the Missouri River, a subscription made and bonds issued under such authority by a county *south* of the river are void in the hands of everybody.[1]

provision authorizing the city to call in bonds and pay the same at any time, and providing that upon tender of the principal the interest should cease, was held to be effective as against a holder for value before maturity. Citing Ogden *v.* County of Daviess, 102 U. S. 634; Anthony *v.* Jasper County, 101 U. S. 693; Northern Bank of Toledo *v.* Porter Tp., 110 U. S. 608. *Infra*, sec. 543.

[1] Sherrard *v.* Lafayette County, 3 Dillon C. C. R. 236 (1875). The case was briefly this: By an act of the legislature of *Missouri*, a company was incorporated with power to construct a railroad from the town of Louisiana, which is situated on the Mississippi River, *north* of the Misssouri River, *to* a point on the Missouri River, and the county court of any county in which *any part of the route* of said road should lie was authorized to subscribe stock to the company, without a vote of the people. Afterwards the new Constitution of *Missouri* went into effect, prohibiting the General Assembly (1) from creating corporations by *special* act, except for municipal purposes; (2) from authorizing any county, &c., to become a stockholder in, or loaning its credit to, any company, association, or corporation, *unless two-thirds of the qualified voters should assent thereto*. Subsequently to this the legislature passed an act purporting to *amend* the charter of the said railroad company, which provided that the county court of any county in which any part of the line of said railroad might be located might subscribe to the stock of said company and issue bonds, &c. Under this act, the county court of Lafayette County, a county lying wholly *south* of the Missouri River, issued *without a vote of the people*, the bonds from which the coupons here sued on were detached, and several instalments of interest had been paid on them. *Held*, 1. That the amendatory act from which authority to issue these bonds is claimed is a *special* act, in effect creating a new corporation, and is hence inhibited by the State Constitution. 2. That it was not competent for the legislature, by extending the route of the proposed road beyond the point designated in the original charter, to authorize a county *south* of the Missouri River to incur indebtedness in aid of the road, without a two-thirds vote as required by the Constitution. 3. That since there was an entire want of power to issue the bonds, they were void even in the hands of innocent purchasers. 4. That the fact that the county court had paid interest on these bonds did not estop it from afterwards setting up their invalidity. But see Burr *v.* Chariton County, 12 Fed. Rep. 848.

Construction of special power. The act which authorized the issuing of the bonds to pay the county subscriptions to a railway company directed that the bonds so issued should be made payable to "the president and directors of the railroad company, and their successors and assigns." The bonds issued were made payable to "the railroad company or bearer." It was held that the power granted was sufficiently pursued, and that the bonds so issued were valid. Woodward *v.* Calhoun Co. Sup. (U. S. Dist. Court for *Mississippi*, *Hill*, J.), 2 Cent. Law Jour. 396 (1874). Special act held to control general act. Chicago, B. & Q. R. R. Co. *v.* Otoe County, 16 Wall. 667 (1872).

Power to donate bonds in lieu of lands and right of way. By various provisions of a city charter, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and were authorized to borrow money to an unlimited extent, when instructed so to do by a popular vote, and further, to issue bonds to fund any indebtedness of the city, existing or to be created. Under this authority, a railroad company, by reason of complying with certain conditions, became entitled to demand from the city the right of way and depot grounds. The company agreed with the city to accept the bonds voted to procure the right of way and grounds in lieu

§ 543. **Registration of Bonds; Effect of Fraudulent Antedating.** — The history of the issue of municipal bonds in this country shows that conditions imposed by law requiring a popular vote, or conditions in the propositions submitted to the voters, intended to prevent fraud and to secure the actual building and completion of the roads, have been often evaded, and bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts, as we have seen, have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislatures of some of the States have passed acts *requiring all bonds to be registered* with one of the executive departments of the State before they are issued or negotiated. Thus in 1872[1] the legislature of Missouri, a State in which many fraudulent bonds had been issued, passed an act which provided that "*before* any bond, hereafter issued by any county, . . . shall *obtain validity or be negotiated*," it must be *first* registered by the State auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. In the case of Anthony *v.* Jasper County,[2] it appeared that

of the right of way and grounds, and it was held that the city had the power thus to agree, and that the bonds were valid. Converse *v.* Fort Scott, 92 U. S. 503 (1875); s. c. 3 Cent. Law Jour. 449.

A proposition once voted down may be subsequently re-submitted and adopted, unless the act evinces a contrary intention. Soc. for Sav. *v.* New London, 29 Conn. 174; Smith *v.* Clark County, 54 Mo. 58; Woodward *v.* Calhoun County, 2 Cent. Law Jour. 396. In *Kentucky* it is held that municipal corporations are not restricted to one subscription. Tyler's Ex. *v.* Elizabethtown & P. R. R. Co., 9 Bush (Ky.), 510 (1872). Second subscription held valid. *Ib.*

Issue of bonds before law authorizing it took effect. Rochester *v.* Alfred Bank, 13 Wis. 432; Berliner *v.* Waterloo, 14 Wis. 378.

[1] Act of March 30, 1872 (Laws of Missouri, 1872, p. 56).

[2] Anthony *v.* Jasper County, 4 Dillon C. C. R. 136 (1876); s. c. 3 Cent. Law Jour. 321; affirmed 101 U. S. 693. In delivering its judgment, the Circuit Court said: "If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no '*validity*,' and hence could not support an action in the hands of any person. But they are antedated; and the question is, whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds cannot be enforced. The case comes within the doctrine, which is well settled, that where a *statute* declares absolutely and without exception that a contract or bond or note is void, it is void into whosesoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they '*obtain no validity*.' Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void. Is the county estopped to set up this defence? We think not. The case is to be distinguished, we think, from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bondholder, and falls within the principle of Bayley *v.* Taber, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes of a certain description, 'made or

bonds were signed, sealed, and issued in the manner above appearing, *after* this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not, certified by the auditor as registered bonds. The bonds found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date. The Circuit Court held that the bonds could not be enforced, and that the county was not estopped to set up the defence, — a decision which necessarily implied a distinction between such a case and those in which the Supreme Court of the United States had held that the county or municipality could not visit the frauds of their officers upon the innocent holders of the bonds. The case was taken to the Supreme Court of the United States, and the distinction taken below was adjudged to be sound.[1]

A municipal corporation issued bonds *valid on their face, but in*

issued' after a specified day, should be 'utterly void, and no action should be sustained thereon,' that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day. The principle of that case is the same as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law, the other officers being innocent of wrongful participation. The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this State to municipalities and counties to issue such bonds. This power has been taken away by the new Constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in antedating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibitions of the Constitution, and threatens to become immortal."

This *decision was adhered to* in Hoff *v.* Jasper County, 110 U. S. 53, where it was also held that innocent holders for value are charged with the duty of knowing the laws concerning the registration and certification of bonds, and of inquiring whether they have been complied with. Northern Bank *v.* Porter Township, 110 U. S. 608; Lewis *v.* Commissioners, 105 U. S. 739; Menasha *v.* Hazard, 102 U. S. 81. *Construction of Kansas Bond Registration Act.* January *v.* Johnson County, 3 Dillon C. C. R. 392; Bissell *v.* Spring Valley Township, 124 U. S. 225; Crow *v.* Oxford, 119 U. S. 215; Lewis *v.* Comm'rs, 105 U. S. 739. *Nebraska Registration Act.* Dixon County *v.* Field, 111 U. S. 83. *Illinois Registration Act.* German Sav. Bank *v.* Franklin Co., 128 U. S. 526, 540 (1888).

[1] Anthony *v.* Jasper County, 101 U. S. 693 (1879); Douglass *v.* Lincoln County (Mo.), 5 Fed. Rep. 775. Where a constitution or law fails to give conclusive effect to registration or to the certificate thereof, the certificate will not conclude a municipal corporation from denying the facts certified to. Dixon County *v.* Field, 111 U. S. 83; s. c. *supra*, sec. 529 *a*; s. p. German Sav. Bank *v.* Franklin County, 128 U. S. 526, 540 (1888), distinguishing Lewis *v.* Barbour Co. Comm'rs, 105 U. S. 739. See also Crow *v.* Oxford Tp., 119 U. S 215.

fact void, because they were antedated to evade the registration act, and were not registered; the corporation had power to borrow money, and the proceeds of the bonds passed into the city treasury and were used for lawful purposes; it was held that the corporation was liable in an *action for money had and received* to the purchaser of the bonds or his assignee, not for the amount of the bonds, but for the amount of money actually paid for the bonds to the corporation, with simple interest thereon.[1]

§ 544. **Retrospective Statutes validating Irregular Subscriptions and Bonds.** — In the absence of special constitutional restrictions, the competency of the legislature to enact retrospective statutes, to validate an irregular or defective execution of a power by a municipal or public corporation, is undoubted.[2] And the power

[1] Wood *v.* Louisiana, 5 Dillon C. C. R. 122 (1878), affirmed by the Supreme Court 102 U. S. 294; Gause *v.* Clarksville, 1 Fed. Rep. 353; *ante*, sec. 461; compare Litchfield *v.* Ballou, 114 U. S. 190. See *supra*, sec. 529 *a*, and note. The general subject of *implied liability* of municipal corporations has been treated in another connection.

[2] Keithsburg *v.* Frick, 34 Ill. 405; County of Jasper *v.* Ballou, 103 U. S. 745; Copes *v.* Charleston, 10 Rich. (S. C.) Law, 491; McMillen *v.* Boyles, 6 Iowa, 304; *Ib.* 394; Gelpcke *v.* Dubuque, 1 Wall. 220 (note statute there construed); People *v.* Mitchell, 35 N. Y. 551; Thomson *v.* Lee County, 3 Wall. 327; Bass *v.* Columbus, 30 Ga. 845 (1860); Bissell *v.* Jeffersonville, 24 How. 287 (1860); Campbell *v.* Kenosha, 5 Wall. 194; Kenosha *v.* Lamson, 9 Wall. 477 (1869); Steines *v.* Franklin County, 48 Mo. 167 (1871); Knapp *v.* Grant, 27 Wis. 147 (1870); Black *v.* Cohen, 52 Ga. 621 (1874); Duanesburgh *v.* Jenkins, 57 N. Y. 177 (1874), overruling s. c. 46 Barb. 294, and distinguishing People *v.* Batchellor, 53 N. Y. 128; Kimball *v.* Rosendale, 42 Wis. 407 (1877); s. c. 24 Am. Rep. 421; Ritchie *v.* Franklin Co., 22 Wall. 67 (1874); Bradley *v.* Franklin Co., 65 Mo. 638 (1877); Lewis *v.* Shreveport, 3 Woods C. C. 205; Cooley on Const. Lim. 371, and cases there cited; *ante*, secs. 70, 75, 79, 419; *post*, sec. 554, note; Bolles *v.* Town of Brimfield, 120 U. S. 759; Otoe County *v.* Baldwin, 111 U. S. 1; Thompson *v.* Perrine, 103 U. S. 806; approved Same *v.* Same, 106 U. S. 589; Dows *v.* Town of Elmwood, 34 Fed. Rep. 114; Gardner *v.* Haney, 86 Ind. 17. The legislature may legalize a subscription to the stock of a railroad, made by a municipal corporation without authority, unless prohibited by the Constitution, and if the subscription would have been legal had it been done under legislative authority. Grenada County *v.* Brogden, 112 U. S. 261, distinguished Hays *v.* Holly Springs, 114 U. S. 120, referred to *infra*. See also Otoe County *v.* Baldwin, 111 U. S. 1; Cooley on Taxation, 223, 232.

In *Mississippi* it is held that where the State Constitution prohibits the legislature from authorizing the issue of municipal obligations in aid of corporations, or lending of credit therefor, except on condition that two-thirds of the qualified voters assent thereto at an election, the legislature cannot, by a mere retrospective act, validate municipal bonds which were issued without legislative authority before the Constitution became operative. Sykes *v.* Columbus, 55 Miss. 115; Grenada Co. *v.* Brogden, 112 U. S. 261; Hays *v.* Holly Springs, 114 U. S. 120, referred to in this section, *infra*. See also, Cairo, & St. L. R. R. Co. *v.* Sparta, 77 Ill. 505 (1875).

In St. Joseph Township *v.* Rogers, 16 Wall. 666, where it appeared that the election at which the subscription was

to cure defective subscriptions to the stock of railway companies and to validate bonds issued therefor has been frequently exercised

approved was held before the passage of the law authorizing the subscription, the court said: "Argument to show that defective subscriptions of the kind may, in all cases, be ratified where the legislature could have originally conferred the power is certainly unnecessary, as the question is authoritatively settled by the decisions of the Supreme Court of the State (*Illinois*), and of this court in repeated instances." And again: "Mistakes and irregularities are of frequent occurrence in municipal elections, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of legislative authority."

The Constitution of *Illinois* of 1848, Art. ix., sec. 5, declared "that the *corporate authorities* of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The Supreme Court of the State (Marshall *v.* Silliman, 61 Ill. 218; Wiley *v.* Silliman, 62 Ill. 170; see *ante*, secs. 79, 419) decided that this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the *corporate authorities*, nor *coerce* a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. And the court held that an act validating an election, irregularly called and notified, to vote upon the question of township subscription, and declaring the same legal and binding, was void. In the opinion of the court, the act was an effort to confer the power of municipal taxation upon persons who were not, by themselves, the corporate authorities in the sense of the Constitution, and to compel the town to issue its bonds for railroad stock, by declaring a void proceeding to be a valid subscription. The liability of the township on the same bonds afterwards came before the Supreme Court of the United States in Elmwood Township *v.* Marcy, 92 U. S. 289 (1875), and a majority of the court, not vindicating, nor, it would seem, approving, the decision of the Supreme Court of *Illinois*, nevertheless, as there had been in their view, no conflicting decisions of that tribunal on the point, and as it involved the construction of a "peculiar provision of the Constitution of *Illinois*," they felt bound to follow it, although it was made after the bonds in question had been issued. *Clifford*, *Swayne*, and *Strong*, JJ., dissented, on grounds which would seem to be strongly supported by the previous decisions of the court. Marshall Co. Sup. *v.* Schenck, 5 Wall. 772; Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 677; Chicago, B. & Q. R. R. Co. *v.* Otoe County, 16 Wall. 667; Olcott *v.* Fond du Lac Co. Sup., *Ib.* 678; Quincy *v.* Cooke, 107 U. S. 549.

In Foote *v.* Johnson County, 5 Dillon C. C. R. 281 (1878), it was ruled that the Supreme Court of the United States, having held the "township railroad aid act" of *Missouri* constitutional (Cass County *v.* Johnston, 95 U. S. 360), it was the duty of the Circuit Court to follow that judgment, notwithstanding the later decision of the Supreme Court of *Missouri* in The State *v.* Brassfield, 67 Mo. 331 (1878); and that where negotiable commercial securities are issued and negotiated *before* there is any decision by the courts of the State against the validity of the act authorizing their issue, the Supreme Court of the United States does not consider itself bound to follow a *subsequent* decision of the local courts invalidating such securities, but will decide for itself whether, under the Constitution and laws of the State, such securities are valid or void. S. P. Douglass *v.* County of Pike, 101 U. S. 677 (1879).

The rights of the innocent holders of municipal bonds issued in aid of railroads "are to be determined *by the law as it was judicially construed to be* when the bonds were put on the market as commercial paper." County of Ralls *v.* Douglass, 105 U. S. 728; Green County *v.* Conness, 109 U. S. 104; Sawyer *v.* Concordia Parish, 12 Fed. Rep. 754; Marshal *v.* Elgin, 8 Fed. Rep. 783. This subject is fully and instructively discussed in the recent cases of German Sav. Bank *v.* Franklin County, 128 U. S. 526 (1888), and Scotland County *v.* Hill, 132 U. S. 107 (1889). See *ante*, sec. 542, note.

and judicially sustained. Subsequent legislative sanction within constitutional limits is equivalent to original authority.[1] But the intention of the legislature to validate the subscription or the bonds must clearly appear from the terms of the curative act. An oblique validation, or one expressed in doubtful, covert, or obscure language, will not be sufficient, especially where the subscription was made or the bonds issued in disregard of conditions which the Constitution required the legislature of the State to impose upon the municipality before the *power* to make the subscription or to issue the bonds should arise or exist.[2]

[1] Wilson *v.* Hardesty, 1 Md. Ch. 66; County of Jasper *v.* Ballou, 103 U. S. 745; Shaw *v.* Norfolk R. R. Co., 5 Gray (Mass.), 180; Satterlee *v.* Matthewson, 2 Pet. 380; Wilkinson *v.* Leland, 2 Pet. 627; Watson *v.* Mercer, 8 Pet. 88; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Stanley *v.* Colt, 5 Wall. 119; Croxall *v.* Shererd, 5 Wall. 268; Keithsburg *v.* Frick, 34 Ill. 405.

[2] Hayes *v.* Holly Springs, 114 U. S. 120 (1884). In this case it appeared that the Constitution of *Mississippi* of 1869 prohibited the legislature from authorizing any municipal subscription to any corporation "unless two-thirds of the qualified voters at a special or regular election shall assent thereto." In 1871, *without any statute authorizing it*, an election was held in the City of Holly Springs, *Mississippi*, which resulted in favor of a subscription by the city of $75,000 to a specified railroad company. In 1872, the legislature passed an act providing that "all subscriptions to the capital stock of the said railroad company made by any county, city, or town in this State not in violation of the Constitution, are hereby legalized, ratified and confirmed." After this act bonds of the city were issued, which recited that they were "issued under and in pursuance of the Constitution and laws of *Mississippi*, and authorized by a vote of the people of the city at a special election held for the purpose." But as the provisions of the Constitution are inhibitory upon the legislature, and not enabling to the city; as under the Constitution legislative authority to enable the municipality to issue such bonds *must* provide for the assent of two-thirds of the voters at an election; as no such election had been provided for by legislative act; as the curative act of 1872 made no reference to the unauthorized election of 1871, and did not ratify and approve it; and as the language of the curative act was too vague to warrant the conclusion with certainty, that the legislature "intended to confirm and ratify the subscription in question,"—it was held to be insufficient for that purpose, and the plaintiff, although a *bona fide* holder of the bonds containing the recitals of full compliance with the Constitution and laws of the State, was defeated. The case was distinguished from the case of Grenada County *v.* Brogden, 112 U. S. 261, also from *Mississippi*, since in that case the legislature had in the curative act "designated and identified the voting at an election, described as resulting in an approval by the constitutional two-thirds of the qualified voters, followed by an authority to Grenada County, declared to be based upon such approval, to subscribe for the stock." *Per Blatchford*, J., in Hayes *v.* Holly Springs, 114 U. S. at p. 126.

As to the recitals in the bonds (see *supra*), the court said, "Even a *bona fide* holder of a municipal bond must show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of statutory power, but they

§ 545. **Want of Power always a Defence; Question of Power is the One of Chief Interest and Importance.** — Touching the rights of the holder of authorized negotiable municipal securities, it may again be observed that such instruments are *commercial paper*, and governed by the rules of the law merchant concerning such paper, and that as respects a holder for value, before due, without notice of facts constituting a defence thereto, the only defence which is available is, that there was *no power* in the defendant corporation to issue the bonds or instruments in question. By want of *power* as here used is meant the want of any existing valid legislative act authorizing the municipality to make the bonds or instruments; not irregularities in the exercise of the power, but want of legislative power itself. This principle is thus expressed in one of the judgments of the Supreme Court: "Bonds payable to bearer, issued by a municipal corporation, . . . if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed *no power* from the *legislature*, they are invalid, even in the hands of innocent holders."[1] *Irregularities* in the exercise of the power, as against a holder for value, without notice of such irregularities, constitute no defence.[2] Since, therefore, *want of power* is the *only* defence open to the corporate maker of such instruments, when they have been negotiated for value to innocent holders, the question of *power* is the one around which the principal interest centres, and to which, in its various phases, we have given our main attention.

§ 546. **Bonds void against bona fide Holders; Recitals in Bonds cannot cure want of Power to Issue.** — Where there is an entire absence of power, as distinguished from a defective execution of the power, then the recitals of those invested with the ministerial duty of issuing the bonds will afford no protection even to *bona fide* holders for value.[3] If such bonds are issued without legislative

cannot create it. If, as in the present case, legislative authority is wanting, the bond has no validity."

[1] Per *Clifford*, J., in St. Joseph Township *v.* Rogers, 16 Wall. 644, 659 (1872). As nearly all the cases in the Supreme Court have turned on the question of power, it is not deemed material again to cite them in this connection, as the propositions in the text are no longer the subject of judicial controversy. *Ante*, sec. 529 *a*, as to invalidity of bonds issued in violation of a constitutional provision. See *post*, chapter on Mandamus.

[2] Jacksonville, N. & S. R. R. Co. *v.* Virden, 104 Ill. 339; Bank of Statesville *v.* Statesville, 84 N. C. 169.

[3] German Bank *v.* Franklin County, 128 U. S. 526 (1888), is a strong application of the doctrine of the text, where bonds, notwithstanding certain recitals (*ante* sec. 542, note), were held void in the hands of *bona fide* holders. See, also, Force *v.* Batavia, 61 Ill. 100; Williams *v.* Roberts, 88 Ill. 13; Lippincott *v.* Pana, 92 Ill. 24; Eddy *v.* People, 127 Ill. 428 (1889); Sykes *v* Columbus, 55 Miss. 115; Williamson *v.* Keokuk, 44 Iowa, 88 (1876); Aspinwall *v.* Daviess County, 22 How. 364; Marsh *v.* Fulton Co., 10 Wall. 676; Citizens' Loan Assoc. *v.* Topeka, 20 Wall. 655; St. Joseph *v.* Rogers, 16 Wall. 644 (1872). See, also, Avery *v.* Springport, 14 Blatchf. 272. See *supra*, sec. 529 *a*, and note; Duke *v.* Brown, 96 N. C. 127; Millerstown *v.* Frederick, 114 Pa. St. 435; Ottawa *v.* Carey, 108 U. S. 110; Purdy *v.* Lansing, 128 U. S. 557 (1888); Agawam National Bank *v.* South Hadley, 128 Mass. 503.

[1] Citizens' Savings & Loan Association *v.* Topeka, 20 Wall. 655; Schuyler Co. Sup. *v.* Farwell, 25 Ill. 181; Marshall Co. Sup. *v.* Cook, 38 Ill. 48; Lippincott *v.* Pana, 92 Ill. 24. In Loan Association *v.* Topeka, the court says: "We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose."

So where a county court was empowered to issue bonds to the amount of $250,000, bonds issued in excess of that sum were declared void in the hands of a purchaser before maturity, for value and without notice of the overissue. Daviess County *v.* Dickinson, 117 U. S. 657. See *supra*, sec. 529 *a*.

[2] McPherson *v.* Foster, 43 Iowa, 48 (1874).

[3] One who purchased bonds from a railroad company, which had been issued by a town in its aid, was held, after the bonds had been declared void, *not to be subrogated* to the rights of the company, if it had any, to enforce collection of the appropriation voted by the town. Aetna Life Ins. Co. *v.* Middleport, 124 U. S. 534.

authority they are void, and the levy of taxes and payment of interest will not render them valid.[1] So where *there is want of power* the mere silence of the taxpayer in permitting the issue of bonds will not create an estoppel even in favor of an innocent holder for value.[2] It is the duty of purchasers to examine into the *power* of the municipality to issue the bonds, and if no power exists there can be no recital which will protect even *bona fide* holders for value.[3]

§ 547. **Laches; Acquiescence; Failure to enjoin the Issue; Payment of Interest, and retaining the Consideration, as Grounds of Estoppel.** — The cases we have heretofore considered were mainly those in which the municipality has been held estopped by the recitals in the bonds to show that conditions precedent had not been complied with. We will *now advert to other grounds of estoppel*, arising from the acquiescence or acts of the municipal authorities. It is undoubtedly a sound proposition that a municipal corporation, as well as a private corporation, may, in the absence of constitutional or legislative restriction, confirm acts, not *ultra vires*, which it may deem beneficial to it.

§ 548. **Same subject.** — As experience shows that the officers of public and municipal corporations do not guard the interest con-

fided to them with the same vigilance and fidelity that characterize the officers of private corporations, the *principle of ratification by laches or delay* should be more cautiously applied to the former than to the latter. But the principle applies to both classes of corporations, as well as to natural persons. The general doctrine is undoubted, — that there is ordinarily no estoppel in respect to acts which are in violation of the Constitution or of an act of the legislature, or which are obviously and in the strict and proper sense of the term, *ultra vires*. The history of the doctrine of *ultra vires* in Great Britain and in this country makes it difficult to affirm that the rule is without exceptions; and it is the part of prudence and wisdom to keep close to the adjudications without undertaking to formulate in advance rules of universal application. Precision is absolutely essential to legal conceptions. A legal term which stands for an indefinite idea or for several different ideas will necessarily introduce confusion when used without qualification; and perhaps no term in the law has been more unfortunate in this respect than the expression *ultra vires*. We mean by it, as here used, the want of legislative power, under any circumstances or conditions, to do the particular act in question. As to *irregularities* in the exercise of an express power to issue bonds, and particularly in respect to steps connected with preliminary conditions, the failure of the municipality or of the taxpayer to enjoin the issue, followed by long acquiescence, especially when this is accompanied by affirmative acts which recognize the validity of the bonds, such as receiving and holding the stock or consideration for the bonds, or paying interest on them for a series of years, *has been held to estop the municipality from defending*, on the ground of non-compliance with conditions precedent, — especially when the bonds, as is usually the case, have been negotiated for value. But the corporation is in no case estopped from setting up a *total want of power* to issue the bonds. The leading cases in the Supreme Court relating to the subject-matter of this section are referred to in the note.[1] It is

[1] As to the effect of *failure to enjoin* the issue of the bonds and of acquiescence in the irregular exercise of the power, see Rogers *v.* Burlington, 3 Wall. 654, 667. Compare dissent on this point, *Ib.* p. 672; Bissell *v.* Jeffersonville, 24 How. 300; Cooley on Taxation, 548, 549; *ante*, sec. 522, note; Butler *v.* Dunham, 27 Ill. 477; Steines *v.* Franklin County, 48 Mo. 176, 185; State *v.* Van Horne, 7 Ohio St. 331; Barrett *v.* County Court, 44 Mo. 201; Shoemaker *v.* Goshen Tp. Trs., 14 Ohio St. 587. No estoppel when bonds are issued in excess of a constitutional limitation on the amount which may be issued. See *supra*, sec. 529 *a*.

In Supervisors *v.* Schenck, 5 Wall. 781, — from *Illinois*, — which is an important case on this subject, it appeared that in *Illinois* counties were authorized, upon a popular vote, to subscribe for stock and pay therefor in bonds; an election was ordered by the *county court* in a certain county, when it should have been ordered

obvious that a *constitutional* provision requiring a public sanction to a subscription by a municipality to railroad stock prevents the subsequent acts of the municipal officers from operating as a ratification without the assent of the voters.[1]

(by reason of a change in the law) by the *board of supervisors;* it was duly held; the proposition was carried; the *supervisors* made the subscription, issued the bonds, received the stock, and ordered the levy of taxes, and paid the coupons for nine or ten years; and it was held by the Supreme Court of the United States, in conformity with the doctrine of the State Supreme Court, as first announced but subsequently overruled, that the acquiescence, conduct, and acts of the county authorities were a ratification of the bonds, at least when in the hands of an innocent holder, and estopped the county to make the defence that the election had been ordered by the county court instead of the board of supervisors. In view of the facts as stated, the judgment of the court would appear to be sound and open to no criticism, as the ground of the objection to the bonds was an irregular exercise of an admitted power in the county, and not a want of power. The recital in the bonds is not given, but it would appear from the opinion that the plaintiff's case also fell within the doctrine of Knox Co. Comm'rs *v.* Aspinwall.

In Pendleton County *v.* Amy, 13 Wall. 297 (1871), decided on demurrer, it did not appear that there was any estoppel by reason of recitals in the bond, or from subsequent payment of interest; but the pleadings showed that the county had received in exchange for the bonds a certificate of the stock of the railroad company, which it had held for seventeen years before the suit was brought, and still held. The county was authorized to purchase the stock, but only on condition of a popular vote. It was decided by the Supreme Court that purchasing and holding the stock under these circumstances estopped the county to assert against an innocent holder of the bonds that they were issued in disregard of the condition of a popular election, required by the act of the legislature conferring the power. Three of the judges dissented, probably on this point; and certainly the case seems to be an extreme application of the doctrine of estoppel. The bonds (so far as appeared) were without recitals; no payment of interest had been made; a popular vote was made necessary, and the plea alleged that no such vote had ever been had, and that the question of subscription had never been submitted to or voted upon by the people; and the mere receipt and holding of the stock were held sufficient to estop the county to make the defence. We have not been able to reconcile the case, on this point, with Marsh *v.* Fulton County, referred to in a subsequent portion of this note.

The case of Marsh *v.* Fulton County, 10 Wall. 676 (1870), decides this principle, viz., that where, under the legislation of the State, the county authorities had no power to subscribe for stock and issue bonds therefor, and where (as held) they made the subscription and issued the bonds without the sanction of a popular vote, *the bonds containing no recital*, such bonds are void, and are not ratified by acts of the county authorities, such as appointing agents to participate in the corporate meetings of the railway company, by the payment of part of the bonds and the interest on the others for a series of years; and the reason given by the court was that no ratification could be made unless it was authorized by the people, the defect being one of power. *Field*, J., observed: "They [the supervisors] could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization." Compare Pendleton County *v.* Amy, *supra*.

[1] Norton *v.* Shelby County, 118 U. S. 425; following Aspinwall *v.* Daviess County, 22 How. 364; Marsh *v.* Fulton County, 10 Wall. 676, 684; Wadsworth *v.* Eau Claire County Sup., 102 U. S. 534.