: The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association, or corporation whatever; nor shall the State ever hereafter become a joint owner or stockholder in any company or association in this State or elsewhere formed for any purpose whatever.

Art. VIII, Sec. 5: The State shall never assume the debts of any county, city, town or township, or of any corporation whatever unless such debt shall have been

created to repel invasion, suppress insurrection or defend the State in war.

Art. VIII, Sec. 6: The General Assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation or association.

Art. XII, Sec. 6: The State shall never contract any debt for purposes of internal improvement.

Art. XIII, Sec. 6: The General Assembly shall provide for the organization of cities and incorporated villages by general laws and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.

For legislative provisions see Page and Adams Annotated Ohio General Code of 1912, sections 3912 *et seq.*

Sec. 3912: Municipal corporations shall have special power to borrow money and to maintain and protect a sinking fund.

Sec. 3914: Municipal corporations may issue bonds in anticipation of special assessments. Such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which the assessments are levied. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds and the assessments as paid shall be applied to the liquidation of such bonds.

Sec. 3918: Bonds issued under authority of this chapter shall express upon their face the purpose for which issued and under what ordinance.

Sec. 3940: Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year by the council of a municipal corporation, under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation.

Sec. 3941: The net indebtedness created or incurred by the council under the authority granted it in section one (1) of this act and in an act passed April 29th, 1902, to amend sections 2835, 2836 and 2837 and to repeal section 2837a of the Revised Statutes together with its subsequent amendments shall never exceed four (4) per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation.

Sec. 3948: The net indebtedness created or incurred by a municipal corporation under authority of sections one and four of this act and under the authority of an act passed April 29th, 1902, to amend sections 2835, 2836, and 2837 and to repeal section 2837a of the Revised Statutes together with its subsequent amendments, shall never exceed in total eight (8) per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation.

§ 502. Oklahoma.

Constitution as ratified Sept. 17, 1907.

Art. X, Sec. 14: Taxes shall be levied and collected by general laws, and for public purposes only, except that taxes may be levied when necessary to carry into effect section 31 of the bill of rights. Except as required by the Enabling Act, the State shall not assume the debt of any county, municipal corporation, or political subdivision of the State, unless such debt shall have been contracted to defend itself in time of war, to repel invasion, or to suppress insurrection.

Art. X, Sec. 15: The credit of the State shall not be given, pledged or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State; nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association, or corporation.

Art. X, Sec. 16: All laws authorizing the borrowing of money by and on behalf of the State, county, or other

political subdivision of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose.

Art. X, Sec. 17: The Legislature shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association, or individual.

Art. X, Sec. 23: The State may, to meet casual deficits or failure in revenue, or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time, exceed $400,000, and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained or to repay the debts so contracted, and to no other purpose whatever.

Art. X, Sec. 24: In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection or to defend the State in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Art. X, Sec. 25: Except the debts specified in sections 23 and 24 of this article, no debts shall hereafter be contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast

for and against it at such election. On the final passage of such bill in either House of the Legislature, the question shall be taken by yeas and nays, to be duly entered in the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?"

Art. X, Sec. 26: No county, city, town, township, school district or other political corporation, or subdivision of the State, shall be allowed to become indebted, in any manner, for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof voting an election to be held for that purpose, nor, in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding 5 per cent of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring of such indebtedness; provided, that any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same.

Art. X, Sec. 27: Any incorporated city or town in this State may, by a majority of the qualified property taxpaying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section 26, for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city: Provided, That any such city or town incur-

ring any such indebtedness requiring the assent of the voters as aforesaid, shall have the power to provide for, and, before or at the time of incurring such indebtedness, shall provide for, the collection of an annual tax in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same.

Art. X, Sec. 28: Counties, townships, school districts, cities and towns shall levy sufficient additional revenue to create a sinking fund to be used, first, for the payment of interest coupons as they fall due; second, for the payment of bonds as they fall due; third, for the payments of such parts of judgments as such municipality may, by law, be required to pay.

Art. X, Sec. 29: No bond or evidence of indebtedness of this State shall be valid unless the same shall have endorsed thereon a certificate, signed by the Auditor and Attorney-General of the State, showing that the bond or evidence of debt is issued pursuant to law and is within the debt limit. No bond or evidence of debt of any county, or bond of any township or any other political subdivision of any county, shall be valid unless the same have endorsed thereon a certificate signed by the County Clerk, or other officer authorized by law to sign such certificate, and the County Attorney of the county, stating that said bond or evidence of debt is issued pursuant to law, and that said issue is within the debt limit.

§ 503. Oregon.

Constitution ratified Nov. 9, 1857, with amendments.

Art. XI, Sec. 5: Acts of Legislative Assembly incorporating towns and cities shall restrict their powers of

taxation, borrowing money, contracting debts, and loaning their credit.

Art. XI, Sec. 6: The State shall not subscribe to or be interested in the stock of any company, association or corporation.

Art. XI, Sec. 7: The Legislative Assembly shall not loan the credit of the State, nor in any manner create debts or liabilities, which shall singly or in the aggregate with previous debts or liabilities, exceed the sum of fifty thousand dollars, except in case of war, or to repel invasion or suppress insurrection, and every contract of indebtedness entered into or assumed by or on behalf of the State, when all its liabilities and debts amount to said sum, shall be void and of no effect.

Art. XI, Sec. 8: The State shall never assume the debts of any county, town or other corporation whatever, unless such debts shall have been created to repel invasion, suppress insurrection, or defend the State in war.

Art. XI, Sec. 9: No county, city, town, or other municipal corporation, by vote of its citizens or otherwise, shall become a stockholder in any joint-stock company, corporation or association whatever, or raise money for, or loan its credit to, or in aid of any such company, corporation or association.

Art. XI, Sec. 10: No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, or to build permanent roads within the county; but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question.

Under the authority of the Constitution, Sec. 5, quoted above, legislative acts have been passed from time to time relative to the incurring of debts by towns and cities. See Ballinger & Cotton's Ann. Codes & Stats., Sec. 2722, 2727-2735, 3389 and 3415.

§ 504. Pennsylvania.

Constitution ratified Dec. 16, 1873, with amendments.

Art. IX, Sec. 4: No debt shall be created by, or on behalf of, the State except to supply casual deficiencies of revenue, repel invasions, suppress insurrection, defend the State in war, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed, in the aggregate at any one time, one million of dollars.

Art. IX, Sec. 5: All laws authorizing the borrowing of money by and on behalf of the State shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for the purpose specified and no other.

Art. IX, Sec. 6: The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association, nor shall the Commonwealth become a joint-owner or stockholder in any company, association or corporation.

Art. IX, Sec. 7: The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

Art. IX, Sec. 8: The debt of any county, city, borough, township, school district, or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors thereof at a public election in such manner as shall be provided by law; but any city the debt of which

now exceeds seven per centum of such assessed valuation may be authorized by law to increase the same three per centum, in the aggregate at any one time upon such valuation.

In November 1911, the following paragraph was added to section 8:

"Except that any debt or debts hereinafter incurred by the city and county of Philadelphia for the construction and development of subways for transit purposes, or for the construction of wharves and docks, or the reclamation of land to be used in the construction of a system of wharves and docks, as public improvements, owned or to be owned by said city and county of Philadelphia, and which shall yield to the city and county of Philadelphia current net revenue in excess of the interest on said debt or debts, and of the annual installments necessary for the cancellation of said debt or debts, may be excluded in ascertaining the power of the city and county of Philadelphia to become otherwise indebted: Provided, That a sinking fund for their cancellation shall be established and maintained."

Art. IX, Sec. 9: The Commonwealth shall not assume the debt, or any part thereof, of any city, county, borough or township, unless such debt shall have been contracted to enable the State to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the State in the discharge of any portion of its present indebtedness.

Art. IX, Sec. 10: Any county, township, school district or other municipality incurring any indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest, and also the principal thereof within thirty years.

Art. XV, Sec. 2: No debt shall be contracted or liability incurred by any municipal government except in pursuance of an appropriation previously made therefor by the municipal government.

Art. XV, Sec. 3: Every city shall create a sinking fund which shall be inviolably pledged for the payment of its funded debt.

§ 505. Rhode Island.

Constitution of 1842 as amended.

Art. IV, Sec. 13: The general assembly shall have no power, hereafter, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of insurrection or invasion; nor shall they in any case, without such consent, pledge the faith of the state for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with this state by the government of the United States.[10]

Art. IV, Sec. 14: The assent of two-thirds of the members elected to each house of the general assembly shall be required to every bill appropriating the public money or property for local or private purposes.

See also Revised Statutes of 1909, title 8, chap. 46, secs. 20 and 21.

Sec. 20: "The outstanding notes, bonds and contracts of towns shall be paid and be fulfilled according to the tenor thereof, and all public works now authorized to be prosecuted shall be prosecuted and all indebtedness now authorized to be incurred on account thereof may be incurred according to the tenor of the authority thereof."

Sec. 21: "No town shall, without special statutory au-

10—In re State House Bonds (R. I.), 33 Atl. 870. Acts authorizing the issue of bonds for the construction of state house should provide for the repayment into the treasury of moneys already expended for this purpose.

Blais v. Franklin (R. I.), 77 Atl. 172. Public laws 1909, Chap. 499, relative to the construction of a bridge between the cities of Pawtucket and Central Falls do not create a state debt contrary to Const., Art. IV, Sec. 13.

thority therefor, incur any debt in excess of three per centum of the taxable property of such town, including the indebtedness of such town on the tenth day of April, one thousand eight hundred and seventy-eight, but the giving of a new note or bond for pre-existing debt, or for money borrowed and applied to the payment of such pre-existing debt, is excepted from the provisions of this section, and the amount of any sinking fund shall be deducted in computing such indebtedness."

§ 506. South Carolina.

Constitution 1895 with amendments.

Art. VIII, Sec. 3: The General Assembly shall restrict the powers of cities and towns to levy taxes and assessments, to borrow money and to contract debts, and no tax or assessment shall be levied or debt contracted except in pursuance of law, for public purposes specified by law.[11]

Art. VIII, Sec. 5: Cities and towns may acquire, by construction or purchase, and may operate water works systems and plants for furnishing lights, and may furnish water and lights to individuals, firms and private corporations for reasonable compensation; Provided, That no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities or towns.

Art. VIII, Sec. 7: No city or town in this State shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, and no such debt shall be created without submitting the ques-

11—See as construing South Carolina Act of 1873, entitled, "An act to reduce the volume of public debt and provide for the same," and determining the validity of bonds issued thereunder, Walker v. State, 12 S. C. 200.

tion as to the creation thereof to the qualified electors of such city or town, as provided in this Consitution for such special elections; and unless a majority of such electors voting on the question shall be in favor of creating such further bonded debt, none shall be created: Provided, That this section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates are issued and payable out of such taxes: And Provided, further, That such cities and towns shall on the issuing of such bonds create a sinking fund for the redemption thereof at maturity. Nothing herein contained shall prevent the issuing of bonds to an amount sufficient to refund bonded indebtedness existing at the time of the adoption of this Constitution.

At the election of Nov. 8, 1908, four amendments were adopted adding the following paragraphs to Art. VIII, Sec. 7:

"Provided, That the limitation proposed by this section, and by Sec. 5, Art. X, of this Constitution, shall not apply to bonded indebtedness incurred by the town of Darlington, where the proceeds of said bonds are applied solely for the purpose of drainage of said town and street improvements, and where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution upon the question of other bonded indebtedness."

"Provided, That the limitations imposed by this section and by Sec. 5 of Art. X, of this Constitution shall not apply to bonded indebtedness incurred by the towns of Aiken in the County of Aiken; Camden, in the County of Kershaw; Cheraw, in the County of Chesterfield; Clinton, in the County of Laurens; Edgefield, in the County of Edgefield; and St. Matthews, in the County of Calhoun, when the proceeds of said bonds are applied solely and exclusively for the building, erecting, establishing

and maintenance of water-works, electric-light plants, sewerage system or streets, and where the question of incurring such indebtedness is submitted to the qualified electors of said municipality, as provided in the Constitution, upon the question of bonded indebtedness."

"Provided, further, That the limitations imposed by this section and by Sec. 5, of Art. X, of this Constitution, shall not apply to the bonded indebtedness incurred by the City of Aiken; but said City of Aiken may increase its bonded indebtedness in the manner provided for in said section of said article to an amount not exceeding fifteen per cent of the value of the taxable property therein for the purpose of establishing, extending, completing and repairing a system of water-works, sewerage, electric lights and power."

"Provided, further, That the limitations imposed by this section and by Sec. 5, Art. X, of this Constitution, shall not apply to bonded indebtedness incurred by the town of St. Matthews, but said town of St. Matthews may increase its bonded indebtedness in the manner provided in said section of said article to an amount not exceeding fifteen per cent of the value of the taxable property therein, where the proceeds of said bonds to the amount of twenty thousand ($20,000) dollars shall be turned over by the town council of said town of St. Matthews to the duly appointed commissioners of the county of Calhoun, for the purpose of aiding in the construction of public buildings for the County of Calhoun."

"Provided, further, That the limitations imposed by this section and by Sec. 5 of Art. X, of this Constitution, shall not apply to the bonded indebtedness in and by any municipal corporation when the proceeds of said bonds are applied solely and exclusively for the purchase, establishment and maintenance of a water-works plant, or sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality,

as provided in the Constitution upon the question of other bonded indebtedness."

Art. X, Sec. 5: The bonded debt of any county, township, school district, municipal corporation or political division or subdivision of this state shall never exceed eight per centum of the assessed value of all the taxable property therein. And no county, township, municipal corporation or other political division of this state shall hereafter be authorized to increase its bonded indebtedness if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per centum of the value of all taxable property therein as ascertained by the valuation for state taxation.

And wherever there shall be several political divisions or municipal corporations covering or extending over the same territory, or portions thereof, possessing a power to levy a tax or contract a debt, then each of such political divisions or municipal corporations shall so exercise its power to increase its debt under the foregoing eight per cent limitation that the aggregate debt over and upon any territory of this state shall never exceed fifteen per centum of the value of all taxable property in such territory as valued for taxation by the state: Provided, That nothing herein shall prevent the issue of bonds for the purpose of paying or refunding any valid municipal debt heretofore contracted in excess of eight per centum of the assessed value of all taxable property therein.

Art. X, Sec. 6: The credit of the State shall not be pledged or loaned for the benefit of any individual, company, association or corporation; and the State shall not become a joint-owner of or stockholder in any company, association or corporation. The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay

jurors, county officers, and for litigation, quarantine and court expenses, and for ordinary county purposes, to support paupers, and pay past indebtedness. Provided, That the limitation imposed by this section shall not apply to any township in the County of Greenwood, nor to any township in the County of Saluda, through which, in whole or in part, the line of railroad of Greenwood & Saluda Railroad shall be located and constructed, nor to the County of Saluda, such said townships in Greenwood County and Saluda County and the County of Saluda being hereby expressly authorized to vote bonds in aid of the construction of the said proposed railroad, under such restrictions and limitations as the General Assembly may prescribe hereinafter; Provided, That the amount of such bonds shall not exceed eight per centum of the assessed valuation of the taxable property of such townships." (As amended in 1910.)

Art. X, Sec. 7: No scrip, certificate or other evidence of State indebtedness shall be issued, except for the redemption of stock, bonds or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution.

Art. X, Sec. 11: To the end that the public debt of South Carolina may not hereafter be increased without the due consideration and free consent of the people of the State, the General Assembly is hereby forbidden to create any further debt or obligation, either by the loan of the credit of the State, by guaranty, endorsement or otherwise, except for the ordinary and current business of the State, without first submitting the question as to the creation of such new debt, guaranty, endorsement or loan of its credit to the qualified electors of this State at a general State election; and unless two-thirds of the qualified electors of this State, voting on the question, shall be in favor of increasing the debt, guaranty, endorsement or loan of its credit none shall be created or made. And any debt contracted by the State shall be by

loan on State bonds, of amounts not less than fifty dollars each, bearing interest, payable not more than forty years after final passage of the law authorizing such debt. A correct registry of all of such bonds shall be kept by the treasurer in numerical order, so as to always exhibit the number and amount unpaid, and to whom severally made payable. And the General Assembly shall levy an annual tax sufficient to pay the annual interest on said bonds.

§ 507. South Dakota.

Constitution as adopted Oct. 1, 1889, with amendments.

Art. X, Sec. 2: Except as otherwise provided in the Constitution, no taxes or assessment shall be levied or collected or debts contracted by municipal corporations except in pursuance of law for public purposes specified by law; nor shall money raised by taxation, loan or assessment for one purpose ever be diverted to any other.

Art. XIII, Sec. 1: Neither the State nor any county, township or municipality shall loan or give its credit or make donation to or in aid of any individual, association or corporation, except for the necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor pay or become responsible for the debt or liability of any individual, association or corporation; Provided, That the State may assume or pay such debt or liability when incurred in time of war for the defense of the State. Nor shall the State engage in any work of internal improvement.

Art. XIII, Sec. 2: For the purpose of defraying extraordinary expenses and making public improvements, or to meet casual deficits or failure in revenue, the State may contract debts never to exceed with previous debts in the aggregate $100,000, and no greater indebtedness

shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the State or the United States in war, and provision shall be made by law for the payment of the interest annually and the principal when due, by tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest and principal by such tax or otherwise shall be irrepealable until such debt is paid; Provided, however, The State of South Dakota shall have the power to refund the territorial debt assumed by the State of South Dakota by bonds of the State of South Dakota.

Art. XIII, Sec. 3: The indebtedness of the State of South Dakota limited by Sec. 2 of this article shall be in addition to the debt of the Territory of Dakota assumed by and agreed to be paid by South Dakota.

Art. XIII, Sec. 4: The debt of any county, city, town, school district, civil township or other subdivision, shall never exceed five (5) per centum upon the assessed valuation of the taxable property therein for the year preceding that in which said indebtedness is incurred.

"In estimating the amount of the indebtedness which a municipality or subdivision may incur, the amount of indebtedness contracted prior to the adoption of the Constitution shall be included:

"Provided, That any county, municipal corporation, civil township, district or other subdivision may incur an additional indebtedness not exceeding ten per centum upon the assessed valuation of the taxable property therein for the year preceding that in which said indebtedness is incurred, for the purpose of providing water and sewerage, for irrigation, domestic uses, sewerage and other purposes; and,

"Provided, further, That in a city where the population is 8,000 or more, such city may incur an indebtedness not exceeding eight per centum upon the assessed valuation of the taxable property therein for the year

next preceding that in which said indebtedness is incurred, for the purpose of constructing street railways, electric lights or other lighting plants;

"Provided, further, That no county, municipal corporation, civil township, district or subdivision shall be included within such district or subdivision without a majority vote in favor thereof, of the electors of the county, municipal corporation, civil township, district or other subdivision, as the case may be, which is proposed to be included therein, and no such debt shall ever be incurred for any of the purposes in this section provided, unless authorized by a vote in favor thereof by a majority of the electors of such county, municipal corporation, civil township, district or subdivision incurring the same." (As amended in 1896 and 1902.)

Art. XIII, Sec. 5: Any city, county, town, school district or any other subdivision incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for the payment of the interest or principal of any debt shall be irrepealable until such debt be paid.

§ 508. Tennessee.

Constitution adopted Feb. 23, 1870, with amendments.

Art. II, Sec. 29: * * * but the credit of no county, city, or town, shall be given or loaned to, or in aid of any person, company, association, or corporation and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election and the assent of a like majority (here follow certain exceptions as to the number of votes required).

Art. II, Sec. 31: STATE AID FORBIDDEN. The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation, or municipality; nor shall the State become the owner, in whole or in part, of any bank, or a stockholder with others in any association, company, corporation, or municipality.

Art. II, Sec 33: STATE BONDS TO DEFAULTING RAILROADS, NONE. No bonds of the State shall be issued to any railroad company which, at the time of its application for the same, shall be in default in paying the interest upon the State bonds previously loaned to it, or that shall hereafter, and before such application, sell or absolutely dispose of any State bonds loaned to it for less than par.

Art. XI, Sec. 10: INTERNAL IMPROVEMENTS TO BE ENCOURAGED. A well regulated system of internal improvement is calculated to develop the resources of the State and promote the happiness and prosperity of her citizens; therefore, it ought to be encouraged by the General Assembly.

§ 509. Texas.

Constitution as ratified Feb. 17, 1876, with amendments.

Art. III, Sec. 49: No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue shall never exceed in the aggregate at any one time two hundred thousand dollars.

Art. III, Sec. 50: The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association, or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatso-

ever for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

Art. III, Sec. 51: The Legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporation whatsoever; Provided, That this shall not be so construed as to prevent the grant of aid in case of public calamity.

Art. III, Sec. 52, as amended in 1904: The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company; Provided, however, That under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivisions of the State, or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include towns, villages, or municipal corporations, upon a vote of a two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit to any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes, to-wit:

(a) The improvement of rivers, creeks and streams

to prevent overflows, and to permit navigation thereof or irrigation therefrom, or in aid of such purpose.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purpose of irrigation, drainage or navigation, or in aid thereof.

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

Art. XI, Sec. 3: No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.

Art. XI, Sec. 5: Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature, and may levy, assess, and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year which shall exceed two and one-half per cent of the taxable property of such city; and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.

Art. XI, Sec. 6: Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed and collected separately from that levied, assessed and collected for current expenses of municipal government, and shall when levied specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons,

bonds, or other indebtedness for the payment of which such tax may have been levied.

Art. XI, Sec. 7: All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for the construction of sea-walls, breakwaters or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for.

Art. XI, Sec. 8: The counties and cities on the Gulf Coast being subject to calamitous overflows, and a very large proportion of the general revenue being derived from those otherwise prosperous localities, the Legislature is especially authorized to aid by donation of such portion of the public domain as may be deemed proper, and in such mode as may be provided by law, the construction of sea-walls or breakwaters, such aid to be proportioned to the extent and value of the works constructed, or to be constructed, in any locality.

§ 510. Utah.

Constitution of 1895 with amendments.

Art. III, Sec. 3: All debts and liabilities of the Territory of Utah incurred by authority of the legislative assembly thereof are hereby assured and shall be paid by this State.

Art. XIV, Sec. 1: To meet casual deficits or failures in revenue, and for necessary expenditures for public purposes, including the erection of public buildings, and for

the payment of all Territorial indebtedness assumed by the State, the State may contract debts not exceeding (as amended in 1910) in the aggregate at any one time an amount equal to one and one-half per centum of the value of the taxable property of the State, as shown by the last assessment for State purposes previous to the incurring of such indebtedness. But the State shall never contract any indebtedness, except as in the next section provided, in excess of such amount, and all moneys arising from loans herein authorized shall be applied solely to the purposes for which they were obtained.

Art. XIV, Sec 2: The State may contract debts to repel invasion, suppress insurrection, or to defend the State in war but the money arising from the contracting of such debts shall be applied solely to the purpose for which it is obtained.[12]

Art. XIV, Sec. 3: No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof, in this State; unless the proposition to create such debt shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon, shall have voted in favor of incurring such debt.

Art. XIV, Sec. 4: When authorized to create indebtedness as provided in Section 3 of this Article, no county shall become indebted to an amount, including existing indebtedness, exceeding 2%. No city, town, school district or other municipal corporation, shall become indebted to an amount, including existing indebtedness,

12—State v. Candland (Utah), 104 Pac. 205. The phrase "shall never contract any indebtedness" as used in Const., Art. XIV, Secs. 1 and 2, includes any obligations which the State undertakes or is obligated to pay out of future appropriations derived from an exercise of the State's power of taxation."

Under this construction the debt authorized to be incurred by the regents of the state university held an obligation or debt of the state.

exceeding 4% of the value of the taxable property therein, the value to be ascertained by the last assessment for State and county purposes previous to the incurring of such indebtedness; except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; Provided, That no part of the indebtedness allowed in this section shall be incurred for other than strictly county, city, town or school district purposes; Provided, further, That any city of the first and second class, when authorized as provided in Section 3 of this Article, may be allowed to incur a larger indebtedness, not to exceed four per centum, and any city of the third class, or town, not to exceed (as amended in 1910) eight per centum additional, for supplying such city or town with water, artificial lights or sewers when the works for supplying such water, light and sewers shall be owned and controlled by the municipality.

Art. XIV, Sec. 5: All moneys borrowed by, or on behalf of the State, or any legal subdivision thereof, shall be used solely for the purpose specified in the law authorizing the loan.

Art. XIV, Sec. 6: The State shall not assume the debt, or any part thereof, of any county, city, town or school district.

Art. XIV, Sec. 7: Nothing in this article shall be so construed as to impair or add to the obligation of any debt heretofore contracted, in accordance with the laws of Utah Territory, by any county, city, town or school district, or to prevent the contracting of any debt, or the issuing bonds therefor, in accordance with said laws, upon any proposition for that purpose, which, according to said laws, may have been submitted to a vote of the qualified electors of any county, city, town or school district before the day on which this Constitution takes effect.

§ 511. Vermont.

Constitution established July 9, 1793 with amendments.

There appears to be nothing in the constitution relative to the debt making power of civil subdivisions. The Legislature has authorized in chap. 157, Rev. Stats. of 1906, secs. 3556-3558, 3574 and 3575 the incurring of indebtedness, the sections noted are as follows:

Sec. 3556: No municipal corporation shall create an indebtedness, unless to refund outstanding bonds or orders, to an amount exceeding five times its grand list last taken; provided that it may, by a two-thirds vote by ballot of the voters present and voting at a meeting called for that purpose, increase such indebtedness an additional amount not exceeding five times such grand list. Bonds or obligations given or created in excess of the limit authorized by this section shall be void.

Sec. 3557: In determining the amount of municipal indebtedness permitted by the preceding section, obligations created for a water supply, sewers or electric lights, and temporary loans created in anticipation of the collection of taxes and necessary for meeting current expenses, shall not be taken into account; Provided, That no such temporary loan shall be extended beyond the fiscal year for which it is made, and shall not exceed in amount 90% of the amount of taxes levied for such year; nor shall the provisions of this and the preceding section apply when the charter of a municipal corporation limits its indebtedness.

Sec. 3558: A town may aid in the construction of a railroad organized under the general law, by issuing bonds to aid such railroad, by taking the capital stock therein, or in such other manner as it directs; but the liability so assumed shall not exceed eight times the grand list of the town. Such aid shall be given as provided in this chapter.

Sec. 3574: A town or incorporated village may issue bonds, to an amount not exceeding three times its grand list, for the purpose of purchasing road-making apparatus and for building permanent highways within the limits of such town or village.

Sec. 3575: Such town or incorporated village may vote to issue such bonds at a meeting of the corporation, duly warned for that purpose, by a two-thirds majority of all the votes cast, and may stipulate in such vote by whom and in what manner the proceeds of such bonds shall be expended; but no town or incorporated village shall issue such bonds if it is already bonded to an amount exceeding five times its grand list.

See also Rev. Stats. 1906, chap. 157, secs. 3567-3573, granting authority for the refunding of outstanding bonds and notes.

§ 512. Virginia.

Constitution effective July 10, 1902, with amendments.

Art. VIII, Sec. 127: No city or town shall issue any bonds or other interest-bearing obligations for any purpose, or in any manner, to an amount which, including existing indebtedness, shall, at any time, exceed eighteen per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes; Provided, however, That nothing above contained in this section shall apply to those cities and towns whose charters existing at the adoption of this constitution authorize a larger percentage of indebtedness than is authorized by this section; and Provided, further, That in determining the limitation of the power of a city or town to incur indebtedness there shall not be included the following classes of indebtedness:

(a) Certificates of indebtedness, revenue bonds or

other obligations issued in anticipation of the collection of the revenue of such city or town for the then current year; Provided, That such certificates, bonds or other obligations mature within one year from the date of their issue, and be not past due, and do not exceed the revenue for such year;

(b) Bonds authorized by an ordinance enacted in accordance with section one hundred and twenty-three, and approved by the affirmative vote of the majority of the qualified voters of the city or town voting upon the question of their issuance, at the general election next succeeding the enactment of the ordinance, or at a special election held for that purpose, for a supply of water or other specific undertaking from which the city or town may derive a revenue; but from and after a period to be determined by council, not exceeding five years from the date of such election, whenever and for so long as such undertaking fails to produce sufficient revenue to pay for cost of operation and administration (including interest on bonds issued therefor, and the cost of insurance against loss by injury to persons or property), and an annual amount to be converted into a sinking fund sufficient to pay, at or before maturity, all bonds issued on account of said undertaking, all such bonds outstanding shall be included in determining the limitation of the power to incur indebtedness, unless the principal and interest thereof be made payable exclusively from the receipts of the undertaking.

Art. XIII, Sec. 184: No debt shall be contracted by the State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war. No scrip, certificate or other evidence of State indebtedness, shall be issued, except for the transfer or redemption of stock previously issued, or for such debts as are expressly authorized in this Constitution.

Art. XIII, Sec. 185: Neither the credit of the State,

nor of any county, city or town, shall be, directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the State, or any county, city, or town subscribe to or become interested in the stock or obligations of any company, association, or corporation, for the purpose of aiding in the construction or maintenance of its work; nor shall the State become a party to or become interested in any work of internal improvement, except public roads, or engage in carrying on any such work; nor assume any indebtedness of any county, city, or town, nor lend its credit to the same; but this section shall not prevent a county, city or town from perfecting a subscription to the capital stock of a railroad company authorized by existing charter conditioned upon the affirmative vote of the voters and freeholders of such county, city or town in favor of such subscription; Provided, That such vote be had prior to July first, nineteen hundred and three.

Art. XIII, Sec. 186: Prohibits the payment of debts or obligations created either by the State or any county, city or town in aid of the rebellion.

§ 513. Washington.

Constitution as adopted October 1, 1889, with amendments.

Art. VIII, Sec. 1: The State may, to meet casual deficits or failure in revenues, or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars ($400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained or to repay the debts so contracted, and to no other purpose whatever.

Art. VIII, Sec 2: In addition to the above limited

power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and to no other purpose whatever.

Art. VIII, Sec. 3: Except the debts specified in sections one and two of this article, no debt shall hereafter be contracted by, or on behalf of this State, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debts as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the State, for three months next preceding the election at which it is submitted to the people.[13]

Art. VIII, Sec. 5: The credit of the State shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.

Art. VIII, Sec. 6: No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable prop-

13—Seattle Dock Co. v. Seattle & L. W. Waterway Co., 195 U. S. 624. Affirming 77 Pac. 845, Laws of 1893, Chap. 99, providing for the construction of public waterways by private contractors with liens on state tidelands for their compensation do not create a debt by or on behalf of the State under Const., Art. VIII, Sec. 3.

erty in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, That no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided, further, That any city or town with such assent may be allowed to become indebted to a larger amount, but not exceeding five per centum additional, for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality.

Art. VIII, Sec. 7: No county, city, town or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporations.

Art. XII, Sec. 9: The State shall not in any manner loan its credit nor shall it subscribe to or be interested in the stock of any company, association or corporation.

§ 514. West Virginia.

Constitution as adopted in 1872, with amendments.

Art. X, Sec. 4: No debt shall be contracted by this State, except to meet the casual deficits in the revenue; to redeem a previous liability of the State, to suppress

insurrection, repel invasion, or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State shall be equally distributed over a period of at least twenty years.

Art. X, Sec. 6: The credit of the State shall not be granted to, or in aid of, any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation, or person, nor shall the State ever hereafter become a joint owner or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever.

Art. X, Sec. 8: No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding 5 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, nor without, at the same time, providing for the collection of a direct annual tax sufficient to pay, annually, the interest on such debt, and the principal thereof, within and not exceeding thirty-four years: Provided, That no debt shall be contracted under this section unless all questions connected with the same shall have been first submitted to a vote of the people and have received three-fifths of all the votes cast for and against the same.

§ 515. Wisconsin.

Constitution of 1848 with amendments.

Art VIII, Sec. 3: The credit of the State shall never be given or loaned in aid of any individual, association or corporation.

Art. VIII, Sec. 4: The State shall never contract any

public debt, except in the cases and manner herein provided.

Art. VIII, Sec. 6: For the purpose of defraying ordinary expenditures, the State may contract public debts but such debts shall never in the aggregate exceed $100,000. Every such debt shall be authorized by law, for some purpose or purposes to be distinctly specified therein; and the vote of a majority of all the members elected to each House, to be taken by yeas and nays, shall be necessary to the passage of such law; and every such law shall provide for levying an annual tax sufficient to pay the annual interest of such debt, and the principal within five years from the passage of such law, and shall specially appropriate the proceeds of such taxes to the payment of such principal and interest, and such appropriation shall not be repealed, nor the taxes be postponed, or diminished, until the principal and interest of such debt shall have been wholly paid.

Art. VIII, Sec. 7: The Legislature may also borrow money to repel invasion, suppress insurrection or defend the State in time of war; but the money thus raised shall be applied exclusively to the object for which the loan was authorized, or to the repayment of the debt thereby created.

Art. VIII, Sec. 9: No scrip, certificate or other evidence of State debt whatsoever shall be issued, except for such debts as are authorized by the sixth and seventh sections of this article.

Art. VIII, Sec. 10: The State shall never contract any debt for works of internal improvement or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the State especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues de-

rived from such works in aid of their completion. Provided, That the State may appropriate moneys for the purpose of acquiring, preserving and developing the water power and forests of the State; but there shall not be appropriated under the authority of this section in any one year an amount to exceed two-tenths of one mill of the taxable property of the State as determined by the last preceding State assessment.

Art. XI, Sec. 3, as amended November 3, 1874: "It shall be the duty of the legislature and they are hereby empowered to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent abuses in assessments and taxation and in contracting debts by such municipal corporations. No county, city, town, village, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to any amount, including existing indebtedness in the aggregate exceeding 5% 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. Any county, city, town, village, school district or other municipal corporation incurring any indebtedness as aforesaid, shall before or at the time of doing so provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." [14]

14—Long v. New London, 9 Biss. 539. An act authorizing a city to issue bonds "for such sum or sums * * * as may be agreed upon by and between the directors of the railroad and the proper officials" of the city, constitutional under Act. XI, Sec. 3, requiring the Legislature to restrict the power of taxation, borrowing money, etc. by municipalities.

See, also, Perrin v. City of New London (Wis.), 30 N. W. 623.

§ 516. Wyoming.

Constitution adopted 1889 with amendments.

Art. III, Sec. 39: The legislature shall have no power to pass any law authorizing the State or any county in the State to contract any debt or obligation in the construction of any railroad or give or loan its credit to or in aid of the construction of the same.

Art. X, Sec. 5, RAILROADS: Neither the State, nor any county, township, school district or municipality shall loan or give its credit or make donations to or in aid of any railroad or telegraph line: Provided, That this section shall not apply to obligations of any county, city, township or school district, contracted prior to the adoption of this constitution.

Art. XVI, Sec. 1: The State of Wyoming shall not in any manner create any indebtedness exceeding one per centum on the assessed value of the taxable property in the state as shown by the last general assessment for taxation, preceding; except to suppress insurrection or to provide for the public defense.

Art. XVI, Sec. 2: No debt in excess of the taxes for the current year, shall in any manner be created in the State of Wyoming, unless the proposition to create such debt shall have been submitted to a vote of the people and by them approved; except to suppress insurrection or to provide for the public defense.

Art. XVI, Sec. 3: No county in the State of Wyoming shall in any manner create any indebtedness, exceeding two per centum on the assessed value of taxable property in such county, as shown by the last general assessment, preceding; Provided, however, That any county, city, town, village or other subdivision thereof in the State of Wyoming, may bond its public debt existing at the time of the adoption of this constitution, in any sum not exceeding four per centum on the assessed value of the taxable property in such county, city, town, village or

other subdivision, as shown by the last general assessment for taxation.

Art. XVI, Sec. 4: No debt in excess of the taxes for the current year shall, in any manner, be created by any county or subdivision thereof, or any city, town or village, or any subdivision thereof in the State of Wyoming, unless the proposition to create such debt shall have been submitted to a vote of the people thereof and by them approved.

Art. XVI, Sec. 5: No city, town or village, or any subdivision thereof, or any subdivision of any county of the State of Wyoming, shall, in any manner, create any indebtedness exceeding two per centum on the assessed value of the taxable property therein; Provided, however, That any city, town or village may be authorized to create an additional indebtedness, not exceeding four per centum on the assessed value of the taxable property therein as shown by the last preceding general assessment, for the purpose of building sewerage therein. Debts contracted for supplying water to such city or town are excepted from the operation of this section.

Art. XVI, Sec. 6: Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall loan or give its credit or make donations to or in aid of any individual, association, or corporation, except for the necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation. The state shall not engage in any work of internal improvement unless authorized by a two-thirds vote of the people.

Art. XVI, Sec. 8: No bond or evidence of indebtedness of the State shall be valid unless the same shall have endorsed thereon a certificate signed by the auditor and secretary of state that the bond or evidence of debt is issued pursuant to law and is within the debt limit. No bond or evidence of debt of any county, or bond of any township or other political subdivision, shall be valid

unless the same shall have endorsed thereon a certificate signed by the county auditor or other officer authorized by law to sign such certificate, stating that said bond or evidence of debt is issued pursuant to law and is within the debt limit.

§ 517. Territorial.

The power of territorial legislatures to incur debts or authorize the incurring of indebtedness is limited by Act of Congress, July 30, 1886, to be found in 24 Statutes at Large, Chap. 170, sections 3 and 4, which are as follows:

Sec. 3: That no law of any territorial legislature shall authorize any debt to be contracted by or on behalf of such territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the territorial debt, to suppress insurrections, or to provide for the public defense, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions for such territory, if the total indebtedness of the territory is not thereby made to exceed one per centum upon the assessed value of the taxable property in such territory as shown by the last general assessment for taxation.

And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such territory, or of any political or municipal corporation, county, or other subdivision therein.

Sec. 4: That no political or municipal corporation, county, or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes pre-

vious to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void.

That nothing in this act shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation, or subdivision of any territory as to any bonds heretofore issued or contracted to be issued.

§ 518. Hawaii Territory.

By an Act of Congress, laws of 1900, chap. 339, the limit of indebtedness is fixed at seven per cent of the assessed value of taxable property.

§ 519. The Philippine Islands.

In sections 64, 66-73 of the Act of 1902, to provide for the civil government of the Philippine Islands, authority is to be found for the incurring of indebtedness and the issuance of municipal bonds by various municipalities subordinate to the Philippine Islands Government.

CHAPTER XIX

BOND FORMS AND RECORDS

§ 520. Marcy v. Township of Oswego.[1]

"The bonds to which coupons were attached involved in this case contained the following recital: "This bond is executed and issued by virtue of and in accordance with an Act of the Legislature of the said State of Kansas, entitled 'An Act to Enable Municipal Townships to Subscribe for Stock in any Railroad, and to Provide for the Payment of the Same, approved Feb. 25th, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said Township of Oswego, at a special election duly held on the seventeenth day of May, A. D. 1870."

Each bond also declared that the Board of County Commissioners of the County of Labette, of which county the township of Oswego is a part, had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said Board of County Commissioners, and attested by the County Clerk, of the said County, under its seal. Accordingly, each bond was thus signed, attested and sealed. Nor is this all. The bonds were registered in the office of the State Auditor, and certified by him in accordance with the provisions of an Act of the Legislature. His certificate on the back of each bond declared that it had been regularly and legally issued, that the signatures thereto were genuine, and

1—Marcy v. Township of Oswego, 92 U. S. 371, 23 L. Ed. 748.

that it had been duly registered in accordance with the Act of the Legislature."

§ 521. County of Dixon v. Marshall Field.[2]

The recitals in the bonds which were relied on in this case to set in operation in favor of the defendant in error the doctrine of estoppel were as follows: "This bond is one of a series of $87,000 issued under and in pursuance of an order of the county commissioners of the County of Dixon, in the State of Nebraska, and authorized by an election held in the said County on the 27th day of December, A. D. 1875, and under and by virtue of Chapter 35 of the General Statutes of Nebraska, and amendments thereto, and the Constitution of the said State, article 12, adopted October, A. D. 1875."

"These recitals, in conjunction with the certificate of the county clerk, and those of the secretary and auditor of state, it is claimed, declare a compliance with the law in the issue of the bonds, which, as against an innocent holder for value, cannot now be questioned."

§ 522. Morgan et al v. United States.[3]

"165,120.) (165,210.

"(Consolidated debt. Issued under Act of Congress approved March 3, 1865. Redeemable after five and payable twenty years from date.)

"1,000.) (1,000.

"It is hereby certified that the United States of America are indebted unto bearer in the sum of one thousand dollars, redeemable at the pleasure of the United States after the first day of July, 1870, and payable on the first day of July, 1885, with interest from the first day of July, 1865, inclusive, at six per cent per annum, payable

2—County of Dixon v. Marshall Field, 111 U. S. 83, 28 L. Ed. 360.

3—Morgan, et. al. v. The United States, 113 U. S. 476, 28 L. Ed. 1044.

on the first day of January and July in each year, on the presentation of the proper coupon hereunto annexed. This debt is authorized by Act of Congress approved March 3, 1865.

"Washington, July 1, 1865. J. LOWERY,

"For Register of the Treasury.

"Six months' interest due July 1, 1885, payable with this bond.

"(Thirteen coupons attached from and including coupon for interest due January 1, 1879, to and including coupon for interest due January 1, 1885.)"

§ 523. Bernard's Twp. v. Morrison et al.[4]

"This bond is one of a series of like tenor, amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said Township in pursuance of an Act entitled 'An Act to Authorize Certain Towns in the Counties of Somerset, Morris, Essex and Union to issue Bonds and Take Stock in the Passaic Valley and Peapack Railroad Company,' approved April 9, 1868.

"In testimony whereof, the undersigned commissioners of the said Township of Bernard, in the County of Somerset, to carry into effect the purposes and provisions of the said Act, duly appointed, commissioned and sworn, have hereunto set our hands and seals the first day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

"JOHN H. ANDERSON, (L. S.)
"JOHN GUERIN, (L. S.)
"OLIVER R. STEELE, (L. S.)

"Commissioners.

"Registered in the county clerk's office.

"WILLIAM ROSS, JR.,

"County Clerk."

4—Bernard's Twp. v. Morrison, et al., 133 U. S. 523, 33 L. Ed. 726.

§ 524. Rich v. Town of Mentz.[5]

The following is the record in full as presented to the Supreme Court of the United States and appearing on pages 1076-77 of Book 33 of Lawyer's Edition:

"I. On the 18th day of July, 1872, there was filed in the clerk's office of the County of Cayuga, N. Y., the judgment of the county judge of said county, with the petition of certain taxpayers of which the following are copies:

" 'County of Cayuga, N. Y.

" 'In the matter of the application of the taxpayers of the Town of Mentz, Cayuga County, N. Y.—Petition.

" '*To the Honorable the County Judge of the County of Cayuga, N. Y.:*

" 'The petition of the subscribers hereto respectfully shows: That they are a majority of the taxpayers of the Town of Mentz, in the County of Cayuga, and State of New York, whose names appear upon the last preceding assessment-roll or tax-list of said Town of Mentz, as owning or representing a majority of the taxable property in the corporate limits of the said Town of Mentz; that they are such a majority of taxpayers, and are taxed or assessed for, or represent, such a majority of taxable property; that they desire that said Town shall create and issue its bonds to the amount of thirty thousand dollars ($30,000), which said amount does not exceed twenty per centum of the whole amount of taxable property, as shown by said assessment roll or list, and invest the same, or the proceeds thereof, in the stock of the Cayuga Northern Railroad Company, which is a railroad company in the State of New York.

" 'And your petitioners pray your honor to cause to be published the proper notice, to take proof of the facts

5—Rich v. Town of Mentz, 134 U. S. 632, 33 L. Ed. 1074.

set forth in this petition; and that such proceedings may be had thereon as are authorized and prescribed by the statutes of the State of New York, in such case made and provided.

" 'Dated April 20, 1872.

" '(Signed by) A. M. GREEN,

and 224 other names, and verified by Green on the 28th day of May, 1872.

" 'County of Cayuga, N. Y.

" 'In the matter of the application of the taxpayers of the Town of Mentz, Cayuga County, N. Y.—Order of County Judge.

" 'On the petition herein bearing date the 20th day of April, A. D. 1872, and on motion of H. V. Howland, attorney for said petitioners, it is ordered that a notice be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said County of Cayuga, directed to whom it may concern, and setting forth that on the 8th day of June, A. D., 1872, at 10 o'clock in the forenoon of that day, I, William E. Hughitt, county judge of the County of Cayuga, in the State of New York, will proceed to take proof of the facts set forth in said petition, as to the number of taxpayers joining in said petition, and as to the amount of taxable property represented by them and that such proof will be taken at the grand jury room, in the court house of the City of Auburn, in said County of Cayuga, N. Y.

" 'Dated this 28th day of May, in the year of our Lord, 1872.

" 'W. E. HUGHITT,

" '*Cayuga County Judge.*

"(Indorsed: 'Filed May 28, 1872.')

"(Then follows the usual affidavit of the printers of said newspaper, showing due publication of the notice of hearing.)

" 'County of Cayuga.

" 'In the matter of the application of the taxpayers of the Town of Mentz.—Judgment.

" 'Upon the filing of the petition herein and order made thereon, with a copy of the notice to take proof of the facts set forth in said petition, and the affidavit of publication of the said notice in the manner required by law, and by the order made in this proceeding as aforesaid, together with the testimony taken therein; and it appearing to the satisfaction of the court that the whole number of taxpayers in the Town of Mentz, Cayuga County and State of New York, whose names appear upon the last assessment-roll or tax-list for the year 1871, is 434, and that of this number 225 have signed the said petition, being more than one-half of said taxpayers; and it further appearing that the total valuation of the taxable property of the said town of Mentz upon the said assessment-roll or tax-list is five hundred and forty thousand six hundred and forty-five dollars, and that the valuation of the property of said petitioners as represented upon the said roll or tax-list is $312,350, being thirty-one thousand and twenty-eight dollars in excess of one-half of the total valuation of the taxable property of said Town of Mentz.

" 'Now, on motion of H. V. Howland, attorney for said petitioners, it is adjudged, decreed and determined that the said petitioners do represent a majority of the taxpayers of said Town of Mentz as shown by the last preceding tax-list or assessment-roll, that is to say, the said tax-list or assessment-roll for the year 1871, and do represent a majority of the taxable property upon said tax-list or assessment-roll.

" 'And it is hereby ordered, that William A. Halsey, E. B. Somers and J. H. Wethey, three freeholders, residents and taxpayers within the corporate limits of said Town of Mentz, be, and they hereby are, appointed com-

missioners for the period of five years next ensuing, and until others are appointed by a county judge of this county, or other competent authority, to cause or execute in due form of law, with all reasonable dispatch, bonds of the said Town of Mentz, of the amount of thirty thousand dollars, and to issue or sell the same, or dispose of the same and invest the same or the proceeds thereof in, and to subscribe in the name of the said Town of Mentz, the stock of "The Cayuga Northern Railroad Company" to the amount of $30,000; and that the said commissioners and each of them shall have all the powers and be subject to the same duties and liabilities, imposed and prescribed in and by the Act of the Legislature of the State of New York entitled "An Act to Amend an Act to Authorize the Formation of Railroad Companies and to Regulate the Same," passed April 2d, 1850 (and all other Acts pertaining to that subject) "so as to Permit Municipal Corporations to Aid in the Construction of Railroads," passed May 18, 1869, and the several Acts amendatory thereof and supplementary thereto.

" 'And it is further adjudged and ordered, that notice of the final determination herein as aforesaid be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said County of Cayuga, once in each week for three weeks.

" 'Dated July 17, 1872.

" 'W. E. HUGHITT,

" '*Cayuga County Judge.*"

"(Indorsed: 'Filed July 17, 1872.')

"(Due proofs were made of publication of the foregoing determination.)

"II. The Cayuga Northern Railroad Company was duly incorporated under the General Statutes of the State, on the 22nd of April, 1872.

"III. The persons named in said adjudication of the county judge aforesaid, qualified as commissioners under

the Statute and subscribed, in behalf of said Town of Mentz, for 300 shares of the capital stock of said company, of par value of $100 per share, and paid therefor by the issue to said company of thirty Town of Mentz bonds of $1,000 each, in form as set out in the complaint, with coupons attached in the usual form, providing for the payment of interest semi-annually, January and July; principal payable July 15, 1902.

"The coupons were all in the following form:

" '$35.00.

" 'The Town of Mentz, County of Cayuga, will pay the bearer hereof, at the Fourth National Bank of New York, in the City of New York, on the 15th day of July, 1876, the sum of thirty-five dollars, for six months' interest then due on bond No. 7.

" '$35.00. W. A. HALSEY, *Commissioner.*'

"IV. Prior to the commencement of this action the plaintiff became a purchaser of the five bonds and attached coupons which are described in the declaration in this action, from one Deming, who had theretofore purchased the same for cash, and without notice of an infirmity, the plaintiff being a resident citizen of the State of Iowa.

"V. Plaintiff produced said five bonds, with twelve coupons each $35, cut from each, in all sixty coupons, which with the interest to the day of trial amounted to $2,836.25.

"VI. That no part of said railroad has ever been built; but the Town of Mentz raised the money by tax, according to said statute, and has paid the coupons of the entire issue, which fell due January 15, 1873; the Town has never paid any other coupons, and said commissioners have retained, and now hold, the usual certificates of stock in the said railroad company, 300 shares, received by them at the time of delivery of said bonds to the railroad company.

"VII. All the proofs were taken subject to defendant's objection, that the county judge acquired no jurisdiction under the original petition; and also that judgment of the county judge was insufficient.

"And defendant insisted upon the aforesaid objection, and prayed for a dismissal of the complaint with costs."

The form of the bonds, of which plaintiff held five, numbers 21, 22, 23, 24 and 25, with their coupons, was thus set out in the complaint:

"No. 21. United States of America, $1,000.
State of New York, Town of Mentz,
County of Cayuga.

"Issued by virtue of an Act of the Legislature of the State of New York, entitled, 'An Act to Amend an Act Entitled an Act to Authorize the Formation of Railroad Corporations, and to Regulate the Same, Passed April 2, 1850, so as to Permit Municipal Corporations to Aid in the Construction of Railroads, Passed, May 18, 1869.'

"This Act authorizes the Town of Mentz, in the County of Cayuga to subscribe to the stock of 'The Cayuga Northern Railroad Co.,' and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said Act is $30,000.

"Know all men by these presents, that we, the undersigned commissioners under the above entitled Acts, for the Town of Mentz, in the County of Cayuga and State of New York, upon the faith and credit and in behalf of said Town, for value received promise to pay said bearer the sum of one thousand dollars on the 1st day of July in the year one thousand nine hundred and two (1902) at the Fourth National Bank of New York in the City of New York, with interest at seven per cent per annum; from and after the 15th day of July, 1877, payable semi-annually upon the 15th day of July, and January, in each year at the same place, on the presentation and surrender of the coupons for such interest hereto annexed.

"In witness whereof we have hereunto set our hands and seals and have caused the coupons hereto annexed to be signed by W. A. Halsey, one of our number, this 15th day of July in the year one thousand eight hundred and seventy-two.

"E. B. Somers, (L. S.)
"W. A. Halsey, (L. S.)
"J. H. Wethey. (L. S.)"

The judges of the court being divided in opinion as to the sufficiency of the petition, and of the adjudication and judgment of the county judge, judgment was ordered for the defendant in accordance with the opinion of the circuit judge, and the following questions, upon which the division of opinion arose, were certified to this court:

"First. Was the petition of certain taxpayers of the Town of Mentz, which was presented to the county judge of Cayuga County, in the State of New York, on the 28th day of May, 1872, and a copy of which is set forth in the finding and decision of the court, sufficient in the form and substance of its recital, to authorize the said county judge to take jurisdiction and proceed to render an adjudication pursuant to chapter 907 of the Laws of New York of 1869, as amended by chapter 925 of the Laws of New York of 1871?

"Second. Was it essential in order to confer jurisdiction upon said county judge, to adjudicate pursuant to section 2 of chapter 907 of the Laws of 1869, as amended by section 2 of chapter 925 of the Laws of 1871, that the petition should state, among other things, in substance, that the taxpayers petitioning were a majority of taxpayers of the Town of Mentz, who were taxed or assessed for property, not including those taxed for dogs or highway tax only?

"Third. Was the adjudication of the county judge of Cayuga County, made on the 17th day of July, 1872, a copy of which is set forth in the findings and decision of

the court, sufficient to authorize the defendant to create and issue its bonds pursuant to chapter 907 of the Laws of New York of 1869, as amended by chapter 925 of the Laws of New York of 1871?

"Fourth. Was it essential in order to confer authority upon the defendant to create and issue its bonds under said Laws of 1869 and 1871, that the adjudication or judgment of the county judge should declare, in substance, that the quorum of taxpayers who desired that the defendant should create and issue its bonds, was one exclusive of taxpayers who were assessed or taxed for dogs or highway tax only?"

§ 525. Board of County Commissioners of the County of Chaffee v. Potter.[6]

"No..... $1,000.

"United States of America, County of Chaffee, State of Colorado.

"Funding Bond.

"(Series A.)

"The county of Chaffee, in the State of Colorado acknowledges itself indebted, and promises to pay to .... or bearer, one thousand dollars, lawful money of the United States, for value received, redeemable at the pleasure of said county after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of said county, in the town of Buena Vista, with interest thereon at the rate of eight per cent per annum, payable semi-annually on the first day of March, and the first day of September of each year, at the office of the county treasurer

6—Board of County Com'rs of the County of Chaffee v. Potter, 142 U. S. 355, 35 L. Ed. 1040.

aforesaid, or at the banking-house of Kountze Brothers, in the City of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due.

"This bond is issued by the Board of County Commissioners of said Chaffee County, in exchange at par for valid floating indebtedness of the said County, outstanding prior to August 31, 1882, under and by virtue of, and in full conformity with, the provisions of an Act of the General Assembly by the State of Colorado, entitled 'An Act to Enable the Several Counties of the State to Fund their Floating Indebtedness,' approved February 21, 1881, and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said County of Chaffee, voting on the question at a general election duly held in said county, on the seventh day of November, A. D., 1882.

"The bonds of this issue are comprised in three series designated 'A,' 'B,' and 'C,' respectively; the bonds of series 'A' being for the sum of one thousand dollars each, those of series 'B' for the sum of five hundred dollars each, and those of series 'C' for the sum of one hundred dollars each. This bond is one of series 'A.'

"The faith and credit of the County of Chaffee are hereby pledged for the punctual payment of the principal and interest of this bond.

"In testimony whereof, the board of county commissioners of the said County of Chaffee have caused this bond to be signed by their chairman, countersigned by the county treasurer and attested by the county clerk under

the seal of the county, this first day of December, A. D., 1882.

.....

"Chairman Board of County Commissioners.

"Attest: .....

"County Clerk.

"(County Seal).

"Countersigned: .....

"County Treasurer."

§ 526. City of Brenham v. German-American Bank.[7]

"United States of America.

"State of Texas. City of Brenham.

"City of Brenham Bonds.

"No. ..... $100.

"Bonds for General Purposes, $15,000.

"Twenty years after date, for value received, the City of Brenham promises to pay to bearer one hundred dollars with interest at the rate of ten per cent per annum from date, payable semi-annually, on the first days of September and March of each year, upon presentation of the proper coupon hereto annexed, both principal and interest payable at the office of the treasurer of the City of Brenham. This bond is redeemable by the City of Brenham after the expiration of ten years from date hereof. This bond is authorized by an ordinance of the City of Brenham, approved June 7th, A. D. 1879.

"In witness whereof, the mayor and secretary of the City of Brenham hereunto set their hands and affix the seal of the City of Brenham, this 31st day of July, A. D. 1879.

M. P. KERR, *Mayor.*

"C. H. CARLISLE, *City Secretary.*"

7—City of Brenham v. German-American Bank, 144 U. S. 173, 36 L. Ed. 390.

The ordinance referred to in the bonds is here given in full as it appears on page 392, Book 36, Lawyer's Edition: "An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city, to borrow money for general purposes.

Be it ordained by the city council of the City of Brenham:

Sec. 1. That the mayor be, and is hereby, authorized and empowered to have printed coupon bonds of the City of Brenham to the amount of fifteen thousand dollars.

Sec. 2. Said bonds shall be three (3) of the denomination of one thousand dollars ($1,000.00), fourteen (14) of the denomination of five hundred ($500.00) dollars, twenty-five (25) of the denomination of one hundred ($100.00) dollars and fifty of the denomination of fifty ($50.00) dollars.

They shall be made payable to bearer twenty years after date at the office of the treasurer of the City of Brenham, with interest from date until paid, at the rate of ten per cent per annum, payable semi-annually on the first days of September and March, at the office of the treasurer of the City of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

Sec. 3. Said bonds shall be dated and interest begin to run on the first day of ....., A. D. 18.., provided that should any of said bonds be sold at a subsequent date the amount of interest then due shall be indorsed as a credit on the coupons first due.

Sec. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as Series 2, No. ....., giving the number of the bond issued, commencing with No. 1.

Sec. 5. Coupons shall be attached to each of said bonds for each semi-annual installment of interest, which said coupon shall have printed thereto the signature of

the mayor and the city clerk, and shall be received for general ad valorem taxes of the city.

Sec. 6. Said bonds shall be negotiated and sold by the mayor and the finance committee of the city as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per cent, and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

Sec. 7. That there be, and is hereby appropriated, out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

Sec. 8. That this ordinance go into effect and have force from and after its passage.

Approved June 7th, 1879. M. P. Kerr, *Mayor.*

Attest: C. H. Carlisle, *Secretary.*

§ 527. Board of Education v. De Kay.[8]

"No..... School Bond. $1,000.00.

"City of Atchison, State of Kansas.

"Know all men by these presents, that the City of Atchison, Kansas, for value received, is indebted to the bearer in the sum of one thousand dollars, which it promises to pay on the 1st day of January, A. D., 1884, at the National Park Bank, in the City of New York, with interest at the rate of ten per cent per annum, payable semi-annually, on the 1st day of January and on the 1st day of July of each year upon presentation at the said National Park Bank of the interest coupons hereto attached as they mature; the last installment of interest

8—Board of Education v. De Kay, 148 U. S. 591, 37 L. Ed. 573.

payable with this bond. This bond is issued under and by virtue of an Act of the Legislature of the State of Kansas, entitled 'An Act to Organize Cities of the Second Class, Approved February 28th, 1868,' and is secured by pledge of the school fund and property of said city of Atchison for the payment of the principal and interest thereof, as the same may become due.

"Dated at Atchison, this 1st day of January, 1869.

(Signed) "JNO. A. MARTIN,

"*President of the Board of Education.*

"W. F. DOWNS, *Clerk.*

"Countersigned: —

"FRANK SMITH, *Treasurer.*"

§ 528. Graves et al. v. County of Saline.[9]

"United States of America. $1,000.00.

"State of Illinois, County of Saline, funding bond, issued under the Act of 1865 as amended April 27, 1877, and June 4, 1879.

Twenty years after date, for value received, the county of Saline promises to pay to the bearer hereof the sum of $1,000 in lawful money of the United States, at the office of the treasurer of the State of Illinois, in the City of New York, with interest at the rate of 6 per cent per annum, payable annually, as shown by and upon the surrender of the annexed coupons, as they severally become due, reserving, however, the right to redeem this bond at any time after five years from date.

This bond is one of a series of 195 of like tenor, issued for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county, which remain outstanding and unpaid, under the provisions of an act of the general assembly of the State of Illinois,

9—Graves, et al. v. County of Saline, 161 U. S. 359, 40 L. Ed. 732.

entitled 'An Act to Enable counties, cities, towns, townships, school districts, and other municipal corporations to fund, retire and purchase their outstanding bonds and other evidences of indebtedness in the office of the auditor of public accounts,' approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879, and in pursuance of a vote of a majority of the legal voters of said county, voting at an election legally called, under said act, the 6th of November, 1883.

We hereby certify that all requirements of said acts have been fully complied with in the issue thereof.

In testimony whereof, we, the undersigned officers of said county, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures this 1st day of July, A. D. 1885.

W. G. FRITH,
Chairman of the County Board.
W. E. BURNETT,
(Seal.) *County Clerk.*"

Each of said bonds was duly registered according to law with the auditor of the state of Illinois, who indorsed upon each of said bonds the following:

"State of Illinois. $1,000.
Saline County Bond.

Date of bond, July 1, 1885. Payable twenty years after date. Redeemable five years after date. Interest payable July 1, annually. Principal and interest payable at the office of the state treasurer of the state of Illinois, in the city of New York, and state of New York.

Auditor's Office, Illinois,
Springfield, Nov. 23d, 1885.

I, Charles P. Swigert, auditor of public accounts of the state of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire, and purchase their

outstanding bonds and other evidences of indebtedness, and to provide for the registration of new bonds or other evidences of indebtedness, in the office of the auditor of public accounts,' approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879.

I further certify that the aggregate equalized valuation of property assessed for taxation in said county for the year 1885 were certified to this office as follows:

Real estate, $1,362,921. Personal property, $477,340.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office, the day and year aforesaid.

CHARLES P. SWIGERT,
(Seal.) *Auditor Public Accounts.*"

§ 529. Woodruff v. State of Mississippi.[10]

"No. 309. $1,000.

Mississippi Levee District No. 1.
United States of America, State of Mississippi.
Eight Per Cent Bond.

One of a series of five hundred bonds of one thousand dollars each, numbered from one to five hundred consecutively, issued by the levee board of the state of Mississippi, district No. 1, in pursuance of and by the authority granted in an act of the legislature of the state of Mississippi, approved March 17, 1871, entitled 'An act to redeem and protect from overflow from the River Mississippi certain bottom lands herein described.'

Know all men by these presents that the levee board of the state of Mississippi, district No. 1, under and by authority of the law mentioned in the caption hereof, hereby acknowledge themselves, for value received, indebted to the bearer in the sum of one thousand dollars in gold

10—Woodruff v. State of Mississippi, 162 U. S. 291, 40 L. Ed. 973.

coin of the United States of America, which said sum the said levee board of the state of Mississippi, district No. 1, for themselves and their successors, do hereby bind themselves and engage well and truly to pay to the bearer on the 1st day of January, A. D. 1878, at the banking house of the National Park Bank, in the city of New York; and the said levee board of the state of Mississippi, district No. 1, for themselves and their successors, do hereby engage to pay an interest thereof of 8 per cent per annum, payable semi-annually on the 1st days of January and July in each and every year ensuing the date hereof until the maturity and payment of this bond, at the place of payment mentioned in the coupons hereto annexed, upon the delivery of said coupons as they severally become due.

In testimony whereof, the president of the levee board of the state of Mississippi, district No. 1, has signed and the treasurer of said board has countersigned these presents, and the president has caused the seal of the said board to be affixed hereto the first of January, in the year of our Lord one thousand eight hundred and seventy-two.

(Signed) M. S. Alcorn, *President.*
(Signed) A. R. Howe, *Treasurer.*"

Upon each bond was printed as an endorsement, sections 7, 8, 9, 10, 20 and 29 of the act of 1871.

§ 530. County of Presidio v. Noel-Young Bond & Stock Co.[11]

The statement in the opinion of the court in this case relative to the form of bond is as follows: "Each of the bonds sued on is in the name of the county, is for $1,000, and payable to bearer fifteen years after date, at 8 per

11—County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 558, 53 L. Ed. 402.

cent per annum interest, on the 10th of April at the state treasury. It recites that it was 'issued by virtue of an act of the legislature of the state of Texas, entitled "An act to authorize the county commissioners' court of the several counties of the state to issue bonds for the erection of a court house to levy a tax to pay for the same," approved February 11, 1881, and by virtue of the provisions of chapter 17, laws of called session of the eighteenth legislature, which said chapter has since been validated by the act of March 27, 1885, authorizing the county commissioners' court of the several counties of the state to issue bonds for the erection of a county jail, and by order of the county commissioners' court of the several counties of the state to issue bonds for the erection of a county jail, and by order of the commissioners' court of said county of Presidio, on the 9th day of February, 1886, and is redeemable before maturity at the pleasure of the county."

To each bond was affixed the seal of the county commissioners' court and each was signed by the county judge, countersigned by the clerk of the county court and by the county treasurer, the latter certifying that it had been registered.

§ 531. National Life Insurance Co. v. Board of Education of the City of Huron.[12]

The following is a copy of one of the bonds from which these coupons were cut:

"Issued in accordance with the provisions of sections 1830, 1831 and 1832 of the Compiled Laws of 1887, of Dakota Territory, and in force in the state of South Dakota, authorizing boards of education to issue bonds to raise funds to purchase school sites, erect school buildings, or to fund bonded indebtedness.

12—National Life Insurance Co. v. Board of Education of the City of Huron, 62 Fed. 778.

"No. 1. United States of America. $500.00.

"The State of South Dakota, Board of Education,
"City of Huron.

"The board of education of the city of Huron, county of Beadle, state of South Dakota, fifteen years after the date hereof, for value received, promises to pay bearer five hundred dollars, lawful money of the United States, at office of the Chase National Bank, New York City, with interest thereon at the rate of six per cent per annum, payable semi-annually according to the tenor and effect of the annexed coupons. The bond is one of a series of bonds of like date, tenor and effect, amounting in the aggregate to sixty thousand dollars, and numbered from one to one hundred and twenty, inclusive, issued to raise funds for the purchase of a school site, and for the erection of a school building thereon. And it is hereby certified and recited that all acts, conditions, and things required to be done, precedent to and in the issuing of said bonds, have duly happened and been performed in regular and due form as required by law, and that the total amount of this issue of bonds, together with all other outstanding indebtedness of said board of education, does not exceed the statutory or constitutional limitation and that this bond has been duly registered by the clerk of the board of education in a book provided for that purpose, as required by law.

"In testimony whereof, the board of education of the city of Huron, in the county of Beadle, state of South Dakota, has caused this bond to be signed by its president, attested by its clerk, countersigned by its treasurer, and the seal of said board of education to be hereunto affixed, at the city of Huron, this 4th day of October, A. D. 1890.

(Seal.) "(Signed)
F. F. SMITH, *President.*
"(Countersigned)
J. C. KLEMME, *Treasurer.*

"Attest: JOHN WESTDAHL, *Clerk.*"

§ 532. Risley v. Village of Howell.[13]

"No..... $1,000.00.

"The United States of America.

"State of Michigan (Michigan coat of arms),

"Village of Howell.

"Improvement Bond.

"Know all men by these presents, that the village of Howell, in the state of Michigan, acknowledges to owe and promises to pay to J. M. Ashley, Jr., or bearer, one thousand dollars, lawful money of the United States of America, on the first day of ....., in the year of our Lord, one thousand eight hundred and ....., at the Fourth National Bank, in the city of New York, with interest at the rate of six per centum per annum payable semi-annually, on the first days of December and June in each year, on the surrender of the annexed coupons as they severally become due. This bond is issued under and by authority of a special act of the state of Michigan, entitled 'An act to authorize the village of Howell to raise money to make public improvements in the village of Howell, being No. 248 of the Local Acts of 1885, of the legislature of the state of Michigan,' approved February 25, 1885, and also under the ordinance of the village of Howell, passed August 12, 1885.

"In testimony whereof, the said village of Howell has caused these presents to be signed by the president and recorder of said village, and to be sealed with the seal of said village, this twelfth day of August, A. D. 1885.

"(Seal.) (Signed) Geo. H. Chapel.

"(Signed) Jay Corson."

13—Risley v. Village of Howell, 64 Fed. 453.

§ 533. Hughes County, S. D., v. Livingston.[14]

"Number..... $500.00.

"United States of America.

"State of South Dakota,

"Hughes County Funding Bond.

"Know all men by these presents, that the county of Hughes, in the state of South Dakota, acknowledges itself to owe, and for value received hereby promises to pay to T. W. Pratt or bearer, the sum of five hundred dollars ($500.00); in lawful money of the United States of America, on the sixth day of July, A. D. 1911, or at any time after the sixth day of July, A. D. 1901, at the option of said county, with interest thereon at the rate of six per centum per annum, payable annually on the sixth day of July in each year, on presentation and surrender of the annexed interest coupons as they severally become due. Both principal and interest of this bond are payable at the Chemical National Bank, in the City of New York, and the state of New York. This bond is one of a series of like tenor and date, numbered from 1 to 224, both inclusive, aggregating the sum of $112,000.00, and is issued by said county of Hughes for the sole purpose of funding the outstanding indebtedness of said county incurred for constructing a court house and jail, and is issued in pursuance of an act of the Eighteenth legislative assembly of the territory of Dakota, entitled 'An act authorizing and empowering organized counties of Dakota to erect county buildings for court house and jail purposes, and to issue and dispose of bonds to provide funds to pay therefor, and to provide for the payment of principal and interest of such bonds.' (Laws Dak. T. 1889, c. 42), and in accordance with an election duly called and held on the second day of June, 1891, and it is hereby certified and recited that all acts, conditions,

14—Hughes County, S. D. v. Livingston, 104 Fed. 306.

and things required to be done precedent to and in the issuing of this series of bonds have been properly done, happened, and been performed in the regular and due form, as required by law, and that the total indebtedness of said county, including this issue of bonds, does not exceed the constitutional and statutory limitations. In witness whereof (that) said county of Hughes, by its board of county commissioners, has caused this bond to be signed by the chairman of said board, attested by the county auditor of said county, and caused the seal of said county to be affixed hereto the sixth day of July, A. D. 1891.

"(Signed.) JOHN F. HUGHES,
"*Chairman of the Board of County Commissioners.*
"Attest: HARRY ERNEST, *County Auditor.*
"Registered in my office, according to law:
"THOMAS H. GREEN,
"*County Treasurer.*"

§ 534. The County of Presidio v. Noel-Young Bond & Stock Company.[15]

PLAINTIFF'S ORIGINAL PETITION

To the Honorable U. S. Circuit Court, W. D. T., El Paso, Texas:

The Noel-Young Bond and Stock Company, Plaintiff complaining of the County of Presidio, in the State of Texas, Defendant, respectfully states:

That plaintiff is a corporation duly incorporated and organized under the laws of the State of Missouri and is not a resident of the State of Texas; and the defendant is a municipal corporation constituting one of the counties of the State of Texas and organized under the laws of said State, and that W. W. Bogel, who is a resident of the

15—The County of Presidio v. Noel-Young Bond & Stock Company, 212 U. S. 58, 53 L. Ed. 402.

said County of Presidio, is the County Judge of said county and said county is located in the Western District of Texas.

Plaintiff states that on the 6th day of December, 1886, said County of Presidio executed and delivered its certain negotiable or written obligations and bonds numbered 90, 91, 92, 94, 95, and 96, each and every one of said bonds and obligations being issued, as is represented and recited in the same, for the erection of a courthouse and jail, said recital in each of said bonds is as follows:

"This bond is issued by virtue of an act of the Legislature of the State of Texas, entitled 'An Act to authorize the County Commissioners' court of the several counties of the state, to issue bonds for the erection of a court house, and to levy a tax to pay for same; approved February 11th, 1881, and by virtue of the provision of Chapter 17, laws of called session of the 18th Legislature, which said chapter has since been validated by the Act of March 27th, 1885, authorizing the County Commissioners' Court of the several counties of the state, to issue bonds for the erection of a county jail, and by order of the County Commissioners' Court of said County of Presidio, on the 9th day of February, A. D. 1886, and is redeemable before maturity at the pleasure of the county."

Plaintiff states that each of said bonds is endorsed and was endorsed at the time of its issuance, with the following printed endorsement "Bond No..... $1,000.00 Presidio County Court-house and Jail Bond."

Plaintiff states that each and every one of said bonds was alike and of the same tenor and effect (excepting the numbers thereof), and they all bear interest at the rate of eight per cent per annum, payable annually on the 10th day of April, at the state treasury, on surrender of the proper coupons attached thereto, and all of said bonds were duly signed and executed by the proper officers and agents of said County of Presidio and were duly regis-

tered by the treasurer of said county under the direction and orders of the Commissioners' Court of said county.

That by each of said bonds the said County of Presidio acknowledged itself indebted to, and promised to pay to the bearer thereof the sum of One Thousand Dollars fifteen years after the date thereof, to-wit: fifteen years after December 6th, 1886, with interest at the rate of 8 per cent per annum payable as aforesaid on the presentation and surrender of the proper coupons thereto attached, and that said bonds and coupons were duly issued by virtue of the authority recited in them and by authority of law.

That to each of said bonds above mentioned there were attached fifteen coupons of and for the sum of $80.00 each, for the annual interest of 8 per cent provided for in the same whereby the County of Presidio promised in each of said coupons to pay to the bearer thereof the sum of $80.00.

That one of said coupons on each of said bonds has become due on the 10th day of April of each and every year since their issuance, up to and including the year 1900, and each and all of said coupons were and are payable to the bearer of same and were and are signed by the proper officers of said county and were and are attested as required by law: that the plaintiff, The Noel-Young Bond and Stock Company is the bearer and holder of each and all of said bonds Nos. 90, 91, 92, 94, 95, and 96, and of the interest coupons which were attached thereto, as aforesaid.

That all of the interest coupons which were attached to said bonds up to and including the year 1895, have been paid, and that the six coupons for $80.00, each payable on April 10th, 1896, belonging to and issued in connection with said six bonds, and the six coupons for $80.00 each payable on April 10th, 1897, and the six coupons for $80.00 each payable on April 10th, 1898, and the six coupons for $80.00 each payable on April 10th, 1899,

and the six coupons for $80.00 each payable on April 10th, 1900, belonging to and issued in connection with said bonds, are all past due and remain unpaid, and that the principal due on said thirty coupons amounts in the aggregate to the sum of $2400.00

Plaintiff states that all of said six bonds matured and became due and payable on the 6th day of December, 1901, and there being no coupons on them representing the interest accruing after April 10th, 1900, there is due upon the same interest at 8 per cent per annum from April 10th, 1900.

Plaintiff says that payment of said six bonds for $1000.00 each aggregating $6000.00, with interest on the same at the rate of 8 per cent per annum from April 10th, 1900, and the payment of all of said thirty coupons and interest hereinbefore described has been duly demanded and all of said bonds and coupons have been duly presented to the Commissioners' Court of Presidio County, Texas, for payment and allowance, and all the same have been by the Commissioners' Court of Presidio County heretofore wholly refused and disallowed and the payment of the same has been refused, and said court has refused to recognize said bonds and coupons in any way as just and valid claims against said county; and by the order of said Commissioners' Court, said county has repudiated any and all liability on said bonds and coupons.

That the principal due on said six coupons for the sum of $80.00 each, which fell due April 10th, 1896, is $480.00 and the principal due on said six coupons for the sum of $80.00 each, which fell due on April 10th, 1897, is $480.00 and the principal due on said six coupons for the sum of $80.00 each which fell due on April 10th, 1898, is $480.00 and the principal due on said six coupons for the sum of $80.00 each, which fell due on April 10th, 1899, is $480.00 and the principal due on said six coupons for the sum of $80.00 each which fell due on April 10th, 1900 is

$480.00 and the principal due on the said six bonds as aforesaid is $6,000.00.

Plaintiff states that said defendant the County of Presidio, has never paid plaintiff, the legal holder, owner and bearer of said bonds and coupons, any amount whatever due thereon; and plaintiff is damaged in the sum of $10,000.

Plaintiff prays that the defendant, the County of Presidio, Texas, be duly cited, as the law provides, and it prays judgment against said County of Presidio for the amount of the bonds sued on, to-wit: $6,000.00 with interest on the same at eight per cent per annum from April 10th, 1900, and for the whole amount of said coupons, with interest on the coupons, hereinbefore described respectively, at the rate of six per cent per annum from the time they matured respectively; and it prays judgment for costs and asks for general relief.

PATTERSON & BUCKLER,
Attorneys for the Plaintiff.

§ 535. Defendant's first amended original answer.

And now comes the defendant, Presidio County by its attorneys in the above styled and numbered cause, and by leave of the Court first had and obtained, amends its answer heretofore filed, and in lieu thereof, files the following pleas to the plaintiff's petition:

(1.) And for plea and answer to plaintiff's action defendant comes by its attorneys and says, that plaintiff ought not to have and recover herein for that, heretofore, to-wit: On the 28th day of March, 1893, in a certain suit therein pending in the District Court in and for Presidio County, Texas, wherein Ball, Hutchings & Company were the plaintiffs and the said Presidio County, and the counties of Brewster, Jeff Davis, Buchel and Foley, in the State of Texas, were the defendants, in which suit the plaintiffs sought to recover judgment for the sum of

$1,440.00, being the interest due on certain interest bearing coupon bonds attached to bonds numbered 90, 91, 92, 93, 94, 95, and 96 inclusive, the said bonds purporting to have been issued on the 6th day of December, 1886, by Presidio County, for one thousand dollars each, payable to bearer fifteen years after date with interest at the rate of 8 per cent per annum, which interest was evidenced by fifteen coupons attached to each of said bonds of $80.00 each, which numbered consecutively from 1 to 15, of which coupons plaintiffs alleged they were the holders and bearers, and became so for value before maturity, without notice of any irregularity or infirmity affecting the validity of either of said bonds or coupons.

That among other defenses plead by this defendant in said suit, it was alleged that if said bonds were issued and delivered to plaintiffs of [or] their assignors, they were so issued and delivered for an unlawful purpose, to-wit: for the purpose of furnishing the courthouse of Marfa as per specifications of a certain contract made with Britton & Long for the sum of seven thousand dollars, as appears from the proceedings of the Commissioners' Court of Presidio County, dated December 4th, 1886, that the order and proceedings of said Commissioners' Court in issuing and delivering said bonds for the aforesaid purpose were fraudulent and illegal and void and that the contractors to whom said coupons and bonds were issued, and the subsequent holders thereof had notice of the purposes above stated, for which said bonds were issued, and in said plea, it was further alleged that Presidio County, the defendant herein, issued certain bonds numbered one to sixty inclusive, for the purpose of building a courthouse, with interest coupons attached, which were delivered to J. W. Britton, a contractor, that bonds and coupons for building a jail, numbered 61 to 86 inclusive, were delivered to D. C. Anderson, a contractor, that bonds for the construction of water works, numbered from eighty-seven to eighty-nine

inclusive, with interest coupons attached, were issued to J. H. Britton, and that coupons attached to said bonds numbered ninety to ninety-six inclusive, the subject matter of said suit, were issued on the 6th day of December, 1886, and delivered to Britton & Long, contractors, for the purpose of purchasing furniture for the courthouse at Marfa, and that if said County Commissioners' Court had any authority in law to issue bonds for the building of the courthouse and jail at Marfa, such power had been exhausted by issuing the bonds numbered one to eighty-six inclusive, and the interest coupons attached thereto and that the subsequent issuance and delivery of the bonds for furnishing the courthouse was without authority of law, fraudulent and void, and that the proceedings of the Commissioners' Court in relation thereto affected with notice all persons purchasing and dealing in said bonds and interest coupons, and especially the plaintiff in said suit, and defendant says that upon issue joined upon said pleadings the plaintiffs and defendants as aforesaid, the District Court of Presidio County, the Honorable C. N. Buckler presiding, before whom said case was tried without a jury, jury being waived, entered in substance the following judgment:

BALL, HUTCHINGS & COMPANY
vs.
PRESIDIO COUNTY ET AL.

Now on this, the 28th day of March, 1893, this cause came on for trial, and all the parties to the action announced ready for trial, and a jury being waived, and after hearing the evidence and argument of counsel, was of the opinion that the law and the facts were with the defendants, and so found, wherefore, the Court doth order and adjudge that the plaintiffs herein, Ball, Hutchings & Company, recover nothing against the defendants, Presidio County, Jeff Davis County, Brewster County,

Buchel County and Foley County, and that the said defendants, and each of them, go hence without day and recover their costs of the plaintiff herein, and the plaintiff, Ball, Hutchings & Company, pay all the costs incurred in this action, and that execution issue therefor, and to the judgment of the Court as heretofore set out. The plaintiff by their counsel, in open court excepted, and gave notice of appeal.

And defendants say that the coupons and bonds referred to in the plaintiff's petition in this case are the same bonds to which the coupons were attached that were sued upon in the aforesaid case, in which judgment was rendered against the plaintiff, Ball, Hutchings & Company, except bond and coupons attached thereto, numbered ninety-three, which are not involved in this suit; and defendant further says that the judgment rendered against plaintiff in said suit of Ball, Hutchings & Company, vs. the defendants aforesaid, in the District Court of Presidio County, Texas, was thereafter in all things affirmed by the Supreme Court of the State of Texas, on, to-wit: the 4th day of March, A. D. 1895. The defendant says that the aforementioned suit was upon interest coupons attached to bonds numbered ninety to ninety-six inclusive, and are the same identical bonds sued on in this case, except bond number ninety-three, as aforesaid, as by the record and proceedings thereof will more fully appear, which said judgment of the District Court of Presidio County, being affirmed by the Supreme Court of the State of Texas, still remains in full force and effect, and is in no wise reversed or made void, and this the said defendant is ready to verify by such record, wherefore the defendant pleads said judgment in bar of this suit, and prays judgment against the said plaintiff thereon and for all costs of suit.

BEALL & KEMP, J. A. GILLETT,
Attorneys for Defendants.

(2.) And for further plea in this behalf defendant says that plaintiff ought not to have and recover herein upon the said series of bonds and coupons attached, sued upon in this case, being numbered ninety, ninety-one, ninety-two, ninety-four, ninety-five and ninety-six, because the same were issued and delivered to Britton & Long, contractors, for the fraudulent and illegal purpose of furnishing the courthouse at Marfa, which had already been constructed, and because said bonds and coupons attached thereto were issued without any lawful authority, in this; that the power of the county to erect a courthouse and jail at Marfa having been exhausted, as appears from the order of the Commissioners' Court of Presidio County on February 9th, 1886, recited in face of said bonds and the contract therein mentioned. The purchasers of the bonds in suit were put upon inquiry and affected with notice of the fraudulent and illegal character of said bonds. That is to say: that on the 9th day of February, 1886, the Commissioners' Court of Presidio County, Texas, entered an order embodying the following: (1) The bid of Britton to construct a courthouse at Marfa, Presidio County, Texas, for sixty thousand dollars, to be paid in courthouse and jail bonds, and that of Anderson to construct a jail at the same place for twenty-six thousand dollars, to be paid in the same kind of bonds, which were accepted; (2) Britton and Anderson were respectively required within ten days from February 9th, 1886, the date of said order, to enter into contracts to construct same; (3.) Work to begin in twenty days from date of contract, and the courthouse to be furnished within one year, and the jail to be finished within six months from date of contracts; (4.) the bonds were to be of the denomination of one thousand dollars each, to bear interest at eight per cent, to run fifteen years from their dates, and the sixty thousand dollars to be delivered to Britton wear [were] to bear same date as his contract to build courthouse, thirty thousand dollars

of them to be delivered to him when the contract was signed, and thirty thousand when the court house was half finished and the twenty-six thousand dollars to be delivered to Anderson were to bear the same date as his contract to build the jail, thirteen thousand dollars of them to be delivered to him when the contract was signed and thirteen thousand dollars when the jail was half finished; (5.) And the County Judge was authorized on behalf of the county, to enter into said contracts with Britton and Anderson, and to issue, and to deliver to them respectively, said bonds as above provided; that sixty of said bonds numbering one to sixty inclusive, were dated February 11th, 1886, and delivered to Britton, and that twenty-six of said bonds, numbering from sixty-one to eighty-six inclusive, were dated February 15, 1886, and delivered to Anderson, said 86 bonds being for one thousand dollars each, were of the bonds authorized to be issued by said order of February 9th, 1886, of the Commissioners' Court of Presidio County, and each bond was in the same words and figures, with the exception of numbers and dates that on the 6th day of December, 1886, the Commissioners' Court of Presidio County, for the purpose of paying for the furnishing of said courthouse and erecting a system of water works for said courthouse and jail then already constructed delivered to Britton and Long ten bonds numbered eighty-seven to ninety-six inclusive, each in the following language except as to number, omitting coupons.

"The State of Texas, *County of Presidio:*

No. 96, $1,000.00.

"The County of Presidio, in the State of Texas, will pay the bearer $1,000, fifteen years after date, with interest at the rate of eight per centum, payable annually on the 10th day of April, at the state treasury, on surrender of proper coupon hereto attached. This bond is issued by virtue of an act of the Legislature of the State

of Texas, entitled 'An act to authorize the County Commissioners' Court of the several Counties of the state to issue bonds for the erection of a courthouse, and to levy a tax to pay for the same, approved February 11, 1881, and by virtue of the provisions of chapter 17, laws of called session of the Eighteenth Legislature, which said chapter has since been validated by the act of March 27, 1885, authorizing the County Commissioners' Court of the several counties of the state to issue bonds for the erection of a county jail, and by order of the County Commissioners' Court of said County of Presidio, on the 9th day of February, 1886, and is redeemable before maturity at the pleasure of the county.

"In testimony whereof, the County Commissioners' Court of Presidio County has caused to be hereto affixed the seal and signature of the proper officers of said Court this the 6th day of December, 1886.

"J. S. CATLIN,
"County Judge of Presidio County.

"Countersigned,
"W. S. LAMPERT,
"Clerk of the County Court of Presidio County, Texas.
"Registered:
"FRED W. RUAFF,
"County Treasurer."

And defendant says that said order only authorized the issuance of eighty-six bonds of one thousand dollars each, and directed that they should be dated within ten days of February 9, 1886, which was in fact complied with by dating those numbered one to sixty on the 11th, and those numbered sixty-one to eighty-six on the 15th of February, 1886, and delivering them to the contractors aforesaid.

That the issuance of the bonds aforesaid fully satisfied the order of the Commissioners' Court aforesaid and the said ten bonds subsequently issued, to which coupons were attached, involved in this suit, were issued in fact

without an order of the said Commissioners' Court to support them, and are therefore void in law. Defendant further says that the law requires a dealer in county bonds to know the provisions of the act of the Legislature, and the order of the County Commissioners' Court under and by virtue of which such bonds were issued, whether referred to on the face of the bonds or not; that the said plaintiffs were informed from the act of the Legislature, the order of February 9, 1886, and the bonds given December 6, 1886, purchased by them, to which coupons are attached, that there was a difference of ten months between the order of the court and the bonds purporting to have been issued thereunder, and whereas the order required the total issue of bonds authorized to be dated within ten days from February 9, 1886, sixty thousand dollars when the courthouse contract was signed, and twenty-six thousand dollars when the jail contract was signed, both contracts to be signed within ten days, that all of said bonds were, under said order and to be delivered before December, 1886, as the courthouse was to have been completed within one year and the jail in six months from the date of contracts, and one-half of the courthouse and jail bonds were to have been delivered to the contractors on the signing of the contracts, and the other half when the respective buildings were one-half completed, and thus requiring delivery in all probability, of all the bonds within seven or eight months from February 9, 1886; that the County Judge was authorized to sign and deliver the bonds, sixty to Britton and twenty-six to Anderson; that before delivery they must have been executed by the County Clerk, registered by the County Treasurer; that the delivery of the said bonds satisfied said order of February 9th, 1886, that by the numbering of the said ten bonds of December 6, 1886, offered for sale, from eighty-seven to ninety-six inclusive, evidenced that more than eighty-six bonds were being issued under said order, and that these facts being known

were sufficient to put plaintiffs upon inquiry as to whether these bonds were in excess of the amount authorized by the said order, and being thus put upon inquiry as to such facts, it became plaintiff's duty to use reasonable diligence to ascertain as to whether the bonds of December 6, 1886, offered them were in fact in excess of the amount authorized by such order, and the failure of plaintiff to follow up the information in its possession is and was in law inconsistent with good faith, and affects them with notice of the invalidity of said bonds and coupons attached thereto. Wherefore defendant says that the bonds and coupons sued upon and described in said plaintiff's petition are fraudulent, illegal and void, and this, the defendant is ready to verify.

BEALL & KEMP,
J. A. GILLETT,
Attorneys for Defendant.

STATE OF TEXAS, *County of Taylor:*

Before me, the undersigned authority, on this day personally appeared J. A. Gillett, who signed and subscribed the foregoing pleas numbered one and two, after being duly sworn, says the facts stated therein are true.

J. A. GILLETT.

Sworn to and subscribed before me, this the 3rd day of October, A. D. 1905. J. H. FINKS, *Clerk.*

And further comes the defendant, by its attorneys and says that the coupons each and every one of them sued for by plaintiff as set out in his petition, are barred by the statute of limitation of four years, in this, that suit was not brought to recover hereon within four years next after the cause of action accrued, and this the defendant is ready to verify.

Wherefore plaintiff ought not to have recovered thereon, and of this defendant prays judgment.

BEALL & KEMP,
J. A. GILLETT,
Attorneys for Defendant.

Now comes the defendant, by its attorneys, and denies all and singular the allegations of plaintiff- petition except as may hereinbefore have been admitted in the foregoing answers, and of this puts itself upon the country.

BEALL & KEMP,
J. A. GILLETT,
Atty's for Def't.

§ 536. Bill of exceptions.

Be it remembered, that on the trial of the above entitled cause, to-wit, the 3rd day of October, A. D. 1905, the following proceedings were had.

The plaintiff brought suit to recover against the defendant on certain bonds numbered 90, 91, 92, 94, 95, and 96, of date December 6th, 1886, with interest bearing coupons attached to each of said bonds the recital in each of said bonds being as follows:

"This bond is issued by virtue of an act of the Legislature of the State of Texas, entitled 'An act to authorized the County Commissioners' Court of the several counties of the state, to issue bonds for the erection of a courthouse, and to levy a tax to pay for same, Approved February 11th, 1881, and by virtue of the provisions of chapter 17, law of called sessions of the 18th Legislature, which said chapter has since been validated by the act of March 27, 1885, authorizing the County Commissioners' Court of the several counties of the state, to issue bonds for the erection of a county jail, and by order of the County Commissioners' Court of said County of Presidio, on the 9th day of February, A. D. 1886, and is redeemable before maturity at the pleasure of the county."

Plaintiff alleged that each of said bonds is endorsed and was endorsed at the time of its issuance with the following printed endorsement; Bond No. — $1,000.00, Presidio County Courthouse and Jail Bond." The Plain-

tiff alleged that each and every of said bonds were alike, of the same tenor and effect (excepting the number thereof) and that they all bore interest at the rate of 8 per cent per annum, payable annually on the 10th day of April, at the State Treasury, on the surrender of the proper coupons attached thereto and all of said bonds were duly signed and executed by the proper officers and agents of said County of Presidio, and were duly registered by the Treasurer of said county under the directions and orders of the Commissioners' Court of said County. That by each of said bonds the said County of Presidio promised to pay to the bearer thereof the sum of One Thousand dollars fifteen years after the date thereof, to-wit, fifteen years after December 6, 1886, with interest at the rate of 8 per cent per annum, payable on the presentation and surrender of the proper coupons thereto attached, and that said bonds and coupons were duly issued by virtue of the authority recited in them, and by authority of law; and that each of said bonds above mentioned had attached thereto fifteen coupons for the sum of $80.00 each, for the annual interest of 8 per cent provided for in the same, and that in each of said coupons the county promised to pay the bearer thereof the sum of $80.00. That one of said coupons on each of said six bonds became due on the 10th of April of each and every year since their issuance, up to and including the year 1900; and each and all of said coupons were, and are payable to the bearer of the same and were signed by the proper officer of said county, and attested as required by law and that the plaintiff Noel-Young Bond & Stock Company is the bearer and holder of each and all of said bonds numbered as aforesaid, and of the interest coupons which are attached thereto which became due April 10th, 1896-1897-1898-1899 and 1900. That all of said six bonds matured and became due and payable on the 6th day of December, 1901, and that there being no coupons on them representing the interest ac-

cruing on said bonds after April 10, 1900, there is due upon the same interest at the rate of 8 per cent per annum from April 10, 1900. That the payment of said six bonds of $1,000.00 each aggregating $6,000.00 with interest on the same at 8 per cent per annum from April 10, 1900; and the payment of all of said thirty coupons which became due as hereinafter stated and the interest hereinafter described has been duly demanded, and all of said bonds and coupons have been duly presented to the Commissioners' Court of Presidio County, Texas, for payment and allowance, and all of the same have been by the Commissioners' Court of Presidio County heretofore wholly refused and disallowed, and payment of the same has been refused, and said Court has refused to recognize said bonds and coupons in any way as just and valid claims against said county; and by the order of said Commissioners' Court said county has repudiated any and all liability on said bonds and coupons. That the principal which fell due on said six coupons for the sum of $80.00 each, which fell due April 10, 1896, is $480.00 and the principal due on said six coupons for the sum of $80.00 each, which fell due on April 10, 1900, is $480.00, and the principal due on said six coupons for the sum of $80.00 each which fell due on April 10, 1898, is $480.00 and the principal due on said six coupons for the sum of $80.00 each, which fell due on April 10, 1899, is $480.00; and the principal due on said six coupons for the sum of $80.00 each, which fell due on April 10, 1900, is $480.00, and the principal due on the said six bonds as aforesaid, is $6,000.00. That the County of Presidio has never paid plaintiff the legal owner and bearer of said bonds and coupons any amount due thereon; and the plaintiff is damaged in the sum of $10,000.00.

Plaintiff prayed judgment against said County of Presidio for the amount of the bonds sued upon, to-wit, $6,000.00, with interest on the same at the rate of 8 per cent per annum from April 10, 1900, and for the whole

amount of said 30 coupons with interest on the coupons at the rate of 6 per cent per annum from the time they matured respectively on April 10, 1896, April 10, 1897, April 10, 1898, April 10, 1899 and April 10, 1900, and for costs.

Plaintiff's petition was filed the 26th day of July, 1904, in the United States Circuit Court for the Western District of Texas at El Paso and the case was transferred by an order of the Hon. T. S. Maxey, Judge of said Court, he being disqualified to try said cause, to the United States Circuit Court for the Northern District of Texas, at Abeline, for the trial on to-wit, the 12th day of October, A. D. 1904. The defendant Presidio County filed its plea and answer to said action, setting up the following defense thereto. (See amended answer on preceding pages.)

The plaintiff, the Noel-Young Bond & Stock Company, introduced in evidence on the trial of this case the six bonds described in its petition, and the thirty coupons sued upon in same, to-wit, bonds numbered 90, 91, 92, 94, 95, and 96, all of date December 6th, 1886, and all alike in form excepting their numbers. The following is a copy of each of said bonds (the numbers being different as stated):

"THE STATE OF TEXAS,

"*County of Presidio:* "No. — $1,000.00.

"The County of Presidio, in the State of Texas, will pay the bearer $1000, fifteen years after date, with interest at the rate of 8 per centum, payable annually on the 10th day of April, at the state treasury, on surrender of the proper coupon hereto attached. This bond is issued by virtue of an act of the Legislature of the State of Texas, entitled 'An act to authorize the County Commissioners' Court of the several counties of the State to issue bonds for the erection of a courthouse and to levy a tax to pay for the same,' approved February 11, 1881, and by virtue of the provisions of chapter 17, laws of called session of the

Eighteenth Legislature, which said chapter has since been validated by the act of March 27, 1885, authorizing the County Commissioners' Court of the several counties of the State to issue bonds for the erection of a county jail, and by order of the County Commissioners' Court of said County of Presidio, on the 9th day of February, 1886, and is redeemable before maturity at the pleasure of the County.

"In testimony whereof the County Commissioners' Court of Presidio County has caused to be hereto affixed the seal and signature of the proper officers of said court, this 6th day of December, 1886.

J. S. CATLIN,
"County Judge of Presidio County.

"Countersigned:

"W. S. LEMPERT,
"Clerk of the County Court of Presidio County, Texas.

"Registered:

"FRED W. ROUFF,
"County Treasurer."

Plaintiff also introduced in evidence the following printed endorsement which appears upon the back of each of said bonds:

"Bond No. — $1,000.00 Presidio County Court House and jail Bond."

The said thirty coupons introduced in evidence were the six coupons from said bonds numbers 90, 91, 92, 94, 95, and 96, which became due and payable on the 10th day of April, 1896; the six coupons from said bonds which became due on April 10th, 1897, the six coupons from said bonds which became due April 10th, 1898, the six coupons from said bonds which became due April 10th, 1899, the six coupons from said bonds which became due April 10, 1900.

Plaintiff read from agreed statement in writing an admission upon the trial of the cause that the six bonds sued upon and the thirty coupons above described, had been

presented to the County Commissioners' Court of Presidio County for payment and were disallowed by said Court before the filing of this suit.

The defendant offered and read in evidence from an agreed statement of facts the following portions thereof in substance.

The plaintiffs' petition in the case of Ball, Hutchings & Company *vs.* Presidio County, No. 227, filed in the District Court of Presidio County, Texas, on August 15th, 1892, in which plaintiff in said cause No. 227 sought to recover upon certain coupons which matured prior to and on the 10th day of April, 1892, which said coupons were attached originally to bonds numbers 90, 91, 92, 93, 94, 95, and 96, it being alleged in said petition filed in said case on August 15th, 1892, that Ball, Hutchings & Company were the owners and legal holders of the seven bonds and the coupons sued upon in said case numbered 227, which were attached to said bonds numbers 90 to 96, inclusive, and it was alleged that said bonds had been issued by Presidio County.

The defendant, Presidio County, offered in evidence the answer filed by defendant in said case setting up the same defenses as are plead in this suit to show the invalidity and illegality of said bonds.

Defendants also introduced as evidence the judgment of the District Court of Presidio County rendered in said cause on the 28th day of March, 1893, in words and figures as follows:

No. 227

"Ball, Hutchings & Co.

vs.

Presidio County et al.

"Now on this, the 28th day of March, 1893, this cause came on for trial, and all the parties to the action announced ready for trial, and a jury being waived, the Court, after hearing the evidence and argument of coun-

sel, was of the opinion that the law and the facts were with the defendants, and so found, wherefore the Court doth order and adjudge that the plaintiffs herein, Ball, Hutchings & Co., recover nothing against the defendants, Presidio County, Jeff Davis, Brewster County, Buchel County and Foley County, and that said defendants and each of them go hence without day, and recover their costs of the plaintiffs herein; and that the plaintiffs, Ball, Hutchings & Co., pay all the costs incurred in this action, and that execution issue therefor. And to the judgment of the Court as heretofore set out the plaintiffs, by their counsel, in open court excepted and gave notice of appeal, and plaintiffs' exceptions to the findings of the Court were overruled."

The defendant also offered in evidence the record of the case on appeal and the decision of the Court of Civil Appleals [Appeals] as reported in S. W. Reporter vol. 27 p-. 702-707, in which said court reversed the judgment of the District Court of Presidio County, and rendered the same in favor of the plaintiff, Ball, Hutchings & Company, and also the record of the judgment of the Supreme Court of the State of Texas in said cause, in which said court reversed the judgment of the Court of Civil Appeals, and affirmed the judgment of the District Court of Presidio County. The Supreme Court holding in its said judgment and opinion as reported in vol 88, Tex. Sup. Ct. Reports, p-. 60 to 66.

This evidence was offered and read in support of defendants' pleas of former judgment in bar of plaintiffs' action.

The defendant offered and read in evidence in support of its second plea in which the bonds and coupons attached thereto sued upon in plaintiffs' petition alleged to have been issued fraudulently and without lawful authority, not being supported by any order of court authorizing the issuance and delivery of said bonds, the statement of facts, agreed upon, in the case of Ball,

Hutchings & Company vs. Presidio County et al.—The following portions of which are embodied substantially in this bill of exceptions as follows:

(1.) The defendant offered in evidence the order of the County Commissioners' Court of said County of Presidio, 9th day of February, 1886, as follows:

"Commissioners' Court Minutes, February Term, 1886.

"Now on this, the 9th day of February, A. D. 1886, Commissioners' Court being in regular session, and having met pursuant to adjournment, with the following officers present, to-wit: Hon. T. T. Harnett, County Judge; J. A. Wedell, Co. Com'r Precinct No. 1; G. W. Brown, Co. Com'r Precinct No. 2; J. F. Ellison, Co. Com'r Precinct No. 3; H. L. Kelly, Co. Com'r Precinct No. 4; C. L. Nevill, Sheriff, M. F. Brown, Co. Attorney; W. S. Lempert, Clerk, came on to be heard and considered by the court the matter of contracts for the construction of courthouse and jail for Presidio County, and the same having been fully considered by the Court, it is ordered by the court that the bid of J. H. Britton to construct a courthouse in accordance with the plans and specifications furnished by him and now on file in this Court, for the sum of sixty thousand ($60,000.00) dollars, to be paid in county courthouse and jail bonds bearing even date with the contract to be entered into in accordance with law and bearing interest at the rate of 8% per annum, payable in fifteen years, as provided by law

"Said bonds to be paid and delivered to the said J. H. Britton in the following installments, to-wit: Thirty thousand (30,000) dollars upon the execution of the contract and bond, and the remainder, thirty thousand (30,000) dollars, when the said courthouse is one-half constructed, be and the same is hereby accepted.

"And it is further ordered by the Court that the bid of D. C. Anderson to construct a jounty [county] jail for

said County of Presidio, in accordance with the plans and specifications furnished by Alfred Giles, and now on file in this Court, for the sum of twenty-six thousand dollars (26,000), to be paid in Presidio County courthouse and jail bonds, bearing even date with this contract, to be entered into, and bearing interest at the rate of 8 p-r cent. p-r annum and payable in fifteen years, as provided by law, said bonds to be paid and delivered to the said D. C. Anderson in the following installments, to-wit: Thirteen thousand (13,000) dollars upon the execution of the contract and bond in accordance with this order, and the remaining thirteen thousand (13,000) dollars when the said county jail is one-half constructed, be and the same is hereby accepted.

"It is further ordered by the court that the said J. H. Britton shall enter into a good and sufficient bond with two or more sureties in the sum of one hundred thousand dollars, to be approved by the County Judge of Presidio County; and that the said D. C. Anderson shall enter into a good and sufficient bond, with two or more good and sufficient sureties, in the sum of fifty thousand (50,000) dollars, to be approved by the County Judge of Presidio County; the said bonds to be conditioned upon the faithful compliance by said J. H. Britton and the said D. C. Anderson with the said contract.

"It is further ordered by the Court that upon the said J. H. Britton and the said D. C. Anderson making and delivering to the County Judge of Presidio County the bonds hereinbefore required, the said County Judge of Presidio County is hereby authorized and empowered to enter into, in behalf of Presidio County, a written contract with the said J. H. Britton and the said D. C. Anderson for the construction of said courthouse and jail upon the terms hereinbefore specified; and is further authorized and empowered to issue county courthouse and jail bonds for one thousand dollars each to the amount of eighty-six thousand ($86,000) dollars, conditioned as the

law provides, and bearing interest at the rate of 8 per cent. p-r annum, and to deliver to the said J. H. Britton thirty thousand (30,000) dollars of said bonds and to deliver to the said D. C. Anderson thirteen thousand (-13,000) dollars of said bonds immediately upon the signing of said (contract) or as soon thereafter as practicable.

"It is further ordered by the Court that the said County Judge of Presidio County is further authorized and empowered to deliver to the said J. H. Britton the additional and remaining thirty thousand (30,000) dollars, in such bonds and to the said D. C. Anderson the additional and remaining thirteen thousand (13,000) dollars in such bonds upon the certificate of the superintendents to be selected and employed by the county, that said courthouse or said jail, as the case may be, is one-half constructed.

"It is further ordered by the Court that C. L. Nevill be, and he is hereby authorized and empowered, in conjunction with said superintendent, to receive and pass upon said jail, and the same shall not be received until the same is accepted by said C. L. Nevill and said superintendent, it is further ordered by the Court that said courthouse and jail shall be erected in the town of Marfa, County of Presidio, and State of Texas, upon such lot or lots as may be designated by the Commissioners' Court.

"It is further ordered by the Court that the County Judge in Presidio County is hereby authorized and empowered to employ E. Northcraft, if he will accept, or some other competent person, as superintendent of the construction of said courthouse and county jail and to enter into a contract with the said persons employed, to pay him the sum of two hundred (200) dollars per month as compensation for services as such superintendent.

"It is further ordered by the Court that said contract

shall require the said contractors to begin work in the way of preparations within twenty (20) days from date of contract, and that the said courthouse shall be completed and finished in twelve (12) months from the date of the contract, and the said county jail shall be completed and finished in six (6) months from date of contract. It is the further order of the Court that J. H. Britton is required to enter into a contract with the County Judge of Presidio County for the construction of a courthouse in accordance with the award within ten days from date of this order, and that the said D. C. Anderson enter into contract with said County Judge for the construction of said jail in accordance with the award within ten (10) days from the date of this order, and that if said contracts are not entered into as herein required, the deposit of five per cent. of the amount of said awards now with the clerk of this Court shall be adjudged forfeited to Presidio County, and that the clerk of this Court notify the said J. H. Britton and D. C. Anderson of the order by delivering to them a certified copy of the same.

The defendant then introduced in evidence the order of the County Commissioners' Court of Presidio County, Texas, of the 8th day of November, 1886; which said order is as follows:

"Be it remembered, that on this, the 8th day of November, 1886, there was begun and holden a regular term of the Commissioners' Court in and for Presidio County, Texas, at Marfa, Presidio County, Texas; officers present, Hon. T. T. Harnett, County Judge of Presidio County; J. A. Wedell, Co. Commissioner Precinct No. 1; G. W. Brown, Co. Commissioner Precinct No. 2; W. J. Bishop, Co. Commissioner Precinct No. 3; H. L. Kelly, Co. Commisssioner Precinct No. 4; W. S. Lempert, Clerk; C. L. Nevill, sheriff.

"Now on this the 10th day of November, 1886, came on to be considered the bid of Britton and Long to furnish all material and labor necessary and to complete the wa-

terworks system for the courthouse and jail in accordance with plans and specifications furnished by E. Northcraft, superintendent, for the sum of Three Thousand Dollars, payable in Presidio County Courthouse and jail bonds bearing 8 per cent interest.

"It is the order of the Court that said bid be accepted for said system of waterworks for the courthouse and jail as per plans and specifications filed this, the 10th day of November, 1886, with the clerk of this court, and that said bonds issue within a reasonable length of time, amounting to $3,000, payable in fifteen years bearing interest at the rate of 8 per cent per annum, and to be dated on the first day of December, A. D. 1886.

"It is the further order of the Court that said Britton and Long be, and they are required to complete said waterworks system without any unnecessary delay. It is the further order of the Court that the County Judge of Presidio County be, and he is hereby authorized and empowered to issue bonds in accordance with this order."

The defendant next offered in evidence the following order of the Commissioners' Court of Presidio County, Texas, to-wit:

"Commissioners' Court Minutes, December Term, 1886.

SATURDAY, *the 4th Day of December,* 1886.

"Court met pursuant to adjournment, officers present, Hon. J. H. Catlin, Co. Judge; H. D. Lindenborn, Co. Com'r Prec't No. 1; G. A. Brown, Co. Com'r Prec't No. 2; J. A. Wedell, Co. Com'r Pr-c't No. 3; H. L. Kelly, Co. Com'r Prec't No. 4; C. L. Nevill, sheriff; W. S. Lempert, cl'k.

"Now on this day it is the order of the Court that the bid of Britton and Long to furnish the courthouse with furniture, &c., as per specifications of Britton & Long now on file in this Court, for the sum of $7,000.00 be and the same is hereby accepted and that the necessary contract be entered into.

"Now on this day it is the order of the Court that pay-

ment for the furniture, &c., for courthouse to be *constructed* for by Britton and Long be made in advance, to which order and the order accepting said bid J. H. Catlin, County Judge, entered his protest in open court."

Plaintiff then offered in evidence the testimony of J. H. Catlin, County Judge of Presidio County, as follows:

"That he Catlin, was County Judge of Presidio County on December 4, 1886, and that on or about that date, bids were received by the Commissioners' Court of said county to furnish the courthouse with good and substantial furniture, such as was necessary to carry on the business of the county. There were two bids received for furnishing said courthouse with the proper furniture. The contract was awarded to Britton & Long, and in payment for said furniture bonds were issued and delivered to the said Britton & Long, Nos. 90-96, inclusive. He, Catlin, as County (Judge) presid*ing* at this meeting of the County Commissioners' Court, and entered his protest of record against the awarding of said contract, but in as much as he was overruled by a majority of the court, he signed the bonds as County Judge, said bonds were issued and delivered to said Britton and Long in payment of said furniture and said bonds were issued and made out upon the same lithographic blanks which were left over from the original lithographic blanks for bonds for courthouse and jail."

Defendant next introduced in evidence the following order of the County Commissioners' Court of Presidio County, Texas, as follows:

Now on this, the 9th day of February, A. D. 1886, Commissioners' Court being in regular session and having met pursuant to adjournment with the following officers present, to-wit: Hon. T. T. Harnett, County Judge; J. A. Wedell, Co. Com'r Pr-c't No. 1; G. W. Brown, Co. Com'r Prec't No. 2; J. F. Ellison, Co. Com'r Prec't No. 3; H. L. Kelly, Co. Com'r Prec't No. 4; C. L. Nevill, sher-

iff; M. F. Brown, Co. Attorney, and W. S. Lempert, Clerk.

"Now on this day it is the order of the Court that the clerk of this Court order at once for the use of the county, one hundred blank courthouse and jail bonds, to bear interest at the rate of 8 per cent, said bonds to be printed on durable paper or parchment similar to the bonds issued by El Paso County, Texas, said bonds to be in accordance with a form for the same, which is hereby directed to be furnished said clerk by the county attorney of said county."

Defendant offered in evidence a tabulated statement of the bonded indebtedness of Presidio County, Texas, showing that under the [order] of Feb. 9, 1886, authorizing the issurance [issuance] of sixty bonds and coupons attached, for the building of the courthouse dated February 11, 1886; and twenty-six bonds, with coupons attached for the building of the jail, dated February 15, 1886, were issued and registered, the bonds aforesaid were for one thousand dollars each, with interest coupons attached, and numbered consecutively from one to eighty-six inclusive, and under the order of the 8th day of November, 1886, these bonds were issued, numbered 87 to 89 inclusive, and dated November 27, 1886, and registered about the same date by the County Treasurer. That the bonds numbered from 90 to 96 inclusive, were dated December 6, 1886, and registered by the County Treasurer on the same date, being the bonds sued on in the case, except No. 93. Defendant then offered in evidence by agreement the deposition of F. M. Ball, taken in the year 1892, in said cause No. 227, Ball, Hutchings & Company *vs.* Presidio County then in the District Court of Presidio County, Texas, and by deposition in said cause No. 227 taken by Plaintiff in the year 1892 said F. M. Ball testified as follows; "I am the owner of only four of the bonds, being numbers, 90, 92, 94, and 96. I have disposed

of the others to Mr. J. C. League. I have originally bought seven. The bonds were sent to the attorneys for plaintiff, Ball, Hutchings & Co., at El Paso. I bought the seven bonds of Mr. John T. Long, who sold me same in Galveston on December 10th, 1886, and when I purchased these bonds all their coupons were attached, they being newly issued. I paid $7,006.22, said price being par and interest. I considered the bonds perfectly good or I should not have bought them. At the time of my purchase I had no notice of any facts affecting the legality of said bonds and coupons, and I received no notice of any other facts connected with the issuance of said bonds except as recited in said bonds. I purchased said coupons and bonds as an investment, having idle money for that purpose.

"At the time I purchased the bonds I made no statement that 'I was afraid the bonds were illegally issued;' or words to that effect; nor did I make any inquiry as to whether or not there was pending in Presidio County any suit or proceedings as to the illegality of said bonds; nor did I ever see or hear of any advertisement or notice being published in the Galveston Daily News or other paper, emanating from the taxpayers of Presidio County concerning the issurance [issuance] of said bonds as to their being in any manner illegal. On application at the office of A. H. Belo & Co. for a copy of the Galveston News containing said advertisement or notice I was informed that if they had in their possession an issue of the Galveston News containing such advertisement that they were too busy to furnish me with a copy."

Defendant also introduced in evidence by agreement the deposition of J. C. League, which was taken in said cause No. 227, Ball, Hutchings & Co. *vs.* Presidio County, in the year 1892, and in said deposition taken as aforesaid in the year 1892, in said cause No. 227, J. C. League testified as follows:

"That he was the owner of the bonds and coupons described in plaintiff's petition; that he could not describe the bonds, but that they are the same in description and the same in issue as those bonds owned by F. M. Ball; that he did not have the bonds, and could not obtain a copy to attach to his deposition; that he had sold the bonds to which the coupons were attached; that he purchased the bonds and coupons with F. M. Ball from a party purporting to be the contractor for building the courthouse for which the bonds were issued; that Ball paid for the seven bonds described in plaintiff's petition, and that he paid Ball for three of them with the attached coupons; that he paid full or par value for the bonds and accrued interest at the time he purchased them with attached coupons, that at the time he purchased them he was investing a considerable sum of money in Texas County bonds issued for courthouse and jail purposes; that he purchased the bonds on or about December 10, 1886; that at the time he purchased them Mr. Ball came into his office with a party representing himself to be of a firm of contractors who had secured the seven bonds in part payment for building the courthouse at Marfa, and that the contractors had agreed to sell all of said bonds if taken as a whole, at par and accrued interest; that Ball did not want to invest in more than four bonds, and that he (witness) agreed with Ball to take the other three bonds; that Ball bought the bonds at par and accrued interest; that witness paid him for three bonds at par and accrued interest; that he questioned the party offering the bonds for sale as to whether there was anything about the bonds affecting their legality, and that the party told him and Ball there was not; that he was never informed nor did he have any notice of any facts connected with the issuance of said bonds, except as were stated in said bonds; that he purchased said bonds as an investment,

and was induced to do so because he thought the bonds were good and a safe investment.

Cross-examination:

"I purchased said bonds and coupons about December 10, 1886, from F. M. Ball directly but through *of* a party claiming to have been one of the contractors who built the courthouse of Presidio County for which the bonds were issued in part payment. I paid for the bonds par and accrued interest to date of purchase. My recollection is that the first maturing coupon was for a fractional amount of interest, amounting to something like $27.00 to $28.00 on each bond to the date the first payment was due —April 10, 1887. I think I paid two or three dollars accrued interest in each bond to December 10, 1886."

The defendant also introduced by agreement the deposition of George Sely taken by the plaintiffs in the year 1892 in said cause No. 227, Ball, Hutchings & Co. *vs.* Presidio County, and in said cause in the year 1892, the said George Sely testified by deposition as follows:

"That the firm of Ball, Hutchings & Company are not the owners of the coupons mentioned in said suit No. 227 in District Court Presidio County, but merely agents for their collection; that the coupons actually belonged on four (4) bonds to Frank Ball and on three (3) bonds to J. C. League; that the seven bonds mentioned were purchased by Frank Ball on the 10th day of December, 1886, from John T. Long, at par and interest and Mr. Frank Ball then sold to Mr. J. C. League three (3) of said bonds at par with interest."

At the close of the evidence counsel for plaintiff, the Noel-Young Bond & Stock Company in this case, admitted that the coupons sued upon in this case were barred by the statute of limitations of four years, and the Court thereupon instructed the jury orally, as follows: Gentlemen of the Jury. In this case, you will return a verdict in favor of the plaintiff against the defendant, Presidio

County, for the amount of the principal of the bonds sued upon, with interest thereon at the rate of 8 per cent per annum from the 6th day of December, 1900." And the Court stated to the jury that the coupons sued upon were barred by the statute of limitations. To which charge of the Court in the presence of the jury, and before the jury retired to consider of its verdict, the defendant excepted to that portion of the charge wherein the jury were instructed to "Return a verdict in favor of the plaintiff against the defendant for the amount of the bonds sued upon, with interest thereon at the rate of 8 per cent per annum from the 6th day of December, 1900," on the following grounds: Because the judgment of the District Court of Presidio County rendered on the 28th day of March, 1893, which was affirmed on error by the Supreme Court of Texas, in which bonds sued on in this case were held void, was under the pleadings and evidence in this case a bar to plaintiff's action; second, because under the pleadings and undisputed evidence in this case, the said bonds were issued without lawful authority not being supported by any order of the Commissioners' Court of Presidio County, authorizing the issuance of the same. Third, because said bonds were issued and delivered to Britton & Long, contractors, for the illegal purpose of furnishing the court house at Marfa, which had already been constructed, and were issued without any lawful authority, the power of the county to issue bonds to erect a courthouse and jail at Marfa, having been exhausted as appears from the order of the Commissioners' Court of Presidio County, on February 9th, 1886, which is recited in the face of said bonds, and the contracts mentioned in said order of the Court, and the registry of said bonds affected with notice the purchasers of the bonds in this suit, that said bonds were issued without authority of law.

Thereupon the defendant asked the Court to give the

following Charge, "You are instructed that the Supreme Court of Texas having held the bonds sued upon void; and it appearing from the evidence and admission of parties in Court that the interest coupons sued upon in this case are barred by the statute of limitation, you will return a verdict for the defendant;" which said charge was refused by the Court, to which the defendant excepted at the time on the grounds states [stated] in the foregoing exception. And thereupon the jury retired under the oral instruction aforesaid by the court and rendered a verdict in favor of the plaintiff and against the defendant for the sum of Six Thousand ($6,000.00) Dollars, with 8 per cent interest thereon from December 6th, 1900, and judgment of the court was rendered upon the said verdict for the sum of eight thousand three hundred and sixteen dollars and to the verdict and judgment thereon, the defendant excepted on the ground that under the issues joined and the evidence in the case the jury should have been instructed by the Court to find for the defendant, and the defendant requested that its Bill of Exceptions, taken at the time, be now signed, allowed, and approved by the Court, and made a part of the record, under the order of the Court, made at the time, granting a period of thirty days within which to prepare and file this Bill of Exceptions, which is accordingly done.

EDWARD R. MEEK,
U. S. District Judge.

In Chambers, at Fort Worth, Oct. 28th, 1905.

§ 537. Oral charge of the court.

"GENTLEMEN OF THE JURY: In this case, you will return a verdict in favor of the plaintiff against defendant, Presidio County, for the amount of the principal of the bonds sued upon, with interest thereon at the rate of 8 per cent per annum from the 6th day of December, 1900;" and the Court stated to the jury that the coupons sued upon were barred by the statute of Limitations.

DEFENDANT'S SPECIAL CHARGE

Gentlemen of the jury you are instructed in this case to return a verdict in favor of the defendant, Presidio County.

J. A. GILLETT,
BEALL & KEMP,
Att'ys for Defendant.

Refused.

EDWARD R. MEEK, *Judge.*

VERDICT OF JURY

In the United States Circuit Court, For the Northern Judicial District of Texas, at Abeline. Verdict of the jury in the case of The Noel-Young Bond & Stock Company *vs.* The County of Presidio, No. 335.

We the jury find for the plaintiff for the amount of the bonds $6,000.00 with interest from Dec. 6th, 1900, at 8% per annum.

W. L. DURRETT, *Foreman.*

§ 538. Judgment.

"On this the 3rd day of October, 1905, the above styled cause came on for trial. Both parties appeared by their attorney and announced themselves ready for trial. A jury consisting of D. W. Stephens, W. H. Robertson, J. H. Stamp, W. C. Martin, W. L. Durrett, R. L. Setton, Burnie Miller, H. J. Haddington, T. M. Green, J. B. Ammerman, Fred Alvoid and R. A. Simpson was duly empanneled, qualified and sworn. The Court sustained the defendant's plea of the statute of limitation of four years to all of the coupons sued upon by the plaintiff and instructed the jury, and the jury being further instructed so to do returned into open court the following verdict: Verdict of the jury in the case of the Noel Young Bond & Stock Company, *vs.* the County of Presidio, No. 335:—

We the jury find for the plaintiff for the amount of the bonds, $6,000.00, with interest from Dec. 6th, 1900, at 8% per annum.

W. L. DURRETT, *Foreman.*

It is therefore ordered and adjudged by the Court that the plaintiff take nothing as against defendant upon any of the coupons sued upon and as to same defendant go hence without a day, and it is ordered and adjudged that the plaintiff, The Noel-Young Bond and Stock Co., (a corporation) do have and recover of and from the County of Presidio in the State of Texas the sum of Eight Thousand Three Hundred and Sixteen Dollars and interest on same from this date at the rate of 8 per cent per annum and all costs in this behalf expended and that said County of Presidio do pay off and satisfy this judgment in the regular course of its business as the law provide, and that all proper process may issue for the enforcement of this judgment.

At the request of defendant's counsel they are hereby allowed 30 days from this date in which to prepare and file their bill of exceptions. Defts. except to charge of Court and refusal to give charges asked for."

§ 538a. Petition for Writ of Error.

Defendant herein, and says that on or about the 3rd day of October, A. D. 1905, this Court entered judgment herein in favor of the plaintiff against this defendant, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition. Wherefore this defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Fifth Circuit for the correction of errors so complained of, and that a transcript of the records, proceedings and papers in this case,

duly authenticated, may be sent to the said Circuit Court of Appeals.

T. J. Beall,
J. A. Gillett,
Attorneys for Plaintiffs in Error, Presidio County.

Allowed this third day of February, 18906.

Edward R. Meek, *Judge.*

§ 539. Assignment of errors.

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

1.

The Court erred in its oral instructions to the jury as follows: "In this case you will return a verdict in favor of the plaintiff for the amount of the bonds sued upon, amounting to the sum of $6,000.00 with interest at the rate of 8% per annum from the 6th day of December, 1900."

2.

The Court erred in refusing to charge the jury to find for the defendant as requested.

3.

The Court erred in refusing to give the following charge asked by the defendant: "You are instructed that the Supreme Court of Texas, having held the bonds sued upon void; and it appearing from the evidence and admission of parties in court that the interest coupons sued upon in this case are barred by the statute of limitation, you will return a verdict for the defendant."

4.

The court erred in entering judgment in favor of the plaintiff and against the defendant.

T. J. Beall,
J. A. Gillett,
Attorneys for Defendant, Presidio County, Pl'ff in Error.

§ 540. Judgment in U. S. Circuit Court of Appeals.

Thereafter and in due course the following judgment was entered:

PRESIDIO COUNTY

vs.

THE NOEL-YOUNG BOND & STOCK COMPANY.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Presidio County, Texas, and the sureties on the writ of error bond herein, Chas. S. Murphy and J. Humphries, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court.

Dec. 15, 1906.

§ 541. National Life Ins. Co. v. Board of Education of City of Huron.[16]

COMPLAINT.

The National Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Vermont, and having its principal place for the transaction of business in the City of Montpelier, in the said State, and being a citizen and resident of the said State, claims of the defendant, the Board of Education of the City of Huron in the State of South Dakota, the sum of four thousand five hundred dollars ($4,500.00), with legal interest thereon from the date of the maturity

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of the several coupons hereinafter set out, and costs of suit; the said Board of Education of the City of Huron, in the State of South Dakota, being a municipal corporation, or body corporate, under and by virtue of the laws of the State of South Dakota, and a citizen and resident of said State, and for cause of such claim the complainant respectfully alleges:

I.

It is and was provided, at the times hereinafter named, by the laws of the State of South Dakota, that it should be lawful for the defendant, a body corporate, and it was thereby empowered, whenever deemed necessary by said Board of Education, in order to raise sufficient funds for the purchase of a schoolhouse site or sites and to erect a suitable building or buildings thereon, to issue bonds bearing a rate of interest not exceeding seven per cent per annum, payable semi-annually at such place as the said bonds might direct, and the said defendant was, by said laws, empowered to sell such bonds upon the market, such bonds to be issued after the question of the issue thereof should have been submitted to a vote of the people and a majority of the qualified electors shall have voted in favor of issuing the said bonds.

II.

Your petitioner further shows that, being so empowered, the defendant did, on the 22nd day of September, 1890, by resolution, determine that it had become necessary, in order to accommodate the pupils residing within the territorial limits of the City of Huron and within the jurisdiction of the said Board of Education of the City of Huron, to purchase an additional school site and erect a suitable school building thereon, and to raise sufficient funds therefor by borrowing the sum of sixty thousand dollars ($60,000) by the issue and sale of bonds therefor. That following the said action of the defendant corporation, an election was held on the 3rd day of October,

1890, at which election a majority of the votes cast, were cast in favor of the issuing of said bonds. That said bonds were to be issued, and were issued in denominations of five hundred dollars ($500.00) each, numbered from one (1) to one hundred and twenty (120), inclusive. That said bonds were within the statutory and constitutional limitations as to indebtedness, and were in all respects issued in conformity with the provisions of the statutes in such cases made and provided. That said bonds bore date October 4th, 1890, and were due in fifteen (15) years, and bore six per cent interest payable semi-annually, which installments of interest were represented by coupons attached to each of said bonds, which coupons were numbered from one (1) to thirty (30), inclusive. That a copy of one of said bonds, being bond No. 1 of the said issue, is as follows:

"Issued in accordance with the provisions of Sections 1830, 1831 and 1832 of the Compiled Laws of 1887 of Dakota Territory, and in force in the State of South Dakota, authorizing Boards of Education to issue bonds to raise funds to purchase school sites, erect school buildings or to fund bonded indebtedness.

No. 1 United States of America. $500.00

The State of South Dakota, Board of Education, City of Huron.

The Board of Education of the City of Huron, County of Beadle, State of South Dakota, fifteen years after the date hereof, for value received, promises to pay bearer

Five Hundred Dollars

lawful money of the United States, at the office of the Chase National Bank, New York City, with interest thereon at the rate of six per cent per annum, payable semi-annually according to the tenor and effect of the annexed coupons. This bond is one of a series of bonds of like date, tenor and effect, amounting in the aggregate to

sixty thousand dollars, and numbered from one to one hundred and twenty, inclusive. Issued to raise funds for the purpose of a school site and for the erection of a school building thereon.

And it is hereby certified and recited that all acts, conditions and things required to be done, precedent to and in the issuing of said bonds, have duly happened and been performed in regular and due form, as required by law, and that the total amount of this issue of bonds together with all other outstanding indebtedness of said Board of Education does not exceed the statutory constitutional limitation, and that this bond has been duly registered by the clerk of the Board of Education in a book provided for that purpose, as required by law.

In testimony whereof, the Board of Education of the City of Huron, in the County of Beadle, State of South Dakota, has caused this bond to be signed by its president, attested by its clerk, and countersigned by its treasurer, and the seal of said Board of Education to be hereunto affixed at the City of Huron this 4th day of October, A. D. 1890.

[SEAL]

(Signed) F. F. SMITH, *President.*

(Countersigned) J. C. KLEMME, *Treas.*

Attest: JOHN WESTDAHL, *Clerk.*"

That the remaining bonds were of like form in every respect save and except that they were numbered respectively from two to one hundred and twenty, inclusive. That attached to the said bond No. 1 were thirty (30) coupons, coupon No. 1 of which was in form as follows, to-wit:

"$15.00 City of Huron, South Dakota. Coupon No. 1.

The Board of Education of the City of Huron, Beadle County, South Dakota, will pay bearer fifteen dollars on the 4th day of April, A. D. 1891, at the office of Chase

National Bank, New York City, being semi-annual interest on Bond No. 1.

F. F. SMITH, *President.*
Countersigned, J. C. KLEMME, *Treasurer.*
Attest: JOHN WESTDAHL, *Clerk.*"

That the remaining twenty-nine (29) coupons attached to the said bond No. 1 were of like form in every respect, save and except the date of maturity thereof, the said bonds maturing respectively, coupon No. 2 in six months from the maturity of coupon No. 1, coupon No. 3 six months from that, and so on for the entire series of coupons. That all of the other bonds had coupons of like tenor and effect. That the said bonds and coupons were duly sold in the market in good faith and for value.

III.

That all the coupons hereinafter set out by copy as exhibits to this complaint and numbered from one (1) to three hundred (300), inclusive, and made a part hereof, are now held and owned by the complainant herein, and are each and all of them due and unpaid, and that the defendant refuses to pay the same or any part thereof. That they are each respectively due and payable at the times and in the amounts as shown by the said exhibits hereto attached, and that each of said coupons bears interest from the date of its maturity at the rate of seven per cent per annum. That the complainant, being now the owner and holder of the coupons, copies of which are hereto attached as hereinbefore stated, numbered exhibits one (1) to three hundred (300), inclusive, is entitled to judgment thereon upon each of the said coupons for the amount thereof, with interest at the rate of seven per cent per annum from the date of its maturity, respectively.

Wherefore, the plaintiff prays judgment against the defendant, in the sum of four thousand and five hundred dollars ($4,500.00), with interest upon one thousand eight

hundred dollars ($1,800.00) of the said sum from the 4th day of April, A. D. 1891, at seven per cent per annum, and upon nine hundred dollars ($900.00) of the said sum from the 4th day of October, A. D. 1891, at seven per cent per annum, and upon nine hundred dollars ($900.00) of the said sum from the 4th day of April, 1892, at seven per cent per annum, and upon the remaining nine hundred dollars ($900.00) of the said sum from the 4th day of October, 1892, at the rate of seven per cent per annum, and for costs of suit, and for all other proper and appropriate relief.

KAUFFMAN & GUERNSEY,
E. D. SAMPSON & JOE KIRBY,
Attorneys for Complainant.

§ 542. Amendments to complaint.

Comes now the plaintiff in the above cause and by leave of the court first had and obtained, amends its complaint now on file therein, and by way of such amendment respectfully shows to the court as follows, to-wit:

I.

That this complainant amends its complaint in this cause by substituting in lieu of the name given to the defendant wherever it appears in the said complaint, the words, "The Board of Education of the City of Huron of the State of South Dakota."

II.

By way of further amendment to the said complaint, this complainant respectfully shows to the court that at the time the bonds of the defendant, from which the coupons sued upon in this action were served, were issued and sold, the said defendant through its officers, in order to facilitate the sale of said bonds caused to be prepared, and did prepare, certificates and certified copies of the records of the defendant corporation, duly

certified by the proper officers of the defendant corporation, showing the proceedings had by the defendant with reference to the issuance of the said bonds, the purpose for which it was proposed to use the money to be derived from the sale of the said bonds, the amount of the indebtedness and the equalized assessed valuation of the defendant corporation, and, generally, all matters preliminary to the issuance of the said bonds affecting their validity.

That the said bonds were sold upon the open market to the New England Loan & Trust Company, which company was induced to purchase the same by reason of the recitals in the said bonds, and by reason of the matters and things set out in the said certificates and certified copies showing said bonds to constitute valid obligations of the defendant corporation, and that the said bonds were so purchased in the open market by the said New England Loan & Trust Company in reliance upon the statements contained in the recitals in the said bonds and in the said certificates and certified copies furnished by defendant.

That the said New England Loan & Trust Company so purchased the said bonds in the ordinary course of business in good faith for a valuable consideration before the maturity of the first of the series of coupons attached thereto, believing the said bonds to be the valid obligations of the said defendant corporation, and without any knowledge of any matter or thing in any way tending to impeach the validity of the said bonds.

That the bonds were thereafter sold in the ordinary course of business before maturity, and for value, by the said New England Loan & Trust Company to various parties who bought the same in good faith in reliance upon the recitals contained in the said bonds, and upon said certified copies and certificates and without knowledge of any matter or thing tending to impeach their validity.

That the coupons sued upon in this action are coupons severed from the said bonds heretofore referred to.

That by reason of the premises the defendant is now estopped from asserting as against this complainant that said bonds and the coupons severed therefrom, upon which this suit is founded, are not the valid, subsisting obligations of the defendant.

Wherefore plaintiff prays for judgment as it has heretofore prayed in its original complaint now on file herein.

GUERNSEY & BAILY,
E. D. SAMSON and
JOE KIRBY,
Attorneys for Complainant.

§ 543. Amended answer.

The defendant for amended answer to the complaint in the above entitled action, as amended.

I.

1. Admits that the defendant is a body corporate under the laws of the State of South Dakota and a citizen and resident of the State, but denies that the defendant ever executed or delivered or in any manner issued the pretended bonds or coupons mentioned in the complaint, or any of them, or that it had any existence until long after the issuance of said pretended bonds.

2. Denies that there is or ever has been any municipal corporation, or body corporate, in the City of Huron in the State of South Dakota by the name of "The Board of Education of the City of Huron, South Dakota," or by the name of "The Board of Education of the City of Huron, County of Beadle, State of South Dakota," or by the name of "The Board of Education of the City of Huron in the County of Beadle, State of South Dakota."

3. Admits that certain pretended bonds in the form of those mentioned in the complaint, aggregating $60,000.00 and with pretended coupons attached, in the form, and

to the number and in the respective amounts of those described in the complaint, were pretended to be issued as the bonds of the Board of Education of the City of Huron, State of South Dakota, by the persons whose names are signed hereto, pretending to be the officers of said pretended Board of Education, but denies that any of the persons whose names purport to have been signed to said bonds as president, secretary, or treasurer of said Board of Education, were officers of the defendant at the time of issuing said pretended bonds, or at any other time.

4. Denies that at the date of the pretended bonds, described in the complaint, there was any such corporation as the Board of Education of the City of Huron of the State of South Dakota, but admits that a certain pretended body claiming to be such board and of which the said F. F. Smith, John Westdahl and J. C. Klemme claimed to be respectively the president, clerk and treasurer, executed certain pretended bonds of the description of those mentioned in the complaint.

5. Denies any knowledge or information sufficient to form a belief whether the plaintiff is the owner or the holder of any of the coupons numbered 2, 3 and 4 attached or belonging to bonds numbered 1 to 40, inclusive, described in the complaint; and upon information and belief avers that all the coupons numbered 1 are and were at the commencement of this action the property of and held by the New England Loan & Trust Company of Des Moines, Iowa, and those numbered 2, 3 and 4, attached or belonging to bonds numbered 41 to 60, inclusive, the property of and held by the Dartmouth's Savings Bank, and that as to said coupons held by said Trust Company and said Savings Bank, the plaintiff is not the real party in interest in this action.

6. Denies each and every allegation of said complaint.

II.

And for a further and separate defense defendant alleges that at the time when said pretended bonds and coupons bear date and purport to have been issued, the City of Huron was organized for school purposes, by the name of "The Board of Education of the City of Huron" under the provisions of an act of the Legislative Assembly of the Territory of Dakota, approved March 4th, 1881, entitled "An act providing a Board of Education for the City of Bismark and for other purposes," and had not organized either for civil or educational purposes under the provisions of the compiled laws of the State of South Dakota, under which said pretended bonds purport to have been issued; that the defendant was not incorporated at that time, and that "The Board of Education of the City of Huron," organized as aforesaid, under said acts, of March 4th, 1881, never issued or delivered said bonds or coupons, or any of them, nor incurred the pretended indebtedness which they purport to represent.

III.

And for a further and separate defense, the defendant avers, that at the general election held in the fall of the year 1889, in that part of the Territory of Dakota, which now comprises the State of South Dakota, the City of Huron was a candidate for selection, by the electors voting at such election, as the temporary capital, or seat of government, of the new State of South Dakota, and in the fall of the year 1890 was, at the general election of that year, in like manner, a candidate for election, by said electors, as the permanent capital of said State.

That prior to the issue of the pretended bonds described in the complaint, or any of them, the City of Huron had expended large sums of money in carrying on the campaign for the selection of that city as the capital, and had incurred indebtedness, which then existed and still exists, exceeding 5% upon the assessed value, for

either of the years aforesaid, of all the property within its corporate limits, and, for the purpose of securing further funds for the prosecution of said campaign of the year 1890, and to procure votes of the electors aforesaid in favor of Huron as the permanent seat of government of the State, the City Council and certain citizens of the City of Huron entered into a combination and conspired together to pledge the credit of the city, as a school corporation, and to that end to issue school bonds which should be a charge upon the property of all the tax-payers within the city limits, and to carry out such conspiracy, on the 30th day of August, 1890, procured a pretended election to be called and held on the 11th day of September, 1890, to determine the question whether the City of Huron should adopt, for educational purposes, the provisions of chapter 47 of the Session Laws of 1887 of the Territory of Dakota, as contained in article 3, of chapter 17 of the Compiled Laws of 1887, which contains sections 1801 to 1839, inclusive, and to the end thereby to create a Board of Education, from their own number, who would carry out their designs, but claiming and pretending that such action was necessary in order to purchase a new or additional schoolhouse site and erect a suitable school building thereon for the accommodation of the school children of the city, which said pretended election was called by the mayor of said city, pursuant to a resolution of said City Council.

That on the evening of the same day, on which said pretended election was held, in pursuance of said conspiracy, and in furtherance of its designs, said City Council assembled and canvassed the vote cast, and declared the result of such election to be in favor of the adoption of the provisions of the general law, as contained in said Compiled Laws, and by further resolution, declared the same adopted; and, by preconcerted arrangement, at the same meeting, said City Council instructed the mayor, by further resolution, to immediately call another

election, to be held on the 22nd day of September, 1890, for the choice of eight members of the said pretended Board of Education and a treasurer thereof; and on the evening of the same day on which said election was held said City Council again assembled and forthwith declared the result of said election, which was as designed and intended by said conspirators; and the same evening the persons so chosen, including the treasurer, immediately assembled and qualified, and organized themselves into a pretended Board of Education by the selection of F. F. Smith as president and John Westdahl as clerk, and at once, as their first pretended official act, adopted the following resolutions:

"Whereas, the school facilities of the school corporation of the City of Huron have become inadequate to accommodate the pupils of school age of said corporation, and it has become necessary for the Board of Education of said corporation for the purpose of furnishing such required accommodations, to purchase an additional school site and erect a suitable school building thereon, and in order to raise sufficient funds therefor, to borrow money; and whereas, it will require the sum of $60,000 to purchase such necessary school site and to erect and furnish such school building thereon as is needed; therefore, be it resolved by the Board of Education of the City of Huron in regular session assembled, that the question of issuing bonds of said corporation to the amount of $60,000 in denominations of $500, payable in fifteen years from their date, bearing interest at the rate of 6% per annum, and payable semi-annually, at the place to be specified in said bonds, be submitted to the qualified electors of said corporation; and be it further resolved that the mayor of the City of Huron be, and he is hereby requested by the Board of Education of the City of Huron to forthwith call an election for the purpose of taking the sense of the qualified electors of such corporation upon the question of issuing said $60,000 of bonds by said corpora-

tion for the purpose of purchasing an additional school site and the erection of a suitable school building thereon, to accommodate the schools of said corporation."

Which resolution was spread upon their record and, on the same evening, presented to said City Council, who still remained in session to receive it, and was incorporated into the record of the proceedings of that body. That without further delay, at the same meeting last aforesaid, and as further step in carrying out the plans of said combination, said City Council, by further resolution, directed the mayor to call another election, to be held on the 3rd day of October, 1890, to determine the question of issuing said bonds, for the alleged purpose specified in said first-mentioned resolution, namely, for the purpose of purchasing an additional schoolhouse site and erecting a school building thereon.

That on the evening of said 3rd day of October, at the close of the election that day held, as aforesaid, said pretended Board of Education again convened, canvassed the votes so cast, declared the result in favor of the issue of bonds, resolved to issue the same to the amount of $60,000, and bearing date the following day, and received pretended bids for the purchase thereof (without having advertised therefor), one of which pretended bids, so received, for the entire series at par, was then and there, at the same meeting, in form, accepted; all of which matter and things appear of record in the journal of the proceedings of said pretended Board of Education, kept by the clerk thereof.

And the defendant upon its information and belief, avers that said pretended bonds so issued as aforesaid, are the same bonds referred to in the complaint in this action, and to which the coupons sued upon were appended and alleges, that F. F. Smith, who signed, and John Westdahl, who attested the same, as president and secretary, respectively, of said pretended Board of Education, were among the persons chosen as aforesaid for

members of said pretended Board of Education, at said pretended election on the 22nd day of September, 1890, and John C. Klemme, who countersigned said bond, the same person who was, at the same election, chosen treasurer of said board.

That said pretended bids submitted as aforesaid, were sham, and not real or bona fide offers for the purchase of said bonds, and were submitted by said pretended bidders at the suggestion of members of said pretended Board of Education, as part of the scheme aforesaid, and that there was not in fact, any sale of said bonds made or intended to be made in pursuance of any of said bids.

That no schoolhouse site was ever purchased, and no school building built, and that the public schools of the City of Huron never received on account of said bonds more than $500; that no part thereof ever came to the hands of this defendant or its treasurer, nor to the hands of the Board of Education of the City of Huron, as organized under the act of the Territorial Legislature of March 4th, 1881, and that only the sum of $5,000 ever came to the hands of John C. Klemme; and that all the balance of the money realized from said bonds was paid to the conspirators aforesaid, and expended in carrying on said capital campaign.

That the pretended bid accepted as aforesaid, was made by one D. L. Stick, a resident at that time of the City of Huron, and immediately upon its acceptance and before the execution or delivery of the bonds or any of them, it was moved and carried by a unanimous vote of said pretended Board of Education.

"That said bonds be delivered to the purchaser thereof, Mr. D. L. Stick, and that the president and the clerk of the board are hereby directed to make the delivery thereof, and that said Stick is hereby authorized and directed to pay to the City of Huron the sum of $55,000 out of the sum paid for said bonds."

And by like unanimous vote the following resolution was forthwith adopted:

"Resolved that pending the negotiations of the purchase of a school site and the preparation of the erection of a school building thereon as contemplated by a prior resolution of this board, the sum of $55,000, derived from the sale of bonds, be temporarily loaned to the City of Huron upon the security of a city warrant delivered to the treasurer of the Board of Education for said sum."

Which motion and resolution were spread upon the journal aforesaid of the proceedings of said pretended Board of Education.

That said warrant was utterly worthless at the time it was issued, and there was not then, and never have been, any money in the treasury of the City of Huron to pay it, or to apply upon it, and its entire amount then was and always has been in excess of 5% upon the assessed value of all the property in the city limits, and the City Council were without power or authority to issue the same or any warrant for that purpose.

That subsequently, on or about the 10th day of November, 1890, $4,500 of said remaining $5,000 was in like manner paid out upon the demand of said conspirators in exchange for a like amount of worthless city warrants.

That the City Council had no jurisdiction to pass or adopt any of the aforesaid resolutions, or to order, and the mayor of the City of Huron had no power to call any of the aforesaid pretended elections; and that none of the resolutions aforesaid of said City Council were ever published in any newspaper published in the City of Huron.

That, if said pretended Board of Education had any power to issue bonds at all, it could only issue them in the name of the Board of Education of the City of Huron of the State of South Dakota, the corporate name prescribed by section 1811 of said compiled laws, and not

in any other name, and said pretended bonds set forth in the complaint and the coupons attached thereto are illegal and void.

IV.

And for a further and separate defense the defendant alleges that no provision whatever was made, either at or before the issuance or delivery of the pretended bonds described in the complaint, or at or before the incurring of the indebtedness which they purport to represent, for the collection of any annual or other tax whatsoever, to pay either the principal or the interest of said bonds, or any part thereof.

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and
H. C. HINCKLEY, Huron, S. D.,
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