

depend for their exercise upon the will of the representatives of the people assembled in the legislature. If these and like powers are exercised in various political subdivisions of the state by school districts, road districts, townships, counties, villages, and cities, the latter are but the agents and instrumentalities of the legislature for the more convenient administration of the local government of the people within its jurisdiction. All the governmental powers and privileges these instrumentalities enjoy are derived from the legislature through the general or special laws that recognize their existence and limit their powers. It goes without saying that the power which established these agencies can destroy them, can revoke the whole or a part of the powers it delegated to them, and can delegate these powers, or any portion of them, to other agents, unless restrained by some of the limitations we have referred to. *Meriwether v. Garrett*, 102 U. S. 472, 511; *U. S. v. Baltimore & O. R. Co.*, 17 Wall. 322, 329; *State v. Hunter*, 38 Kan. 578, 582, 17 Pac. 177; *Philadelphia v. Fox*, 64 Pa. St. 169, 180; *People v. Draper*, 15 N. Y. 533, 545; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; *People v. Langdon*, 8 Cal. 1, 16; *Ohio v. Covington*, 29 Ohio St. 102; *Jensen v. Board*, 47 Wis. 298, 309, 310, 2 N. W. 320; *Daley v. City of St. Paul*, 7 Minn. 390, (Gil. 311); *Bridges v. Shallcross*, 6 W. Va. 562; *Biggs v. McBride*, (Or.) 21 Pac. 878, 881; *People v. Freeman*, (Cal.) 22 Pac. 173; *State v. George*, (Or.) 29 Pac. 356; *President, etc., of Revenue v. State*, 45 Ala. 399.

Without a delegation of the legislative power of the state, the township of Oswego had no authority to issue the original bonds, or to refund them by the issuance of new bonds. In all that that township did or could do in this regard, it was but the instrumentality or agency through which the legislature was exercising its power of administering the local government of the township. It was in the discretion of the legislature to determine by what agents it would exercise that power. It might have delegated the power to audit and destroy the old bonds, and to issue the new ones, to the trustee or to the clerk of the township, but it had the like right and the same power, in its discretion, to delegate the performance of this duty to the commissioners named in the act; and it is not the province of the courts to review or restrict the exercise of that discretion, in a case clearly within the scope of legislative authority.

The judgment below is reversed, with costs, and the cause remanded, with directions for further proceedings in accordance with law.

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FOLSOM v. TOWNSHIP OF NINETY-SIX.

(Circuit Court, D. South Carolina. December 7, 1893.)

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—TOWNSHIP BONDS.

When the only question in a suit on coupons of township bonds is the existence of authority to issue them under the state statutes

and constitution, a prior decision thereof by the state supreme court, in a suit by a taxpayer to recover taxes levied for interest on the bonds, is binding on the federal courts.

2. MUNICIPAL BONDS—VALIDITY.

Legislative recognition of the validity of township bonds can give them no binding force when issued under an unconstitutional statute.

At Law. Action by George W. Folsom against the township of Ninety-Six, Abbeville county, S. C., on certain bond coupons. On demurrer to complaint and amended complaint. Demurrer sustained, and said pleadings dismissed.

Shields & Shields and Haynsworth & Parker, for plaintiff.

E. B. Gary, for defendant.

SIMONTON, District Judge. The issue made by the demurrer to the complaint and amended complaint raises the question of the validity of the bonds, the coupons of which constitute the cause of action. The bonds were issued under authority of the act of assembly approved 24th December, 1885, entitled "An act to annul the charter of the Greenville & Port Royal Railroad Company. The township of Ninety-Six issued its bonds shortly after the passage of the act, and they were put on the market. On the 23d February, 1887, a taxpayer of the township began his suit against the county treasurer for repayment of the tax paid by him under a levy for the interest on these bonds. This is the course provided in section 268 of the general statutes of South Carolina whenever a tax has been illegally levied. The taxpayer pays the tax, and brings his suit for the amount of it. This was the earliest moment at which a taxpayer could pursue this course. The case went into the supreme court of South Carolina, its court of last resort, and is reported as *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14. After a full hearing and long deliberation, the supreme court held that the issue of these bonds was not warranted by the eighth section of the ninth article of the constitution of the state; that the legislature could not authorize their issue; and that they were null and void. This construction of the constitution and statute of the state by its court of last resort is binding on this court. "We are bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment." *Cross v. Allen*, 141 U. S. 539, 12 Sup. Ct. 67. *Norton v. Shelby Co.*, 118 U. S. 441, 6 Sup. Ct. 1121, controls this case. We are not discussing a question of irregularity in the issue of the bonds, or the existence of facts charged to the notice of the plaintiff, or any principle of the law merchant or of general law. It is a question of original authority in the making of these bonds. Did the county commissioners possess the lawful authority, in any shape or form, to make or to issue them? It goes to the very root of the matter. The supreme court of South Carolina say that they have not—never had—any such authority. This court follows the decisions of the highest court of a state in construing the constitution

of a state, unless they conflict with or impair the efficacy of the federal constitution, or of a federal statute, or of a rule of commercial or general law. No principle of the federal constitution is invaded. The decision does not impair the validity of a contract, for there was no contract. No rule of commercial law is impaired, for the first principle of the law merchant is that a principal is not responsible for the acts of one done without authority. No principle of general law is impaired, for it is universal law that a contract void *ab initio*, because unlawful, cannot be ratified or confirmed. It must be kept in mind that the question here is not as to the construction of the bonds, nor as to the effect of recitals therein, nor as to the right of bona fide holders of them, they being negotiable instruments. The only question is, does the constitution of South Carolina authorize townships to invest in stock exchangeable for these bonds? The answer to this question turns wholly upon the construction to be given to this constitution, and that construction has been settled in the case of *Floyd v. Perrin*, *supra*,—a construction made upon bonds of the same issue with these, indeed upon all the bonds of this issue, in a case between the taxpayer and the tax collector.

But it is said that the legislature, in the act of assembly of 1887, (19 Stat. 921,) has recognized these bonds. This may be true; but the distinction is this: When bonds of a municipal corporation can be issued if the legislature consent and authorize it, and any municipal corporation, without such consent and authority, have issued bonds, the legislature, having the power to permit it, can, by subsequent action, ratify and confirm the act validating the bonds; in other words, can give its permission *nunc pro tunc*. But where, as in this case, the courts decide that the legislature could not give permission to these small municipal corporations to issue bonds like these, it can by no act of recognition, ratification, or validation give life or vitality to them. This is the first decision of this supreme court on this question. In order to prevent any misconception of the scope of this opinion, it must be added that these bonds do not come within the operation of the act of assembly of 22d December, 1888,—“An act to provide for the payment of township bonds issued in aid of railroads in this state,”—discussed and explained in *State v. Whitesides*, 30 S. C. 581, 9 S. E. 661, and *State v. Neely*, 30 S. C. 591, 9 S. E. 664. The condition precedent of that act is that the railroad must have been completed through the township, and accepted by the railroad commissioners. There is no averment in the complaint that this condition has been fulfilled, and it is admitted in argument that it has not been fulfilled.

Let an order be entered sustaining the demurrer, and dismissing the complaint.

## WALKER et al. v. COLLINS et al.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 325.

## 1. FOLLOWING PRACTICE IN STATE COURTS—DEPOSITIONS.

A state statute requiring every deposition intended to be read on the trial to be filed at least one day before the day of trial does not apply in the federal courts.

## 2. WRONGFUL ATTACHMENT—EVIDENCE—REPLEVIN.

A stock of goods purchased for \$6,000 was attached as the property of the seller, but, after some of them had been disposed of, the remainder were replevied by the purchaser, who made affidavit that they were worth \$6,000. *Held*, that in a subsequent action brought by him for wrongful attachment this affidavit was not admissible to show that he had lost nothing by the conversion of part of the goods.

## 3. APPEAL—OBJECTIONS NOT RAISED BELOW—DOCUMENTARY EVIDENCE.

A party who offered a document in evidence for a purpose for which it was incompetent cannot on appeal insist that the court erred in not admitting it for a different purpose. *Insurance Co. v. Frederick*, 58 Fed. 144, followed.

## 4. SAME—HARMLESS ERROR—INSTRUCTIONS.

In an action against a sheriff and his deputies, a statement in the charge that defendants admitted taking the goods and converting part of them to their own use is no ground for reversal, though one defendant denied having anything to do with the taking, when it appears that all were concerned therein, and that the case was tried on the theory that, if any of the defendants were liable, all were.

## 5. INSTRUCTIONS—MISTAKE OF FACT—EXCEPTIONS.

Mistake in a statement of fact should be called to the court's attention at the time, and, if not then corrected, exception should be taken directly to such statement, and not to the entire instruction in which it is included.

## 6. SAME—FRAUD.

There is no error in charging that fraud is never presumed, and must be shown by "satisfactory proof, i. e. proof to the satisfaction of the jury."

In Error to the Circuit Court of the United States for the District of Kansas.

At Law. Action by E. Collins and W. H. Bretch, trading as Collins & Bretch, against R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, to recover damages for wrongful attachment. A former trial resulted in a judgment for plaintiffs, which was reversed by this court. 1 C. C. A. 642, 50 Fed. 737, 4 U. S. App. 406. On the second trial verdict and judgment were again rendered for plaintiffs, and defendants bring error. Affirmed.

W. E. Brown, for plaintiffs in error.

C. S. Bowman and Charles Bucher, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. This is the second appearance of this case in this court. It was before the court at the May term, 1892, and reference is made to the opinion then delivered (4 U. S. App. 406, 1 C. C. A. 642, 50 Fed. 737,) for a full statement of the case. Upon the second trial in the lower court, Collins & Bretch,