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CONSTRUCTION OF STATUTORY POWERS IN BOND CASES IN THE SUPREME COURT OF THE UNITED STATES.

In the April number (1878) of the American Law Register (*ante*, p, 209), we attempted to show that this court had misconceived the decisions of a state court (that of the Supreme Court of Missouri) in the construction of a statute alleged to be violative of the constitution of that state, on a question of power to subscribe aid to railroads conferred upon townships (*Cass County* v. *Johnson*), and by the decision had practically subverted the constitutional provision, although professing to follow the state decisions which were shown to be directly contrary to it. Subsequently (in April 1878) this view of the article was sustained by two decisions of the Supreme Court of Missouri, in cases from Platte and Lafayette counties in that state, directly involving the questions passed on by the Supreme Court of the United States in *Cass County* v. *Johnson*, in each of which cases the construction attempted to be placed on the former decisions of the state court by the Supreme Court of the United States was expressly disavowed.

It is now proposed to present briefly the doctrine of the Supreme Court of the United States, in the construction of *such* powers, *i. e.*, statutory powers in bond cases, and to show,

1st. That such construction is unwarranted and subversive of the law of powers applicable to cases of special agency.

2d. That the application of the law of estoppel to such cases by this court is unwarrantable and without authority of law.

3d. That its system of so-called contracts built upon such principles is artificial, and must be, eventually, abandoned or overthrown.

The doctrine of this court upon the construction of statutory powers, as granted to municipalities, counties and organized townships, to aid in construction of railroads and other public improvements (for it does not give a like construction in ordinary cases, as of individuals or of private corporations: *Floyd Acceptance Cases*, 7 Wall. 666), as gathered from its numerous decisions in such cases, from *Knox County* v. *Aspinwall* down, seems to be this:—

That where legislative authority has been given to a municipality, or to a county, or to an organized township, to subscribe for the stock of a railroad company, and to issue bonds—municipal, county or township—in payment, but only on some precedent condition, such as a popular vote favoring the subscription: and when it may be gathered from the legislative enactment that the officers of the municipality, or county, or township, were invested with power to decide whether the condition precedent has been complied with, *their recital that it has been*, made in the bonds issued by them and held by a *bona fide* purchaser, is *conclusive of the fact* and binding upon the municipality, or county, or township, for the recital is itself a decision of the fact by the appointed tribunal: *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Venice* v. *Murdock*, 92 Id. 494; *Marcy* v. *Township of Oswego*, 92 Id. 637; *Humboldt Township* v. *Long et al.*, 92 Id. 642; *Mercer County* v. *Hackett*, 1 Wall. 83; *Van Hostrop* v. *Madison City*, 1 Id. 291; *St. Joseph Township* v. *Rogers*, 16 Id. 644; *Bissell* v. *Jeffersonville*, 24 How. (U. S.) 287; *Knox County* v. *Aspinwall*, 21 Id. 539; Dillon on Municipal Corporation, 2d ed., sec. 419 and cases cited.

This *peculiar* construction of the law governing principal and constituent involves three essential assumptions (none of which are legitimate) in order to support the fore-ordained conclusion, which is reached by working up to it, rather than deduced from valid and legitimate inference; that is to say:—

1. That the legislative authority to subscribe for stock, upon a prescribed precedent condition, invests the agency constituted by it with the powers of a "tribunal" authorized to decide whether the condition precedent has been complied with.

2. That the recital by such constituted agency, of the compliance

with such precedent condition in bonds issued by them [in *assumed* pursuance of the legislative authority] and held by a *bona fide* purchaser, is *conclusive of the fact* that the precedent condition has been complied with.

3. That the municipality, or county, or township, is *conclusively* bound by the recitals made by such constituted agencies, in bonds so held as aforesaid, and is *estopped* to show to the contrary, the recital itself being a decision by the appointed "tribunal."

The doctrine thus constituted and formulated will be considered hereafter in one view.

And *first*, as to this statutory "tribunal." It has never been pretended to have been "gathered from the legislative enactment" in any of these cases that the legislative purpose was to give this extraordinary power of being absolute judges to pass irrevocably upon conditions on which depended their own power or authority to act at all, to local trustees and commissioners. On the contrary it is the transparent intention in each of these cases that certain things prescribed as pre-requisites shall first be done, and *when done and only after they have been done*, are these local trustees empowered to do anything, much less to bind any one conclusively not only by their acts, but by their recitals of the performance of those things upon which *only* any valid action could be based. But the only "gathering from the enactment" deemed necessary by this court, apparently is, that if authority to issue bonds is given, although dependent upon precedently prescribed conditions, if an agency is constituted to issue them, this clothes the agency with a power as a "tribunal" to decide finally upon the performance of the conditions and to bind conclusively by their recitals of such performance. As well might it be said that the trustee in a deed of trust (who is also a "tribunal" under this view), is invested with authority to decide finally upon the conditions of the deed so that the grantor would be estopped from showing to the contrary, although the admitted law is that the recitals of such trustee in the deed of conveyance which he "issues" in assumed conformity with the power given him, is not even *prima facie* evidence of the facts recited, except by agreement to that effect, contained in the instrument, between the contracting parties.

But it is not only repugnant to law, but also to natural justice, that any mere agency, constituted for a special purpose, and having defined and prescribed powers, whose exercise is to be dependent

upon a precedent condition which is also clearly defined and prescribed, should bind its principal to any parties otherwise than by actually complying with the limitations imposed upon it; (and if it does not, no power is really conferred upon it to do anything), and its recital can have no influence, either way, to control the truth or fact of the matter. To hold to the contrary—and this court has *always* so held in such cases—is to make it impracticable to fix limitations upon powers thus intrusted, and to invite collusion between the "tribunals" and bond-jobbers for the ultimate benefit of so-called *bona fide* purchasers. The construction of such powers herein urged has the substantial endorsement of this court in the *Floyd Acceptance Cases*, 7 Wall. 666, in which were involved commercial paper, statutory powers, a "tribunal" and *bona fide* purchasers, but fortunately for the merits the defendant was neither a municipality, county or township. It is there held, "that a person dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued." And it is somewhat singular that in no treatise on the subject of agency, and in no decision by any respectable court, either in England or America, has such construction been given to powers, as is held and persisted in by this court in all cases of municipal bonds. On the contrary, it is everywhere said and held that an authority derived from a statute, prescribing clearly the laws of its exercise, must be strictly pursued in all its provisions, in order to be binding upon those conferring the authority: (2 Kent's Commentaries 621 (marginal page); Story on Agency, 3d ed., sects. 105, 126, 133, 136, 139 and 307 a; 1 Parsons on Contracts, 5th ed., 44, 45; 2 Wharton's Law of Evidence, sects. 1170, 1178; Cooley's Constitutional Limitations, 4th ed., 658, 660; Cooley on Taxation 197, 199 and 216; Dillon on Mun. Corp., 2d ed., sects. 372, 418 and 419; Chitty on Contracts, 10th ed., 229; Smith's Mercantile Law, 3d ed., 173–174; 1 American Leading Cases, 5th ed., 653, 680; Sedgwick Constitutional and Statutory Law 342, 385; 3 Cush. (Mass.) 511; 8 Allen (Id.) 10 Id. 528; *Baxter* v. *Lamont* 60 Ill. 237; *Geiger* v. *Ashbury*, 49 Cal. 571).

The sole authority relied upon by this court in support of its peculiar views (except its own former decisions), appears to be the case of *Royal British Bank* v. *Turquand*, 6 E. & B. 327. Let us see what this case is, as stated in *Knox County* v. *Aspinwall*, where it was first invoked: It was an action upon a bond against the defendant as the manager of a joint-stock company. The defence was a want of power under the deed of settlement or charter to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed. The resolution passed was considered defective. JERVIS, Ch. B., in delivering the judgment of the court, said: "We may now take it for granted that the dealings with these companies are not like dealings with other (*i. e.*, ordinary) partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." The distinction between this case and those which refer to it for support cannot be better expressed than in the words of Mr. Justice MILLER, in his dissenting opinion in *Humboldt Township* v. *Long et al.*, 92 U. S., at page 650, in which Judges DAVIS and FIELD concurred: "If the English judges who decided the case of the *Royal British Bank* v. *Turquand*, on the authority of which *Knox County* v. *Aspinwall* was based, were here to-day, they would be filled with astonishment at the result of their decision. The bank in that case was not a corporation. It was a joint-stock company, in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended in this particular case on a resolution of the company. The charter or deed of settlement gave the power, and when it was exercised the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient. That was a private partnership. Its papers and records were not open to public inspection. The managers and directors were not officers of the law, whose powers were

defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records, made and kept by officers of the law for that purpose. In all these material circumstances that case differed widely from those now before us."

The fatal weakness of the doctrine here criticised lies in this: the giving of *any effect whatever* to the recital in the bonds (although indispensable to the effectual working of the machinery of the "tribunal," and for laying the foundation for the so-called estoppel), or distinguishing between cases in which there happened to be no recital, as in *Marsh* v. *Fulton County*. The essential and indispensable fact must appear that the power was exercised according to the conditions imposed, when the bonds were issued (and the recital or non-recital of compliance can have no influence upon the fact), in order to make the act of issuing valid and binding upon the county or municipality. And the *giving* of the power is not questioned, in most cases, but whether the conditional power conferred has been exercised upon the terms of the grant; for if it has not, no authority to issue at all is either given or proposed to be given. The pretext that *because* the officers are authorized to issue the bonds *if* the prescribed conditions are performed, that *therefore* they are thus *also* appointed to ascertain and adjudge upon these facts so as to exclude evidence of the truth of the matter from being produced, because of being in the hands of (what they call) a *bona fide* holder *who chooses to assume that the conditions were complied with*—whether so recited or not—seems unworthy of the court and unjust to litigants. And although the giving of such effect to the recital may seem to follow legitimately from the assumption, in the first instance, that the investiture of power to decide is implied by the constituting of such a tribunal to issue bonds upon a condition, this will not avail anything, since the assumption itself has been shown to be without foundation, and contrary to the principles of law governing such cases. Nor is the dilemma in the least relieved by the final assumption that the municipality is estopped from showing the truth as against its own (assumed) investiture of power, and the recital of compliance with its prescribed precedent conditions by its constituted agency, when the bonds issued are in the hands of so-called *bona fide* holders of said bonds. For if the first assumption is unwarranted, to wit: that the giving of power upon condition that certain pre-requisites are first met, invests the constituted agency with final

power to pass judicially upon the compliance with them; so also the further inference that the recital of such compliance is conclusively (or at all) binding upon the municipality or county, and the final consequential inference of estoppel to show to the contrary; for the corner-stone being upon sand, the superstructure topples over with it.

Indeed it seems incomprehensible that such a court should have built up such a structure upon such slender foundations, if unwarranted assumptions and inferences from them can fairly be dignified by that term, except upon the view indicated in the former article, heretofore referred to, that the court constituted itself the guardian of the peoples' rights and of the public credit, with which it had neither power nor occasion to deal, and having gone thus far has been logically compelled to go farther or abandon its ground, a thing which the judiciary is proverbially reluctant to do. And this self-constituted guardianship, instead of being challenged and repudiated as it should have been, at least by the bar, who are the sentinels of the people against either judicial or legislative encroachment, has been attempted to be vindicated and even applauded by corporation lawyers, who have assumed that "this great court, this more than Amphictyonic council" (which last appellative is really an insult, if history is to be believed), sitting in serene majesty and unruffled composure, was the *only court* capable of considering *such* a subject impartially, and that the state courts were but the mere instruments and exponents of local prejudice. Instead of such supereminent authority thus claimed and exercised, the real authority of the court in such cases, is only this: To ascertain intelligently and impartially what the decisions of the state courts construing their own laws are *and to follow them.* This, it acknowledges, sometimes absolutely, sometimes qualifiedly, but rarely performs. And the claim of being free to pass upon the questions originally because "commercial paper" (so called) is usually involved, is on a footing with the other arrogations of power, and even this is deferentially abandoned when the United States is a party, as in the case of the *Floyd Acceptances*, 7 Wall. 666.

2. As regards the novelty of the application of the doctrine of estoppel, in such cases as these, little more need be said, since some consideration of it has necessarily been given in reviewing the primary question as to the construction of power. But it may be safely said that in cases where the power to bind does not exist,

and never existed because of actual non-compliance with the precedently imposed conditions, there can be no estoppel, and this whatever the bonds so issued may recite or fail to recite, and however *bona fide* the holder. No one has been rightfully misled in such cases, and the municipality, or county, has done nothing having a tendency towards misleading. On the contrary, the inquirer is explicitly informed of the conditional terms of the subscription by the statute itself, and if he chooses to infer rather than examine or ascertain he should suffer the consequences of a mistaken and unwarranted inference. None of the essential elements of an estoppel *in pais* can be truthfully invoked by a *bona fide* holder of bonds so issued, purchased without examination or inquiry and with a blind reliance upon recitals of precedent conditions performed, when the validity of the issuing is contingent upon the fact of actual performance. He has not in good faith on his part, been induced by the voluntary intelligent action of the party against whom it is alleged to change his position. No inducement whatever is held out to any person to change his position by the authorization, upon a guarded and explicit prohibition against issuing until certain preliminary pre-requisites have been met to issue bonds, if the precedent conditions are performed. The parties principal do not approach each other, nor is any one authorized even by implication, to offer or represent anything to the *bona fide* purchaser, but, on the contrary, it appears on the face of the authority that it is contingent upon the prior performance of preliminary conditions. To assume or infer the performance of such conditions from its recital or to assume or infer the non-performance from its non-recital is equally unwarrantable, and no man can be truly said to have acted in good faith who does so.

3. The system of so called contracts, built upon such principles is artificial and is subversive of justice.

This is but the statement of an inevitable conclusion, as the result of deduction from what has been already said in the article. It is sufficient objection to such a system that it imposes burdens, and creates liabilities where none existed, and assumes and enforces a contract never made.

Nor is this the only wrong done, though it seems great enough in all conscience; the effect of such a course of decision and its consequences has been wide-spread and far-reaching.

It has made the county or municipal "tribunals" usually com-

posed of unlearned men who are not always of known integrity—the centre of an influence as corrupting to them as it has been injurious to those they claimed to represent; unscrupulous persons in the employ of unprincipled capitalists or of sham and swindling corporations, made no scruple to "buy" such tribunals or a majority of them, in cases where the precedent conditions had notoriously not been complied with, knowing that the "recitals" of a falsity was as available as if the truth, in the hands of a "*bona fide* holder." Reciprocally the "tribunals" offered themselves for sale to the highest bidder, so that communities became to be the prey of vultures from the outside and cormorants within, until in some instances violence and bloodshed was invoked to put a stop to this villainy. Finally, confidence was almost wholly withheld, as being the only adequate protection, and enterprises deserving of support were left to languish or decay. The result is that commercial, manufacturing and productive interests have been seriously prejudiced and retarded for many years past.

The *rationale* of the doctrine with all its fallacies and false inferences was fairly stated and unmercifully exposed by Mr. Justice MILLER (FIELD and DAVIS concurring), in his dissenting opinion in *Humboldt Township* v. *Long et al.*, 92 U. S. 646, at the close of the October Term 1875 of the Supreme Court of the United States, after ten or twelve such judgments following *Knox County* v. *Aspinwall*, had been rendered. He said: "I understand these opinions to hold that when the constitution of the state, or an act of its legislature, imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be void. But if there exists any authority whatever to issue such bonds, no restrictions, limitations or conditions imposed by the legislature in the exercise of that authority can be made effectual if they be disregarded by the officers of those corporations. * * * It is therefore clear that so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity.

"It may be the wisest policy to prevent the issue of such bonds altogether; but it is not for this court to dictate a policy for the states on that subject. The result of the decision is a most extraordinary one. It stands alone in the construction of powers spe-

cifically granted, whether the source of the power be a state constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes that, of all the class of agencies, public or private, whether acting as officers whose powers are created by statute or by other corporations or by individuals, and whether the subject-matter relates to duties imposed by the nation, or the state, or by private corporations, or by individuals, *on this one class of agents, and in regard to the exercise of this one class of powers alone* must full, absolute and uncontrollable authority be conferred on them, or none. In reference to municipal bonds alone, the law is, that no authority to issue them can be given which is capable of any effectual condition or limitation as to its exercise.

"The power of taxation, which has been repeatedly stated by the court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactment be limited. If the constitution of a state should declare that no tax shall be levied exceeding a certain per cent. of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent., the courts would not hesitate to pronounce a levy in excess of that rate void. But when the legislature undertakes to limit the power of creating a debt by these corporations, which will require a tax to pay it in excess of that rate of taxation, this court says there is no power to do this effectually. *No such principle has ever been applied by by this court, or by any other court, to a state, to the United States, to a private corporation, or to individuals.* [The italics are mine.] I challenge the production of a case in which it has beeen so applied. In the *Floyd Acceptance Cases*, 7 Wall. 666, in which the Secretary of War had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of a *bona fide* purchaser before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think, for a moment, of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his autho-

rity, when that authority is express, is open and notorious, bind the corporation which he professes to represent.

"The simplicity of the device by which this doctrine is upheld as to municipal bonds, is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is that, whenever a condition or limitation is imposed upon the power of these officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

"This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the *Floyd Acceptance Cases* this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed, it could not be aided by giving the paper that form. In County Bond Cases it seems to be otherwise. In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In County Bond Cases, while this principle is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is valid.

"There is no reason in the nature of the condition on which the power depends in these cases why any purchaser should not take notice of its existence before he buys. * * * In the matter of a power depending on such facts as in these cases, in any other class of cases, it would be held that, before buying these bonds, the purchaser must look to those matters on which their validity depended. They are all public, all open, all accessible. * * * But in favor of purchasers of municipal bonds, all this is to be disregarded, and a debt contracted without authority and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district. I say helpless advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary,

perhaps, to his wishes. Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties and villages, in creating debts, which not they, but the property owners must pay."

After distinguishing between these cases and that of *Royal British Bank* v. *Tarquand*, he concludes as follows :—

"It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due. But it is another thing to say that when an officer created by the law exceeds the authority conferred upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue, and no power to prevent it. This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issue of the bonds was *not the act of the corporation.* It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose rather than the property holder, who might not know anything of the matter, and if he did, had no power to prevent the wrong."

These suggestions of legal objection to the doctrine so long and persistently held and enforced by this court are unanswerable,—for they are based upon principles of truth, justice, and the law. The doctrine prevailing at present is in hostility to all these, and has nothing but a repetition of exposed errors to support it.

Before the final returns of the writs of *mandamus* so numerously issued have been finally adjudicated, there will be, in some way or other, the reaching of a result very different from what now appears. For it is in the nature of the case that such open and flagrant violations of the principles of law and of justice, should not have free or uninterrupted course—and being combatted to the last, as they must be, will be finally abandoned and disavowed.

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