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

the records of the county which issued the bonds, is considered in The Town of Concord *v.* Portsmouth Savings Bank.[1] A controlling

recitals which import such performance." (110 U. S. 619).

The principle of the decision in the case of Buchanan *v.* Litchfield, *supra*, was adopted and followed in the subsequent case of Dixon County *v.* Field, 111 U. S. 83 (1883), arising under the *Constitution of the State of Nebraska*, which ordains (art. xii., sec. 2) that "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 subdivision, 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 other evidences of indebtedness so issued shall be valid, unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of State, showing that the same is issued pursuant to law." Suit was brought on negotiable bonds issued by Dixon County by a *bona fide* holder for value. The defence was that the bonds were issued in violation of the above-quoted provision of the Constitution. The plaintiff contended that the municipality was estopped from setting up this defence, by reason of the recitals in the bonds, and by the certificates of the secretary and auditor of State endorsed thereon. There were eighty-seven bonds issued at one time of $1,000 each. Each bond contained a recital that it "*was issued under and in pursuance* of an order of the county commissioners of the county of Dixon, and authorized at an election held in said county on the 27th of December, 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska and amendments thereto (being the act that authorized counties to issue bonds), *and the Constitution of the State* (art. 12), adopted October, A. D. 1875." On each bond was also endorsed the certificate of the county clerk, that the question of issuing said bonds was duly submitted to the people of the county, November 24, 1875, as follows: "Shall Dixon county issue to the C. C. & B. H. R. R. Company $87,000 ten per cent twenty-year bonds? Which was decided in the affirmative by 462 votes against 120." There was also endorsed on the bond the certificate of the secretary and auditor of the State of Nebraska that it was issued pursuant to law. In point of fact, the assessed valuation of the county of Dixon for the year 1875 was $587,331, and no more; that is to say, the amount of bonds issued was *more than ten per cent* of the assessed valuation of the county. On the principle that there must be authority of law by statute for every issue of bonds of a municipal corporation; that the corporation is bound by the recitals in such bonds only in respect of facts which the corporate officers had by law authority to determine and certify, but not in respect of facts which they had no authority to determine, — such as, whether the amount of the bonds in that case exceeded the constitutional limitation, — the Supreme Court decided that the county was not liable, saying: "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 of the county. 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. Nothing in the

[1] Concord *v.* Portsmouth Savings Bank, 92 U. S. 625 (1875).

question in the case was whether the power to subscribe for stock and issue bonds therefor, given by the act March 26, 1869, was

way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." Dixon County *v.* Field, 111 U. S. 83 (1883). In the case next cited, Potter *v.* Chaffee County, the Circuit Court distinguished it from Dixon County *v.* Field.

The *Constitution of Colorado* contains a provision that no county shall contract any debt by loan, in any form, except for public buildings, public roads, and bridges, "and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit:" (here specifying the rates). The legislature of *Colorado* passed an act authorizing counties *to fund their floating indebtedness*. (Laws Colorado, 1881, p. 85.) In pursuance of that act, the county of Chaffee issued bonds, which contained a full recital showing compliance with all the provisions of the funding act. In the case of Potter *v.* Chaffee County, U. S. Circuit Court, Colorado, 1888 (33 Fed. Rep. 614), suit was brought against the county of Chaffee on such funding bonds. The county defended on the ground that the bonds were issued in exchange for county warrants, which warrants were void because issued in the first instance in violation of the constitutional limitation, above quoted, as to county indebtedness. The plaintiff was a *bona fide* holder of the funding bonds in suit. The Circuit Court, reviewing the cases of Buchanan *v.* Litchfield, Dixon County *v.* Field, Bank of Toledo *v.* Porter Township, held that they did not control the case before it, and gave judgment for the plaintiff. After referring to Dixon County *v.* Field, the Circuit Court, *Brewer*, J., said: "But in the case now before this court, there is nothing upon the face of the bond which shows *how many bonds were to be issued or how large the series was*. The statute, in terms, gave to the county commissioners the power to determine the amount to be issued; and no man could, by an examination of the bond, get any information as to the amount of the issue, or, by comparing any information given by the bond with the record notice of the assessed valuation, know that the county had exceeded its power in the issue of the bonds. So that, taking the case of Dixon County *v.* Field as the latest annunciation of the Supreme Court in respect to the rule of decision, it must be held that the county is estopped from pleading in this case that the bond was issued in exchange for a void warrant."

Since the foregoing was written and as this volume passes through the press, the Supreme Court of the United States has decided the cases of Lake County *v.* Rollins (130 U. S. 662) and Lake County *v.* Graham (*Ib.* 674, 1888). In the case first cited the Supreme Court, reversing the same case below (34 Fed. Rep. 845), held that the constitutional provision in *Colorado* was an absolute limitation upon the power of the county to contract any and all indebtedness, including county warrants issued for ordinary county expenses. In the second case the same principle was applied to funding bonds of a county negotiable in form and in the hands of *bona fide* holders, issued under the authority of a funding act in excess of the constitutional limitation, although the bond recited that all of the provisions and requirements of the statute had been fully complied with by the proper officers in the issue of the bonds, and that such issue had been authorized by a vote of the majority of the duly qualified electors of the county. The bonds in suit showed that they were part of an issue amounting to $500,000, and contained no reference to the Constitution, and no statement that the constitutional requirements had been observed. In this respect, if it be material, the bonds were different from those in suit in the case of Potter *v.* Chaffee County, *supra*, and this circumstance seems to be the only one to distinguish that case from Lake County *v.* Graham. In the latter case the court considered the principles of Dixon County *v.* Field applicable to the case, and

annulled by the new Constitution of the State (which took effect July 2, 1870) before the subscription was made, or a valid contract

distinguished it from cases where there had been an overissue of bonds contrary to the provisions of a statute, as in Sherman County *v.* Simons, 109 U. S. 735, and Oregon *v.* Jennings, 119 U. S. 74. *Lamar*, J., speaking for the court, said: "The question here is distinguishable from that in the cases relied on by counsel for defendant in error [the overissue cases contrary to a statute]. 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 the assessed value and the debt proposed. These being the exactions of the Constitution itself, it is not within the power of the 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."

The author may be permitted to observe that when the provisions of the statutes under which the overissue cases were decided are considered, they being silent as to the creation of any ministerial commission or special tribunal to decide upon the amount of indebtedness, it seems to be not easy to find logical and solid grounds for the distinction. But the distinction is made. It is doubtless a sound exposition of the Constitution; and as to the constitutional provision, it is firmly established by the judgments of the State tribunals, as well as by those of the Supreme Court of the United States. What effect it will hereafter have upon the soundness of the decisions sustaining bonds issued under similar circumstances, but in excess of a like statutory limitation, remains to be seen.

A holder of bonds issued in violation of such a constitutional provision is practically remediless. The *public policy* which underlies the constitutional limitation of *Illinois*, above mentioned, was upheld by the Supreme Court, in a case where the equities of the creditor strongly appealed for recognition and protection. We refer to the case of Litchfield *v.* Ballou, 114 U. S. 190. This was a sequel of Buchanan *v.* Litchfield, 102 U. S. 278. After the decision in the last-mentioned case, holding the bonds to be void, suit was commenced against the city of Litchfield by Ballou, a large holder of the bonds, in which he alleged that the money received by the city for the sale to him of these bonds was used in the construction of a system of water-works for the city, of which the city is now the owner. That though the bonds were void, as held in the case of Buchanan *v.* Litchfield, yet that *in equity the city is liable to him for the money it received from him;* and since by the use of that money the water-works were constructed, he asked for a decree against the city for the amount, and if not paid, that the water-works of the city be sold to satisfy the decree. It appeared from the answer and proofs on the part of the city, that the lands on which the water-works were constructed were bought and paid for before the bonds were issued or voted, and much of the expense, also, of the construction of the water-works was paid by taxation, and by resources of the city other than the water-works bonds. A decree was passed as prayed, in the court below, which decree was reversed by the Supreme Court of the United States, with directions to dismiss the bill. The Supreme Court held that the *prohibitions of the Constitution extended as well to implied contracts to repay the money as to the express contracts found in the bonds.* Mr. Justice *Miller's* language on this point is very decisive. "The language of the Constitution," he says, "is that no city, &c., '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 of 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. The prohibition is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." The decree below was attempted

to subscribe was completed. The court held that, in point of fact a legal and binding subscription was made, or agreed to be made, in December, 1869, and hence the defence of want of legal power failed; and it then proceeded to view the case as affected by *estoppel*, the plaintiff being a *bona fide* holder for value without notice of any defence. The opinion was expressed that a recital in the bonds that the subscription was made in December, 1869, being the recital of a matter of fact, and a fact, too, peculiarly, if not exclusively, within the knowledge of the board of supervisors, estopped the county under the circumstances to set up that the subscription was not made until after July 2, 1870, when their authority to subscribe had expired.[1] As the same judgment could

to be sustained, on the theory that the city was in possession of the money received for the bonds, or, what is the same thing, its equivalent in property identified as having been procured with this money. The court held that this theory was not sustained by the proofs, or sustainable, inasmuch as the money received by the city from the bondholders had long since passed out of its possession, and could not be restored. Also held that it was not a case for the application of the principle that the plaintiff's money could be traced into property and a constructive trust fastened upon it, since other funds raised by taxation had also gone into the property, which had been purchased before the bonds were issued, or were public streets into which no property of the complainant had entered. This decision seems to leave the holders of the bonds remediless notwithstanding their strong equities, which equities there would appear to be no difficulty in ordinarily enforcing in equity as a lien, or on the principle of a constructive trust, if it were it not for the effect given to the constitutional prohibition.

Under Art. IX, sec. 8, *Pennsylvania Constitution* of 1874, a municipality may incur a debt or increase its existing debt to an amount exceeding two per cent upon the assessed valuation of the taxable property therein, if the whole indebtedness will not thereby exceed seven per centum of such valuation. This limit cannot be exceeded, unless the municipality procures the assent of the electors in the manner provided in the Constitution, and laws relating thereto. A bond, though in terms negotiable, issued by a municipal corporation to fund a debt incurred contrary to the provisions of the Constitution, is void even in the hands of a holder for value. Millerstown *v.* Frederick, 114 Pa. St. 435 (1886); distinguishing Kerr *v.* Corry, 105 Pa. St. 282 (1884), where the power to issue the bonds existed, but the bonds themselves were misapplied, and a *bona fide* holder held entitled to recover. Purchasers of bonds are bound to take notice of the official statement required by the statute to be filed with the clerk of the proper county relating to the amount of municipal indebtedness and taxable values. If no such statement is filed its absence should put the proposed purchaser on inquiry, and this although the duty of making and filing such statement is imposed upon the officers of the municipality as a personal duty, and this although it will not operate against the municipality as an adjudication or an estoppel. *Ib.* Construction of constitutional provision limiting municipal indebtedness, see Wheeler *v.* Philadelphia, 77 Pa. St. 338, 351 (1875). As to the construction of limitations on municipal indebtedness, see *ante*, secs. 130–137; Index, tit. *Limitation on Indebtedness;* East St. Louis *v.* People, 124 Ill. 655; Mr. Merryman's Article on Limitations on Municipal Indebtedness, 29 Central Law Journal, 346 (November, 1889).

[1] Concord *v.* Portsmouth Savings Bank, 92 U. S. 625 (1875); *infra*, sec. 539. The point is so material that we subjoin the opinion delivered by *Strong*, J., on this point. He says: "There is, however, another consideration that is worthy of

be reached on the ground that a valid contract to subscribe had been made *before* the Constitution took effect, it may be a question whether the last point was a point really adjudged by the court.

notice. The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that they are issued by the county of Moultrie, 'in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan, and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, *in December*, A. D. 1869, *in conformity to the provisions* of an act of the General Assembly of the State of *Illinois*, approved March 26, A. D. 1869.' Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the General Assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding notwithstanding the Constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made, namely, at the records of the board, he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds that the authority to make a subscription, with all its legitimate consequences, had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired." If the records of the county had contradicted the recitals in the bond, and had affirmatively shown that no subscription was made until *after* the Constitution took effect, would the purchaser of the bonds be bound to notice that fact? See *supra*, sec. 529 *a*, and note; *post*, secs. 539, 540, 549.

Purchaser not affected by statements in county records contrary to recitals in the bonds issued by the county. Nicolay *v.* St. Clair County, 3 Dillon C. C. R. 163 (1874). But compare sec. 529 *a*, and note. In Aller *v.* Cameron, *Ib.* 198, the defendant town was held estopped to set up against a holder of its bonds for value that it was *not legally incorporated*.

Effect of recital by authorized officers. See also Chambers County *v.* Clews, 21 Wall. 317, 321; Grand Chute *v.* Winegar, 15 Wall. 355; Lynde *v.* County of Winnebago, 16 Wall. 6; C. B. & Q. R. R. Co. *v.* Otoe County, 16 Wall. 667; Mercer County *v.* Hacket, 1 Wall. 83; Woods *v.* Lawrence County, 1 Black, 386; Gelpcke *v.* Dubuque, 1 Wall. 175; Meyer *v.* Muscatine, *Ib.* 384; Kennicott *v.* Supervisors, 16 Wall. 464. The Supreme Court of Illinois refused to follow the ruling in the last cited case. Scates *v.* King, 110 Ill. 456. A recital in a bond issued in payment of a subscription to railway stock, that it is authorized by a certain statute, will not estop the municipal corporation from asserting that the issue was not authorized by a proper vote as required by law. Carroll County *v.* Smith, 111 U. S. 556.

§ 531 (419). **Rationale of Estoppel.** — A correct view of this subject would seem to be this: Officers are the agents of the corporate body; and the ordinary rules and principles of the law of agency are applicable to their acts. Their unauthorized acts are not binding upon the corporate body of which they are the public agents Ordinarily, their unauthorized representation that they have power to do an act is not binding upon the corporation; that is, the question is as to their power, *in fact and in law*, not what they have represented it to be. The only exception to this rule, in addition to the one hereinbefore treated of, to wit, where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with, is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will or may be bound by the false representations of the agent respecting his authority, and its extent and scope; but where the authority to act is solely conferred by statute, which, in effect is the letter of attorney of the officer, all persons must, at their peril, see that the act of the agent on which he relies is within the power under which the agent acts; and this doctrine is recognized by the Supreme Court of the United States in some of its judgments.[1] Accordingly, bonds *issued in violation of an express statute or constitutional provision* are void, though in the hands of innocent holders for value.[2] On the principle that there can be no *de facto* officer unless there is a *de jure* office, bonds executed

[1] The Floyd Acceptances, 7 Wall. 666 (1868); Marsh *v.* Fulton County, 10 Wall. 676 (1870). See, also, Clark *v.* Des Moines, 19 Iowa, 199, 210 (1865); Treadwell *v.* Commissioners, 11 Ohio St. 183, (1860), reviewing and criticising Knox County *v.* Aspinwall, 21 How. 539. See, also, Gould *v.* Sterling (action on bonds), 23 N. Y. 464; s. c. 1 Am. Law Reg. (N. S.) 290, and note of Prof. *Dwight;* Starin *v.* Genoa, 23 N. Y. 452; People *v.* Mead, 36 N. Y. 224; Dodge *v.* County of Platte, 82 N. Y. 218. United States *v.* City Bank of Columbus, 21 How. 356 (1858), is a very striking illustration of the general principle that a corporate officer cannot bind the corporation by his unauthorized acts or representations concerning the authority of himself or others. De Voss *v.* Richmond, 18 Gratt. (Va.) 339 (1868); s. c. 7 Am. Law Reg. (N. S.) 589. Upon this principle it was held that the legislature may make the negotiability of municipal bonds dependent upon their delivery by a State officer, and that a purchaser of bonds purporting to have been issued under a statute containing such a condition, is not a *bona fide* purchaser without notice, in case the bonds are fraudulently issued without being delivered by the designated officer. *McCrary*, J., Lewis *v.* Barbour Co. Comm'rs, 3 Fed. Rep. 191.

[2] Aspinwall *v.* Daviess Co. Com., 22 How. 364; Marsh *v.* Fulton County, *supra;* Moore *v.* New York, 73 N. Y. 238, approving text. As to bonds issued in excess of *constitutional* and statutory limitations, see *supra*, secs. 527–530.

by persons purporting to be *de facto* officers of a county when there was no lawful statute in existence creating the office, are absolutely void for want of power to issue them.[1]

§ 532 (420). **Estoppel by Recitals in the Bond; Illustration.** — So in a subsequent case, similar in character, *the common council of a city* were, by virtue of various statutes, authorized to subscribe for stock in a railroad company, and to issue bonds in payment therefor *on the petition of three-fourths of the legal voters of the city.* Before the issue of the bonds, the council decided that three-fourths of the citizens had petitioned, and the bonds themselves thus recited. The Supreme Court of the United States held that the council was the tribunal to decide whether the requisite number had petitioned; that it was contemplated that this question, which was one of fact, should be ascertained and conclusively settled prior to the issue of the bonds; and that when the city was sued upon the bonds by innocent holders for value, parol testimony was inadmissible to show that the petitioners did not constitute three-fourths of the legal voters of the city.[2]

[1] *Ante*, sec. 276; Norton *v.* Shelby County, 118 U. S. 425 (1885). In this case it appeared that the administration of local matters in each county in Tennessee had for nearly a century been vested in a County Court, or as often called, Quarterly Court, composed of justices of the peace elected in its different districts. Power was given to the County Court to make a subscription and issue bonds to a railroad company. Before the power was executed the legislature passed an act abolishing the County Court, and vesting its powers, including the power to subscribe for stock and issue bonds, in a Board of County Commissioners. The County Commissioners issued the bonds. The act abolishing the Quarterly Court and creating the Board of County Commissioners was held, after the issue of the bonds, to be unconstitutional by the Supreme Court of the State of Tennessee, on the ground that the County Court was one of the institutions of the State recognized in the Constitution, and that the act creating the Board of County Commissioners and conferring on them the powers of the County or Quarterly Court was unconstitutional and void; and hence it was held by the Supreme Court of the United States that the bonds had no validity even in the hands of *bona fide* holders. The validity of the bonds was attempted to be sustained on the ground that the acts of the County Commissioners under a statute *subsequently* held to be unconstitutional, were to be regarded as the acts of officers *de facto*, and hence binding in favor of the *bona fide* holders of the bonds. But the Supreme Court decided otherwise; and, in a very learned and elaborate opinion, reviewing the authorities, by Mr. Justice *Field*, it is held: First, that it was the duty of the Federal Court on a question of this kind to follow the decision of the highest court of the State. Second, that there could, in law, be no such thing as an officer either *de jure* or *de facto* if there be *no office* to fill; and that the act attempting to create the office of commissioners never became a law and the office never came into existence. The view of the court on this point is tersely summed up in this sentence (*Ib.*, 442): "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."

[2] Bissell *v.* Jeffersonville, 24 How. (U. S.) 287 (1860), approving Knox County *v.* Aspinwall, 21 How. 539; s. p. Evansville, I. & C. S. L. R. R. Co. *v.* Evansville, 15 Ind. 395 (1860); Moran *v.* Miami County, 2 Black, 722, 724 (1862); Marshall County Sup. *v.* Schenck, 5 Wall. 772 (1866); Rogers *v.* Burlington, 3 Wall. 654; Cincinnati *v.* Morgan, *Ib.* 275; Mercer County *v.* Hacket, 1 Wall. 83; Meyer *v.* Muscatine, *Ib.* 385, 393, *per Swayne*, J.; Gelpcke *v.* Dubuque, 1 Wall. 175, 203; Pendleton Co. *v.* Amy, 13 Wall. 297 (1871); St. Joseph Township *v.* Rogers, 16 Wall. 644 (1872). In the case last cited it was insisted that the bonds were invalid for want of the required vote. One of the answers of the court to this objection was that "the act of the legislature made 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 was clearly too late to question their validity, where it appears, as in this case, that they are in the hands of an innocent holder." The decision in the case referred to in the text is clearly right, for the reason that the council were the body to decide the preliminary fact, and because, also, according to the rule before stated, the fact was one not of a nature to be ascertained by purchasers in the market to whom the bonds were designed to be sold.

Recitals in bonds. — Where a bond recites that it is issued "under authority of" an act, reciting its title, such recital estops the municipality from making, as against a *bona fide* holder for value, the defence that the road *was not completed in time.* Oregon *v.* Jennings, 119 U. S. 74 (1886). To the effect that such a recital estops a town, as against a *bona fide* holder for value, from showing the *conditions* imposed on its liability by the vote of the people *had not been complied with*, although the statute declared that the bonds should not be valid and binding until compliance with such conditions, see Am. L. Ins. Co. *v.* Bruce, 105 U. S. 328. In Pana *v.* Bowler, 107 U. S. 529, 539, recitals in bonds in favor of a *bona fide* holder were held effectual to estop the municipality, as against an *alleged defect in the mode of conducting an election* held prior to the adoption of the Constitution of Illinois of 1870, the bonds being issued after its adoption, although that instrument forbade the issuing of the bonds, unless their issue should have been authorized under then existing laws by a vote of the

§ 533 (421). **Estoppel by Recitals in Bond; Illustration.** — In another case,[1] the action was upon coupons payable to bearer

[1] Mercer County *v.* Hacket, 1 Wall. 83 (1863). This case, and the case of Woods *v.* Lawrence County, 1 Black, 386, are cited by Mr. Justice *Hunt* in the case of Grand Chute *v.* Winegar, 15 Wall. 372 (1872). The learned justice says: "The same principles were announced in Gelpcke *v.* The City of Dubuque, 1 Wall. 175, and in Meyer *v.* The City of Muscatine, *Ib.* 384. In the latter case the court said that if the legal authority [that is, the legislative enabling Act] was sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with. By the act of February 10, 1854, the legislature of *Wisconsin* authorized the supervisors of the town of Grand Chute to make a plank-road subscription to the amount of ten thousand dollars. The bonds in question were signed by the chairman of the board of supervisors of that town, and recited that the subscription had been made by the supervisors of the town, and that these bonds were issued in pursuance thereof, for the purpose of carrying out the provisions of that act. The plaintiff was the *bona fide* holder for value of the bonds in suit, and his title accrued before their maturity. The cases cited are an answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents."