

1895

Constitutionality of Municipal Aid to Railways

Max H. Kunze
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

 Part of the [Constitutional Law Commons](#)

Recommended Citation

Kunze, Max H., "Constitutionality of Municipal Aid to Railways" (1895). *Historical Theses and Dissertations Collection*. Paper 51.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

T H E S I S

-----o-----

CONSTITUTIONALITY OF MUNICIPAL AID TO RAILWAYS

-----oOo-----

Presented for the Degree of

Bachelor of Laws

by

Max H. Kunze

-----o-----

Cornell University

1895.

“ Si enim alicui placet, mea devotis gaudebo.
Si autem pro mei abiectioe vel pro viciosi ser-
monis rusticitate nulli placet. Memet ipsam tamem
juvat quod feci.”

C O N T E N T S

-----O-----

	Page
Introduction	1
Chapter I.	
Municipal Corporations - Origin and Definitions	5
Chapter II.	
Express and Implied Powers	13
Chapter III.	
Different Ways of incurring Lia- bilities in aid of Railway Con- struction.	19
Chapter IV.	
Constitutionality of Railway Aid	
Bonds	22
Michigan	22
Iowa	24
Wisconsin	29
Pennsylvania	30
New York	34

I N T R O D U C T I O N.

-----o-----

No subject has given rise to as many disputes and legal battles in comparative recent times as the great conflict between railroads and municipal corporations in what is generally known as "Railway taxes".

The beginning of this century found the American continent practically undeveloped. Then great excitement follows that peaceful slumber of a slow civilization. Railroads had been permanently established and were successfully operated and man of any ordinary ability could foresee that these railroads so highly beneficial to agricultural, industrial and mechanical pursuits were highly desirable. So the years of 1830 to 1880 marked the period of a high popular excitement and speculation, every town, city and county in the states clamored for railroads, and hushed with this incentive popular excitement gave way to deliberative calm reason. Railroads had to be secured at all hazards. Different municipalities held out financial inducements to rail road

builders and men became so blind to the future that many a municipal corporation became financially bankrupt in trying to secure such a highway.

So we find that in the '70's the debts of the different municipalities in the United States contracted for railway aid had grown to the fabulous amount of more than (a) \$1000000000 bearing an interest greater in amount to the debt incurred by the United States during and after the Civil War. But before that large debt had consummated some of the wiser men comprehended the dangerous course taken by the various municipalities and sought various legal devices to escape the liabilities contracted. This led to one of the greatest legal battles ever fought. Sharp distinctions, able arguments, keen critical stratagems were invoked, so that I fully believe there is not a single argument involved which has not been only ingeniously invented but which has been likewise attacked. State legislatures conferred powers upon municipalities which some courts held invalid and which others for the same reasons found invalid and not binding. In all therefore a new branch of law was introduced and developed

(a) Dillon on Mun. Corp., Vol. I., Chap. 154.

which is clearly American in origin, spirit and character and has no similarity in any other country. After considering the term municipal corporation, its power and authorities, three different ways it can incur liability; I shall attempt to show the different positions shown by the courts of states, notably that of Michigan where Judges Cooley, Christianson and Campbell decided that a legislature had no implied power under the Constitution to pass measures relating to railway aid, that railways are private corporations with public appearances only, thus forever curbing any future attempt to burden municipalities and checking all litigations on that question from a constitutional basis. Then Iowa where the Supreme Court first held such acts valid, then for a period reversing the former views holding all municipal aid issues invalid, and later following their first line of decisions with some slight restrictions against railway corporations, making their decisions ridiculous. The attitude of the Executive of the State of California who through his veto power attempted to oppose the lobbying schemes of railway manipulators, and he failed through

decisions of the courts.

The attitudes of the courts of New York state who attempted to decide all matters upon the whole questions of facts and circumstances arising from each particular case with no clear view nor legal concept except perhaps "bona fide" for value. The position of other state tribunals favoring all railroad aid legislation and municipal burdens incurred thereby until stopped in their mad career of folly, by their brothers of the legislature who at last conceived such aid detrimental to public interest and either declared expressly against it or found a remedy through constitutional amendments.

The peculiar law view of the Supreme Court of Pennsylvania, which attempted to frustrate railway legislation on technical interpretations and failed. The development of a line of decisions by the United States Supreme Court decided on principles of equity often ignoring the technical construction when such would work harm to innocent parties.

C H A P T E R I.

-----O-----

Municipal Corporations-Origin and Definition.

The ancient understanding of a city as Fairbairn has said: "Was not merely a place where men have mostly congregated and built themselves houses and workshops, where the exchange and the cathedral stand together, the one for worship and the other for business; were ware-rooms run into long unlovely streets, where narrow and unfragrant closes are crowded with the poor, and spacious yet hard monotonous squares are occupied by the rich; the Latin civitas, the Greek polis have a nobler meaning; there cardinal and honorable sense was not the place but the living community. They were terms that expressed all that was ideal in the state, in the father-land".

By process of a natural growth a certain number of families became ~~cleansed~~; Roman; Gens: Ionic, - Gens. Union of gendes formed a curia, or phratria; and a gathering of gendes of phratries made tribes, a union of tribes constituted a civitas, polis or municipia.(a)

"Rome in its origin was a mere municipality, a cor-

(a) Mommsen's Roemisches Staatsrecht, Chap. I.

population. In Italy around Rome, we find nothing but cities, no country places, no villages. The country was cultivated but not peopled. The inhabitants dwelt in cities. If we follow the history of Rome we find that she founded or conquered a host of cities. It was with the cities she fought, it was with the cities she treated, into cities she sent her colonies. In Gaul and Spain we meet with nothing but cities, the country around is marsh and forest. In the monuments left to us we find roads from city to city; the many by paths now existing were unknown". (a)

In the German Empire the first municipalities were founded by the Romans after their Gallic conquests. The Roman idea of municipal corporations was strictly followed and adhered to ; although many cities in mediaeval times discarded the Roman type of municipal corporations and liberated themselves from the sovereign power of the state, organizing independent, others who again were deprived in their rights by the nobility as in the case of the imperial cities, which obtained charters defining their liberties and duties; many of their cities espec-

 (a) Guizot's Hist. of Civ.

ially in the southern German states have retained their Roman municipal form up to recent date.(a)

The oldest chartered imperial cities are Worms and Speyer which received their charters in the 11th and 12th centuries. During the Middle Ages cities in the German-Roman Empire rose to a high degree of independent government. There were then also the imperial cities which were dependent to barons or lords, and other cities were clearly independent. Of these later cities there were those known as the Hanseatic Bund. True corporations within the meaning of that term. Their powers were carried to excess, as for instance in 1361-1370 the Hanse warred with the King of Denmark and drove him into exile.

The Spanish Cortes responded and were closely in municipal form to that of the Hanseatic towns. Beginning their famous career in 1188.

Of all the independent municipalities Hamburg, Lubeck and Bremen are the only sovereign municipal corporations which in 1871 were admitted into the German federation as individual sovereign municipal corporations thus

(a) Kotze, Preussische Staedteverfassung.

ranking in degree with a state. (a) Flecken, dörfer and Landgemeinden are municipal corporations corresponding to towns, villages and counties and are a revision of the old idea of the Gausssystem; with some modern American principles of quasi-corporations.

In England the origin of municipalities dates back to the time of the Roman conquest. Later these cities fell into the hands of the Saxon kings and practically lost all political significance during the reign of William the Conqueror. Formal incorporation of cities were made during the reign of Henry VI. (a) The charters of municipalities are granted upon application by the Parliament or the crown. For centuries these evolutions changed the original idea of municipalities so that now every branch of government is well and distinctly defined giving them all appearances of a close corporation. Municipalities in England have more implied authority than their kindred in America. Municipal corporations which have existed since time immemorial are literally speaking founded by common law. (b)

-
- (a) Ranke, Deutsche Reichsverfassung.
 - (a) Charter to Kingston upon Hull, 1439.
 - (b) Blackstone, Vol.

In the United States the true embodiment of the word civitas was made through the puritans. They made each town-meeting a complete democratic government. These town-meetings laid the foundations for our free and independent municipalities. An example we have in the city of Boston which kept up its town meetings and town system until 1822 when their first charter was granted to them by the legislature of Massachusetts. (a) Michigan adopted the New England system of municipalities through Lewis Cass, formerly a New Hampshire citizen. Each state and territory in the United States has some peculiarities in their own municipal system. This is derived from the fact that they followed different countries as their model. New York modelled after the charter municipalities of England, with county, town and town-ship divisions; likewise Pennsylvania, the Virginias, the Carolinas and the Western states which followed their laws. Louisiana and Mississippi at first adhered more closely to the civil municipal system as adopted by France while the different cities in Florida and California in earlier periods through their charters proved

(a) Mass. Assembly Rep., 1822.

that they were modeled after the Spanish system.

This century has noticed a wonderful development and change in the American system of municipal corporations. A harmonious one has been the resultant, so that the American municipality may refer to a county, to a city, town, township or any other subdivision. They are all creatures of legislative enactments with the exception of the earliest towns which have submitted to later legislative changes. (a) Peculiar in itself is the city of Washington which is one of the few cities called Federal cities, closely corresponding to the type of imperial cities as found in Europe. American municipalities had an importance of self constituted liberties different from that of any European municipal corporation.

"The city corporations which have grown up in modern times are of infinite advantage to society; they bind men more closely together than does any other form of government. But that which most remarkably distinguishes them from those corporations which formerly existed, is the general spirit of freedom which has been breathed into them. More especially is this the case

(a) St Augustine, Florida.

with town corporations in America which are as different from those of England as the latter from similar corporations in Scotland and Holland".(a)

"A municipal corporation is an investing of the people with the local selfgovernment thereof".(b)

"A municipal corporation is a public corporation created by government for political purposes and having subordinate and local powers of legislation. An incorporation of persons, inhabitants of a political place or connected with a particular district enabling them to conduct its local selfgovernment."(c)

"Municipal corporations are body politic and bodies corporate, established by law, to assist in the civil government, but chiefly to regulate or administer the local or internal affairs of the town, city or district which is incorporated."(d)

"A corporation is public when it has for its object the government of a portion of the state. It is invested with subordinate legislative powers to be exercised for local purposes connected with the public good in the

-
- (a) Rosebaugh v. Saffin, 10 O. St. 31, Grimka, J.
 - (b) Salk, 183.
 - (c) 2 Bouvier Law Dict., 21.
 - (d) Dillon on Mun. Corps., Vol. I., Par. 19.

administration of civil government subject to the control of the legislature."(a)

"In New York state a municipal corporation includes a county, town, school district, village and city and any other territorial subdivision of the state established by law with the power of selfgovernment."(b)

In Missouri any subdivision of the state including less than five thousand inhabitants may become a municipality by application for a special charter.(c)

- (a) Waterman of Corps. Par. 16.
- (b) White on Corps., Par. 2.
- (c) Heller v. Stremmel, 52 Mo. 309.
State v. Leffingwell, 54 Mo. 458.

C H A P T E R II.

-----o-----

Express and Implied Powers.

Municipal corporations are political subdivisions of the state with a well defined territorial limit, exercising the power of government as delegated to them by the sovereign state. They are creatures of the state and can only do such acts as the state empowers them to do.

"The legislature creates municipal corporations, defines and limits their powers, enlarges or diminishes them at will, points out the agencies which are to exercise them and exercises a general control over them as it shall deem proper and needful to the public welfare, it confers upon them the power to make contracts and levy taxes for the performance of matters of public import."^(a)

These powers delegated to them may be expressed by the constitution, by legislative enactments, relating generally to all municipalities, or to certain special municipalities clearly named. The powers are generally conferred on them through their municipal charters, this

(a) Comm. v. Detroit, 26 Mich, 235, Cooley, J.

then would relate to towns and cities.

A charter is a compact or privilege given by a state to a municipality, enumerating rights and defining duties which may be revoked by the legislature at any time unless there is a constitutional privilege to the contrary.

The powers expressly delegated may vary with the different political and territorial attitude assumed by the municipality. Generally they define the territorial government, how the municipal officers who act as agents shall be elected, how taxes shall be levied, what rate of taxes shall be assessed, the territorial boundaries of the municipality, all subject to constitutional restriction. The right to make contracts is a power which is generally speaking delegated by express provision to the municipal corporation.

Implied powers conferred upon municipalities are powers not granted through express enactment or stated by well defined words. A municipality may do all acts which are for the health, welfare, and public good of its citizens, acts which arise from case of necessity such

as for the prevention of disease, pestilence, disorder, riot and any other act which is necessary for the welfare of the inhabitants of the municipality. A municipality may therefore erect and maintain hospitals public schools market halls, or order the destruction of buildings dangerous to its citizens. Likewise a municipal corporation can own and control plants for the lighting and heating of the city, own and operate toll roads, erect bridges, make canal and harbor improvements. Municipalities, therefore, may do any act which complies with the laws of the state or are agreeable to their own charter so long as it is for the good of the corporation and comes within the meaning of public policy. But a corporation can not go outside of the meaning to seek the general good of the community. Clearly a corporation cannot invest its public monies in a quasi-public work unless the power is specially granted to them by act of legislature. When these acts are beyond the authority they are ultra vires and not binding.

"Municipal corporations can only be bound by their acts when they keep strictly within the limits prescribed by law. Powers granted must be exercised substantial-

ly in the mode designated".(a)

"Municipal corporations have such powers as are given to them in terms and such as are necessary to carry into effect the express powers and those should be strictly construed."(b)

A school district cannot invest in the corporate stock of outside corporations.(c)

Municipal corporations cannot issue bonds in favor of any railway in aid of its construction unless the statute expressly confers upon them the power and authority to do so.(d)

Can a legislature authorize a municipality to indebted itself in aiding a quasi-public corporation? This question has many answers, and the particular circumstances of each case must be considered. "The power to tax is the power to destroy". So with a municipal corporation. The mania of securing railroads affords a good illustration.

Some western county with less than ten thousand inhabitants issues with the sanction of its guardian the

-
- (a) Rogers v. Burlington, 3 Wall. 670.
 - (b) Bank v. Chillicothe, 7 O. St. 31.
 - (c) State v. Board of Sup., 27 O. St. 96.
 - (d) Wells v. Supervisors, 102 U. S. 625.

legislature, three hundred thousand dollars in bonds in favor of a railroad company, bonds bearing ten percent interest annually.(a)

These bonds were very easily voted upon, as the obligations did not mature until 30 years from date of issue. The citizens who subscribed for the stock and gave out the debt with few exceptions will not see the day of redemption of their obligation. They voted a tax upon their posterity, upon their ~~improvements~~^{realty upon their} improvements that will arise thereon, upon the industrial products that shall be created, a tax in favor of a quasi-public corporation which disposes of the money security at once to greedy speculators. Such a power is in the opinion of some of the ablest jurists not to be delegated as such is beyond the corporate purpose of the municipality.

Some courts have held that the power of taxation if there is no provision in the constitution to the contrary rests absolutely in the legislature.(b) In so ruling the courts overlooked an inherent principle of right which

(a) Dillon, I, Par. 156.

(b) Davidson v. Ramsey, 18 Minn. 432; Stein v. Mobile, 24 Ala. 591; Ry. Co. v. Stockton, 41 Cal. 147.

(b)

has been brought down by both civil and common law. "No man shall be deprived of ---- property without due process of law". as echoed in the witenagmode; as repeated in the assembly of free britons when demanding th their Magna Charta. A tax must be laid with equality with rules and prescribed limits. There is no pwoer found in assemblies to burden municipalities with a debt which is beyond their nature and character to assume, which is beyond the general purposeof its existence. Aid and municipal ownership in quasi-public works should be condemned because such ownership has nothing to do with the promotion of individual liberty, with the welfare of society. It is contrary to the sense of self government. It makes the minority a ~~slave~~ slave to the majority of men who reign for short periods, men who do this from selfish motives, burdening their posterity with a loathsome tax. It enhances the financial standing of the rich at the expense of the poor tax payer.

C H A
C H A P T E R III.

-----O-----

Different ways of incurring Liabilities by
Municipalities in aid of Railway Construction.

I. By Stock Subscriptions.

The municipality duly authorizing its lawful agents may take as many shares of railroad in railroad stock and issue bonds of the municipality in payment thereof.(a)

§ The municipality may own the controlling interest of the railroads and act as general manager, president and director and generally direct the affairs of the railroad through its lawful agents under legislative sanction, giving the municipality the appearance of ownership.(b)

b Municipal corporations as a general rule subscribe for the stock and issue in payment their municipal bonds for the express purpose of securing a public highway beneficial to their interests. These bonds are technically speaking termed "Railway aid bonds". (c)

(a) Town of Eagle v. Kohn, 84 Ill. 292; Bonds v. Wis. Cent. Ry. 45 Wis. 542; Mercer Co. v. Hackett, 1 Black, 386. ; Gibson v. Dayton, 123 U. S. 59.

(b) Walker v. Cin. 21 O. ST/ 14-55; Gibbons v. Mobile G. N. Ry. 36 Ala. 417; Johnston v Co.24 Ill 75

(c) Comm. v. Alleghany, 37 Pa. St. 237; Comm v. Pittsburgh, 34 Pa.st. 496; Knox Co. v. Aspinwall, 24 How. 378.

II. By Outright Donation of Bonds.

Often the municipal corporations granted to railway companies a bonus of a certain sum of money with the understanding that the railroad should comply with certain conditions imposed upon them subject to the fulfilment by the railway. Thereupon the municipality tendered its bonds in payment of the conditions imposed upon the municipality: by the part performance of the contract through the railroads as understood in the terms of the contract. Such are outright donations made upon condition ~~that~~ ~~the~~ town shall have special rates for its citizens for a number of years or any other condition that can be lawfully performed. (a)

III. By Direct Tax Levy.

In more recent years the municipalities of many of the middle and western states, although desirous of having railways do not attempt to issue enormous amounts of floating bonds either as subscriptions to stock, or as outright donations and by contract between the two parties they agree to pay to the railroad in aid of construction a certain percentage of their annual taxes assessed and levied within the direction of their respective state constitutions or legislative enact-----

- (a) Sweet v/. Hulbert, 51 Barb. 313.
- () Chicago D. V. Ry. Co. v. Smith, 62 Ill. 270.
- (c) Sheboygan Ry. Co. v. Town, 29 Wis. 373.

enactments. (a)

IV. Land Grants.

This division of railway aid I shall not examine minutely as it more properly belongs to powers of the sovereign state legislatures. The giving or granting of public lands such as may induce a railway to build its road bed and sell adjoining lands granted to them to defray part expenses of its construction.

(a) *Klaiss v. Galusha*, 78 Iowa, 310.

Allert v. Gaston, 70 Iowa, 371.

CHAPTER IV.

-----0-----

Constitutionality of Railway Aid Bonds.

The question whether the legislature of different states has authority without special constitutional provision to empower their state municipalities through legislative enactments to subscribe for stock and give bonds to railway corporations in aid of construction has led to several distinct lines of decisions. On the one side we find the rule as laid down by the Supreme Court of Michigan¹ in *People v. Salem* (a) where judges Cooley, Christianson and Campbell decided that no such implied authority can be exercised by the legislative body; the question arose on an application for a mandamus. The legislature of Michigan, in 1864, passed an act authorizing the several townships in the counties of Oakland, Washtenan and Nayne to pledge their credit and the credit of the county of Livingston to raise by a tax a loan of money to aid in the construction of the Detroit and Howell Ry. Co. from some point near Detroit near their townships. The road was constructed as ordered. The town of Salem voted aid to the extent of 5 %

(a) *People v. Salem* 20 Mich. 452.

per angum of the assessed value. The meeting was irregular for want of sufficient notice and the legislature subsequently passed an act to legalize the same. The condition attached that the railway should complete its road was performed and the township board refused to issue the bonds, questioning the legislative authority. Mandamus was brought to compel the performance. Per Cooley J., "The Legislature has a right to levy burdens and regulate taxes but in order to be valid there are three necessary requisites, a the tax must be public and not merely private, b the tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. A state burden is not to be imposed upon any territory smaller than the whole state not a county burden on any territory smaller than a county. c A tax laid on a municipality must not only be public but local as well. A railway is not a public corporation. A railway is often spoken of as a species of public highway. They are such as they accommodate the public travel and are regulated by law with a view to produce partiality in accommodations. In other respects this idea is rather fanciful, they are private property when in the hands of private individuals. They can only use the power of eminent domain as granted to them by direct

specification of the legislature. The legislature has no such implied authority and can pass upon subjects of taxation as is expressly provided in the constitution."(a)

This decision is often cited with approval by other courts but as a rule it stands alone. There can be no question about its importance. The Supreme Court of Michigan by adopting this rule saved its portals from the entrance of hundreds of suits which might have arisen later for a construction. It aided the municipalities through an advisory attitude and clearly pointed out the only mode of taxation to be followed by the legislature. It prevented a debt which other states so freely consented to be laid upon their municipal corporations, it prevented all future attempts of railway lobbyists to enhance themselves upon the productive wealth of the state of Michigan. This supreme tribunal shows its greatness that with one wise judicial act they may prevent all future follies. It is to be deplored that no other state followed this decision.

The attitude of the Supreme Court of Iowa.
The State of Iowa is one of those states which assumed different positions in railway aid. No state afforded

a greater field for a good harvest to railway constructors as Iowa. It is difficult to find one county, city township or town which did not take railway aid stock or issue bonds gratis or grant a tax levy to different railway corporations. Millions of dollars of these bonds came into the hands of foreign speculators and the legal contests arising over the payment of these bonds and tax levies fill volumes of legal reports. In one of the first suits raised on this question, City of Dubuque v. Dubuque Pacific Ry.(a), the court held that legislatures have an implied authority under their constitution to grant to municipalities the power to aid in railway construction.

The constitutional clause : "The state shall not in any way, direct or indirect become a stockholder to any corporation;" was held on a technical construction not to apply to municipalities but to the state itself. (b)

 (a) City of Dubuque v. Dubuque Pacific Ry. 4 G. Greene, 1.

(b) This decision was followed by,
 State v. Bissell, 4 G. Greene, 28.
 Clapp v. Cedar Co., 3 Iowa, 15.
 Ring v. Johnson Co., 6 Iowa, 265.
 McMillan v. Boyle Co., 6 Iowa, 304.
 Gaines v. Robb, 8 Iowa, 199.
 Stokes v. Scott Co., 10 Iowa, 166.
 Whittakery. Johnson Co. 10 Iowa, 161.

In state v. Wapello Co., (a) this whole line of decisions is reversed . The court declared the act of 1851 unconstitutional and void. They came to this logical conclusion that the general assembly cannot pass a valid law without express constitutional proviso; that a municipality cannot become a stockholder in a private enterprise in its respective corporate capacity. This decision is followed for more than fourteen years by a line of able cases. Bonds of municipal corporations are void as not only authorized by constitution and law but in contravention of both. (b) County bonds issued for railway aid are always invalid. (c) Coupons and interest on railway bonds issued for stock subscriptions have no validity and cannot be enforced. (d)

The constitutional question was again raised in an application for an injunction restraining city officials from collecting a tax assessed in favor of a railroad aid bond holder and the injunction was made permanent. (e)

- (a) State v. Wapello Co., 13 Iowa, 388.
- (b) McMillan v. Boyles, 14 Iowa, 593.
- (c) Rock v. Wallace, 14 Iowa, 593.
- (d) Smith v. Henry Co., 15 Iowa, 385.
- (e) TenEyck v. Keokuk, 15 Iowa, 486.
- (e) Chamberlain v. Burlington, 19 Iowa,

The whole line of decisions is reaffirmed in McClure v. Owen?(a) and Hanson v. Vernon, (b)

For some reasons only known among themselves for the opinion of the judges does not shed sufficient lustre upon their reason to comprehend why the supreme court in Stewart v. Pope,(b) declared an act of the legislature valid. This act was passed in 1868 authorizing municipalities to issue railway aid bonds. By this decision the court reversed the decisions that had been so ably followed. The opinion in logical fallacies cannot be equalled. The court held that the taxing power is in the assembly not specifying any particular taxes & that railroads are a public benefit and public corporations. They have the same sovereign power in constructing a railroad by obtaining the right of eminent domain and therefore a clear right to tax. This decision is affirmed in Sioux City v. Bird.(c) In more recent decisions the court have construed more liberally in favor of municipalities and irregularities in issue of railway aid can be set up as a proper defence. Part performance of condition im-

 (a) McClure v. Owen, 26 Iowa, 144.

(b) Hanson v. Vernon, 27, Iowa, 28.

(b) Stewart v. Pope Co., 30 Iowa, 9.

(c) City v. Bird, 30 Iowa 255.

posed by the municipality and non-performance of the builders will avoid the liability of the municipality.(a) The new constitution of Iowa, Art. XI. Sec. 3, prevented all future bond issues.(b) This was followed by an act of the revised statutes in 1838, Sec. 939(c). So the courts shifted from rule to rule with unparalleled rapidity without a clear view to hold up the dignity of their tribunal. This makes the several lines of decisions highly interesting if not even amusing. The legislators conceiving the former fallacies remedied all future harm. This remedy came through the expression given by the people in their new constitution.

(a) Manning v. Matthews, 66 Iowa, 675.

(b) Blunt v. Carpenter, 68 Iowa, 265.

Barthel v. Meader, 72 Iowa, 125.

(b) "No county or other political subdivision or any municipal corporation shall be allowed to become indebted in any manner or for any purpose or to any amount in the aggregate exceeding five percent on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax list, previous to the incurring of such indebtedness."

(c) "All bonds or other evidences of debt, hereafter issued by any corporation to any railroad company as capital stock shall be null and void and no assignment shall give them any validity."

Wisconsin's one criterion.

The legislature cannot authorize municipal corporations to make outright donations to railway corporations, all such acts are unconstitutional and void. (a)

In all other cases the courts will look to all defenses and equities arising from bonds as negotiable instruments under the law of merchants. (b)

A rule laid down is that a proposition by a railroad to municipal corporation to aid in the construction of the road, after submitting this proposition to the legal voters and after an affirmance by a majority of the voters, becomes a mutual contract binding each contracting party. (c)

-
- (a) Whiting v. Sheboygan Ry. Co., 23 Wis. 167.
 - (b) Ellis v. Northern Pac. 77 Wis. 115.
 - (b) Lawson v. Milwaukee H. Ry. 30 Wis. 597.
 - Lynch v. Eastern Ry. Co., 57 Wis. 430.
 - Bushnell v. Beloit, 10 Wis. 155.
 - Verbeck v. Scott, 71 Wis. 59.
 - (c) Phillips v. Albany, 28 Wis. 340.
 - Lawson v. Ry. Co., 30 Wis. 597.
 - Lawson v. Schnellen, 33 Wis. 288.
 - Supervisors v. Walbridge, 38 Wis. 179.
 - Platville v. S. Wisconsin, 45 Wis. 493.

Pennsylvania.

The Supreme Court of Pennsylvania held the acts of the assembly providing railway aid constitutional and valid.(a) In order to prevent the various outrages committed and stop fraud perpetrated the following rule was laid down: "A bond is not negotiable paper."(b)

"We will not treat bonds as negotiable instruments, on this ground we stand alone. We are not insensible to the importance of this fact nor are we wanting in deference to the learning and wisdom of the judges who differ from us. We know the history of these municipal bonds, how the legislators, yielding to popular excitements authorized their issue; how grand juries and county commissioners and city officers were molded to the purposes of speculators, how recklessly railroad officers abused the over-wrought confidence of the people and what burdens and taxation have resulted to the public. A money security was created and thrown upon the market by this paroxysm of public mind and now the question is how

- (a) Sharpless v. Philadelphia, 9 Harris, 146.
Mose v. Reading, 9 Harris, 183.
Mercer Co. v. Pittsburg, 27 Pa. St. 389.
- (b) Diamond v. Lawrence Co., 37 Pa. St. 353.

shall the judicial mind regard them. Bonds of this kind are not of common law that is founded on the usages of trade and business among merchants, they are not like bills of exchange. Local in origin, not for any ordinary indebtedness not for the purposes which naturally belong to such municipalities. They are rendered lawful only by legislative authority. They are creatures of statute law; legislatures call them certificates of loans or bonds bonds never notes or bills. They bear the impress of a seal indicating their authenticity, a thing which at once destroys the commercial value of a bill. The only semblance they are payable to bearers. Any sealed instrument may be made payable to any particular payee or bearer. No negotiable instrument can be made under seal."(a)

Courts also permitted contracts to be rescinded in an action commenced in equity where faithlessness of officers could be shown annulling all stock subscriptions and bonds made in payment thereof except those in the hands of bona fide holders for value.(b)

The acts of the legislature which authorize bonded issues specially provided that they should only be sold

(a) Diamond v. Lawrence Co., 37 Pa. St. 355.

(b) Bondholders v. Mercer CO/, 32 Pa. St. 218.

at par; to this the most technical construction was given. If bonds were sold for less than par the municipality was permitted to avoid payment. Lis Pendens was held notice to any holder for value depriving him of his favored position bona fide and he could not recover.(a) The Supreme Court attempted by these views to protect the interests of the municipalities . In this attempt they partly failed.

The United States Supreme Court in *Mercer County v. Hackett* and *Wood v. Lawrence County* over-ruled *Diamond v. Lawrence County*, declaring municipal bonds issued by municipalities in favor of railroad corporations negotiable by manual delivery.(b) The act of the Assembly of Pennsylvania providing that selling bonds for less than par is prohibited does not avoid payment nor constitute a sufficient defense against a bona fide holder for value. (c)

Although logical in their reasoning the decisions of the Pennsylvania Supreme Court could not stand the test of a tribunal that sees to the interests of parties liv-

-
- (a) *Mercer Co. v. Pittsburg Ry.*, 27 Pa St. 389.
 - (b) *Diamond v. Lawrence Co.*, 37 Pa St., 359.
Mercer Co. v. Hackett, 1 Wall. 83.
Wood v. Lawrence Co., 1 Black, 385.
 - (c) Act of 1857,

ing in different states. Most of these bonds were naturally transferred on stock markets in foreign states. The decisions could only protect municipal corporations in suits arising between parties entirely within the jurisdiction of the Supreme Court of Pennsylvania. By legislative enactments municipal corporations of Pennsylvania were at last relieved from all future experiences. . The Constitution of 1874 prohibited all railway aid issue by municipalities. (a)

The Pennsylvania courts in adhering to the strict common law view and technicalities failed in what they attempted to remedy. They should have decided the question on a constitutional basis and there purpose would have sufficiently established their views.

(a) "The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder ~~or stockholder~~ in any company, association or corporation, or to obtain or appropriate money for or to loan its credit to any corporation, association, institution or individual."

The attitude of the New York
Court of Appeals.

An act of the legislature conferring the power upon a municipality to issue railway aid bonds is merely directory and after the municipality by a majority of votes declares in favor of such ~~and~~ issues bonds, the municipality is bound. The power to subscribe for stock carries with it the implied power to issue bonds in payment thereof. (a) An act of the legislature, April 27, 1868, authorizing the town of Saratoga to issue bonds as an outright donation pure and simple in aid of railway construction was declared unconstitutional. James J., "The legislature has authorized the town to make a donation pure and simple. No such authority is conferred upon the municipality by constitution or charter, it is contrary to the spirit of the constitution if not to the letter." (b) Here the court adopts the criterion as first, approved in Wisconsin. (c)

On general principles the New York courts hold that the statutes of the legislatures in authorizing the municipalities to issue railway aid bonds are constitu-

(a) Bank v. Rome, 18 N. Y. 38.

(b) Sweet v. Hulbert, 51 Barb. 313.

(c) Whiting v. Sheboygan Ry. Co., 25 Wis. 157.

tional.(a) The legislature has authority to pass such laws and if the municipality ratifies the act subsequently the irregularities on the face of the bond issues can be validated by later acts. These obligations bind and fix the liability of the municipal corporation.(b)

We can safely assert that the New York court in legal controversies between bond holders and municipal corporations touching their credit, considered all the circumstances surrounding each particular case. As a rule they declared that the legislature had a right to pass such enactments without express constitutional provision, granting them an inherent power to lay all taxes according to their own discretion. When such acts were passed they gave them a technical construction. Any part of the act that had not been complied with and the bonds being in the hands of a bona fide holder for value were declared void.(c)

Such a defence might be that the requisite number of taxpayers had not signed the necessary papers. And in that particular case the court for the first time agreed

-
- (a) Calhoun v. Millard, 121 N. Y. 69.
 - (b) William v. Duanesburgh, 66 N.Y. 129.
Horton v. Town of Thomson, 71 N. Y. 513.
Roger v. Stevens, 86 N. Y. 623.
 - (c) Town v. Sav. Bank, 84 N. Y. 403.
Gregg v. Andes, 93 N. Y. 405.

with the rule adopted by the Pennsylvania Supreme Court. Municipal bonds are not negotiable within the strict meaning of the law of merchants. (a) Where the requisite number of signatures of resident taxpayers had been obtained and many citizens repudiated the consent given through a revocation in writing, this was held to be a good defence against any bond holder who held even as bona fide. (b) The court would sit in equity and look into all the acts of the parties. So a defect in the petition gave the municipality a good ground to maintain an action for rescission. The bonds were cancelled by a decree of court. (c) The maxim; "Equity aids the vigilant and not those who slumber on their rights"; finds its application where a town for more than ten years paid the interest on the bonded issue and later attempted to avoid payment on the grounds of a defect in the petition. (d) The New York courts held to one criterion testing constitutionality of railway aid by legal and equitable principles generally sustaining the municipalities in their attempted defences if within equitable doctrine.

-
- (a) Cagwin v. Hancock, 84 N. Y. 542.
 - (b) Town v. Bank, 84 N. Y. 405.
 - (c) Town of Mentz v. Cook, 103 N. Y. 504.
Calhoun v. Milard, 121 N. Y. 69.
 - (d) Town of Cherry, v. Becker, 123 N.Y. 161.

The act of 1874 prohibited all future aid of municipalities in favor of railway construction.(a)

Many state constitutions were amended by an extra clause which prevented municipalities from incurring any further debt in aid of railway construction.

Indiana.

The courts favored railway aid expressly declaring that the legislature had authority without any constitutional provision, mentioning the special nature of the taxes. In 1851 the Constitution was amended and subsequently amended in 1881, March 4.(b)

(a) New York Laws of 1875.

(b) Const. of 1881, p. 220: "No political or municipal corporation in this state shall ever become in any manner or for any purpose indebted to any municipality or to any corporation to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporations shall be void".

Ohio.

Ohio attempted in its early decisions to hold all such municipal railway aid constitutional. Setting up as a rule that a legislature has implied authority in absence of any constitutional provision to grant to municipal corporations the power to aid public corporations. Ohio, therefore, holds with the majority of state courts and with the United States Supreme Court; "A railroad is a public corporation". This view seems somewhat strained and no argument of my own can approach the contrary view as laid down in *People v. Salem*. A railway a public corporation? A railroad corporation is not created by special charter originating and springing direct from the legislature, but is a voluntary association, self organized, under a general corporation act or by special act which confers upon them the ordinary privileges and franchises that belong to other private joint stock companies. They are created by contract between the state and the corporation which cannot be affected by subsequent legislative interference. No power of modification can change or repair their condition if not specially stated in the law authorizing their formation.

In *Bank of Chillicothe v. Chillicothe*, the court

held that a municipality cannot set up the ultra vires acts of its agents and plead defences. Maintaining the view that all bonds of municipal corporations are such contractual obligations as the courts will hold binding. (a)

The new Constitution of the state of Ohio was adopted with this clause, "The General Assembly shall never authorize any county, township, town, city or district by vote of its citizens, to become a stockholder in any joint stock company or corporation." (b) In State v. Trustees the people had voted in favor of stock in aid of a railway, but not subscribed and issued the bonds till after the constitution was adopted. The contract was therefore not complete and the bonds which were given after the constitution went into effect, should naturally have been held invalid for want of power to complete the contract and therefore unconstitutional. Here their court strange to say held them valid. (c)

This decision is clearly against one arising under exactly the same circumstances in the courts of Indiana held such acts illegal and relieved the municipality of

-
- (a) State v. VanHorne, 7 O. St. 327.
 - (b) State v. Trustees, 8 O. St. 394.
 - (c) Ohio Const. Art. 8, Sec. 6. (1851).

its bonded obligations.(a) The United States Supreme Court affirmed the decision of Indiana. Contracts of subscription are not complete after election . Until the subscription is made the contract is executory and obligatory on neither party. The meaning of the Constitution of Ohio was clearly misconstrued. The spirit of the constitution overlooked, when the courts held a legislative act valid whereby the city of Cincinnati was allowed to subscribe \$1,000,000,000 of dollars to a railroad in aid thereof and hold a controlling interest in the stock.(b)

Illinois.

Illinois arrayed itself among the many states holding in favor of railway aid without special constitutional provisions the courts encouraged the legislators to pass special acts for railway aid construction, holding a railway is a public highway. The legislature has, in absence of any constitutional provision the power to enter into contracts with municipalities to take stock issue bonus bonds or promise tax levies. That all such

 (a) Aspinwall v. Davis Co., 22 How. 354.

(b) Walker v. Cincinnati, 21 Ohio St. 14-55.

obligations issued are treated on the basis of the law of merchant. (a)

Later views of the courts admit the harm done by the former decisions and announce that they are bound by "stare decisis". "Frequent fluctuations in the opinions of the courts of last resort involve the courts in absurdities, render law uncertain, destroy the feelings of reliance so essential to the strength and stability of all authority, and produce mischiefs innumerable." (b)

The legislative enactment of 1869 checked all wild schemes of municipal speculators in favor of railway aid construction. "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railway or private corporation, or make donations or loans its credit in aid of such corporations" (

This act is followed by several other restrictive measures; the act of 1883 provides "The liability of all

-
- (a) Prettyman v. Supervisors, 19 Ill. 406.
 Robertson v. Rockford, 21 Ill. 451.
 Johnston v. Stark Co., 24 Ill. 75.
 Perkins v. StCharles, 24 ILL. 203.
 Taylor v. Thomson, 42 Ill. 9.
 Chicago Ry. v. Smith, 52 Ill. 270.
 Quincy Ry. v. Morris, 64 Ill. 410.
- (b) Ex parte Thornton, 62 Ill. 271.

counties, cities, townships, towns or precincts which have been made for aid of railway building shall cease and determine after September, 1883." The state before this had passed the refunding acts whereby the counties and all other municipal corporations were aided in paying their obligations. In *Ry. Co. v. Town of Bishop*,^(a) the Act of 1883 was declared constitutional so the state of Illinois finds itself after much litigation, after enriching railway monopolists, in the class of states which declare railway aid by municipal corporations unconstitutional and void.

United States Supreme Court.

The peculiar relation which the Supreme Court of the United States holds to the different states their municipalities, and rights of foreign citizens are brought out by its many decisions on municipal railway aid bonds.

First ~~where~~ the bonds issued with proper authority? This implies the sanction of the state constitution, legislature and the highest state tribunal. If such sanc-

(a) *Ry. Co. v. Town of Bishop*, 111 Ill. 124.

tion was found the bond holder received the much sought aid. (a) Second, the United States Supreme Court, recognized the aid bonds as negotiable instruments and protected bona fide holders for value, applying the doctrine of *lex mercatorum*. (b)

In all other cases the law of contract received a close construction in favor of the municipal corporation. (c)

All state courts have laid down this solid proposition: there is no implied authority in municipal corporations to grant railway aid. Such authority can only be conferred by express permission from the people as embodied in the constitution or from legislative authority by express enactments.

a By charter of municipality. (d).

b By laws authorizing general aid. (e).

-
- (a) *Wilson v. Salamanca*, 99 U. S. 499.
Harter v. Kernochan, 103 U. S. 552.
Menasha v. Hazard, 102 U. S. 81.
Kealy v. Milan, 127 U. S. 139.
 - (b) *Knob Co. v. Aspinwall*, 23 How. 200.
Mercer Co. v. Hackett, 1 Wall. 85.
Moran v. Miami Co. 2 Black, 722.
Supervisors v. Schenck, 5 Wall. 784.
Converse v. Scott, 92 U. S. 503.
Ayling v. Joseph Tr., 101 U. S. 593.
 - (c) *Curtis v. Butler Co.*, 24 How.
Anthony v. Jasper, 101 U. S. 593.
Ottawa v. Carey, 108 U.S. 110.
 - (d) *Clark v. Gainesville*, 10 Wis. 119.
 - (e) *Town v. Ayling*, 99 U. S. 112.

c By laws authorizing specially. (a)

d By charter conferring upon the railway the right to enter into contracts with a municipal corporation. (b)

A line of judicial decisions in the majority of the states holds up the doctrine: Unless there is an express constitutional restriction or provision, legislative enactments in favor of railway aid by municipal corporations are valid. (c)

- (a) Bogan v. Watertown, 30 Wis. 259.
Sweet v. Hulbert, 51 Barb. 313.
Bissell v. Jeffersonville, 24 How. 237.
Gould v. Sterling, 23 N. W. 456.
- (b) St. Joseph v. Rogers, 16 Wall. 645.
Springport v. Bank, 84 N. Y. 403.
Comm. v. Pittsburg, 34 Pa. 496.
- (c) Davidson v. Ramsey Co., 18 Minn. 482.
Stein v. Mobile, 24 Ala. 591.
Hollenbeck v. Hahn, 2 Neb. 377.
Ry. Co. v. City of Stockton, 41 Cal. 147.
Antonio v. Lane, 32 Tex. 405.
