§ 528. **Same subject.** — In the case referred to in the last section — Marcy *v.* Township of Oswego, — the bonds were duly executed, and contained a *recital* of the act, and that they were issued "*in virtue of and in accordance*" with it, and "*in pursuance of and in accordance with the vote* of three-fifths of the legal voters of the township, at an election held on" a specified day. The plaintiff was a *bona fide* holder for value, without notice. The defence was that the bonds were voted and issued at one time, as one act, and in payment of one subscription, *in excess* of the amount authorized by the statute. The circuit justice of the United States for the circuit distinguished the case from Knox County *v.* Aspinwall, before referred to, on the ground that the statute imposing the limitation, the order for the election, the proposition submitted, the order for the issue of the bonds, and the latest assessment roll were not, properly, matters *in pais*, but were all public, all open, all accessible, and all of record, and if consulted by the purchaser would have shown the bonds to have been voted and issued in violation of the express limitation upon the power contained in the statute. But the judgment of the circuit court was reversed, three judges dissenting, and the defence held unavailing. The case was considered to fall within the principle of the previous decisions. Mr. Justice Strong, speaking for the court, after stating the facts as we have given them, observed: "In view of these facts, and of the decisions heretofore made by this court, the question cannot be considered an open one. We have recently reviewed the subject in the case of The Town of Coloma *v.* Eaves [*supra*], and reasserted what had been decided before; namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary condition precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted." [1]

the township from making this defence against a *bona fide* holder.

The case of Marcy *v.* Township of Oswego was cited and approved in Humboldt Township *v.* Long, 92 U. S. 642, the court observing: —

"There is no essential difference between this case and that. 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 issued the bonds, it cannot be 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." Compare Daviess County *v.* Dickinson, noted *infra*, and see Sherman County *v.* Simons, 109 U. S. 735; Potter *v.* Chaffee Co. Comm'rs, 33 Fed. R. 614. *Recitals* in bond held, in favor of a *bona fide* holder, to estop the debtor municipality to set up that the bond was issued in excess of the amount authorized by statute. New Providence *v.* Halsey, 117 U. S. 336 (1885), a New Jersey case, in which the court follows the decision on this point in Cotton *v.* New Providence, 47 N. J. L. 401, and Mutual Benefit Life Ins. Co. *v.* Elizabeth, 42 N. J. L. 235. Bergen Co. Freeholders *v.* Mer. Ex. Nat. Bank of N. Y. 12 Fed. Rep. 743. See also *supra*, sec. 525, and note; *post*, sec. 529 *a*. Negotiable bonds containing no recitals, actually issued in excess of the number of bonds authorized by the act, and as security for the personal debt of a fiscal officer of the corporation to the original holder, are not binding upon the corporation. Merchants' Bank *v.* Bergen County, 115 U. S. 384 (1885). Bonds were voted to the amount of $250,000; but the presiding judge and clerk of the county court issued without power to do so bonds in excess of that amount. The bonds contained no recital on their face as to the Act under which they were issued, but each bond had a certificate thereon, signed by the county judge only, that it was issued as authorized by the statute (naming it) and by an order of the county court in pursuance thereof. It was held that the bonds *in excess of the* $250,000 were void in the hands of even *bona fide* holders for value, for want of power to issue them, and that the county was not estopped; that the bonds to the amount of $250,000 which were valid were the bonds which were *first* delivered. Daviess County *v.* Dickinson, 117 U. S. 657 (1885). Where bonds were issued by a municipal corporation to fund a debt part of which only was in excess of the constitutional limitation, it was held to be an entire and indivisible transaction, and that *the whole issue of bonds was void*. On this point the court says: "It is impossible to distinguish the valid from the invalid portion of the debt secured by the bonds; the transaction involved in the issue of the bonds was entire and indivisible, and therefore the whole is invalid." Millerstown Bor. *v.* Frederick, 114 Pa. St. 435, 441. Compare Daviess County *v.* Dickinson, *supra*. *Infra*, secs. 528, 529, 529 *a*.

[1] In the dissenting opinion of Mr. Justice *Miller* (with whom concurred *Davis* and *Field*, JJ.), the view of the court is strongly combated. A few extracts will show the opinion of the dissentients, and bring into clearer relief the views of the court: —

"In the cases under consideration," says *Miller*, J., "this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness, but I do know that in some of the cases tried before me last summer in *Kansas* it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue. This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear that, so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to

§ 529. **Same subject.** — The cases referred to in the last two sections afford, perhaps, a more striking illustration than any pre-

issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the States on that subject. The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. . . . No such principle has ever been applied by this court, or by any other court, to a State, to the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied. In the Floyd Acceptance Cases, 7 Wall. 666, in which the Secretary of War had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent. The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is that, whenever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends, in the paper they issue, this false recital has the effect of creating a power which had no existence without it. This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the Floyd Acceptance Cases, this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed, it could not be aided by giving the paper that form. In county bonds it seems to be otherwise. In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid. There is no reason in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in this case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

"So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued, is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds the purchaser must look to those matters on which their validity depended. They are all public,

viously decided by that court, that the *purchaser may implicitly rely upon the recitals in the bonds* made by the proper officers, that the authority to issue them has arisen, and that he is under no obligation to consult the records of the municipality, and is not charged with constructive notice of their contents; and this, too, it will be observed, where the recital in the bonds was general and not specific in its nature, and where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township.[1]

§ 529 *a*. **No estoppel by Recital to set up Defence of an Overissue contrary to a Constitutional Limitation.** — Peremptory constitutional provisions that municipalities shall not issue bonds exceeding a specified percentage on the value of the taxable property within the municipality, to be ascertained by the official assessments or valuations for the purposes of taxation, are regarded by the Supreme Court of the United States, as well as by the State tribunals, as fixing a limit beyond which *the power to issue bonds* cannot be legislatively conferred; and the Supreme Court holds, that if bonds

all open, all accessible [see on the point, sec. 529 *a*, *post*, and note, and sec. 549, and note], — the statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds, all this is to be disregarded; and a debt contracted without authority and in violation of express statute is to be collected out of the property of the helpless man who owns any in that district. I say 'helpless' advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary, perhaps, to his wishes. Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties, and villages, in creating debts which not they, but the property-owners, must pay. . . . It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due. But it is another thing to say that when an officer created by the law exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue and no power to prevent it. This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property-holder, who might not know anything of the matter, or if he did, had no power to prevent the wrong." See, also Lewis *v.* Barbour Co. Comm'rs, 3 Fed. Rep. 191, notes; *infra*, sec. 531, note. Compare with later case of Daviess County *v.* Dickinson, 117 U. S. 657 (1885), *supra*, sec. 527, note.

[1] The author allows this section to stand as in the last edition. The Supreme Court has not yet overruled the propositions therein stated, but it has reached a different result where the overissue is in violation of a *constitutional* provision, as will appear by the next section (529 *a*), and the cases there cited.

be issued in excess of such limit, they are void in the hands of *bona fide* holders, notwithstanding a recital therein that they are issued *under and in pursuance of the Constitution of the State*, inasmuch as such recital will not estop the municipality from showing that the bonds were issued in violation of the constitutional limitation; and if this be shown the plaintiff cannot recover, though he be a holder for value and without actual notice of any overissue; — at least, this was so held in a case where the bond itself showed on its face the total aggregate issue of bonds, and where the issue was in such an amount as that if compared with the assessment roll (itself a public record, which everybody is bound to notice), the fact of overissue would appear upon inspection or by arithmetical calculation. The cases on this subject in the note arising under constitutional limitations, were distinguished on the grounds specially stated from previous cases where the innocent holder of the bond was allowed to recover, notwithstanding the bond had been issued in excess of a *statutory limitation* of a similar character.[1] Constitutional provisions of this kind are of recent origin, and were ordained the more effectually to prevent the creation of extravagant municipal indebtedness. The Supreme Court doubtless felt, and we think justly felt, the force of the consideration that if the doctrines of that court in respect of the estoppels created by recitals in a bond were extended to the question of the amount or extent of municipal indebtedness, at least in cases where such amount could be ascertained by reference to a public record, if not indeed in all cases, would be to defeat or render practically worthless the very purpose of the constitutional provision, — a purpose deemed so important that it is embodied in the organic law.

We have sought above to state with care what has been actually determined by the Supreme Court of the United States in the several cases referred to in the note, without attempting to anticipate future applications of that principle, or limitations upon it, in cases where the facts are different from those of the cases which have been thus far adjudged.[2]

[1] *Supra*, secs. 527–529.

[2] Buchanan *v.* Litchfield, 102 U. S. 278 (1880); Dixon County *v.* Field, 111 U. S. 83 (1883). Buchanan *v.* Litchfield, *supra*, involved the construction of a provision of the *Constitution of Illinois* of 1870 (art. 9, sec. 12), which ordains that "no county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness." A statute of *Illinois* authorized cities to construct water-works, and for that purpose to borrow money and issue bonds. Bonds were issued pursuant to the statute, each reciting that "it is issued under authority of an Act of the General Assembly of the State of Illinois [describing it], and in pursuance of an ordinance of said city of Litchfield, entitled 'An Ordinance to provide for the issuing of bonds and the construction of the Litchfield water-works.'" The constitutional provision above mentioned is not referred to in the statute authorizing the issue of the bonds, or in the ordinance, or in the bonds. At the time of the issue of the bonds the indebtedness of the city already exceeded the constitutional limit. Suit was brought for overdue coupons on these bonds by a *bona fide* holder for value, without any notice that the bonds were issued in excess of the constitutional restriction. The Supreme Court of the United States decided that the city was not liable, and that the plaintiff could not invoke the doctrine of estoppel; and reference was made to the absence of an express statement in the bonds themselves that the aggregate indebtedness, of which they were a part, was not in excess of the constitutional limit. In answer to the objection that the city was *estopped to make the defence*, the court says (*Ib.*, p. 292): "Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds further than would be consistent with reason and sound policy, and further than we are now willing to go. The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the Constitution, was by itself conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold."

The court also said (p. 289): "The purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of the taxable property within the city for the year in which the bonds were issued." It is by no means clear from the opinion that a positive recital that the amount of the bond issue was within the constitutional limit would, if it was false, avail the holder. The language of the court as to the effect of such a recital, though strong, is hypothetical and *obiter;* and the effect of recitals under the constitutional provision is more fully considered in Dixon County *v.* Field, *infra*. Although the court distinguishes Buchanan *v.* Litchfield from previous cases where the overissue of bonds was contrary to a *statute* limitation, yet after all it seems to indicate, to some extent, a recession from the high water-line of the cases from which it is thus distinguished.

In the subsequent case from *Ohio* of the Northern Bank of Toledo *v.* Porter Township, 110 U. S. 608 (1883), not involving, however, any constitutional limitation, the court, considering especially the scope and effect of a recital as an estoppel, decided that where the bond recites that it is issued in part payment of a subscription to the capital stock of a railroad, in pursuance of the several acts of the General Assembly and a vote of the qualified electors taken in pursuance thereof, while the corporation is thereby 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, it is not estopped to show that it was without legislative authority to order the election and to issue the bonds. "The question of legislative authority," said the court, "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 the recitals to prove irregularity 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 the

§ 530. **Estoppel by recital of Matter of Fact, e. g. Date of Subscription.** — The effect of recitals in the bonds, and of statements in