discounted by and belonged to the said Harris & Sons, or was transmitted for collection, unless the jury shall find, from all the evidence in the case, that the defendants had knowledge of such private practice; and in the absence of such knowledge, the defendants were authorized to treat such paper according to what it purported on its face, and the general custom of bankers in the District of Columbia and elsewhere, offered in evidence."

This prayer contains two propositions, the one relating to the knowledge of defendants of certain private modes of doing business of Harris & Sons; and the other, to what the jury were authorized to infer, from certain other circumstances, in the absence of such knowledge on the part of defendants.

The instructions which were given by the court, and which are in the record, were full and sound on the first of these propositions, and we think were all that was necessary on both branches of the prayer. But the second branch of the instruction asked is objectionable, because it referred to the jury the interpretation of the indorsement on the paper, and also required of them to determine the case on the face of the paper, and the custom of bankers alone, without reference to the special facts proven in regard to the course of dealing between defendants and Harris & Sons. The charge of the court left all these matters of fact to the jury for their consideration, after a full and fair statement of all the principles of law which were necessary to a sound verdict.

We see no error in the record, and therefore the judgment of the Circuit Court is

AFFIRMED WITH COSTS.

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## GELPCKE ET AL. *v.* THE CITY OF DUBUQUE.

1. By a series of decisions of the Supreme Court of Iowa prior to that, A.D. 1859, in *The State of Iowa, ex relatione*, v. *The County of Wapello* (13 Iowa, 388), the right of the legislature of that State to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly, was settled in favor of the right; and those decisions, meeting with the approbation

of this court, and being in harmony with the adjudications of sixteen States of the Union, will be regarded as a true interpretation of the constitution and laws of the State so far as relate to bonds issued and put upon the market during the time that those decisions were in force. The fact that the said Supreme Court of Iowa *now* holds that those decisions were erroneous, and ought not to have been made, and that the legislature of the State had no such power as former courts decided that they had, can have no effect upon transactions in the past, however it may affect those in the future.

2. Although it is the practice of this court to follow the latest settled adjudications of the State courts giving constructions to the laws and Constitutions of their own States, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice, and law.
3. Municipal bonds, with coupons payable to "bearer," having, by universal usage and consent, all the qualities of commercial paper, a party recovering on the coupons will be entitled to the amount of them, with interest and exchange at the place where, by their terms, they were made payable.

THE Constitution of the State of Iowa, adopted in 1846, contains the following provisions, to wit:

"ART. 1. § 6. All laws of a general nature shall have a uniform operation."

"ART. 3. § 1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated the General Assembly of the State of Iowa," &c.

"ART. 7. The *General Assembly* shall not *in any manner create any debt* or debts, liability or liabilities, which shall, singly or in the aggregate, with any previous debts or liabilities, exceed the sum of *one hundred thousand dollars*, except in case of war, to repel invasion, or suppress insurrection."

"ART. 8. § 2. Corporations shall *not be created in this State by special laws, except for political or municipal purposes;* but the General Assembly shall provide, by *general laws*, for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. *The State shall not directly or indirectly become a stockholder in any corporation.*"

With these *constitutional* provisions in existence and force, the *legislature* passed certain *statutes*. One,—incorporating

the city of Dubuque, passed February 24, 1847,—provided, in its 27th section, as follows:

"That *whenever*, in the *opinion of the City Council*, it is expedient to *borrow money* for any particular purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes; the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

By an act passed January 8, 1851, this charter was "so amended as to empower the City Councils to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said act;" that is to say, by the section just quoted. A subsequent act,—one passed 28th January, 1857,—enacts thus:

"The *city of Dubuque* is hereby *authorized and empowered* to aid in the construction of the *Dubuque Western*, and Dubuque, St. Peter's and St. Paul Railroad Companies, *by issuing* $250,000 *of city bonds to each*, in pursuance of a vote of the citizens of said city, taken in the month of December, A.D. 1856. *Said bonds shall be legal and valid*, and the City Council is authorized *and required* to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, *bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the moneys arising from the sale of said bonds, without the limits of the city and county of Dubuque*, in the construction of either of said roads; and *neither the city of Dubuque nor any of the citizens shall ever be allowed to plead that the said bonds are invalid.*"

With this Constitution, as already mentioned, in force, and after the incorporation of the city and the passage of acts of Assembly, as just mentioned,—*and after certain decisions of the Supreme Court of Iowa as to the constitutionality of these acts, the character and value of which decisions* make the

principal subject of discussion in this case,—the city of Dubuque issued a large amount of coupon bonds, which were now in the hands of the plaintiffs. The bonds bore date on the 1st of July, 1857, and were payable to Edward Langworthy, *or bearer*, on the 1st of January, 1877, at the Metropolitan Bank, in the city of New York. The coupons were for the successive half year's interest accruing on the bonds respectively, and were payable at the same place. The bonds recited that they were given "for and in consideration" of stock of the Dubuque Western Railroad Company, —(one of the roads to which, by the act last mentioned, the city was authorized to subscribe),—and that for the due payment of their principal and interest, "the said city is hereby pledged, in accordance with the code of Iowa, and an act of the General Assembly of the State of Iowa, of January 28, 1857,"—the act just referred to. The coupons on the bonds not being paid, the plaintiffs sued the city of Dubuque in the District Court of the United States for the District of Iowa, claiming to recover the amount specified in the coupons, with the New York rate of interest from the time of their maturity, and exchange on the city of New York.

The city set up the following grounds of defence:

1. That the bonds were issued by the city to aid in the construction of a railroad extending *beyond its limits into the interior of the State.*

2. That at the time of issuing the bonds and coupons, the indebtedness of the city *exceeded one hundred thousand dollars.*

3. That at the time of issuing the bonds and coupons, the indebtedness of *the State of Iowa exceeded one hundred thousand dollars.*

4. That at the time of issuing the bonds and coupons, the indebtedness of *the cities and counties of Iowa exceeded*, in the aggregate, *one hundred thousand dollars.*

The plaintiffs demurred. The demurrer was overruled, and judgment entered for the defendant. On error, the question in this court was, whether the judgment had been rightly given?

Argument for the creditors.

*Mr. S. V. White and Mr. Allison for the bondholders:* In one point of view, the question before the court is a narrow one; a question as to the number and relative weight of decisions of the Supreme Court of Iowa alone, and in its own constitution and statutes; a settlement of the balance on an account domestic simply. It is a question whether this court will regard seven solemn decisions, made by the Supreme Court of Iowa, beginning in A.D. 1853, and ending in A.D. 1859, on the faith of which decisions, strangers have lent their money for the improvement of the State itself, or of cities which adorn and enrich it, so overruled by a decision made in A.D. 1860, or decisions of a later date, as that bonds issued payable to BEARER, are now void in the hands of bearers who, between the said years of 1853 and 1859, and on the faith of those decisions, bought them in good faith and for value. Undoubtedly we shall ask that this question be decided; that this settlement of the account domestic simply be settled. The case involves, as a necessity, perhaps no other question. The court may possibly confine itself much to these limits. In some points of view, however, the issue is of greater dignity. It concerns the honor, not of Iowa only, but of all the States; the value of millions of securities issued by nearly every State of the Union, and by cities and counties and boroughs in them all. Yet, more: we shall ask this court to treat as contradicting precedents made by the Supreme Court of Iowa itself, and so as subversive of regard for authority,—as erroneous, therefore, in the law, and of no obligation,—the latest decisions of a State of this Union; the decision, we mean, in *The State of Iowa, ex relatione*, v. *The County of Wapello*,* and any decisions which, to the disregard of earlier and settled precedents, follow it. On all these accounts the subject deserves an examination on a wider view of precedents than those of Iowa alone. Time is not wasted in appropriating much of it to an inquiry as to American decisions universally. We propose, therefore, to examine

* 13 Iowa, 388.

Argument for the creditors.

1. The adjudications of courts of the different States upon the same or similar questions, prior to its adjudication by the courts of Iowa.

2. The adjudications of the courts of the State of Iowa, upon such questions; and,

3. The adjudications of the courts of the United States, and of the several States, since the question was first decided by the courts of Iowa.

1. And first, we may admit that all courts have held uniformly, that such acts and contracts as those to be considered in this case do not arise from any legislative power delegated to the municipal corporations, but that they arise only from powers conferred *by legislative act of the State.*

The first case upon the subject arose in Virginia, and was decided by the Court of Appeals of that State, A. D. 1837, in *Goddin* v. *Crump.** The legislature of that State had authorized the city of Richmond to subscribe for stock in a company incorporated for the improvement of the navigation of James River, and for building a road to the Falls of the Kanawha River, and to borrow money to pay the same, and to levy and collect a tax for the payment of principal and interest so borrowed. Under these acts the Common Council of the city of Richmond passed an ordinance subscribing for such stock, and for levying a tax, as authorized by such acts, and the collector of the city had levied upon a slave, the property of complainant, to satisfy the tax due from him under such levy. The complainant exhibited his bill in equity, in behalf of himself and others, citizens of the city of Richmond, who were property-holders therein, and who had not consented to the passage of the acts of the legislature, nor the acts of the council in passing the ordinance and in levying the tax, and prayed to be relieved from the payment of such tax; and that the collector, who, with the Common Council of Richmond, was made a party defendant, might be enjoined and restrained from the collection of such tax, perpetually; upon the ground that the law authorizing such subscription and levy was unconstitutional and void.

* 8 Leigh, 120.

Upon this case the Court of Appeals of Virginia (Brooke, J., dissenting) decided:

I. That an act, to be within the legitimate scope of a municipal corporation, need not be performed in the corporate limits, but might properly be extended to objects beyond the limits of the corporation.

II. That the true test of the corporate character of the act, was the *interest* of the corporation.

III. That the citizens themselves were the judges of what was the interest of the corporation, and not the judges of the court, and however much a court might doubt the wisdom of the citizens in determining that question, they would not interfere with it.

IV. That the majority of such citizens could bind a dissenting minority, and properly charge them and their property with the payment of tax, to which they had given no assent.

V. That the laws in question are not repugnant to the Constitution, and the bill was accordingly dismissed with costs.

The next case in point arose, A. D. 1843, before the Supreme Court of Errors of the State of Connecticut, *City of Bridgeport* v. *Housatonic R. R. Co.** In that case, in March, 1837, the city of Bridgeport voted to take stock in the Housatonic Railroad Company, and to procure loans of money, pledging the faith of the city therefor. In May, 1838, the legislature confirmed and legalized such acts; and on June 15th, 1838, the bonds sued on were duly issued. The court unanimously decided:

I. The legislature can give power to municipal corporations to subscribe stock in railroads passing through or terminating in them;

II. That the legislature may, by act or resolution, confirm and render valid, prior voidable acts of such corporations;

III. That the fact of a municipal corporation becoming stockholders in a railroad, and therefore, *pro tanto*, going beyond the legitimate ends for which the corporation was

* 15 Connecticut, 475.

constructed, is only an incident to the general power to provide for the interests of the citizens of the corporation, and does not, therefore, take it out of the scope of its corporate acts;

IV. That a majority of such citizens can constitutionally decide upon the acts of the corporation, and compel a minority to contribute, by taxation, to objects to which such minority are opposed.

The next case was in the Supreme Court of Tennessee, *Nichol* v. *Mayor of Nashville*,* December Term, A. D. 1848. The legislature of Tennessee had incorporated a railroad company, and by subsequent act the town of Nashville was authorized to subscribe 20,000 shares of its stock, and to borrow money, and to levy taxes to pay principal and interest on such loan. A bill was filed in equity to enjoin the borrowing of money under said act, and to prevent the issue of bonds and the levy of a tax, the ground assigned being, the acts were unconstitutional and void. Demurrer to bill. The court decide:

I. That the building of a railroad or aiding therein, by subscription to the stock, which railroad shall terminate in, or pass through or *near* a municipal corporation, is within the legitimate scope of corporate acts, and for such purposes a tax may be levied and collected by the delegated authorities of such corporation;

II. That such act neither contravenes the provisions of the Constitution of the United States, nor of the State of Tennessee.

The same questions came before the Court of Appeals in Kentucky, in *Talbot* v. *Dent*,† A. D. 1849, and again, A. D. 1852, in *Slack* v. *Maysville R. R. Co.*‡

The chief justice delivered the opinion of the court in both cases, and in both, the foregoing decisions of Virginia, Connecticut, and Tennessee were cited, argued, approved, and followed, at length.

The same questions came before the Supreme Court of

* 9 Humphreys, 252. † 9 B. Monroe, 526. ‡ 13 Id., 1.

Pennsylvania, in *The Commonwealth* v. *Mc Williams*,* May Term, 1849, and again in *Sharpless* v. *Mayor*,† and in *Moers* v. *City of Reading*.‡ All these cases decide the questions as former and other courts had done, and hold the bonds binding.

The Supreme Court of Illinois, A. D. 1849,§ held an act of the legislature, giving the right of taxation to a certain precinct, to keep up a bridge across Rock River, to be constitutional, and sustained a tax levied by the local authorities under such law; and the Supreme Court of New York,‖ May Term, 1840, made a similar ruling in behalf of a law authorizing a municipal tax, for the purpose of paying the excess of expenses for bringing a canal to such corporation, although private individuals had given bond for the payment of such excess to the canal company.

The same questions came before the Supreme Court of Ohio, A.D. 1852, and A.D. 1853, in two cases,¶ in which the questions were decided as in all the cases already named. Comment may therefore be spared.

Thus there had then been decisions of the highest appellate courts of eight States of the Union, extending through a period of sixteen years, and numbering in all twelve such decisions.

2. *As respects the Courts of Iowa.* And here, we premise, that so far as *cities* are concerned, there has never been a decision made upon the question in Iowa, but the principle has been repeatedly settled in the case of *counties*, upon principles, however, equally binding upon cities.

The question came before the Supreme Court of Iowa, at the June Term, 1853, in the case of *Dubuque Co.* v. *Dubuque and Pacific R. R. Co.*,** and the court held:

1. That a county has the constitutional right to aid in building a railroad within its limits.

* 11 Pennsylvania State, 61. † 21 Id., 147. ‡ Id., 188.
§ Shaw *v.* Dennis, 5 Gilman, 405.
‖ Thomas *v.* Leland, 24 Wendell, 65.
¶ Cincinnati R. R. Co. *v.* Commissioners of Clinton County, 1 Ohio State, 77, and Cass *v.* Dillon, 2 Id., 607. ** 4 G. Greene, 1.

II. That the provision of the Constitution, which limited the State debts to the sum of $100,000, and also the provision which declares that the State shall not directly nor indirectly become a stockholder in any corporation, applied only to the *State* in its *sovereign* capacity.

III. That § 114 of the Code of 1851, applied as well to railroads as to ordinary roads, and that proceedings regularly had, under that and subsequent sections, to § 124 inclusive, were regular and legal, and authorized the issue of bonds for railroad purposes, and that said railroad bonds were valid and binding upon the county. This opinion is written by Greene, J.; Kinney, J. dissenting.

At the June Term, 1854, in *The State* v. *Bissell*,* the same question was raised, together with minor questions, about the regularity of the proceedings. It was a proceeding in Chancery to prohibit the county judge of Cedar County from issuing bonds to a certain railroad company. The county judge in response set out his action in the premises, to which the relators filed a demurrer, which was sustained by the court below, and the defendant prohibited from levying the tax by perpetual injunction. From this decree the defendant, the county judge, appealed, and the case was heard in the Supreme Court, the decree reversed, and the county judge permitted to issue bonds and levy and collect a tax therefor. In this case the opinion was written by Hall, J., and the decision last but one cited is followed without comment. Although Greene, J., dissented on a minor question, growing out of the facts in the case, there was no dissenting opinion on the constitutionality of the bonds.

Next in order, in the course of the history of this question, in the State of Iowa, are two acts of the legislature of the State, passed at the session of December, A. D. 1854, both approved January 28th, 1855.†

By the first of these it is enacted, "*That wherever* any [railway] company shall have received, or may hereafter re-

* 4 G. Greene, 328.

† Chap. 128 and 146, of acts of Fifth General Assembly of the State of Iowa, 142 and 219, respectively.

ceive, the bonds of any city or county *upon subscription of stock*, by such city or county, such bonds may have interest at any rate not exceeding ten per cent., and may be sold by the company, at such discount as may be deemed expedient."

By the second it is enacted, "that in all cases where county or town or city incorporations have or may hereafter become stockholders in railroads, or other private companies or incorporations, it shall not be lawful for the county judges, mayors, or other agents of such cities or counties, to issue the bonds of their counties, or cities, until they are satisfied that the contemplated improvements will be constructed through or to their respective cities or counties, within thirty-six months from the issuing and delivery of said bonds; and the proceeds of such bonds shall, in all cases, be expended within the limits of the county in which said city may be situated; *Provided*, that nothing in this act shall in any way affect corporation rights, for any contracts or subscriptions heretofore made with any railroad company or corporation, for the issuing of county corporation bonds."

These acts show the construction of the State authorities at that time, and are themselves a legislative acknowledgment that under prior laws such municipal corporations had the right to issue bonds to railroads and to take stock in them, and afforded general authority of law for such actions on the part of such corporations in future.

The next case that came before the Supreme Court of the State, was that of *Clapp* v. *The County of Cedar*,* a suit brought on the same bonds, the issue of which was sought to be enjoined in the case of *The State* v. *Bissell*, and was determined before the court at the June Term, A.D. 1857, by a court composed entirely of different judges from those on the bench when the last cause was decided. In that case the majority of the court hold:

1. That the question of the constitutionality of the bonds is decided by the prior decisions, upon which the public and the world have acted, and that a change of ruling would be "the worst of all repudiation,—judicial repudiation."

* 5 Iowa, 15.

II. That such bonds and coupons were negotiable as under the law merchant.

Other questions foreign to this subject were also discussed, but it is unnecessary to refer to them. Wright, C. J., dissented, to use his own words, "very reluctantly," on the question of the constitutionality of such bonds.

The question again was decided three times at the June Term, 1858, in *Ring* v. *The County of Johnson*,* in *McMillen* v. *Boyles*,† and in *McMillen* v. *The County Judge and Treasurer of Lee County*.‡ The opinions in the first two cases were written by Woodward (Wright, C. J., dissenting in the first case); in the second case no one dissented; and the opinion in the third case was written by Wright, former dissenting judge. Each case holds,

I. That the question is *settled* by the Supreme Court *by former* adjudications, that the counties have the right, constitutionally, to take stock in a railroad, and to issue their bonds therefor.

II. And the second and third cases decide that the legislature by a curative act had made the bonds of Lee County binding upon the county, although from an informality they were irregularly issued.

In one of the cases, *Ring* v. *The County of Johnson*,§ which was decided a few days before the others, Chief Justice Wright wrote a short dissenting opinion.

Next in order in the decisions of this question comes *Games* v. *Robb*,‖ June Term, 1859, and the opinion is here written by Chief Justice Wright, who says: "That the judge had the power to submit a vote to take subscription on a railroad, to the people, and to levy a tax therefor, *we understand to be settled* in favor of the power by the cases of *Clapp* v. *Cedar County*,¶ *Ring* v. *The County of Johnson*,** and *McMillen* v. *Boyles*,†† and the cases there referred to." Thus, all the judges concur in the decision of this question, as they did in *McMillen* v. *Boyles*, holding the constitutionality of

* 6 Iowa, 265. † Id., 304. ‡ Id., 391. § 6 Id., 265.
‖ 8 Id., 193. ¶ 5 Id., 15. ** 6 Id., 265. †† 6 Id., 304.

the bonds to be decided by the former cases, the opinion of the court being, in each case, written by the learned judge who alone had dissented.

We thus have the decisions of the Supreme Court of Iowa, given to the world through a period of six years, by two different benches, in seven different decisions of the court, upon the questions now made before this court, and although two judges had dissented during that time, yet in the opinion of the Chief Justice of the State, written by him who alone had before that time "very reluctantly" dissented, the great commercial world, whose money was at that very moment building up the commerce of the State by extending railroads through it, were assured that the question was settled, and that, too, in favor of the legality and negotiability of these bonds. Whether, in view of the Constitution of Iowa, it was or was not rightly settled in the first instance, is a matter not important at all to inquire into. It was settled by a tribunal which had power to settle it; and on the faith of judicial decisions the bonds were sold.

Before examining decisions since made by the Supreme Court of Iowa, let us mention the decisions of other courts, down to the date when, at December Term, 1859, the Supreme Court just named took that first step, in *Stokes* v. *The County of Scott*, in overthrowing its decision, which was consummated in *The State, ex relatione*, v. *The County of Wapello*, at the June Term, 1862.

In Ohio, the Supreme Court, at different dates, has affirmed its ruling in five different decisions.* In Missouri, its court followed, in 1856, previous rulings also.† In this, the Supreme Court of the United States, the question was decided twice at December Term, 1858, and once in 1859, and once in 1860.‡

* Ohio *v.* Commissioners of Clinton, 6 Ohio State, 280; The State *v.* Van Horne, 7 Id., 327; Id. *v.* Trustees of Union, 8 Id., 394; Id. *v.* Commissioners of Hancock, 12 Id., 596; Trustees *v.* Shoemaker, 12 Id., 624.

† City *v.* Alexander, 23 Missouri, 483.

‡ Commissioners of Knox Co. *v.* Aspinwall, 21 Howard, 539; Same *v.* Wallace, Id., 547; Zabriskie *v.* The Cleveland R. R., 23 Id., 381; Amey *v.* The Mayor, 24 Id, 365; Commissioners, &c., *v.* Aspinwall, Id., 376.

The District Court of the United States for the District of Wisconsin, in A. D. 1861, made similar decisions, in *Smith* v. *Milwaukee & Superior R. R. Co.*,* and *Mygatt* v. *City of Green Bay*.†

The Supreme Court of New York, at June Term, 1857, in *Clarke* v. *The City of Rochester*,‡ in a review of the question, after an elaborate argument before them, made the same ruling, which was affirmed by the Court of Appeals of that State at the September Term, 1858, *nemine dissentiente*.§

The Supreme Court of Indiana, at the May Term, 1857,‖ made the same ruling.

The Supreme Court of Illinois made a similar ruling, in April Term, 1858,¶ which was, in April Term, 1860, affirmed in two cases.**

The same question, after elaborate discussion, was also unanimously decided in the same way, at the January Term, 1857, of the Court of Appeals of South Carolina.††

The Supreme Court of Wisconsin, at the December Term, 1859, in the two cases,‡‡ made the same ruling, and decided every constitutional question in this case under a Constitution the same as that of the State of Iowa, in favor of the legality of such bonds; and that, too, by the unanimous concurrence of the whole bench. There are other cases, in others of the States of the Union, which might be cited, but it would only tend to lengthen the list, rather than to make it stronger.

Nowhere, in short, can an authority be found, save the subsequent ruling of the State of Iowa, where the highest appellate court of a State, or of the United States, has held such bonds to be invalid, in the hands of *bonâ fide* holders for value; and at the time when that decision was rendered,

* 9 American Law Register, 655. † 8 Id., 271. ‡ 24 Barbour, 446.
§ Bank of Rome *v.* Village of Rome, 18 New York, 38.
‖ The City of Aurora *v.* West, 9 Indiana, 74.
¶ Prettyman *v.* Supervisors, 19 Illinois, 406.
** Johnson *v.* The County, 24 Id., 75; Perkins *v.* Lewis, Id., 208.
†† Copes *v.* Charleston, 10 Richardson, 491.
‡‡ Clark *v.* City, 10 Wisconsin, 136, and Bushnell *v.* Beloit, Id., 195.

decisions had been made by the Supreme Court of the United States, and of fifteen of the different States of the Union, of which Iowa was one, running through a quarter of a century of time, and all going to establish the obligation.

But upon what grounds was this contrarient decision finally based?

In *Stokes* v. *The County of Scott*,* the majority of the court held, where the bonds had been negotiated, and rights had become vested, by purchase, by innocent holders, that there they were valid; but that where the question was presented prior to the issue of such bonds, the court might properly interfere to restrain the issue. Wright, C. J., took his former position, holding such bonds to be unconstitutional and void, in the hands of all parties. Stockton, J., held the bonds constitutional, but not warranted by law; that they might be enforced by innocent third parties, but that it was properly within the province of a court of equity to restrain the issue thereof, where the question was presented *in limine*.

Woodward, J., dissented from both the other judges, holding that the question was settled in the State, and that it was the duty of the court to abide by precedents.

Of the immediate effect of this decision, the world had no right to complain, as no money had been invested, and it was only so far as it tended to cast loose from the accepted decisions of the State of Iowa, and of other States, and to render vested rights insecure, that it tended to work a hardship upon the commercial world.

We come now to *The State of Iowa, ex relatione*, v. *The County of Wapello*, June Term, 1862. The court there decided:

I. That section 114 of the Code of 1851, did not afford the authority of law for issuing of county bonds, overruling the case of 1853,—*Dubuque County* v. *Dubuque and Pacific Railroad Co.*

II. That certain statutes relied on, did not afford such authority, nor legalize such acts already performed; but—

III. That if a constitutional question did not preclude it,

* 10 Iowa, 166.

the court would feel bound by the construction of the statute by former courts, and would follow such decisions.

IV. That such a law, however passed, would not confer the authority, because unconstitutional.

[The counsel then examined this case on principle, arguing that independently of precedents it was wrongly decided.]

Now in the face of this history of decisions in Iowa and everywhere, of what value is this case, *The State of Iowa, ex rel.*, v. *The County of Wapello*, so much relied on? By whom, after all, is law to be settled among us? By the Supreme Court of the United States, or of the State of Iowa? By the supreme tribunal of fifteen States or of one? By the Supreme Court of Iowa for *seven* years or for *two?* By *six* judges of that State or by *three?* Are you to hold, in the face of the fact that millions of dollars have been invested, under the law which enters into and forms a part of every contract as it was interpreted by the courts of the whole country, that you yourselves were mistaken? That for twenty-five years all the tribunals of the whole country were mistaken? That for *seven years the Supreme Court of Iowa was mistaken?* Because it appears now that that tribunal has *reversed its long-established rulings?* Had the question been presented to you one year ago to-day, you would not have hesitated an hour on the proposition, for then there was no diversity of rulings anywhere. Because the Supreme Court of Iowa has chosen thus to disregard its own precedents, are millions of property, treasured on the banks of the Delaware, the Hudson, the Thames, the Seine, and the Rhine; are the decisions *of this State of Iowa* itself, as of all the States; the reputation of *that people*, as of Americans generally, to be swept away? swept away by a "surge of judicial opinion?" Is the sway of law among us thus to "shake like a thing unfirm?" This cannot be. At best there is no settled law in Iowa upon the subject. The court of this year has reversed the decisions of former years; and has but taught instructions which will return, hereafter, to plague it. Assuredly, this high tribunal of the United States, whose opinion has been expressed with clearness,

will not vary its opinion and cut loose from its own, and from accepted decisions of the whole country, at a time when, above all times, change would be unwarranted in principle and freighted with disaster.

*Mr. Bissell, for the City of Dubuque:* The question is, Whether a subscription to an extra-territorial railway,—made by a city corporation under authority of an act of the legislature,—is valid under the *Constitution and decisions of the State of Iowa?* It is not here important for us to inquire what other courts, acting under other constitutions and under other laws, may have decided. And, first, it is conceded by the other side that a city corporation has no power by virtue of its ordinary franchises to make such subscription. If the power exist at all, it is now admitted that it comes only from legislation directly authorizing it. How, then, stands the case?

1. Let it be considered irrespectively of precedents anywhere. Under our form of government, the legislature, unlike parliament, is not omnipotent. Irrespectively of all constitutions, bills of right, or anything of that sort, it will be conceded that the legislature cannot directly take the property of one man and give it to another, or compel one man, or any number of men, to engage in particular pursuits, or to invest their money in particular securities. Nor can it take private property for even public purposes, without *just* compensation; compensation of some kind or in some way. What it cannot do in one form it cannot do in another. What it cannot do by command, it cannot do by taxation. If the legislature should tax the property of individuals in one city for all the expenses of another, such legislation would be void. And even in regard to improvements of a kind really public, if more than any citizen's just share of the expense of them is taken, the legislation is null. If power is given to take property in one place which concerns the public at large, property not being proportionably taken from that public at large, or if property is taken from one place only for objects which concern another, the

power is not one conformed to the principles of constitutional republican government. Now a man's property is as much taken by a tax as by any other form. Indeed of all modes of taking property it is the most effective, as also the most difficult to analyze and oppose. It has always been the instrument of unconstitutional legislation, and, therefore, should be watched and guarded. It is of the essence of taxation, therefore, that it be just. And wherein does this justness consist? Plainly in a just apportionment of taxes; that is to say, an apportionment which brings to the party, *in some form*, just compensation for this property taken away. In regard to a man's property taken by tax and applied to purposes purely local and about him, he gets the just recompense, by the application itself. Where the application is to purposes of a wider and more public kind,—for the purposes of his State, or the United States,—he gets a just recompense, provided all others are taxed *proportionably* with him. But just in so far as he is taxed *above* them, he gets no just recompense at all. The principles are readily applied to a case like the present.

It is almost unnecessary to say, that what the legislature cannot do directly, it cannot do indirectly. The stream can mount no higher than its source. The legislature cannot create corporations with illegal powers, nor grant unconstitutional powers to those already granted.

Again: Counsel of the other side do not distinguish well between private corporations and public ones.

*Private* corporations are only created with the assent of the corporators. They, by becoming corporators, *voluntarily* enter into a *contract*, by which they put their money or property into a common fund, to be controlled in accordance with rules to which they have assented, and which cannot be changed without their assent. The legislature cannot change the terms of their charter, neither can the majority of the corporators, unless it has been so prescribed in the contract, to which each corporator has given his assent. It is therefore right that these corporations should be permitted to enter into such speculations as they may choose. Each

member has placed just so much of his property under the control of the corporation, as he has deemed best for his interest, and no more. With *public* corporations it is different. The corporation is created by the legislature without necessarily consulting the will of the inhabitants, and often, in fact, in opposition to said will. The rights, duties, and powers of public corporations may be altered or taken away at any time by legislative enactment, or greater powers may be conferred upon the corporation in the same manner. The inhabitants of such corporation have no voice in accepting the charter; they have no power of electing how much of their property they will subject to the control of the corporation; they cannot transfer their stock, and thus cease to be members of such corporation. The legislature has power to create such corporation, in opposition to the will of the corporators, because such corporation is a portion of the government of the State itself, and every man yields up to the State just so many of his inherent rights, as are necessary to carry on the government which protects him. As said before, every citizen of a State yields up to the State all those rights which are necessary to carry on the government. He yields up the right *without his individual assent*, to be united, with other citizens, into cities, towns, counties, &c., as the legislature may deem proper. As it is necessary to have roads, wharves, waterworks, &c., for the use of the citizens of such corporations, he yields his assent to be taxed for the creation of such works. Such works, however, when created, are under the control of the corporation. They are for the sole use of the corporation.

In regard to the State of Iowa, its Constitution comes in aid of general principles. It declares (i) that all laws of a general nature shall have a uniform operation. Is not a law which authorizes a great public improvement—one running over the State—a law of a general nature? Does it have a uniform operation when the cost of it is laid on the people living at one terminus, all those along its line being exempt? It declares (ii) that the legislative power of the *State* shall be vested in the *Assembly* of the State; meaning,

of course, that it shall not be delegated. But is it not delegated when, by statute, you give a city power to legislate in a manner, which, but for the statute, it confessedly would not have? It declares (iii) that the Assembly shall not "in *any* manner create *any* debt, . . . which shall singly or in the *aggregate*, . . . . exceed $100,000." The restraint is not against the creation of a debt in behalf of the State, any more than on behalf of her subdivisions. The language is broad. When the State authorizes the cities, counties, townships, boroughs, which cover her whole surface, to lay debts on every respective part of her, is not the purpose of the restraint violated? A construction which renders practically vain a *constitutional* provision which a different interpretation, not forced, will preserve, can not be a sound one. It declares (iv) that corporations shall not be created by general laws, except for political or municipal purposes. Here is a law, in fact creating a corporation for a purpose which is neither. It declares in the same section that the State shall not directly nor *indirectly* become a stockholder in any corporation. But does not the State become indirectly a stockholder in a corporation, when she authorizes a portion of her people to enter into an organization, *which, but for her statute, they cannot have*, and allows them in such form to become a stockholder in a corporation?

It is urged that the courts of the different States of the Union have decided this question so uniformly in favor of the power of the legislature to confer the authority claimed, that it is no longer an open question. We may observe in passing that it is matter of difficulty for professional men or judges—if not belonging to a State—perfectly to understand the value of decisions made under local constitutions and local statutes in that State. They may run into great error if they read them by lights in which they are accustomed to see elsewhere. But assuming all that is claimed for them, such decisions are not binding upon this court; and if the decisions of other courts are not in accordance with the law as understood by this court, they will not be followed. If a dissenting opinion of said courts is based upon correct legal

principles, this court will follow such principles, rather than an erroneous decision of a court. Let us see if the decisions of the courts of the different States do establish the principle, that a legislature, with power like that of the State of Iowa, can confer upon municipal corporations the right to purchase stock in railroad corporations.

In the first case cited, *Goddin* v. *Crump*, it was decided that the legislature of Virginia had power to authorize the city of Richmond to levy a tax, to aid in removing a bar from James River, to open navigation to the city, and to take stock in a private corporation, organized to perform such work. This river was a navigable stream, under the laws of Virginia. The court held that the levy of the tax to pay for such stock was legal, and also held that the interest of the corporation was the true test of the corporate character of the act, and that the legislature was the sole judge of what would conduce to the interest of the city. The act giving the power to aid in the construction of said work, was passed at the request of a majority of the citizens of the city. The majority of the court seem to have lost sight of the fact that an interest in an improvement is entirely different from an incidental benefit arising from the same improvement. But there is a dissenting opinion by Brooke, J., which places the question upon the true grounds. He holds that such legislation violated the bill of rights; that the power of such corporations to tax the people must be limited to objects of purely a local character. This case arose under an express act of the legislature, giving the specific power claimed.

In the next case relied on, *Bridgeport* v. *Housatonic Railroad Co.*, it was decided that the legislature, upon request of a city, may authorize such city to subscribe for and take stock in a railroad leading to such city, provided such act be approved by the people of the city. The only clause in the Constitution, which was claimed to restrict the legislature, was that which forbade private property being taken for public use without compensation. This was also under an express act of the legislature.

In Tennessee it has been decided—the third case cited, shows—that under the provision of the Constitution of that State, which provides that "the legislature has power to grant to counties and incorporated towns the right to impose taxes for *county* and *corporation purposes*," the legislature may authorize a city to aid in the construction of a railroad *to such corporation*, and when the expenditure is by a county, the expenditure must be *within* the county. The Constitution of that State does not limit the grant to an expenditure municipal for *municipal purposes*, but for corporate purposes.

In Kentucky, it has been decided that the legislature had power to authorize municipal corporations to take stock in railroad corporations, and levy taxes to assist in building said road to such corporation. There is an able dissenting opinion in this case. This decision is founded upon the fact that there was no limitation to the legislative power in their Constitution, and that it was, therefore, omnipotent.

In Pennsylvania, this doctrine was carried to its extreme limit in one case,—*Sharpless* v. *The Mayor of Philadelphia*,—where it was decided that a municipal corporation may aid in the construction of a railroad, miles away, if it can be supposed that it may benefit the corporation; and that the legislature is the judge of the question. But in another,—*Diamond* v. *The County of Lawrence*,*—when suit was brought on bonds, like those here, in the hands of holders who had paid value for them, the court declared that they were open to defences of every kind; and a recovery was not had.

In Illinois, where there is no constitutional limitation, it has been held that a municipal corporation may, under legislative authority, aid in the construction of railroads within the corporation.

In Florida, under a similar provision of the Constitution to that of Tennessee, it was held that a county might aid in constructing a railroad *through the county*.†

Other States have followed the decisions we dissent from; some following them to a full extent, and some limiting the

* 37 Pennsylvania State, 358. See *ante*, Mercer County *v.* Hacket, p. 87.

† Cotton *v.* Com. of Leon, 6 Florida, 610.

application to a narrower compass. All of the decisions, we believe, are where there was no constitutional restriction, or where the power was expressly given, as in Tennessee and Florida.

In many of the decisions, the courts seem to have been imbued with the frenzy of the day, and to have lost sight of the well-defined distinction between the powers and liabilities of municipal and private corporations.

This question, it is believed, has not been decided by this court as an independent question; but its decisions so far are based upon the decisions of the courts of the State in which the cases originated, and upon the rule that this court will follow the decisions of State courts, as to the construction of their own Constitution or statutes. If this question has been settled by the courts in the State of Iowa, then this court will follow such ruling; but if they have not settled it, then it is an open question for determination by this court. What is the history of these decisions?

The Supreme Court of Iowa, in the case of *The Dubuque and Pacific Railroad Co.* v. *Dubuque County*, which is claimed to be decisive of this question, decided that the Constitution of the State had not *deprived* the *citizens* of the county of the right to vote the credit of said county to build a railroad within the county limits. That court uses the following language: "As the people have not, in the Constitution, delegated this power, to vote upon such propositions, nor in any way conceded or divested themselves of this right, but have in express terms affirmed, in the bill of rights, that 'all political power is inherent in the people' (Art. I, Sec. 2), we conclude that the people may, with constitutional propriety, vote the credit of the county to aid in the construction of a railroad within its limits;" one judge dissenting as to the power of the county to take stock in railroads. That court has thus decided that the Constitution has not conferred upon the legislature of the State any power to authorize such an expenditure. That this power is not in the people in their aggregate capacity, either as a town, city, county, or State, but in their individual capacity. It

holds virtually that the legislature has no such power, but that it is inherent in the people. There is nothing said about the power of the legislature to confer this authority on a city or county.

The next case relied on is the *State* v. *Bissell*. In that case the question was not raised, and the court say: "This decision is not intended to sanction or deny the legal validity of the decision in the foregoing case, but to leave that question where that decision has left it."*

The next case is *Clapp* v. *County of Cedar*. The court disposes of the constitutional question with the following remarks: "The second step would be, whether a legislature possesses the power to confer this authority upon a county? Few have doubted the existence of this power, the question having generally been, whether the power had been exercised, or whether a county possessed the desired authority without a special grant?"† The court, however, say that "this power is not, as far as the court can see, derived from any legislative enactment," but, upon the strength of the judgment of the court in the above case of *The Dubuque and Pacific Railroad Co.* v. *Dubuque County*, it decides that the counties have power to aid in the construction of railroads within the limits of such county; one judge dissenting.

In *Ring* v. *Johnson Co.*, and *McMillen* v. *Boyles*, the last cases cited on the other side, the question was not directly raised nor decided, the court conceding that counties had the right to aid in the construction of railroads to be constructed *within their limits*.‡

But confessedly the Iowa decisions in favor of these bonds end here. They were never quite unanimous, and have never given satisfaction to either profession or courts. In *Stokes* v. *The County of Scott*, a majority of the court assumed tenable ground, and restrained an issue about to be made. Then came *The State, ex relatione*, v. *The County of Wapello*, a case fully argued, much considered, and unanimously decided. That this case does decide these bonds to be void, that

* 4 G. Greene, 332.

† 5 Iowa, 45.

‡ See, also, Games *v.* Robb, 8 Iowa, 199.

such is now the law in the State of Iowa, is undeniable, we think. The court in that great case remarks, that although some fourteen or fifteen States had expressed their opinions upon this exercise of power by municipal corporations, they had not reached satisfactory conclusions. Hence, it declares, the renewed agitation on the subject; an agitation, it remarks, which "will continue to obtrude itself upon the courts of the country, year after year, until they have finally settled it upon principles of adjudication which are known to be of the class of those that are laid up among the fundamentals of the law: and which will leave the capital of private individuals where the railroad era, when it dawned upon the world, found it, namely, under the control and dominion of those who have it, to be employed in whatever field of industry and enterprise they themselves might judge best." The court then speaks of the decisions of Iowa from the first, *Dubuque Co.* v. *The Dubuque, &c., R. R.*, in 1853, where by a divided court the power was held to have been given, to the last, *Stokes* v. *County of Scott*, in 1859, where by a like court it was to a degree decided otherwise. "The intermediate decisions," it declares, "were an acquiescence in the former of these, by two members of the court, not upon the ground that the legislature had in fact authorized the exercise of any such power by the cities or counties in this State (for this they had expressed very great doubts about, and affected not to believe), but because they felt themselves so much committed and trammelled by the previous decision and subsequent legislative recognition, that they did not feel themselves at liberty, from public considerations, to unsettle the construction which the first decision had given to the code on the subject."

"In this aspect of the case," the court continues, "it will be perceived that the question now under consideration is an entirely open one in this State, and that this court as now constituted must pass upon it as an original question, wholly unaffected by the doctrine of *stare decisis;* or, if influenced at all by prior decisions, we should be inclined to follow the later rather than the earlier opinions." The court then ex-

amines the history of legislation in Iowa, and shows that important features in it have escaped the notice of judges who first gave a construction to the code. It then inquires whether the legislature *can* pass laws like those in question, and considers the question on the principles of State and of municipal governments, and on the character and responsibilities, the risks and liabilities, of railroad corporations; declaring that the legislature cannot. The court was conscious of the importance of the decision they were making. They say, in denying the validity of these bonds: "We are not insensible that in doing so, at this late day, we are liable to expose ourselves and our people to the charge of insincerity and bad faith, and perhaps that which is still worse, inflict a great wrong upon innocent creditors and bondholders: consequences which we would most gladly have avoided, if we could have done so and been true to the obligations of conscience and principle." But they declare that the legislative power assumed "practically overturns one of the reserved and fundamental rights of the citizen, that of making his own contracts, choosing his own business pursuits, and managing his property and means in his own way, and which, under the Constitution of this State, however it may be elsewhere, entitles him to the intervention and protection of the courts, we are willing to risk the consequences resulting from the exercise of such a power as furnishing a sufficient answer in itself to all the reasons which have been or may be assigned in favor of its exercise." In answer to the cry about improvement and trade, they declare that if any person "who believes the law to possess the dignity of a science, and hold an exalted rank in the empire of reason," will "analyze the question with reference to the principles and theory of our own political organization, he will discover that it implicates a right which in importance is above all or any interest connected with the business relation or the physical improvements of the county." And rendering everything to its proper sphere, and leaving to the law its duties, and to conscience hers, they end with this declaration: "We know, however, that there is such a thing as a moral sense and a public faith

which may be successfully appealed to, when the law is impotent to afford relief. These sentiments, we cannot but believe, still reside in the hearts and consciences of our people, and may be invoked to save themselves and their State from seeming bad faith." The case may be avoided or evaded. Answered, on principle, it cannot be.

*Amey* v. *Alleghany City*, decided in this court in 1859,* is one of the decisions relied on to support the plaintiff's case; but that decision is against it. The case, a Pennsylvania one, acknowledged the force of the argument we have used as to the proper objects of legislation, and the constitutionality or unconstitutionality of statutes accordingly. But the court considered that constitutionality was not *there* open for discussion; it having been affirmed by the State court. If it had been open, such legislation would not have been supported. "We have not," say the court, "discussed that position of the learned counsel. *Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved*, we cannot, with the respect which we have for the judiciary of his State, discuss the imputed unconstitutionality of the acts; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its Supreme Court, that acts for the same purposes as those are which we have been considering were constitutional."

If this court considers, as the court of Iowa has done, that the constitutionality of the Iowa acts is open for consideration, they will decide that constitutionality does not exist, and that the bonds are void.

Then, the question is, whether the constitution and laws of a State are to be construed by the State courts of other States, or by its own courts? whether, in a case where no power to interpret *above* the State's court is given to the Supreme Court of the United States—as such power is given in certain other cases,† where a writ of error lies to the highest State court from this—this court will determine that the con-

* 24 Howard, 364.

† Judiciary Act, 1789, § 25.

stitution and statutes of a State mean one thing, when the courts of the State itself have solemnly adjudged that they mean another? whether this court will say, that the State courts have decided a question, when the judges who sit on the bench of that court are declaring unanimously that "the question is an entirely open one," and to be passed upon as an "original question?" whether, because dealers upon change, whose daily bread, like that of underwriters, is "risk;" people upon the "Rhine"—the respectable citizens of the Juden-Gasse of Frankfürt-am-Maine,—have bought these bonds at large discounts, *on account of those doubts of their legality* which everywhere have attended the issue of them, shall have them enforced in the face of constitutions and solemn decisions of the State courts, simply because they *have* bought and yet hold them? These are the questions; some of them grave ones,—if resolved in the affirmative.

Mr. Justice SWAYNE delivered the opinion of the court:

The whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated.

The act incorporating the city, approved February 24, 1847, provides as follows:

"SECT. 27. That whenever, in the opinion of the City Council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes, the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

"By an act approved January 8th, 1851, the act of incorporation was "so amended as to empower the City Council to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said act."

An act approved January 28th, 1857, contains these provisions:

"That the city of Dubuque is hereby authorized and empow-

ered to aid in the construction of the Dubuque Western and the Dubuque, St. Peter's & St. Paul Railroad Companies, by issuing $250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. Said bonds shall be legal and valid, and the City Council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, and bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the money arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads, and neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with the grant of power contained in the 27th section of the act of incorporation are not now in question. If they were, the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bonâ fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.* If there were any irregularity in taking the votes of the electors or otherwise in issuing the bonds, it is remedied by the curative provisions of the act of January 28, 1857.

Where there is no defect of constitutional power, such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came

* Commissioners of Knox Co. *v.* Aspinwall, 21 Howard, 539; Royal British Bank *v.* Turquand, 6 Ellis & Blackburne, 327; Farmers, Land & T. *v.* Curtis, 3 Selden, 466; Stoney *v.* A. L. I. Co. 11 Paige, 635; Morris Canal & B. Co. *v.* Fisher, 1 Stockton's Chancery, 667; Willmarth *v.* Crawford, 10 Wendell, 343; Alleghany City *v.* McClurkan, 14 Pennsylvania State, 83.

under the consideration of the Supreme Court of Iowa, in *McMillen* v. *Boyles*,* and again in *McMillen et al.* v. *The County Judge and Treasurer of Lee County.*† The validity of the act was sustained. Without these rulings we should entertain no doubt upon the subject.‡

It is claimed "that the legislature of Iowa had no authority under the Constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock." In this connection our attention has been called to the following provisions of the Constitution of the State:

"ART. 1. § 6. All laws of a general nature shall have a uniform operation."

"ART. 3. § 1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated as the General Assembly of the State of Iowa," &c.

"ART. 7. The General Assembly shall not in any manner create any debt or debts, liability or liabilities which shall, singly or in the aggregate, exceed the sum of one hundred thousand dollars, except," &c. The exceptions stated do not relate to this case.

"ART. 8. § 2. Corporations shall *not be created in this State by special laws, except for political or municipal purposes*, but the General Assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not, directly or indirectly, become a stockholder in any corporation."

Under these provisions it is insisted,—

1. That the general grant of power to the legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case.

* 6 Iowa, 305. † Id., 391.

‡ Wilkinson *v.* Leland, 2 Peters, 627; Satterlee *v.* Matthewson, 2 Id., 380; Baltimore & S. R. Co. *v.* Nesbit et al., 10 Howard, 395; Whitewater Valley Canal Co. *v.* Vallette, 21 Id., 425.

2. That the seventh article of the Constitution prohibits the conferring of such power under the circumstances stated in the answer,—debts of counties and cities being, within the meaning of the Constitution, debts of the State.

3. That the eighth article forbids the conferring of such power upon municipal corporations by special laws.

All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa: *Dubuque Co.* v. *The Dubuque & Pacific R. R. Co.* (4 Greene, 1); *The State* v. *Bissel* (4 Id., 328); *Clapp* v. *Cedar Co.* (5 Iowa, 15); *Ring* v. *County of Johnson* (6 Id., 265); *McMillen* v. *Boyles* (6 Id., 304); *McMillen* v. *The County Judge of Lee Co.* (6 Id., 393); *Games* v. *Robb* (8 Id., 193); *State* v. *The Board of Equalization of the County of Johnson* (10 Id., 157). The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the Supreme Court of the State, in the later case of the *State of Iowa, ex relatione*, v. *The County of Wapello*,* and it is insisted that in cases involving the construction of a State law or constitution, this court is bound to follow the latest adjudication of the highest court of the State. *Leffingwell* v. *Warren*† is relied upon as authority for the proposition. In that case this court said it would follow "the latest *settled* adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and au-

* 13 Iowa, 390.

† 2 Black, 599.

thority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law."*

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed.†

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because

* The Ohio Life & Trust Co. *v.* Debolt, 16 Howard, 432.

† White *v.* The V. & M. R. R. Co., 21 Howard, 575; Commissioners of the County of Knox *v.* Aspinwall et al., 21 Id., 539.

a State tribunal has erected the altar and decreed the sacrifice.

The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion.

JUDGMENT AND MANDATE ACCORDINGLY.

Mr. Justice MILLER, dissenting:

In the opinions which have just been delivered, I have not been able to concur. But I should have contented myself with the mere expression of dissent, if it were not that the principle on which the court rests its decision is one, not only essentially wrong, in my judgment, but one which, if steadily adhered to in future, may lead to consequences of the most serious character. In adopting that principle, this court has, as I shall attempt to show, gone in the present case a step in advance of anything heretofore ruled by it on the subject, and has taken a position which must bring it into direct and unseemly conflict with the judiciary of the States. Under these circumstances, I do not feel at liberty to decline placing upon the records of the court the reasons which have forced me, however reluctantly, to a conclusion different from that of the other members of the court.

The action in the present case is on bonds of the city of Dubuque, given in payment of certain shares of the capital stock of a railroad company, whose road runs from said city westward. The court below held, that the bonds were void for want of authority in the city to subscribe and pay for such stock. It is admitted that the legislature had, as to one set of bonds, passed an act intended to confer such authority on the city, and it is claimed that it had done so as to all the bonds. I do not propose to discuss this latter question.

It is said, in support of the judgment of the court below, that all such grants of power by the legislature of Iowa to any municipal corporation is in conflict with the Constitution of the State, and therefore void. In support of this view of the subject, the cases of *Stokes* v. *Scott County*,* and *The State of Iowa, ex relatione*, v. *The County of Wapello*,† are relied on.

* 10 Iowa, 166.

† 13 Id., 398.

In the last-mentioned case, the County of Wapello had agreed to take stock in a company whose road passed through the county, but had afterwards refused to issue the bonds which had been voted by the majority of the legal voters. The relator prayed a writ of mandamus to compel the officers of the county to issue the bonds. One question raised in the discussion was, whether section 114 of the code of Iowa, of 1851, was intended to authorize the counties of the State to take stock in railroad companies? And another was, that conceding such to be the fair construction of that section of the code, was it constitutional?

The Supreme Court, in a very elaborate and well-reasoned opinion, held that there was no constitutional power in the legislature to confer such authority on the counties, or on any municipal corporation. This decision was made in a case where the question fairly arose, and where it was necessary and proper that the court should decide it. It was decided by a full bench, and with unanimity. It was decided by the court of highest resort in that State, to which is confided, according to all the authorities, the right to construe the Constitution of the State, and whose decision is binding on all other courts which may have occasion to consider the same question, until it is reversed or modified by the same court. It has been followed in that court by several other decisions to the same point, not yet reported. It is the law administered by all the inferior judicial tribunals in the State, who are bound by it beyond all question. I apprehend that none of my brethren who concur in the opinion just delivered, would go so far as to say that the inferior State courts would have a right to disregard the decision of their own appellate court, and give judgment that the bonds were valid. Such a course would be as useless, as it would be destructive of all judicial subordination.

Yet this is in substance what the majority of the court have decided.

They have said to the Federal court sitting in Iowa, "You shall disregard this decision of the highest court of the State on this question. Although you are sitting in the State of

Iowa, and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the Supreme Court of that State, but you shall decide directly to the contrary; and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. When it says bonds are void, issued in that State, because they violate its constitution, you shall say they are valid, because they do *not* violate the constitution."

Thus we are to have two courts, sitting within the same jurisdiction, deciding upon the same rights, arising out of the same statute, yet always arriving at opposite results, with no common arbiter of their differences. There is no hope of avoiding this, if this court adheres to its ruling. For there is in this court no power, in this class of cases, to issue its writ of error to the State court, and thus compel a uniformity of construction, because it is not pretended that either the statute of Iowa, or its constitution, or the decision of its courts thereon, are in conflict with the Constitution of the United States, or any law or treaty made under it.

Is it supposed for a moment that this treatment of its decision, accompanied by language as unsuited to the dispassionate dignity of this court, as it is disrespectful to another court of at least concurrent jurisdiction over the matter in question, will induce the Supreme Court of Iowa to conform its rulings to suit our dictation, in a matter which the very frame and organization of our Government places entirely under its control? On the contrary, such a course, pursued by this court, is well calculated to make that court not only adhere to its own opinion with more tenacity, but also to examine if the law does not afford them the means, in all cases, of enforcing their own construction of their own constitution, and their own statutes, within the limits of their own jurisdiction. What this may lead to it is not possible now to foresee, nor do I wish to point out the field of judicial conflicts, which may never occur, but which if they shall occur, will weigh heavily on that court which should have yielded to the other, but did not.

The general principle is not controverted by the majority, that to the highest courts of the State belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the State court, that this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively, for all other courts, the Constitution and laws of the Federal Government.*

But while admitting the general principle thus laid down, the court says it is inapplicable to the present case, because there have been conflicting decisions on this very point by the Supreme Court of Iowa, and that as the bonds issued while the decisions of that court holding such instruments to be constitutional were unreversed, that this construction of the constitution must now govern this court instead of the later one. The moral force of this proposition is unquestionably very great. And I think, taken in connection with some fancied duty of this court to enforce contracts, over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule, which in my opinion cannot be sustained either on principle or authority.

The only special charge which this court has over contracts, beyond any other court, is to declare judicially whether the statute of a State impairs their obligation. No such question arises here, for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are called upon, not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever

* See Shelby *v.* Guy, 11 Wheaton, 361; McCluny *v.* Silliman, 3 Peters, 277; Van Rensselaer *v.* Kearney, 11 Howard, 297; Webster *v.* Cooper, 14 Id., 504; Elmendorf *v.* Taylor, 10 Wheaton, 152; The Bank *v.* Dudley, 2 Peters, 492.

was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the State court of Iowa, is to beg the very question in dispute. In deciding this question the court is called upon, as the court in Iowa was, to construe the constitution of the State. It is a grave error to suppose that this court must, or should, determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts, when they really were not.

The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.

Not only is the decision of the court, as I think, thus unsound in principle, but it appears to me to be in conflict with its former decisions on this point, as I shall now attempt to show.

In the case of *Shelby* v. *Guy*,* a question arose on the construction of the statute of limitations of Tennessee. It was an old English statute, adopted by Tennessee from North Carolina, and which had in many other States received a uniform construction. It was stated on the argument, however, that the highest court of Tennessee had given a different construction to it, although the opinion could not then be produced. The court said, that out of a desire to follow

* 11 Wheaton, 361.

the courts of the State in the construction of their own statute, it would not then decide that question, but as the case had to be reversed on other points, it would send it back, leaving that question undecided.

In the case of *The United States* v. *Morrison*,* the question was, whether a judgment in the State of Virginia was, under the circumstances of that case, a lien on the real estate of the judgment debtor. In the Circuit Court this had been ruled in the negative, I presume by Chief Justice Marshall, and a writ of error was prosecuted to this court. Between the time of the decision in the Circuit Court and the hearing in this court, the Court of Appeals of Virginia had decided, in a case precisely similar, that the judgment was a lien. This court, by Chief Justice Marshall, said it would follow the recent decision of the Court of Appeals without examination, although it required the reversal of a judgment in the Circuit Court rendered before that decision was made.

The case of *Green* v. *Neal*,† is almost parallel with the one now under consideration, but stronger in the circumstances under which the court followed the later decision of the State courts in the construction of their own statute. It is stronger in this, that the court there overruled two former decisions of its own, based upon former decisions of the State court of Tennessee, in order to follow a later decision of the State court, after the law had been supposed to be settled for many years. The case was one on the construction of the statute of limitations, and the Circuit Court at the trial had instructed the jury, "that according to the present state of decisions in the Supreme Court of the United States, they could not charge that defendant's title was made good by the statute of limitations." The decisions here referred to were the cases of *Patton* v. *Easton*,‡ and *Powell* v. *Harman*.§

The first of these cases was argued in the February Term, 1815, by some of the ablest counsel of the day, and the opinion delivered more than a year afterwards. In that opinion

* 4 Peters, 124. † 6 Id., 291. ‡ 1 Wheaton, 476.
§ 2 Peters, 241; erroneously cited in Green *v.* Neal, 6 Id., 291, as Powell *v.* Green. REP.

Chief Justice Marshall recites the long dispute about the point in North Carolina and Tennessee, and says it has at length been settled by the Supreme Court of the latter State by two recent decisions, made after the case then before it had been certified to this court, and the court follows those decisions. This is reaffirmed in the second of the above-mentioned cases.

In delivering the opinion in the case of *Green* v. *Neal*, Justice McLean says that the two decisions in Tennessee referred to by Judge Marshall were made under such circumstances that they were never considered as fully settling the point in that State, *there being contrariety of opinion among the judges.* The question, he says, was frequently raised before the Supreme Court of Tennessee, but was never considered as finally settled, until 1825, the first decision having been made in 1815. The opinion of Judge McLean is long, and the case is presented with his usual ability, and I will not here go into further details of it. It is sufficient to say that the court holds it to be its duty to abandon the two first cases decided in Tennessee, to overrule their own well-considered construction in the case of *Patton* v. *Easton*, and its repetition in *Powell* v. *Green*, and to follow without examination the later decision of the Supreme Court of Tennessee, which is in conflict with them all.

At the last term of this court, in the case of *Leffingwell* v. *Warren*,* my very learned associate, who has just delivered the opinion in this case, has collated the authorities on this subject, and thus on behalf of the whole court announces the result:

"The construction given to a State statute by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. . . . . If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest settled adjudications."†

* 2 Black, 599.

† United States *v.* Morrison, 4 Peters, 124; Green *v.* Neal, 6 Id., 291.

It is attempted, however, to distinguish the case now before us from those just considered, by saying that the latter relate to what is rather ambiguously called a rule of property, while the former concerns a matter of contract. I must confess my inability to see any principle on which the distinction can rest. All the statutes of the States which prescribe the formalities and incidents to conveyances of real estate would, I presume, be held to be rules of property. If the deed by which a man supposes he has secured to himself and family a homestead, fails to comply in any essential particular with the statute or constitution of the State, as expounded by the most recent decision of the State court, it is held void by this court without hesitation, because it is a rule of property, and the last decision of the State court must govern, even to overturning the well-considered construction of this court. But if a gambling stockbroker of Wall Street buys at twenty-five per cent. of their par value, the bonds issued to a railroad company in Iowa, although the court of the State, in several of its most recent decisions, have decided that such bonds were issued in violation of the Constitution, this court will not follow that decision, but resort to some former one, delivered by a divided court, because in the latter case it is not a rule of property, but a *case of contract.* I cannot rid myself of the conviction that the deed which conveys to a man his homestead, or other real estate, is as much a contract as the paper issued by a municipal corporation to a railroad for its worthless stock, and that a bond when good and valid is property. If bonds are not property, then half the wealth of the nation, now so liberally invested in the bonds of the government, both State and national, and in bonds of corporations, must be considered as having no claim to be called property. And when the construction of a constitution is brought to bear upon the questions of property or no property, contract or no contract, I can see no sound reason for any difference in the rule for determining the question.

The case of *Rowan* v. *Runnels*,* is relied on as furnishing

* 5 Howard, 134.

a rule for this case, and support to the opinion of the court. In that case the question was on the validity of a note given for the purchase of slaves, imported into the State of Mississippi. It was claimed that the importation was a violation of the Constitution of the State, and the note therefore void. In the case of *Groves* v. *Slaughter*,* this court had previously decided that very point the other way. In making that decision it had no light from the courts of Mississippi, but was called on to make a decision in a case of the first impression. The court made a decision, with which it remained satisfied when *Rowan* v. *Runnels* came before it, and which is averred by the court to have been in conformity to the expressed sense of the legislature, and the general understanding of the people of that State. The court therefore in *Rowan* v. *Runnels* declined to change its own rulings, under such circumstances, to follow a single later and adverse decision of the Mississippi court.

In the case now before the court it is not called on to retract any decision it has ever made, or any opinion it has declared. The question is before this court for the first time, and it lacks in that particular the main ground on which the judgment of this court rested in *Rowan* v. *Runnels*. It is true that the chief justice, in delivering the opinion in that case, goes on to say, in speaking of the decision of the State courts on their own constitution and laws: "But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into *with citizens of other States*, which, in the *judgment of this court*, were lawfully made." I have to remark, in the first place, that this dictum was unnecessary, as the first and main ground was, that this court could not be required to overrule its own decision, when it had first occupied the ground, and when it still remained of the opinion then declared. Secondly, that the contract in *Rowan* v. *Runnels*, was between a citizen of Mississippi, on the one part, and a citizen of Virginia on the other, and the language of the chief justice makes that the ground of the

* 15 Peters, 449.

right of this court to disregard the later decision of the State court; and in this case the contract was made between the city of Dubuque and a railroad company, both of which were corporations existing under the laws of Iowa, and citizens of that State, in the sense in which that word is used by the chief justice. And, thirdly, the qualification is used in the Runnels case that the "*contracts were, in the judgment of this court, lawfully made.*" In the present case, the court rests on the former decision of the State court, declining to examine the constitutional question for itself.

The distinction between the cases is so obvious as to need no further illustration.

The remaining cases in which the subject is spoken of, may be mentioned as a series of cases brought into the Supreme Court of the United States by writ of error to the Supreme Court of Ohio, under the twenty-fifth section of the Judiciary Act. In all these cases the jurisdiction of the Supreme Court of the United States was based upon the allegation that a statute of Ohio, imposing taxes upon bank corporations, was a violation of a previous contract made by the State with them, in regard to the extent to which they should be liable to be taxed. In the argument of these cases it was urged that the very judgments of the Supreme Court of Ohio, which were then under review, being the construction placed by the courts of that State on their own statutes and constitution, should be held to govern the Supreme Court of the Union, in the exercise of its acknowledged right of revising the decision of the State court in that class of cases. It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of the Federal Supreme Court to sit as a revisory tribunal over the State courts, in cases where the State law is supposed to impair the obligation of a contract, would be the merest sham.

It is true that in the extract, given in the opinion of the court just read, from the case of the *Ohio Trust Company* v. *Debolt*, language is used by Chief Justice Taney, susceptible of a wider application. But he clearly shows that there was in his mind nothing beyond the case of a writ of error to

the Supreme Court of a State, for he says in the midst of the sentence cited, or in the immediate context, "The writ of error to a State court would be no protection to a contract, if we were bound to follow the judgment which the State court had given, and which the court brings up here for revision." Besides, in the opinion thus cited, the chief justice says, in the commencement of it, that he only speaks for himself and Justice Grier. The remarks cited, then, were not the opinion of the court, were outside the record, and were evidently intended to be confined to the case of a writ of error to the court of a State, where it was insisted that the judgment sought to be revised should conclude this court.

But let us examine for a moment the earlier decisions in the State court of Iowa, on which this court rests with such entire satisfaction.

The question of the right of municipal corporations to take stock in railroad companies, came before the Supreme Court of Iowa, for the first time, at the June Term, A.D. 1853, in the case of *Dubuque County* v. *The Dubuque and Pacific Railroad Company.** The majority of the court, Kinney J., dissenting, affirmed the judgment of the court below, and in so doing must necessarily have held that municipal corporations could take stock in railroad enterprises. The opinions of the court were by law filed with the clerk, and by him copied into a book kept for that purpose. The dissenting opinion of Judge Kinney, a very able one, is there found in its proper place, in which he says, he has never seen the opinion of the majority. No such opinion is to be found in the clerk's office, as I have verified by a personal examination. Nor was it ever seen, until it was published five years afterwards, in the volume above referred to, by one of the judges, who had ceased to be either judge or official reporter at the time it was published. Shortly after this judgment was rendered, Judge Kinney resigned, and his place was supplied by Judge Hall. The case of the *State* v. *Bissell*† then came before the court in 1854. In this case, after disposing of

* 4 G. Greene, 1.

† 4 Id., 328.

several questions relating to the regularity of the proceedings in issuing bonds for a railroad subscription, Judge Hall, who delivered the opinion of the court, then refers to the right of the county to take stock and issue bonds for railroad purposes. He says: "This point is not urged, and the same question having been decided at the December Term of this court in 1853, in the case of the *Dubuque and Pacific Railroad Company* v. *Dubuque County*, is not examined. This decision is not intended to sanction or deny the legal validity of that decision, but to leave the question where that decision left it." It is clear that if Judge Hall had concurred with the other two judges, no such language as this would have been used, but they would have settled the question by a unanimous opinion. In the case of *Clapp* v. *Cedar County*,* the question came up again in the same court, composed of new judges. The Chief Justice, Wright, was against the power of the counties to subscribe stock, and delivered an able dissenting opinion to that purport. The other two judges, however, while in substance admitting that no such power had been conferred by law, held that they must follow the decision in the Dubuque case. Several other cases followed these, with about the same result, up to 1859, Wright always protesting, and the other judges overruling him. In 1859, in the case of *Stokes* v. *Scott County*,† which was an application to restrain the issue of bonds voted by the county, Judge Stockton said that, in a case like that, where the bonds had not passed into the hands of *bonâ fide* holders, he felt at liberty to declare them void, and concurring with Judge Wright that far, they so decided; Judge Wright placing his opinion upon a want of constitutional power in the legislature. Finally, in the case of the *State of Iowa, ex relatione*, v. *Wapello County*, the court, now composed of Wright, Lowe, and Baldwin, held unanimously that the bonds were void absolutely, because their issue was in violation of the Constitution of the State of Iowa. The opinion in that case, delivered by Judge Lowe, covers the whole ground, and after

* 5 Iowa, 15.

† 10 Id., 166.

an examination of all the previous cases, overrules them all, except *Stokes* v. *Scott County*. It is exhausting, able, and conclusive, and after a struggle of seven or eight years, in which this question has been always before the court, and never considered as closed, this case may now be considered as finally settling the law on that subject in the courts of Iowa. It has already been repeated in several cases not yet reported. It is the first time the question has been decided by a unanimous court. It is altogether improbable that any serious effort will ever be made to shake its force in that State; for of the nine judges who have occupied the bench while the matter was in contest, but two have ever expressed their approbation of the doctrine of the Dubuque County case.

Comparing the course of decisions of the State courts in the present case with those upon which this court acted in *Green* v. *Neal*,* how do they stand?

In the latter case the court of Tennessee had decided by a divided court in 1815, and that decision was repeated several times, but with contrariety of opinion among the judges, up to 1825, when the former decisions were reversed. In the cases which we have been considering from Iowa, the point was decided in 1853 by a divided court; it was repeated several times up to 1859, by a divided court, under a continuous struggle. In 1859 the majority changed to the other side, and in 1862 it became unanimous. In the Tennessee case, this court had twice committed itself to the decision first made by the courts of that State; yet it retracted and followed the later decision made ten years after. In the present case, this court, which was not committed at all, follows decisions which were never unanimous, which were struggled against and denied, and which had only six years of judicial life, in preference to the later decisions commenced four years ago, and finally receiving the full assent of the entire court.

I think I have sustained, by this examination of the cases, the assertion made in the commencement of this opinion,

* 6 Peters, 291.

that the court has, in this case, taken a step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right, which belongs to the State courts, to decide as a finality upon the construction of State constitutions and State statutes. This invasion is made in a case where there is no pretence that the constitution, as thus construed, is any infraction of the laws or Constitution of the United States.

The importance of the principle thus for the first time asserted by this court, opposed, as it is, to my profoundest convictions of the relative rights, duties, and comities of this court, and the State courts, will, I am persuaded, be received as a sufficient apology for placing on its record, as I now do, my protest against it.

NOTE.

At the same time with the preceding and principal case, No. 80 of the term, two other cases between the same parties—one being No. 79, and the other No. 81—were disposed of. They were thus:

SAME *v.* SAME.

No. 81.

A statute which enacts that whenever any railroad company "shall have received or may hereafter receive the bonds of any city or county upon subscriptions of stock by such city or county, such bonds *may bear an interest*" at a rate specified, and "*may be sold* by the company," in a way mentioned,—*implies* that a city (whose charter gave it power to borrow money for public purposes), had power to subscribe to the stock and to issue its bonds in payment, and makes the subscription and bonds as valid as if authorized by the statute directly.

THIS suit differed from 80—the principal one—only in the fact that the bonds of the city, which in this case bore date 1st September, 1855, were issued prior to the passage of the act of 28th January, 1857, *specially authorizing* the city to subscribe to the railroads for which the bonds in No. 80 had been subsequently given. The bonds rested in this case (No. 81), therefore, on the charter of the city (approved February 24, 1847), authorizing it "to borrow money for *public purposes*," and on an act passed 25th January, 1855, before the bonds were issued, one section of

Statement of the case.

which enacted that whenever "any company shall have received, or may hereafter receive, the bonds of any city or county upon subscription of stock by such city or county, such bonds may bear an interest at a rate not exceeding ten per cent., and may be sold by the company at such discount as may be deemed expedient," and which enacted also (§ 3), that "the provisions of this act shall apply to any railroad bonds which have been heretofore issued, as well as to those which may hereafter be issued."

Mr. JUSTICE SWAYNE, after stating the difference between the case and No. 80, and quoting this act, thus delivered the opinion of the court:

"In this act it is clearly implied that cities have authority to subscribe for railroad stock, and to issue their bonds in payment of it. What is implied in a statute is as much a part of it as what is expressed. (*United States* v. *Babbitt*, 1 Black, 61.) Considering the subject in the light of these acts, we entertain no doubt that the city possessed the power to issue these bonds."

JUDGMENT REVERSED AND CASE REMANDED.

SAME *v.* SAME.

No. 79.

1. Where some parts of a contract are illegal while others are legal, the legal may be separated from the illegal, if there be no imputation of *malum in se;* and if the good part show a sufficient cause of action, it is error to sustain demurrer to the whole.
2. Where suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debts for borrowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its non-existence, if it does not exist, is matter of defence, to be shown by the defendant.
3. A contract made by a city to pay a sum of money with interest to a person who has assumed the payment of interest on some of the city's debt,—as well interest to become due, as interest already due—is not a "borrowing of money," but is a contract for the payment of a debt; and, as the last, will be sustained, when, if the former, it might fall within prohibitions against the city's borrowing money except on certain terms.

THIS suit differed both from the principal and from the preceding case in that it was not upon *bonds* issued upon the city, but was upon an instrument of writing by which the mayor and recorder

of the city had entered (Feb. 7, 1859) into a contract with the same Gelpcke and others, that if they, Gelpcke and others, would pay or advance the interest due on various bonds *already* issued by the city (part of the interest then due, and part to become due), and would advance a certain sum of money to enable the city to pay various pressing pecuniary demands upon it, the city "*covenants* that its *city council shall by ordinance require*" a certain tax, to be appropriated for the payment of this debt, and that it *will convey unto F. S. W., as trustee, all its real estate, of whatsoever nature the same may be* (excepting that appropriated to public uses), in trust for payment of the debt. To the suit on this contract the city put in three demurrers. Two of them related to these or other provisions of the contract; "a contract," each demurrer alleged, "the city had no authority to make." The third one was founded on the provision of the 27th section of the charter (see *ante*, p. 176), and was because the petition did not show that the proposition to borrow money had first passed the city council, nor that it had been submitted to vote, nor that it had been adopted by two-thirds of the qualified voters of the city. The court below sustained the demurrers, and gave judgment for the city; which on error here was the point brought up. No argument was made on the first two demurrers. The third one was argued in No. 80.

Mr. JUSTICE SWAYNE delivered the opinion of the court:

The counsel of the plaintiffs in error have submitted no argument in regard to the two first causes assigned for the demurrer. We have not therefore considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se* is, that the bad parts do not affect the good. The valid may be enforced.* That part of the complaint only which relates to the stipulations claimed to be valid will be considered. The residue of the complaint may be laid out of view as surplusage. The demurrer is to the whole complaint. If the part to be considered shows a sufficient cause of action, the court below should have overruled the demurrer.

* United States *v.* Bradley, 10 Peters, 360.

Statement of the case.

I. It is claimed that the contract is for the borrowing of money, and that the complaint is bad, because it does not aver the sanction of two-thirds of the electors of the city. If the fact were so, the consequence would not follow. If the city could make such a contract with that sanction, the sanction will be presumed until the contrary is shown. The non-existence of the fact is a matter of defence which must be shown by the defendant.

II. We are also of the opinion that the contract, except the provision for an advance to the city of $20,000, which it is stated has been repaid, is not for borrowing money. It bound the plaintiffs to pay the interest for the city upon the debts of the city already created and presumed to be valid. The city agreed to refund the amount so paid at the times and in the manner specified. Such a contract is neither within the terms nor the spirit of the provisions of the charter upon the subject of borrowing.

JUDGMENT REVERSED AND CAUSE REMANDED.

N. B. The dissenting opinion of Mr. Justice Miller, given in the principal case, No. 80, applied to Nos. 79 and 81. See also the dissenting opinion of that Justice in *Meyer* v. *City of Muscatine* (*post*), as well as that case generally.

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## BALDWIN *v.* HALE.

A discharge obtained under the insolvent law of one State is not a bar to an action on a note given in and payable in the same State; the party to whom the note was given having been and being of a different State, and not having proved his debt against the defendant's estate in insolvency, nor in any manner been a party to those proceedings.

THIS was a writ of error to the Circuit Court for the District of Massachusetts; the case, as appearing from an agreed statement of facts, being thus:

J. W. Baldwin, a citizen of *Massachusetts*, made, at *Boston*, in that State, his promissory note, *payable there*, in these words:

$2000. BOSTON, February 21, 1854.

Six months after date I promise to pay to the order of myself, two thousand dollars, *payable in Boston*, value received.

J. W. BALDWIN.

And duly indorsed it to Hale, the plaintiff, then and afterwards a citizen of *Vermont*. After the date of the note, but