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."

belonging to negotiable bonds issued by a county in payment of stock subscribed for in a railroad company. By an act of assembly,

people prior to the adoption of the Constitution.

Recitals in a bond that it is issued in payment of a subscription authorized by a statute referred to, held not to estop the municipality to show that the issue was not authorized by a vote of two-thirds of the voters of the corporation, as required by the *Constitution* of the State. Carroll County *v.* Smith, 111 U. S. 556. Recitals in bonds that they were issued "in pursuance to the vote of the electors of Anderson County, September 13, 1869," held, in favor of a *bona fide* holder thereof, to be equivalent to a statement that the vote was one lawful and regular in form; and that evidence to show that the thirty days' notice of the election required by the statute was not given was not available to the municipality as a defence. The case was considered to fall within Town of Coloma *v.* Eaves, 92 U. S. 484, 491; Anderson County Commissioners *v.* Beal, 113 U. S. 227 (1884). Where the *Constitution* required the question of local taxation to be submitted *to the electors*, a statute which empowered the *resident taxpayers* to authorize a town to issue bonds in aid of a railroad, was declared unconstitutional and void. Harrington *v.* Plainview, 27 Minn. 224, followed in Plainview *v.* Winona & St. Peter R. R. Co., 36 Minn. 505.

As to proceedings preliminary to issuing of bonds. *Ante*, secs. 163, 515, note; Knox Co. Comm'rs *v.* Nichols, 14 Ohio St. 260; Atchison *v.* Butcher, 3 Kan. 104 (1865); Mercer County *v.* Hacket, 1 Wall. 83; Rogers *v.* Burlington, 3 Wall. 654; Moran *v.* Miami Co., 2 Black, 722; Flagg *v.* Palmyra, 33 Mo. 440; Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 237; compare Marsh *v.* Fulton County, 10 Wall. 676 (1870); Treadwell *v.* Hancock Co. Comm'rs, 11 Ohio St. 183 (1860); *post*, sec. 550; Pendleton County *v.* Amy, 13 Wall. 297; City of Lexington *v.* Butler, 14 Wall. 284; St. Joseph Township *v.* Rogers, 16 Wall. 644 (1872); Grand Chute *v.* Winegar, 5 Wall. 372 (1872); New Haven, M. & W. R. R. Co. *v.* Chatham, 42 Conn. 465.

Where authority to issue town bonds could be exercised only upon the petition of a majority of taxpayers, "not including those taxed for dogs or highway tax only," a petition stating that the petitioners were "a majority of the taxpayers of the town" was held to be fatally defective. Town of Mentz *v.* Cook, 108 N. Y. 504 (1888). *Ante*, sec. 515, note.

A city was authorized to take stock in a railroad company "*on the petition of two-thirds of the citizens, who are freeholders,*" &c. Bonds of the city were duly issued, signed by the proper officers and attested by the seal of the city, and on their face recited that they were issued by virtue of an ordinance of the city making the subscription. The minutes of the city council simply stated that "the freeholders of the city, *with great unanimity*, had petitioned," &c. It was held that the city council were the proper judges whether or not the required number had petitioned, and that the city, as against *bona fide* holders for value, was "concluded" by the ordinance "as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds." Van Hostrup *v.* Madison City, 1 Wall. (U. S.) 291 (1863); S. P. Meyer *v.* Muscatine (where charter required "a majority of two-thirds of the votes given") *Ib.* 384, 393; Aurora *v.* West, 22 Ind. 88 (1864); *contra*, People *v.* Mead, 36 N. Y. 224. *Post*, sec. 550, note.

Where the act authorizing a municipality to issue bonds was not to take effect until "approved by two-thirds of the electors present at a city meeting held for that purpose, and a *copy of its doings lodged in the office of the secretary of State,*" *bona fide* purchasers of such bonds are not bound to look beyond the certificate thus lodged, and are not affected by the action of the city, refusing at prior meetings to approve the act. Society for Savings *v.* New London, 29 Conn. 174 (1860).

Fraud in the election authorizing the subscription must be set up before rights have accrued. Butler *v.* Dunham, 27 Ill. 474; People *v.* San F. Sup., 27 Cal. 655. Further as to the construction of *powers*

the county commissioners were authorized to subscribe the stock and *issue the bonds only upon the following* "restrictions, limitations, and conditions, and in no other manner or way whatever:" 1. "*After*, and not *before*, the *amount* of such subscription shall have been designated, advised, and recommended by a grand jury of the county." 2. Said "bonds shall, in no case, be *sold* by the railroad company at *less than par*." 3. That the acceptance of this act shall be deemed the acceptance of another act fixing the gauges of railroads in the county of Erie. The plaintiff was a *bona fide* holder for value, of a number of the bonds issued by the county. To defeat a recovery, the county on the trial offered to show, not that *no* recommendation by a grand jury was ever made, but that no *such* recommendation was made as the act required. The following was the recommendation: The grand jury "would recommend (omitting the words 'designate and advise') the commissioners of Mercer County to subscribe an amount not exceeding $150,000," — but not otherwise designating the amount. The bonds referred on their face to the act of assembly and its date, which authorized their issue and recited that they were issued *in pursuance* thereof. This was regarded by the court not as an offer to show "that no law exists to authorize their issue, but as one to show that the recitals in the bonds are not true, and to show that they were *not* made 'in pursuance of the acts of assembly' authorizing them;" and, following Knox County *v.* Aspinwall,[1] it was adjudged that the matters thus offered to be shown constituted no defence against a *bona fide* holder, on the principle that "where bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further." And following Woods *v.* Lawrence County,[2] it was also ruled that it was no defence against such a holder that the bonds were sold by the railroad company for less than par, they being negotiable and the plain-

to aid in the building of railways, see *ante*, chap. vi. sec. 153 *et seq.* *Ante*, secs. 515, 519, and notes.

[1] Knox Co. Comm'rs *v.* Aspinwall, 21 How. 539.

[2] Woods *v.* Lawrence County, 1 Black, 386. In Woods *v.* Lawrence County, above cited, it was also held where the statute requires the grand jury to fix the amount of a subscription to railroad stock, and to approve of it, and upon their report being filed empowers commissioners to carry the same into effect by making its subscription in the name of the county, that if these things be done agreeably to the law, the county cannot afterwards deny its obligation to pay the amount subscribed. In a suit brought to recover the arrears of interest on such bonds, it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defence for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners. This case, among others, was cited and approved in Grand Chute *v.* Winegar, 15 Wall. 372 (1872); S. C. 5 Chicago Legal News, 337.

tiff innocent. And it was also decided that the acceptance by the railroad company of the bonds authorized by the act operated *per se* as an acceptance of the gauge law.

§ 534 (422). **Estoppel by Recitals in the Bond; Illustration.** — In another case, authority to a city "to take stock in any chartered company for making a road, or roads, *to the said city*," was held, in favor of a *bona fide* purchaser of its bonds, to *authorize* it to subscribe to a railroad which, by the terms of its charter, and in fact *did not terminate at said city*, but whose nearest terminus was forty-six miles distant, it appearing that there was, at the time of said subscription, another railroad leading from that terminus to the city.[1] Authority was given by the legislature to the city of Milwaukee to issue bonds in aid of a railroad company specially named, "and any other railroad company duly incorporated and organized for the purpose of constructing railroads leading from the city of Milwaukee," &c., and it was held, such having been the construction put upon it by the city authorities at the time, that the power to issue bonds *was not confined to companies then in existence*, but extended to companies afterwards created.[2]

§ 535 (422 *a*). **Estoppel by Recital in Bond; Illustration.** — In another case,[3] the *city was held liable upon bonds* issued to a railway company under the following circumstances, viz.: The legislature authorized the city to subscribe on the condition of a majority vote; the city embodied three conditions in the proposition submitted to the voters, one of which was that $1,000,000 should be subscribed by other parties; the vote carried; other parties did not subscribe the $1,000,000; the city refused to subscribe and issue bonds, but

[1] Van Hostrup *v.* Madison City, 1 Wall. 291 (1863); see Aurora *v.* West, 9 Ind. 74; s. c. 22 Ind. 88, 96, 503. The decision in Van Hostrup *v.* Madison City was undoubtedly influenced by the natural desire to protect the holders of the bonds. Doubts can but be entertained that the Columbus and Shelby Road, distant and between different points, was a road leading *to* Madison. Note remarks of *Nelson*, J. See also Kirkbride *v.* Lafayette Co., 108 U. S. 208.

[2] James *v.* Milwaukee, 16 Wall. 159 (1872).

In Lynde *v.* Winnebago County, 16 Wall. 6 (1872), a special submission, under the laws of *Iowa*, to a popular vote, was construed to give the requisite authority to issue the bonds of the county to raise money to build a *court-house*. The case also holds that it was competent for the proper county official (the county judge) to visit *New York* for purposes connected with the disposition of the bonds, and while there, *and out of his jurisdiction, to issue and seal new bonds with a new seal procured at the time*, in exchange for bonds already issued, but not yet put on the market, and it was so held although the statute of the State provided that in the case of the *absence* of that officer the county clerk should take his place.

[3] Lexington *v.* Butler, 14 Wall. 282 (1871).

was compelled to do so by a *mandamus* of an inferior court, whose judgment was afterwards reversed by the Court of Appeals of the State, which held that the city had no authority to take the stock or issue the bonds until the $1,000,000 had been subscribed by other parties. Meanwhile, however, bonds were issued by the city, bearing its seal and signed by its mayor and clerk, reciting that they were duly issued under a specified act of the General Assembly.

§ 536. **Same subject.** — The Supreme Court of the United States held in the case last cited that a *bona fide* holder for value of these bonds, who had no actual notice of the facts relied on for a defence, could recover thereon. Mr. Justice Clifford, delivering the opinion of the court, makes use of this language in stating the ground of the judgment: "Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation *has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume* that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached in the hands of such a holder than any other commercial paper." By the expression that it is admitted that the city "possessed the power to subscribe for the stock and to issue the bonds," reference is undoubtedly made to the act of the legislature which gave this power on condition of a majority vote, and possibly to the fact that it was admitted in the plea that the vote was cast in favor of the subscription, for otherwise it seems to have been denied that the power existed; and that it did not exist as between the city and the railroad corporation was decided by the Court of Appeals of the State. The substance of the decision of the United States Supreme Court in this case would seem to be that a *bona fide* purchaser of the bonds had a right to presume that the condition annexed by the city as to the $1,000,000 of other subscriptions had been complied with; and thus viewed, the judgment of the court rests upon grounds whose soundness cannot admit of question. It is not an authority upon its essential facts in favor of the proposition that if the bonds had been issued without any vote, or attempt at a vote, they would have been binding, in the absence of estoppel other than by recitals, or in the absence of other ground of liability.

§ 537 (422 *b*). **Other Grounds of Estoppel.** — In another case,[1] the authority to subscribe for the stock of the company was given *on con-*

[1] Pendleton *v.* Amy, 13 Wall. 297 (1871).

dition that the county should so vote by a majority of real estate holders residing therein. A subscription was made in 1853, and a certificate of stock was issued to the county, which was received by it, and was still owned by it in 1869, when suit was brought. It did not appear that the bonds contained any recitals that conditions precedent had been complied with, or that the county had subsequently levied taxes to pay interest on the bonds. The county set up as a defence that there was no power to issue the bonds, because no vote of the people had ever been taken. The plaintiff being a *bona fide* holder, it was held that he was entitled to recover, and that the county was *estopped* to set up that no vote was had. The ground of the estoppel is thus stated by Mr. Justice Strong: "The county received in exchange for the bonds a certificate of 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, we think the county cannot 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." It will be observed that if the court had been of opinion that the bonds were enforceable in the hands of a holder for value though *no* election had in fact ever been held, the case would naturally have been put upon that ground.

§ 538. **What constitutes Completed Subscription or Contract to subscribe.** — Interesting questions have arisen as to *what constitutes a subscription* on the part of a municipality or other public corporation, or a valid contract to subscribe, to the stock of a railroad company, and when rights are vested thereunder which cannot be legislatively impaired without the consent of the parties in interest. Where a precedent popular vote is required, and upon such vote authority is given to subscribe for the stock, the vote without more does not constitute a contract between the municipality thus authorized to subscribe and the railroad company.[1]

[1] Aspinwall *v.* County of Jo Daviess, 22 How. 364; Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Harshman *v.* Bates County, 3 Dillon C. C. R. 150, 162, note; s. c. affirmed in Supreme Court, 92 U. S. 569 (1875); *ante*, sec. 70, and cases cited. German Bank *v.* Franklin County, 128 U. S. 526 (1888). Subscription by a county for stock held to be complete, although no actual subscription was made on the stock books of the company. Bates County *v.* Winters, 112 U. S. 325 (1884). For what is necessary to complete a valid subscription, see Nugent *v.* Putnam Co. Sup., 19 Wall. 241; Moultrie County *v.* Rockingham T. C. Sav. Bank, 92 U. S. 631; *infra*, secs. 539, 540.

The *rights of a municipality as a stockholder* in a railroad company, and whose stock has been paid for by the bonds of the municipality, are no greater than the rights of other stockholders; and unless

§ 539. **Same subject. Power may be annulled by Constitutional Provision or Legislative Action before Rights become vested; Bonds in Such Case are void in Everybody's Hands.** — As illustrating *the necessity of a continued existence of the power to issue the bonds,* and as showing what did *not* amount to a completed contract before the power was repealed by a constitutional provision, the case of the Town of Concord *v.* Portsmouth Savings Bank may usefully be referred to.[1] Chronologically stated, the facts were these: The bonds were issued under the act of March 7, 1867, and so recited. The act enacted that certain incorporated towns and cities, and towns acting under the township organization law (among which it was conceded the town of Concord was one), should be and were severally authorized to *appropriate* such sum of money as they might deem proper to the Chicago, Danville, and Vincennes Railroad Company, to aid in the construction of the road of said company, to be paid to the company as soon as the track of said road should have been located and constructed through said city, town, or township respectively. To this was attached the following proviso: "Provided, however, that the proposition to *appropriate* moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns, or cities, at a regular annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election, and if the majority of votes cast shall be in favor of the *appropria-*

specially authorized by the legislature, the railroad company has no power, when receiving the subscription and bonds, to agree to put the municipality in a better position than other stockholders, as, for example, by agreeing to pay a fixed rate of interest on such stock, equivalent in amount to the interest on the municipal bonds issued in payment therefor. Pittsburgh & S. Railroad Co. *v.* Allegheny County, 79 Pa. St. 210 (1875); s. c. 3 Cent. Law Jour. 204. Instance in which there was legislative authority for such a contract, see case of the Pittsburgh and Connelsville Railroad Co., 63 Pa. St. 126. When contract to subscribe stock is completed. Shelby County Court *v.* Cumberland & O. Railroad Co., 8 Bush (Ky.), 209, 300; Chicago, K. & W. R. R. Co. *v.* Osage County, 38 Kan. 597. Where a township *delivered its bonds in escrow to a State officer,* to be held until the completion of the road in aid of which they were issued, and the officer returned them to the township upon an adjudication by the Supreme Court of the State that the law authorizing the issue was unconstitutional, it was held, in a suit brought by the railroad thirteen years afterwards, and after the decision of the State court had been reversed by the Supreme Court of the United States, that the return of the bonds by the State officer and their retention by the township were a conversion which entitled the railroad company to bring suit at once, but that the bill brought after such a lapse of time should be dismissed. Young *v.* Clarendon Tp., 26 Fed. Rep. 805.

[1] Concord *v.* Portsmouth Savings Bank, 92 U. S. 625 (1875); see *infra*, sec. 540, note. Effect of the constitutional provision of *Illinois* of July 2, 1870, quoted in the text, see German Bank *v.* Franklin County, 128 U. S. 526 (1888), and cases there cited, in *Illinois* and in the Supreme Court of the United States, construing and applying the same. *Post*, secs. 542, 550; *ante*, sec. 530.

tion, then the same shall be made, otherwise not." The second section empowered and required the authorities of said municipalities to levy and collect a tax, and make such provisions as might be necessary for the prompt payment of the *appropriation* under the provisions of the law. The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. On the 2d of July, 1870, the new Constitution of the State went into operation, by which it was ordained that "no city, town, township, or other municipality shall ever become *subscribers* 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." On the 9th day of October, 1871, the bonds in suit were executed and delivered as a donation to the railroad company; and the question was whether there was any existing authority to make the donation and issue the bonds. The Supreme Court, after pointing out that the authority given to the town of Concord by the act of March 7, 1867, was not to subscribe for stock, but to make an appropriation or donation, which distinction is also taken in the provision of the Constitution above quoted, held that no donation could be made, under the act of 1867, until after the completion of the location and construction of the road through the town; that the vote of November 20, 1869, in favor of an appropriation, was not an appropriation or donation; that the power to make such donation was annulled by the Constitution on July 2, 1870, and that there was at that date no contract *in esse* between the town and the railroad company which stood in the way of the operation of the constitutional prohibition. As to the effect of the vote of the town, of November 20, 1869, and the acceptance of the railroad company of June 20, 1870 (both of which, it will be observed, were before the Constitution went into operation), the court observed: "But the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give; and the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to

locate and build the railroad through the town. It amounted to no more than saying, 'If we build our road through your town, we will receive your gift.' There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the Federal Constitution. We conclude, then, that at the time the donation was made, there was no authority in the municipality to make a donation to the railroad company, and consequently no authority to issue the bonds. It follows that the bonds and coupons are void." [1]

§ 540. **Same subject. Mode of Subscription; when Subscription Complete.** — Power by legislative act *to the board of supervisors of a county to subscribe* an amount not exceeding a given sum to the stock of a specified railroad company, and to issue bonds in payment therefor, without requiring the sanction of a popular vote, but *with a proviso that the bonds shall not be issued until the road is open for traffic*, gives complete authority to the county to subscribe for the stock, or to make a binding agreement to subscribe therefor preparatory to a final subscription. The proviso that the payment of the subscription should be postponed until the railroad should be opened does not limit the power to subscribe, or to enter into an agreement to make the subscription before the road is completed. And it was held that a *resolution of the board of supervisors*, made when the power to subscribe existed or had arisen, *that the county subscribe a given sum* to aid in the construction of the road of the company, without any subscription on the books of the company, amounted to a subscription, or, at all events, to a legal undertaking to subscribe, which, when assented to or accepted by the company, became a binding contract, which the county could not revoke, and which could not be impaired by any subsequent prohibition of the Constitution or the legislature without the assent of the railroad company.[2]

[1] In *Iowa* it is held that if money be expended before the repeal of a statute, upon the faith of the tax provided for by it, the repeal does not invalidate the tax and it may be collected. Burges *v.* Mabin, 70 Iowa, 633; *approved* Barthel *v.* Meader, 72 Iowa, 125.

[2] Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625 (1875); Livingston County *v.* Portsmouth Bank, 128 U. S. 102, 126 (1888); Scott *v.* Hansheer, 94 Ind. 1; *infra*, sec. 540, note. A municipal corporation which issued its bonds to a railroad company *formed by consolidating* two other companies was held estopped to deny the validity of the consolidation. Young *v.* Township of Clarendon, 26 Fed. Rep. 805. See *infra*, sec. 541. In a case where a subscription was made to a railroad company by a city, payment to be made when ten miles of the railroad was completed, and the charter of the company