N. J. Court of Errors and Appeals.

10

THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY, *Plaintiffs in Error,* vs. THE STATE ON RELATION OF BENJAMIN P. JOHNSON.	*On Error to the Supreme Court.*

20

POINTS FOR PLAINTIFFS IN ERROR.

By the writ of error in the above case and two others the judgments of the Supreme Court awarding writs of mandamus to be directed to the plaintiffs in error are brought into this Court for review. 30

The application to the Supreme Court was for a writ of mandamus to compel the plaintiffs to assess the amount of a judgment recovered by the relator against the Mayor and Council of Rahway on the ground that such duty was imposed on the plaintiffs in error by the supplement to the act respecting executions passed March 27, 1878 (P. L. of 1878, page 182). An alternative mandamus was issued, to which plaintiffs in error made a return setting up proceedings under the act entitled, "A further supplement to an act entitled, 'An Act for the better regulation of proceedings upon writs of manda- 40

mus,' " which further supplement was passed March 3, 1880 (P. L. 1880, 102).

To this return the relator demurred, and the demurrer was sustained by the Court on the sole ground that the act of 1880 was unconstitutional in two particulars: One that it deprived the relator of a remedy for the enforcement of his contract which existed when the contract was made. The other, that it sought to impose upon the Supreme Court the performance of duties not judicial, but legislative.

It is respectfully submitted that the Supreme Court erred in both of these positions, and that the act of 1880 is not in violation of either of these provisions of our Constitution.

I.

The act of 1880 does not deprive relator of any remedy for the enforcement of his contract which existed when it was made. The fallacy of the argument of the Supreme Court consists in confounding the right of the relator to apply for a mandamus with his right to have it awarded to him.

The whole argument of the learned Justice who delivered the judgment of the Supreme Court is based on the idea that the relator was entitled to the writ of mandamus as a matter of right.

The writ of mandamus is not a writ of right, but its allowance or disallowance rests in the discretion of the Court to be exercised in view of all the circumstances of the case.

It is a prerogative writ and the Court has power to issue or withhold it according to its discretion. And if issued it would manifestly be attended with

hardships and difficulties, the Court may and even should refuse it.

Tapping on Mandamus, 4, 18.
Moses on Mandamus, 18.
Ex parte Fleming, 4 Hill, 581.
Proprietors of St. Luke's Church *vs.* Slack, 7 Cush., 239. 10

In Clark *vs.* Jersey City, 13 Vroom, 94, Justice Knapp says: "The writ of mandamus cannot be claimed by the relator as his right. *The Court in its discretion will refuse it, if circumstances appear which render the justice or propriety of its allowance doubtful.*" In that case the Court refused the writ because of the delay in applying for it, although no statute of limitations barred it. 20

State *vs.* Readington, 7 Vroom, 66.

The Court will refuse the writ if it sees that it must ultimately fail.

Tapping on Mandamus, 15.
Rex *vs.* Bateman, 4 B. & Ad., 533, per Lord Denman, Ch. J.

30

The Court will not grant the writ if it will produce confusion or disorder, or be vexatious.

Rex *vs.* Ely, 1 W. Black., 59.
S. C., 1 Wils., 266.
Reg. *vs.* Bridgeman, 10 Jurist, 159.
Bugby Charity Trustees, *ex parte*, 9 D. & R., 214.

Again, it is well settled that a writ of mandamus will not issue when the applicant for it has another specific legal remedy. 40

Apgar *vs.* Trustees, 5 Vroom, 309.

Elmendorf *vs.* Board of Finance of J. C., 12 Vr., 137.
Cleveland *vs.* Board of Finance of J. C., 10 Vr., 631.
State *vs.* Township Committee of Union, 8 Vr., 84.
10 Rex *vs.* Nottingham Water Works, 6 A. & E., 358.
King *vs.* Margate Pier Co., 3 B. & Ald., 221.
Shipley and *al. vs.* Mechanics Bank, 10 Johns., 484.
Ex parte Nelson, 1 Cowen., 423.
People *vs.* Brooklyn, 1 Wend., 324.
King *vs.* Bishop of Chester, 1 T. R. 404.

20

At common law, and in New Jersey before the Statute of 1870 (Rev., p. 630, pt. 5) a writ of error would not lie on the award of a writ of mandamus.

Laylor *vs.* The State, 4 Dutch., 575.

It will not now lie if the Court in its discretion refuses to allow the writ.

The same rule obtains still in regard to the allow-
30 ance of a writ of certiorari.

The State *vs.* Wood, 3 Zab., 560.
State *vs.* French, 4 Zab., 136.

The Court of its own motion at the present term, dismissed a writ of error, because it brought here for review the action of the Supreme Court in dismissing a writ of certiorari.

40 See the language of Chas. J. Green, in State *vs.* Wood. 3 Zab., 564.

This is equally applicable to an application for a writ of mandamus.

In view of these well settled principles, the writ of mandamus was never a remedy to which a party had a right, even in cases where the writ was an appropriate remedy.

His application for it was always subject to be denied, for reasons founded on no rigid rules, but in the discretion of the Court exercised on the circumstances of each particular case. 10

Suppose then in the present case, the act of 1880 had not been passed, and the relator had applied for mandamus, and on a rule to show cause, the assessors had shown as a reason for refusing the writ the very matter which the act of 1880 directs to be enquired into, can any one doubt that it would have been competent for the Court to have given effect to such matters, and to have denied the writ on the ground of the disorder or confusion that it would occasion, or because of the undue priority and advantage the relator would obtain over other equally meritorious creditors, or because it was manifest to the Court that it would not only ultimately fail of its purpose, but would also destroy the city government? 20

It is equally true that in such case the relator would be absolutely without redress, for no writ of error or appeal would be allowed him. 30

Is he then deprived of a remedy for the enforcement of his contract when the legislature simply directs the Court to do what it always might have done without such direction, and having done it the relator had no legal ground of complaint?

Suppose another case. Suppose where the relator's bonds were issued his only remedy was by mandamus, and afterwards, and before he had occasion to invoke the aid of the court, the legislature had enacted another specific legal remedy, not so 40

speedy or efficacious as a mandamus, but one which would be effectual for the collection of his debt. In such a case would not the court, on an application for a mandamus, rightly refuse the writ, because there was another specific legal remedy? Yet relator would not therefore be deprived of his remedy. The right and duty of the court to deny the writ is an infirmity which inheres in the proceeding itself, and whoever applies for it makes his application *cum onere.*

When, therefore, the legislature, in any given class of cases, only makes imperative what was discretionary before, it in no proper sense deprives him of a remedy which existed when the contract was made.

2 Story on the Constitution, §1385.
Potts *vs.* N. J. Arms & Ord. Co., 2 C.E.G., 395.

The relator is not deprived of his substantial remedy, and that is all the Constitution forbids.

II.

The writ of mandamus is not and never was in any proper sense a "remedy for enforcing a contract," so as to be within the constitutional prohibition.

The prohibition clearly has reference to remedies for the redress of private wrongs.

A mandamus is not such a proceeding.

It was so decided in the case of Layton *vs.* State, 4 Dutch., 575, above cited.

It is an elementary rule that the writ of mandamus is not applicable to the redress of private wrongs.

Moses on Mandamus, 177.
Ex parte Robbins, 7 Dowl. P. Cases, 566.

Rex *vs.* Clear, 4 B. & C., 901,
Rex *vs.* Montacute, 1 Wm. Black, 61.
S. C., 1 Wils., 283.
Tapping on Mandamus, p. 4, note (a), do. 5, 11, 66.
See Rex *vs.* Cowle, 2 Burrrow, 855, where a distinction is taken between suits between party and party, and these high prerogative writs.

Comyn's Digest, Mandamus A.
King *vs.* Barker, 1 W. Blacks., 352.
Rex *vs.* Payn, 6 A. & E., 397.

Lord Denman, Ch. J., said: "It is enough that a *public duty is left unperformed by a public officer* keeping back documents of which he obtained custody in that character."

In King *vs.* Clear, et al., 4 B. & C., 899, Holroyd J. said:

"In Com. Dig., Mandamus (A.) it is stated that the writ of mandamus is granted to prevent the failure of justice, and for the execution of the common law, or of a statute, or of the King's charter; *but not as a private remedy to the party.* The applicant not having stated the grounds upon which he desires to inspect the books has not brought himself within that rule for granting a mandamus. *His right as a parishioner is a mere private right for which the Court will not grant it.* * * * * *Inasmuch as I think the party should have pointed out some public ground* for the court to proceed upon, and has not done so, this rule must be discharged."

The primary and appropriate office of the writ is to compel the performance of a public duty, and although it may sometimes happen that the right to have a public duty performed, has originated in a contract, and so the writ may operate to enforce a

contract, it is only incidental and exceptional and does not bring the proceedings within that class of remedies which the constitution describes as existing for enforcing a contract.

See the language of Ch. J. Beasley, in State *vs.* Union Township, 8 Vr., 86–7.

10

Elmendorf *vs.* Jersey City, 12 Vr., 135.

This constitutional provision must have a reasonable construction, and it will not be stretched so as to cover a class of cases not fairly within its purview: nor will it be so construed as to prevent the legislature from regulating the use of this high prerogative writ because it sometimes happens to operate as a means of enforcing a contract, although
20 it is in no sense a remedy for any such purpose.

See also, Shipley *vs.* Mechanics Bank, 10 Johns., 484.
People *vs.* Parkerville Coal Co., 1 Abb. Prac., 128.
S. C., 10 How. Prac., 543.

When the learned Justice who delivered the
30 opinion of the Supreme Court declared "that the writ had become substantially a private remedy in these cases," it is respectfully insisted that he ignored the whole course of judicial decision on that subject.

The Court was never bound to allow it if in its operation it would work confusion or injustice, and if for such reasons it refused to allow it, the applicant for it had no redress.

40

(On this point, see especially a learned note to the case of Fish *vs.* Weatherwax, in 2 Johns. cases (2d ed.), pp. 217-4, and the cases there cited).

III.

The Supreme Court erred in holding that the act of 1880 was in violation of the third article of the Constitution, relating to the distribution of the powers of government, cited in the opinion of Mr. Justice Dixon, on page 27 of the case. 10

The argument of the learned Justice and the authorities cited by him, if followed to their legitimate extent, prove too much.

If it be true that the authority to tax necessarily falls to the legislative department, and that as a general rule the taxing power has been treated by the judiciary, as vested in the absolute discretion of the legislative bodies— 20

If it be true, as declared in this opinion, that "all the Judges concur in the view that the power of taxation is legislative, that the laying of taxes is not a judicial act, *but one which belongs to the legislative department exclusively, to be performed upon considerations of policy, necessity and the public welfare*"—

Where does the Court get the power to declare that the taxing power of the City of Rahway shall be set in motion to raise the sum of money, when the legislative department, to which this question exclusively belongs, has never ordered the raising of any such tax? 30

The City Charter (cited on page 22 in section 47) confers upon the Common Council power to raise by tax in each year such sum or sums *as they shall deem expedient* for the payment of the interest upon the City debt, and such part of the principal thereof as may be due and payable—and section 48 makes it the duty of the assessor to assess only the sum so required. 40

If we accept the premises laid down by the

Supreme Court, the question of how much is expedient to be raised for the purposes mentioned, is referred to the Common Council. It is a purely legislative question, and their decision is a final—Tidewater Co. *vs.* Coster 3 C. E. G. 521,522. Considerations of policy, necessity and the public welfare
10 have led them to withhold the direction to the assessors, necessary to enable them to levy this tax.

By what authority does the court reverse that decision and direct that an arbitrary sum shall be raised without the slightest regard to those considerations of policy, necessity and the public welfare, on which the determination of such a question depends? *A fortiori*, by what authority do the courts assume so to direct, when the legislature,
20 confessedly having jurisdiction over the subject, has expressly enacted, by the act of 1880, that no more shall be raised than the obvious considerations of public policy, regarded in the act, will warrant?

Every bond holder when he took his bond knew or ought to have known, that it rested exclusively with the Common Council to determine irreversibly how much it would be expedient to raise to pay their demands. How can such a creditor, merely
30 by recovering a judgment on his bond, transfer that purely legislative question to the courts to determine, when it is admitted by this opinion that a court possesses none of the means necessary to a proper determination of the question?

Such an argument is totally destructive of the power of the Court to compel the raising of the tax. Should it be urged that the act of 1878 makes the duty imperative, I reply that that act is a general
40 law, which on familiar principles cannot repeal the provision of a special charter. Such law would not repeal that part of the charter of Rahway which left to the Common Council the determination of the expediency of the tax, unless that provision of

the charter was specially repealed. Besides the act of 1878, was not a remedy which existed for enforcing these contracts when the relator's bonds were issued. Mr. Justice Dixon was obliged to refer the relator's right to a mandamus to the duty to lay the tax which existed under the charter of the city of Rahway. Now if the Court on such an application would compel the Common Council of Rahway to lay a tax to raise the amounts due these several relators, although the Common Council should not deem it expedient so to do, the Court in determining such question of expediency would clearly have done a legislative act, and would have usurped the function which by the charter was exclusively committed to the Common Council.

The truth is, if the former part of my argument is correct, the courts always possessed the power of determining every question of fact that entered into the exercise of their discretion in issuing writs of mandamus. Under a rule to show cause the facts could be easily ascertained, and it could not be urged as an objection to the exercise of the court's discretion that the matters to be inquired about were such as were usually dealt with by the legislature.

No such difficulty can arise in this case, because all the necessary facts are admitted by the demurrer, and in such a case the court could of its own discretion, even without the imperative command of the act of 1880, have denied the writ.

The argument therefore drawn from the supposed incapacity of the court to deal with questions of this character can have no weight in this case.

Many other cases can be shown where the legislature has conferred upon the courts powers analagous to this, and they have always been sustained when challenged.

A notable instance is the act entitled: "A General Act respecting taxes, assessments and water

rates;"—approved March 23, 1881. (P. L. of 1881, p. 194.) An examination of the powers conferred and duties imposed by this act shows that the Court must consider all the matters left to them by the mandamus act of 1880, and the act gives them the power to lay and assess taxes, and gives to their action the same effect as if the tax had been in the first instance levied, assessed or imposed by the proper taxing authority.

This law I understand has been recently sustained by the Supreme Court at the last term.

Another example is found in the supplement to the charter of the City of Newark, approved March 11, 1875. P. L., p. 249.

This law has been acted on for six years, and millions of dollars have been assessed and collected under it, and yet the learned judge who performed the duties under it all of which invoke the exercise of the taxing power, never dreamed that he was violating the constitution of the State in exercising the power thereby conferred.

A question somewhat similar was raised under an Act of the Legislature of this State for bonding townships in aid of the Montclair Railway. P. L. of 1868, p. 889.

That act was held constitutional both in the Circuit and Supreme Courts of the United States, although the point was expressly raised that the duties of the commissioners were within the legislative department, and the Legislature could not, under the Constitution of New Jersey, confer the appointment of such officers on the judiciary.

Pompton *vs.* Cooper Union, 101 U. S. (11 Ott.), 196.

A similar law was passed in the same year in aid of the Passaic Valley and Peapack R. R. Co. (Laws

of 1868, 915). Here a power to appoint the commissioners was vested in the Circuit Court.

Of a like character is the act entitled "An act to adjust unpaid assessments in Jersey City" (Laws of 1873, p. 442). Many other examples could doubtless be cited would time permit.

In short, if the constitutional provision now applied to the case in hand is properly applied, it will uproot many of the most salutary laws of the State, which have passed the scrutiny of this Court repeatedly.

IV.

There is another error apparent in the record. The fifth section of the act of 1880 directs that all the pending applications shall be consolidated and treated as one proceeding, and that one writ of mandamus alone shall issue upon all the applications on which the Court shall determine a writ should issue. The Court by directing a separate writ in each case has disregarded the directions in this section. This part of the act has no necessary connection with the preceding sections, and should be enforced, even if the preceding sections were found to be unconstitutional. It is well settled that the unconstitutionality of part of an act does not render the whole invalid unless they are all so connected together that the whole must stand or fall together.

The rule of practice prescribed by this section is a salutary and convenient one and is capable of being applied to the cases now before the Court even if some portion of the act is held to be unconstitutional. There would be no difficulty in giving effect to this section to the cases under consideration, if it had stood alone as an independent act, and it in no wise depends for its enforcement upon

the validity of the preceding sections. This Court has repeatedly recognized the doctrine above stated by holding certain parts of a law to be good while other parts were held unconstitutional. The Court committed an error in not consolidating these three cases, and dealing with them all as one case.

10

Payne *vs.* Mahon, 12 Vroom, 292.
Rader *vs.* Township of Union, 10 Vr., 509.

There are other and perhaps broader grounds on which the constitutionality of this law can be sustained, but as they are to be presented to the court by other counsel in other cases they will be merely stated here.

20

A.

Municipal bonds are contracts *sui generis.* The remedy to enforce payment is absolutely under the control of the legislative department and subject to such changes as properly follow legislation for the public welfare.

30

Merewether v. Garrett, 102 U. S. (12 Otto), 472.
Lyon v. City of Elizabeth, 14 Vroom, Feb. T., 1881,
W. S. v. R. R. Co., 17 Wall, 329.
Beers v. Arkansas, 20 How., 527.
Hernsacker v. Borders, 5 Cal., 288.

B.

40

No such vested rights can be obtained in general laws providing for taxation as will prevent the legislature from changing those laws at any time by virtue of its sovereign control over the subject.

C.

Contracts which depends on taxation for payment are subject to such changes of remedy as result from alterations of the law of taxation, and such alterations do not deprive parties of their remedies within the meaning of the constitution. 10

D.

All contracts are subject to assessment laws and insolvent and bankrupt laws and it is competent for the legislature at any time to marshal the assets of any insolvent corporation municipal or otherwise, for equitable distribution.

These bsnds are what are termed assessment 20 bonds and were made dependent upon the collection of assessments and not upon general taxation of the city at large, for their payment.

GARRET BERRY,

Attorney for Plaintiffs in error.

THOMAS N. McCARTER,

Of Counsel. 30

40

DAVISON & CO., Law Printers, 27 Montgomery st., Jersey City.

Court of Errors and Appeals.

THE ASSESSORS, &C., OF THE CITY OF RAHWAY, Plaintiffs in Error, v. THE STATE, EX REL., BENAJAH MUNDY, Defendant in Error.	Two cases. In error to Supreme Court.
THE SAME PLAINTIFFS IN ERROR, v. THE STATE, EX REL., BENJAMIN P. JOHNSON, Defendant in Error.	In error to Supreme Court.

Points and Authorities for Defendant in Error.

The assignments of error present the question whether the return was sufficient.

The alternative writ is not attacked.

The sufficiency of the return depends wholly upon the supplements to the Mandamus Act, found in Pamph. Laws 1880, page 102.

We say that the act is unconstitutional for THREE reasons.

I.

Because it is in conflict with Article IV, Section VII, ¶ 3 of the Constitution of this State, which forbids the passage of any law "impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made," and also with the similar prohibition contained in Article I, Section 10, of Constitution of the United States.

I. The remedy at the date of the contracts.

By the amended Charter of the City of Rahway, (Pamph. Laws 1865, p. 499. sec. 47), the power to tax was conferred upon the Common Council limited only as to the purposes there enumerated, for which it might be exercised.

Among others are the following; "For the payment of interest upon the city debt and upon temporary loans, and such part of the principal thereof as may be due and payable," and "For the contingent expenses of the city; and for all other objects and purposes authorized by this act."

The power so conferred would be extended by implication to every purpose for which the city could lawfully incur indebtedness.

Shackleton v. Guttenberg, 10 Vroom, 660.
Loan Association v. Topeka, 20 Wall. 655.
U. S. v. New Orleans, 8 *Otto*, 381.
Goelet Estate v. Elizabeth, N. J. Law Jour. 1880, *p.* 14.

The power of taxation is without limit as to the extent to which it may be exercised for a lawful purpose.

Weston v. Charleston, 2 Peters, 449, 466.
McCullogh v. Maryland, 4 Wheat. 430.
State, Trenton W. P. Co. v. Parker Recr., 3 Vroom, 426, 435.
Cooley Constl. Lim. *479, &c.
Hanson v. Vernon 27 Iowa 28

The recovery of the judgments recited in the alternative writ conclusively established three things :

1. The existence and amount of the debt.
2. A coextensive power of taxation therefor.
3. A duty to exert this power.

The remedy by mandamus at common law to compel taxation under such circumstances, upon the return of execution unsatisfied, was indisputable.

High on Extr. Remedies, § 377.
2 *Dillon Mun. Corp. (3d edn.)* § 849 *(685) and notes.*
Cooley on Taxation, p. 524 *and cases.*
U. S. v. New Orleans, 8 *Otto*, 381.
Rader v. Road District, 7 *Vroom*, 273, 282.
Shackelton v. Guttenberg, 10 *Vroom*, 660.
Lyon v. Elizabeth, 14 *Vroom*, 158.

Neither the bankrupt condition of the city nor the claims of other creditors were any answer to the application for the writ.

City of Galena v. Amy, 5 *Wall.* 705, 709, 710.

only U.S. v Jefferson Co 5 Dill C.C. 310, 324

The statute regulating the collection of judgments against municipal corporations in force in this State at dates of Relators' contracts, (1875 and 1877) was the act of March 26, 1845, found in Revision, p. 391, as § 9 of the Execution Act.

This statute made it the duty of plaintiffs to seek payment in the first instance from the collector. But if, on service of the writ there was no money in his hands applicable to it, and no source from which it could be expected to arise, the creditor could still put in motion the power to tax as at common law.

Shackelton v. Guttenberg, 10 *Vroom*, 660.

The Relator then had an ultimate and contingent remedy by mandamus to compel taxation at the date of his contracts.

This remedy was modified in form by a supplement approved March 27, 1878, to the act concerning executions (Pamph. Laws 1878, page 182), in accordance with which the Relator has proceeded.

This supplement repealed § 9 of the Execution act by implication, (it was afterward *expressly* repealed, see P. L. 1879, p. 292) and was valid as applied to Relator's contracts.

Gabler v. Elizabeth, 13 *Vroom*, 79.

a, It was within the principle that the legislature may take away old remedies substituting others equally efficient (*Rader v. Road District*, 7 *Vroom*, 274. *Randolph v. Middleton*, 11 *C. E. G.* 543, 548,) or can modify subsisting remedies in matter of form.

Rader v. Road District, supra.
Potts v. N. J. Arms &c. Co., 2 *C. E. G.* 395.
Baldwin v. Newark, 9 *Vroom*, ~~148.~~ 158
The Newark Savings Inst. v. Forman, 6 *Stew.* 436.
Scaine v. Belleville, 10 *Vroom*, 526.
Wilson v. Herbert, 12 *Vroom*. 454, 457-458
Baldwin v. Flagg, N. J. Sup. Ct. Nov. T. 1881.

Before the act of 1878, as well as since, the only reliance of the creditor was the revenue of the city derived from taxation.

Lyon v. Elizabeth, 14 *Vroom*, 158.

The only change effected by the act is, that whereas before the creditor was entitled to be paid from funds collected by taxation for other purposes, now he is be paid out of a levy made solely for him.

The remedy is not rendered *necessarily* less speedy. Whether or not it is so, will depend in each case upon the state of finances at the time of serving the execution.

In many cases the remedy given by the later act would be more expeditious.

Gabler v. Elizabeth, 13 *Vroom*, 79.

This Court cannot, in the absence of proof and in order to declare this act (of 1878) void, *assume* that its operation in this case was injurious to the Relator.

b.

And even if the Relator had the right to treat the act of 1878 as void as to him, for the reason that it took away his right to look to the city collector in the first instance, the right was one that he could *waive*.

The legislature offered him as an immediate and absolute remedy, one which before he could employ only on a contingency. If he choose to adopt it who else can urge its illegality? With his assent the act conflicts with no rule of law.

Potts v. Delaware W. P. Co., 1 *Stock.* 592, 619.
Randolph v. Middleton, 11 *C. E. G.* 543, 548.

Whether the Relator adopted the act of 1878 from choice or from compulsion, the remedy is one to which he had before a contingent right to resort, and which existed at the date of the contracts, for the enforcement thereof, and is therefore within the protection of the Constitution.

II. The effect of the Act of 1880.

It not only deprives Relator of an efficient remedy, but it impairs the obligation of the contract itself in several particulars.

1. The power of taxation which was before capable of being exercised at any rate necessary to produce the amount required, is by this act limited in this case to a rate barely sufficient to pay current expenses. Similar legislation was condemned in the following cases:

Von Hoffman v. City of Quincy, 4 *Wall.* 535.
Butz v. City of Muscatine, 8 *Wall.* 575.
~~*Louisana v. New Orleans*, 12 *Otto*, 203, 207.~~
Wolff v. New Orleans, 13 *Otto*, 358.
Goodall v. Fennell, 27 *Ohio St.* 426.
City of Galena v. Amy 5 Wall 705
U. S. v Jefferson Co. 5 Dill, CC, 310-314

2. In its operation it is precisely analogous to an exemption law, and is thus within the very mischief at which our peculiar constitutional provision was aimed.

Amy 15 Wall 610
Fletcher 54 Miss 628
Brown 58 Ala 62
Cases 22 Grat 266
Rockwell 66 Ind. 505

Rader v. Road District, 7 *Vroom*, 273, 280.
See also *Edwards v. Kearzey*, 6 *Otto*, 595.

3. It delays *unreasonably* the collection of the judgment.

See Webster v. Rose, 6 *Heiskell*, 93.
Cooley Constl. Lim. *292.
Louisana v. New Orleans, 12 *Otto*, 203, 207.

4. It deprives Relator of his priority.

See Martins v. Somerville W. P. Co., 3 *Wall. Jr.*, 206.

5. While it confers no power to raise MORE than enough to pay Relator, it requires the Court to divide the moneys so raised among all judgment creditors who shall apply.

"*May*" is here mandatory.

Davison v. Davison, 2 *Harr.* 169, 171.
Seiple v. Elizabeth, 3 *Dutch.* 407.
People ex rel v. Supervisors, 51 *N. Y.* 401.
Supervisors v. U. S. ex rel, 4 *Wall.* 435.

II.

The act is also in conflict with Article III of the State Constitution, in that it attempts to confer upon the Supreme Court legislative functions.

The power of taxation is legislative in its character.

Cooley on Taxation, pp. 34, 42, and authorities cited in opinion of court below.

It follows from this that under our constitution it cannot be conferred upon the judiciary.

Auditor v. R, R. Co., 6 *Kansas*, 500.
Hardenbergh v. Kidd, 10 *Cal.* 402.
Cooley on Taxation, 34 48-50

The inquiry as to the proper rate to be imposed, is manifestly involved in every act of taxation, and it is one upon which the courts have always declined to enter.

It depends upon considerations with which a court is not fitted to deal, but which address themselves peculiarly to the political department of the government.

McCulloch v Mar
4 Wheat 430
Linton v Mayor
53 Ga 588

Before the Act of 1880, the recovery of judgment conclusively established every fact necessary to make it the duty of the city to levy a tax for its payment upon service of a copy of the execution.

That this duty was a legislative one constituted no obstacle to a writ of mandamus to enforce its performance. Their was no discretion to be exercised, either by the Court or corporation, as to the amount to be raised.

But under this act it is very different. The duty which the Court now has to enjoin is to levy by taxation, not any ascertained sum, but such sum as the Court sitting in the place of the legislative department shall decide that the interests of other creditors will permit.

As to what amounts to delegation

III.

The third ground for declaring this act void is, that it impairs the jurisdiction of the Supreme Court secured to it by the constitution. (Article VI, Section I, and Article X, Section I).

The legislature cannot take from the Supreme Court the power to issue its prerogative writs.

Harris v. Van Derveer's Extr., 6 *C. E. G.* 427.
Traphagen v. West Hoboken, 10 *Vroom*, 232, affirmed in this Court for the reasons given below. 11 *Vroom*, 193.
Jersey City v. Lembeck, 4 *Stew.* 255.
Green v. Jersey City, 13 *Vroom*, 118.

Nor can the legislature withdraw from the operation of such writs any class of cases properly within their scope.

Traphagen v. West Hoboken, 10 *Vroom*, 232.

And that mandamus is the appropriate and only remedy to compel taxation by municipal corporations for the payment of judgments is unquestionable, (see authorities on this point cited above.) The act itself recognizes its appropriateness.

p 3.

By the act of 1878 (P. L. page 182) it is in so many words made the duty of the assessors upon service of the execution to assess the amount thereof, &c., and it was their duty so to assess the whole in the *next* levy.

The act of 1880 in no wise repeals this direction.

The whole effect is to prohibit the Court from compelling by mandamus, the discharge of this duty beyond a certain amount.

The words are "That it shall not be lawful to *require* any municipal corporation by mandamus to raise," &c.

The power to tax remains, as well as the duty enjoined by the act of 1878. The occasion for the exercise of the writ is still there, but the attempt is to take away the power to issue it.

That the act does not *entirely* deny the writ can make no difference. Any legislation that would leave the power of the Court to issue the writ less than commensurate with the duty to be enforced is within the principle of the cases cited.

If the legislature can deny the power to compel taxation to the full amount in the first year, it can deny the power so to use the writ at all. If it can deny the writ in this class of cases so it can in all others. And if it can thus abolish one writ it can in like manner dispense with the rest, and thus destroy the Court.

ALAN H. STRONG,
of Counsel with Def't in Error.

L. S. Hyer, Pr, 119 and 121 Main St., Rahway, N. J.

New Jersey Supreme Court.

New Jersey, ss.

The State of New Jersey to our Justices of our Supreme Court, Greeting:

Because in the record and proceedings and also in the giving of the judgment in a plaint which was in our said Supreme Court before you between The State of New Jersey, ex rel., Benjamin P. Johnson and The Assessors of Taxes of the City of Rahway respondents, on a certain writ of Mandamus issued out of our Supreme Court to the said The Assessors of Taxes of the City of Rahway directed, manifest error hath intervened to the great damage of the said The Assessors of Taxes of the City of Rahway, respondents, as aforesaid as by their complaint we are informed.

We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you send distinctly and openly under your seal the record and proceedings and plaint aforesaid, with all things touching and concerning the same to our Court of Errors and Appeals before the Judges thereof, on the sixth day of August next, and this writ, and that the records and proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the nine-

teenth day of July, in the year of our Lord one thousand eight hundred and eighty-one.

HENRY C. KELSEY,
Clerk.

GARRET BERRY, Attorney.

RETURN.

The answer of the Justices of the Supreme Court of New Jersey within named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we
10 do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within we are commanded

M. BEASLEY, Chief Justice.

THE STATE ex rel. BENJAMIN P. JOHNSON, *vs.* THE ASSESSORS OF TAXES OF CITY OF RAHWAY.	*On Mandamus Judgment.*

WOODBRIDGE STRONG & SONS,
20 Attorneys.

As yet of the Term of June A. D. eighteen hundred and eighty-one.

Witness:—MERCER BEASLEY, Esquire,
Chief Justice.

BENJAMIN F. LEE, Clerk.

NEW JERSEY, ss.

The State of New Jersey sent to "The Assessors of Taxes of the City of Rahway" its writ in the words to wit:

NEW JERSEY, ss.

30 The State of New Jersey to the Assessors of Taxes of
[L.S.] the City of Rahway, Greeting:

Whereas, Benjamin P. Johnson, plaintiff, heretofore to wit: on the second day of April, in the year eighteen hundred and eighty, recovered a certain judgment in the Supreme Court of Judicature before our Justices thereof at Trenton, against The Mayor and Common Council of the City of Rahway, defendant, for the sum of three thousand four hundred and thirty-two dollars and eighty-one cents, as well for a certain

debt, which was then and there adjudged to the said plaintiff as and for the amount of money due and owing to him on four certain writings obligatory, and on certain interest warrants and coupons thereto attached and belonging, made and issued by the said defendant under its seal and delivered to the said plaintiff on the first days of September and October respectively, in the year eighteen hundred and seventy five, in and by each of which said writings obligatory the said defendant promised to pay to the said plaintiff the sum therein mentioned on the first days of September and October respectively, 10 in the year eighteen hundred and seventy-nine, with the interest thereon payable semi-annually upon presentation of the said coupons thereto attached, as also for the damages of the said plaintiff, which he had sustained by reason of the detentention of that debt and of costs by him expended in and about his suit in that behalf as by the record of said judgment appears to us.

And, whereas afterwards, to wit:—On the fifth day of April, in the year eighteen hundred and eighty a writ of fieri facias or execution issued out of our said court on said 20 judgment directed to our Sheriff of our county of Union, whereby he was commanded that of the goods and chattels of the said The Mayor and Common Council of the City of Rahway, defendants, in his county, he should cause to be made the said debt and damages and costs, and if sufficient goods and chattels of the said defendant he could not find in his county whereof to make the debt and damages and costs aforesaid, then our said Sheriff was thereby commanded that he should cause the whole or the residue thereof, as the case might require, to be made of the lands, tenements, heredita- 30 ment and real estate whereof the said defendant was seized on the second day of April in the year eighteen hundred and eighty, or at any time thereafter in whose hands soever the same might be, and that he should have those moneys before our justices aforesaid at Trenton aforesaid on the first Tuesday of June then next, to render to the said plaintiff for his debt

and damages and costs aforesaid, and that he should have then there said writ, which said writ having been duly recorded in the office of the Clerk of said court was thereupon delivered to the said Sheriff to be executed according to law :

And whereas there was no property of the said The Mayor and Common Council of the City of Rahway, defendant, subject to execution wherever to levy the said writ according to the command thereof, and in default of such property, the said Sheriff did afterwards, to wit : on the twelfth day of
10 April in said year eighteen hundred and eighty, serve copies of said writ upon each of the Treasurer, Collector of Taxes (otherwise called the Receiver of Taxes), and the five Assessors of Taxes for the time being of the said defendant corporation as required by law.

And whereas, notwithstanding the premises, the said assessors then and there refused, and you as such assessors have hitherto refused and still refuse to assess and levy in addition to the regular taxes of said corporation, the amount due upon said writ with interest, upon the taxable property within
20 said corporation, contrary to your duty as such assessors as aforesaid, and to the manifest injury of said Benjamin P. Johnson, as we are informed by his complaint.

Now, therefore, we being willing that full and speedy justice be done in this behalf to the said Benjamin P. Johnson, do hereby command you, strictly enjoining that upon receiving this our writ you do proceed to assess and levy in addition to the regular taxes of the said corporation for the current year the said sum of three thousand four hundred and thirty-two dollars and eighty-two cents, the amount of the debt, damages
30 and costs recovered by the said Benjamin P. Johnson against the said The Mayor and Common Council of the City of Rahway, and mentioned in said writ as aforesaid, together with the lawful interest thereon from the said second day of April, in the year eighteen hundred and eighty, until the same shall be paid to said Sheriff, and also the lawful fees of said Sheriff on said writ, upon the taxable property within said corpora-

tion, and that you do in all respects faithfully and diligently perform all the duties imposed upon you in the premises as the Assessors of Taxes of the City of Rahway, by an act entitled "a supplement to an act entitled 'an Act respecting executions.'" Approved March twenty-seventh, eighteen hundred and seventy-eight, in manner and form as therein provided, according to the true intent and meaning thereof, or that you show cause to the contrary thereof, lest that complaint again come to us by reason of your default. And in what manner you shall have executed this our writ, make appear before the 10 Justices of our Supreme Court of Judicature at Trenton, on the third Tuesday of June instant, and have you then there this writ. And this you are in no wise to omit, under the penalty that may fall thereon.

Witness—the Honorable MERCER BEASLEY, Chief Justice of our said court at Trenton aforesaid, the thirteenth day of June in the year of our Lord one thousand eight hundred and eighty-one.

BENJ. F. LEE,
Clerk.

WOODBRIDGE STRONG & SONS, Attorneys.

NEW JERSEY SUPREME COURT. 20

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

Agreeably to the command of the within writ, we, the Assessors of Taxes of the City of Rahway, do certify and make return thereto and for cause why we do not proceed to assess and levy in addition to the regular taxes of the said corporation for the current year the said sum of three thousand four hundred and thirty-two dollars and eighty one cents, the amount of the debt and damages and costs recovered by the said Benjamin P. Johnson against the said The Mayor and 30 Common Council of the City of Rahway, and mentioned in said writ, together with the interest thereon from the second day of April, in the year eighteen hundred and eighty, until the same be paid to said Sheriff, and also the lawful fees of said Sheriff on said writ, upon the taxable property within said corporation, agreeably to the statute therein set out, show to

the Court that by reason of a certain statute passed and approved March 3d, A. D. 1880, and under and by virtue of the provisions thereof, application having been first made to this Honorable Court, and this Court having been requested on behalf of the said City of Rahway to ascertain the facts required by the said statute, on affidavits to be taken on due notice, and the said Court having directed the same to be taken; they were so taken, and it was thereby ascertained and determined that in accordance with said statute:

10 Firstly.—That the indebtedness of said city of Rahway was one millian eight hundred and forty thousand and twenty-seven dollars, and that the same became and was due and payable as follows: Five hundred thousand dollars past due, and the balance due at intervals from eighteen hundred and eighty-one to eighteen hundred and eighty-seven inclusive, and that that the rate of interest was seven per cent. per annum, as reference to the testimony in this case will more fully show.

Secondly.—That the real value of the property taxable within said corporation was two millions five hundred and 20 sixty-six thousand seven hundred and forty-five dollars.

Thirdly.—That the amount to be raised within such corporation for necessary expenses for municipal and other purposes during the current year was sixty-five thousand two hundred and forty-five dollars and nine-one cents.

Fourthly,—And that the highest rate of taxation capable of being imposed on such corporation without injury to the interests of the creditors of the corporation, whose claims are not yet paid, would be two and a-half per centum upon the taxable value of the property of said city, and that to pay the 30 interest on outstanding indebtedness and raise the necessary sum for current expenses would require a tax to be levied of over seven per cent. upon the entire taxable property included within said corporation, which would amount to a confiscation of said property, reference being had to the testimony so taken in this cause in order that the above facts set out may more fully appear. And until this Court considers what amount, if any, should be assessed to pay said judgment in compliance

with said statute, and because this Court have failed to consider the same in compliance with said statute, no levy should be made, and no writ of peremptory mandamus issue, and that respondents are powerless to comply with said writ.

And respondents further show that said city has taken the benefit of the statute passed by the Legislature of the State of New Jersey, and approved March 10th, 1880, entitled "An Act in relation to Cities."

And these respondents append to this their return, a certified copy of the proceedings taken thereunder, and of the election held by virtue thereof, and beg leave to refer to the evidence of Lewis S. Hyer, on file in the Clerk's office of this court, in this cause, as proof that such action was so taken. 10

These respondents further show that it would be against public policy, and would amount to a confiscation of the property within said municipal corporation to compel them to assess the amount stated in said writ, in addition to taxes already imposed for raising funds for current expenses and to defray the necessary expenses of carrying on the city government, and in addition to the interest on the municipal debt, the city not being able, as appears by the above mentioned testimony, to raise by taxation a sufficient amount to pay the interest or any considerable portion thereof on its municipal indebtedness. 20

And these respondents beg leave to append the following certified copies, showing the action of the said Common Council above referred to, and in this manner and for the reasons above set out.

We, the Assessors of Taxes of the City of Rahway do most respectfully make out return to the within writ, and ask that we be further relieved from the duties therein imposed. 30

GARRET BERRY,

Attorney for Respondents.

THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY.

WHEREAS, The Legislature of the State has enacted a law whereby cities are authorized to adjust their indebtedness with he creditors of the same, and

WHEREAS, This act set forth that cities which propose to avail themselves of the benefits of this act, shall first declare, by resolution of its Common Council its inability to raise and pay the annual charge upon the municipal indebtedness of such cities; therefore be it

Resolved, That in the judgment of the Common Council of the City of Rahway, it is now unable to raise and pay the annual charge upon the bonded and other municipal indebtedness of the said city of Rahway.

10 I hereby certify that the above is a true copy of a preamble and resolution passed by the Common Council of the City of Rahway, at a meeting held March 24, 1880, as appears by the records.

LEWIS S. HYER,
City Clerk.

WHEREAS, The city of Rahway, by its Common Council, did on the twenty-fourth day of March, A. D. 1880, in accordance with an act of the Legislature of the State of New Jersey, entitled "An Act in relation to cities," approved March 10th, A. D. 1880, duly express its judg-
20 ment in accordance therewith by resolution of said Common Council by a vote of three-fourths of its members, that the said city of Rahway was unable to raise and pay the annual charge upon its municipal indebtedness; therefore, be it

Resolved, That under and by virtue of said act and in accordance therewith, that the said city of Rahway can pay twenty-five per cent. of its existing indebtedness and no more, and that the said Common Council do issue adjustment bonds for said amount, which said bonds shall bear date the first day
30 January, A. D. eighteen hundred and eighty-one, and be payable in forty years from the date thereof, with the privilege of redemption thereof reserved to said city after five years from said date, and shall bear interest at four per cent from said date, payable semi-annally. And further be it

Resolved, That thirty days' notice be given by publication in the daily and weekly papers of the city of Rahway of a special election to be held on Tuesday, the first day of March next for that purpose, and that the polls shall be held at the following places, viz: First Ward—City Hall Building, corner Main and Monroe streets. Second Ward—Halpaus' Hotel corner Grand and Newton street. Third Ward— hamberlin's

Hotel, corner Cherry and Campbell streets. Fourth Ward—Crowell's Hotel, Main street and Milton avenue. And that Monday, the twenty-eighth day of February, A. D. 1881, be fixed as the day of registration at the above named polling places, said election being held for the purpose of determining by the will of the people in favor of the settlement of the debt as proposed, or against the settlement of the debt as proposed, as the vo ers may determine.

I hereby certify that the above is a true copy of a preamble and resolutions passed at a meeting of the Common Council of the City of Rahway, held January 11th, 1881, all the members (10) present voting therefore, two being absent as appears by the record.

LEWIS S. HYER, City Clerk.

This is to certify that in accordance with the foregoing resolutions, an election was held in the city of Rahway, on March 1st, 1881, and the following is the result thereof, as appears by the record:

Whole number of votes cast,		495
In favor of compromise,	403	
Opposed to compromise,	88	
Majority for compromise,	315	
Scattering,		4

LEWIS S HYER, City Clerk.

And as to the return of the said The Assessors of Taxes of the City of Rahway, respondents, by them made to the said alternation writ, the said Benjamin P. Johnson, the relator mentioned in said writ, by force of the statute in such case made and provided saith, that the said return and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to excuse the said respondents from the performance of the matters in said writ enjoined upon them, or to bar or preclude him, the said relator, from having a peremptory writ in this behalf, and that he, the said relator, is not bound by law to answer the same.

And this he, the said relator, is ready to verify.

Whereofore, by reason of the insufficiency of the said

return in this behalf the said relator prays judgment, and that a peremptory writ may be awarded to him, &c.

And the said respondents say that the said return made by them to the said alternative writ and the matters therein contained in manner and form as the same are above pleaded and set forth are sufficient in law to excuse them, the said respondents, from the performance of the matters in said writ enjoined upon them, and to bar and preclude the said relator from having a peremptory writ in this behalf, and that they, 10 the said respondents are ready to verify and prove the same, where and in such manner as the said Court here shall direct and award.

Wherefore, inasmuch as the said relator hath not answered the said return, or in hitherto in any manner denied the same, the said respondents pay judgment, and that the said relator may be barred from paying a peremptory writ against them.

And now at this day, to wit: the first day of June eighteen hundred and eighty-one, before our said Supreme 20 Court at Trenton, come the parties aforesaid by their respective attorneys aforesaid, and, but, because, our said court, now here are not yet advised what judgement to give of and upon the premises, a day is further given to the parties aforesaid before our said Court at Trenton aforesaid, to wit: until the thirteenth day of July, A. D. 1881, to hear judgment thereupon. at which day before said court at Trenton aforesaid came the parties aforesaid, by their respective attorney aforesaid, whereupon all and singular the premises asoresaid being seen and by the said court now here fully understood, and mature delibera- 30 tion being thereupon had it appears to the said court here that the said return by the said respondents above in manner and form aforesaid pleaded, and the matters therein contained are not sufficient in law to bar and perclude the said relator from having and maintaining the aforesaid action thereof against said respondents. Therefore it is considered by the court here that the said relator do recover against the said respon-

dents the sum of dollars and cents, for his costs and charges by him above his suit in this behalf laid out and expended by the court here, adjudged to the said relator, and with his assent according to the form of the statute in such case made and provided, and that he have execution thereof, and so forth.

And it is further considered the States peremptory writ of mandamus do forthwith issue, directed to the Assessors of Taxes of the City of Rahway, commanding them under the penalty that may fall thereon to proceed to assess and levy in addition to the regular taxes in said corporation for the current year the amount of the debt and damages and costs of the said relator which he recovered in this court against the Mayor and Common Council of the City of Rahway, and mentioned in the execution heretofore issued to the Sheriff of Union county, copies of which were served upon the said Assessors together with the interest thereon from the date of recovery until the same shall be paid to said Sheriff, and also the lawful fees of said Sheriff on said writ upon the taxable property within said corporation, and that the said Assessors do in all things faithfully and diligently perform the duties imposed upon them in the premises by an act entitled "a supplement to an act entitled 'an act respecting executions, approved March twenty-seventh, eighteen hundred and seventy-four,'" which supplement was approved March twenty-seventh eighteen hundred and seventy eight, in manner and form as therein provided according to the true intent and meaning thereof, and according to the command of the said former writ of alternative mandamus, &c.

Judgment signed this thirteenth day of July, A. D. eighteen hundred and eighty-one.

M. Beasley, Chief Justice.

NEW JERSEY SUPREME COURT.

The State of New Jersey, ex rel. Benajah Mundy, vs. The Assessors of Taxes of the City of Rahway.	*On Application for Mandamus Rule to Show Cause.*

Upon reading and filing the affidavit of George S. Spalding, Alan H. Strong, and on motion of Woodbridge Strong & Sons, attorneys for the said Benajah Mundy, it is ordered that the Assessors of Taxes of the City of Rahway do show cause, if any they have, before the Justices of the Supreme Court of New Jersey, at the State House, in the city of Trenton, on the third Tuesday of February next, at ten o'clock in the forenoon, why a peremptory writ of mandamus should not issue, commanding and enjoining them, the said Assessors
10 to assess and levy in addition to the regular taxes for the ensuing year (A. D. 1881) the sum of twenty-two hundred and four dollars and five cents, being the amount of money mentioned in a certain writ of fieri facias issued out of the said Supreme Court on the twentieth day of September, A. D. 1879, returnable to the November term of said court there next, directed to the Sheriff of the county of Union, on a certain judgment for said sum recovered in said court by the said Benajah Mundy against The Mayor and Common Council of the City of Rahway, together with the interest on said sum
20 from the said twentieth day of September, A. D. 1879, until the same shall be paid to said Sheriff, and together with the Sheriff's fees on said writ, upon the taxable property in their said city to be assessed and collected at the same time and in the same manner and under the same conditions, regulations and restrictions as taxes for other purposes and required to be assessed and collected in said city, pursuant to the statute in such case made and provided.

Dated January 18th, 1881. B. Van Syckel,
Entered January 20th, 1881. Jus. Sup. Ct of N. J.
30 On montion of
W. Strong & Sons, Attorneys.

NEW JERSEY SUPREME COURT.

The State ex. rel. Benajah Mundy, vs. The Assessors of Taxes of the City of Rahway.	*On Rule to Show Cause for Mandamus. Ret'ble Feb'y T*, 1881.

THE STATE ex. rel BENAJAH MUNDY, vs. THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY,	*On Rule to Show Cause for Mandamus. Ret'ble Feb'y T.*, 1881.

THE STATE ex. rel. BENJAMIN P. JOHNSON, vs. THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY.	*On Rule to Show Cause for Mandamus. Ret'ble Feb'y T.*, 1881.

It is agreed that the testimony to be used on the hearing of the above entitled Rules to Show Cause for Mandamus shall be taken before Gilbert H. Lindsay, Esquire, Supreme Court Commissioner, at his office in the city of Rahway, on Saturday, February 12, 1881, at 9:30 in the morning, without further notice, and that the testimony so taken may be used as aforesaid without further order for that purpose. 10

Dated February 8th, 1881.

GARRET BERRY,
Att'y for City of Rahway.
W. STRONG & SONS,
Attorney for Relators. 20

NEW JERSEY SUPREME COURT.

THE STATE ex. rel. BENAJAH MUNDY, vs. THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY.	*No. 1.* *On Rule to Show Cause for Mandamus. Ret'ble Feb'y T.*, 1881.

THE STATE ex. rel. BENAJAH MUNDY, vs. THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY.	*No. 2.* *On Rule to Show Cause for Mandamus Ret'ble Feb'y T.*, 1881.

30

THE STATE ex- rel. BENJAMIN P. JOHNSON, vs THE ASSESSORS OF TAXES OF THE CITY OF RAHWAYr	*On Rule to Show Cause for Mandamus. Ret'ble Feb'y T.*, 1881.

Testimony taken before me in the above stated causes

this 12th day of February, 1881, in the above stated causes, pursuant to the annexed agreement between counsel.

Present for defendants GARRET BERRY, Esq.,
Att'y for the City of Rahway.
" " relator, ALAN H. STRONG & SONS.

George H. Spaulding, a witness produced and sworn in these causes on the part of the relator, says: I was formerly in the office of the Sheriff of Union county in the capacity of clerk; I was in that office up to the 29th of January, 1881; I
10 was there in that capacity during the month of September, 1879; on the 24th of September, 1879. the Sheriff of Union county received in his office writs of fieri facias in the two causes entitled "Benajah Mundy vs The Mayor and Common Council of the City of Rahway," and issued out of the Supreme Court; those executions were returnable November term, 1879, and were against the goods and lands of the defendant, The Mayor and Common Council of the City of Rahway; there was no levy made upon either of those writs, because the defendant had no property subject to execution; I know
20 that, because a previous levy made under a previous execution in another canse upon all the available property of the defendant had been set aside by the Court because the property so levied upon was necessary to the maintenance of the city government; copies of the writs in these cases were then made by me and served upon the Treasurer, Receiver of Taxes, and each of the Assessors of the city of Rahway; service upon these officers were made by me on the tenth day of October. 1879; the officers upon whom these writs were served are Robert C. Brewster, Treasurer, William E. Blanchard, Re-
30 ceiver of Taxes, and John B. Turner, Thomas Marsh, Benjamin B. Miller, John Van Ortwick and Edward G. Scisco, Assessors; the Sheriff has not collected any of the money commanded to be made by the writs; I was also in the Sheriff's office during the month of April, 1880; during that month, on the eighth of April, there was an execution received in the office of the Sheriff in the case of Benjamin P. Johnson against The Mayor and Common Council of the City of

Rahway; that writ was also against the goods and lands of defendant and was returnable in the June term, 1880; the writ was issued out of the Supreme Court; no levy was made under that writ, and for the same reason which I have mentioned in connection with the other writs; copies of these wiits were made and served upon Robert C. Brewster, Treasurer, William E. Blanchard, Receiver of Taxes, and Thomas Marsh, Francis E. Terrill, Benjamin B. Miller, John B. Turner and Henry V. Ayers, Assessors, by me on the 12th of April, 1880; no portion of the moneys mentioned in this writ have been collected; 10 I was especially deputized by the Sheriff by writing annexed to the writ to make service of these copies of the writs in these three causes.

No cross examination.

Subscribed and sworn to before me this 12th day of February, 1881. } G. S. Spalding.

G. R. Lindsay,
Supreme Court Commissioner.

It is here admitted by Mr. Berry, counsel for respondents, that the books in the hands of the Receiver of Taxes of the 20 City of Rahway show that there has been no tax levy made to raise the amounts of money due on said writs.

February 12th, 1881. G. R. Lindsay,
Supreme Ct. Com

Counsel for relator here declares the testimony on the part of the relator closed.

G. R. Lindsay, S. C. C.

I certify and return the foregoing is all the testimony taken before me on the part of the relator in the three above stated causes. 30

February 12th, 1881. G. R. Lindsay, S. C. C.

Testimony taken before me, a Master in Chancery, by consent of the attorneys of the respective parties at the city of

Rahway, on the twenty-second day of February, A. D. eighteen hundred and eighty-one.

Present, GARRET BERRY for respondents.
" ALAN H. STRONG for relator.

GEO. W. SAVAGE, Jr.,
Master in Chancery of New Jersey.

Henry S. Langstaff, a witness produced on the part of the Assesssors of the Taxes of the City of Rahway, being duly sworn on his oath, says: I am the Treasurer of the City of
10 Rahway; I have a balance sheet taken from the books of the city on the first day of January, 1881; the total indebtedness at that time was one million eight hundred and forty thousand and twenty-seven dollars and nineteen cents; some of the bonds are past due, and the last will be due in 1889; they bear interest at the rate of seven per centum per annum; the real value of the corporation for the purposes of taxation are

Real estate,.....	$2,206,670 00
Personal property,.....	416,850.00
Total,.....	$2,623,520.00
20 Amount of deductions therefrom,.....	56,775.00
Total amouut,.....	$2,566,745.00

During the current year there was necessary to be raised within this corporation for municipal and other purposes the sum of.....$32,500.00

Taxes for Mandamus and other purposes as follows:

Mandamus tax—Kittell.....	$5,917.57	
" " —Cutter,.....	2,370.16	
" " —Water Bonds.....	6,128.09	
County and State School.....	18,330.09	
30		32.745.91
Total amount,....		$65.245.91

Q. To pay the current taxes for municipal and other purposes and to raise the interest on the city debt, how much money would be required to be raised in the city of Rahway the next year?

A. One hundred and seventy-five thousand six hundred and forty-seven dollars and six cents ($175,647.06].

Q. What per centage would that be on the taxable value of the property of the city?

A. Seven per centum.

Q. Is that the highest rate of taxation capable of being imposed on this corporation without injury to the interests of the creditors of the corporation whose claims are not yet due in your judgment?

10

Objected to.

A. It is.

Q. Could that amount in your judgment be raised?

A. I don't know; I don't think one man in ten could pay it.

Cross-examination by Mr. STRONG.

The total debt is composed of Assessment bonds, Funded Debt bonds, Tax bonds, and Water bonds, and loans from banks on notes amounting to $66,600.00

This last amount is being contested.

These are not all the items viz:

20

Due County Collector for 1879....	$11,809.00
Due County Collector for County and School Tax for 1880.....	18,330.19
Total amount of Floating debt including loans on banks.....	96,739.19

These amounts of assessed valuations are taken from the tax assessment books of the present year.

Subscribed and sworn to this 22d day of February, A. D. 1881, before me } HENRY S. LANGSTAFF.

GEORGE W. SAVAGE, JR.,

M. C. C. of New Jersey.

30

Robert C. Brewster being duly sworn says, (examined by Mr. Berry), I was formerly City Treasurer, and my term of office expired on September 1st, 1880; I know the date when the bonds fell due in a general way; most of the floating debt is past due and our bonds mature from the present time at intervals up to the year 1889, inclusive as follows:

Past due, about	$500,000.00
1881	14,000.00
1882	52,000,00
1883	113,000.00
1884	71,000.00
1885	37,000.00
1886	144,000.00
1887	314,000.00
1888	118,000.00
1889	4,000.00

10

Q. It has been shown, it will require an assessment of seven per cent. to pay the interest on our debt and raise a sufficient amount of tax for other purposes; could that amount be raised without injury to those creditors whose claims are not yet due?

A. It could not be raised; no Collector could ever collect it; I am a long resident of this city and know the ability of the tax community, and in any judgment, not over two and one-half per cent. could be collected on the assessed valuation; I
20 think the assessed value is a fair value.

Cross-examination by Mr. STRONG.

These figures are taken from the City Treasurer's books

Subscribed and sworn to this 22d day of February, A D. 1881, before me } R. C. BREWSTER.

GEORGE W. SAVAGE, JR.,
M. C. C. of New Jersey.

Lewis S. Hyer being duly sworn says, (examined by Mr. Berry):

I am the Clerk of the City of Rahway; minutes of the
30 Common Council produced; paper shown witness; this is a true copy of the resolution of the Common Council, passed January 11th, 1881; offered in evidence and marked D. 1; I have resided in this city sixteen years; in my judgment, a tax of seven per cent. could not be levied without injury to the interests of those bond holders whose bonds are not yet due; it

is not possible to raise that amount, that is, seven per centum.

Subscribed and sworn to this 22d day of February, A. D. 1881, before me } LEWIS S. HYER.

GEORGE W. SAVAGE, JR.,
M. C. C. of New Jersey.

WHEREAS, The city of Rahway, by its Common Council, did on the twenty fourth day of March, A. D. 1880, in accordance with an act of the Legislature of the State of New Jersey, entitled "An Act in relation to cities," approved March 10th, A. D. 1880, duly express its judgment in accordance therewith by resolution of said Common Council by a vote of three-fourths of its members, that the said city of Rahway was unable to raise and pay the annual charge upon its municipal indebtedness; therefore, be it

Resolved, That under and by virtue of said act and in accordance therewith, that the said city of Rahway can pay twenty-five per cent. of its existing indebtedness and no more, and that the said Common Council do issue adjustment bonds for said amount, which said bonds shall bear date the first day of January, A. D. eighteen hundred and eighty one, and be payable in forty years from the date thereof, with the privilege of redemption thereof reserved to said city after five years from said date, and shall bear interest at four per cent. from said date, payable semi-annually. And further be it

Resolved, That thirty days' notice be given by publication in the daily and weekly papers of the city of Rahway of a special election to be held on Tuesday, the first day of March next for that purpose, and that the polls shall be held at the following places, viz: First Ward—City Hall Building, corner Main and Monroe streets. Second Ward—Halpaus' Hotel, corner Grand and Newton street. Third Ward—Chamberlin's Hotel, corner Cherry and Campbell streets. Fourth Ward—Crowell's Hotel, Main street and Milton avenue. And that Monday, the twenty-eighth day of February, A. D. 1881, be fixed as the day of registration at the above named polling places, said election being held for the purpose of determining by the will of the people in favor of the settlement of the debt as proposed, or against the settlement of the debt as proposed, as the voters may determine.

The above is all the testimony taken before me under the

consent of the respective parties; and the testimony is declared by the said attorneys to be closed.

GEORGE W. SAVAGE, JR.,
M. C. C. of New Jersey.

Argued at February Term, 1881, before Justices REED, PARKER and DIXON.

For the relator, ALAN H. STRONG.

For the defendant, G. BERRY, with whom were F. BERGEN and T. N. MCCARTER.

10 The opinion of the court was delivered by

DIXON J. The relator having recovered judgment against the Mayor and Common Council of the City of Rahway, and served his execution thereon, in accordance with the supplement to the "Act respecting executions," approved March 27th, 1878, (Pamph. L. 1878, p. 182,) now seeks a writ of mandamus commanding the assessors of the city to assess and levy the amount due, pursuant to the directions of that statute. Thereupon the municipality appears and requests that the court will proceed in the premises only in conformity with 20 the supplement to the "Act for the better regulation of proceedings upon writs of mandamus," approved March 3d, 1880 Pamph. L. 1880, p. 102. To this request the relator interposes two objections—first, that the act of 1880 is, as to him a violation of paragraph 3, section 7, article IV. of the State Constitution, which forbids the legislature to pass any law depriving a party of any remedy for enforcing a contract which existed when the contract was made; and, secondly, that the act can be executed only by this court's assuming functions which properly belong to the legislative department alone, con- 30 trary to article III of our Constitution.

As to the first of these objections, the defendant insists that the paragraph mentioned does not relate to remedies

against municipal corporations; that such bodies are mere representatives of the sovereign power, and, consequently, can be sued only as the legislature may permit, and that this permission may at any time be revoked or modified, at legislative discretion. This position is untenable. The entire provision is: "The legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." The juxtaposition of the last two clauses of this paragraph rendered it highly probable, on settled rules of interpretation, that whatever contract are guarded by the language concerning their obligation, are referred to by the language concerning the remedy. No reason appears for an opposite conclusion. But long before the provision preserving the obligation of contracts was placed in our Constitution, it had become certain, by the decisions in Fletcher v. Peck, 6 Cranch 87, and in subsequent cases, that the same words in the Federal Constitution embraced contracts made by the State. In the absence of any clear indication to the contrary, we must infer that its use in our own organic law was designed to have the same scope. And such is the view expressed in several cases. Martin v. Somerville Water Power Co., 3 Wall., Jr., 206; Bridge Co. v. H. L. & I. Co., 2 Beas. 81; Zabriskie v. Hack. & N. Y. R. R. Co., 3 C. E. Green 178; Black v. D. & R. Canal Co., 9 C. E. Green 455.

Hence there seems no room to doubt that if, when one made a contract with the state, he was entitled to a remedy for its enforcement, the legislature would not have the right to deprive him of it

But were this otherwise, it has never been held that municipal corporations possessed that immunity from suits upon contracts which the sovereign itself holds; and it is an everyday's occurance that they are sued thereon as are private bodies. Moreover, the doctrine that their contracts are embraced within this constitutional provision is expressly recognized in Rader v. Southeasterly Road District, 7 Vroom 273, where Justice Depue says: "The only limitation on the oper-

ation of sach repeal [of municipal charters] is as to creditors, that it shall not operate to impair the obligation of existing contracts, or deprive them of any remedy for enforcing such contracts which existed when they were made." The same idea is announced in Vanderbeck v. Inhabitants of Englewood, 10 Vroom 345, and the Chief Justice, in Scaine v. Belleville, 10 Vroom 526, declares it to be not in any quarter seriously questioned. The case of Meriwether v. Garrett, 102 U. S. 472, is cited as establishing the opposite principle. But it
10 does not. It merely holds that, by the removal of the agencies through which the courts must act in enforcing the remedy of creditors, the legislature can practically destroy the remedy; thus illustrating the truth that, in some instances, even constitutional rights need for their maintenance the co-operation of all the departments of government. But while the agencies remain, I do not see how the judiciary can, in view of their constitutional obligations, fail to give effect to the lawful demands of suitors. Wolff v. N. Orleans, 103 U. S. 358.

But the defendant next insists that the remedy which the
20 relator is now pursuing did not exist at the time this contract was made. The contract consists of city bonds for the payment of money issued in 1875; the exact remedy now sought was given by the statute of 1878. This averment, therefore, is formally true; but; in substance, it is false. That these bonds created an absolute debt of the corporation is conclusively established by the recovery of the judgment upon them United States v. New Orleans, 98 U. S. 381. The city charter (Pamph. L. 1865, p. 490,) in section 47, confers upon the common council power to raise by tax, in each year, such sum
30 or sums as they shall deem expedient for (inter alia) the payment of the interest upon the city debt and such part of the principal thereof as may be due and payable, and, in section 48, makes it the duty of the assessors to assess the sums so required. Thus was granted to the council ample power to raise by tax the money necessary to pay the relator's debt, and the charter provided complete machinery for carrying this power into effect. The power and machinery continued to

exist when the relator's bonds were issued, and still remain, Such a power in public officers becomes a duty whenever the enforcement of private rights depends upon its exercise; and the language by which it is conferred, though permissive in form, is considered as in fact peremptory. Supervisors v. United States, 4 Wall. 435; City of Galena v. Amy, 5 Wall. 705. Hence, upon the maturity of the relator's bonds, it became the duty of the council to direct a levy to pay them; and after the relator had, by judgment and unsatisfied execution, shown that he had no other means of payment, this court would, without 10 doubt, have awarded to him a mandamus requiring the council to perform that duty. Shackelton v. Town of Guttenberg. 10 Vroom 660. "When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power." Field, J., in Meriwether v. Garrett, supra. See, also, 2 Dill. on Mun. Corp. (3d ed.,) § 849, (685,) and notes. 20

Thus it appears that, at the time these bonds were issued, one of the existing remedies—indeed, practically the sole remedy, (Lyon v. City of Elizabeth, ante p. 158,)—for enforcing their payment, was by mandamus directing taxes to be levied in the city for that purpose. This is the same remedy which the act of 1878 affords. That act merely makes a change in the mode of procedure. Instead of a writ to the council requiring them to direct the assessors to levy the tax, which would be the routine under the charter, the act of 1878 30 permits the writ to go directly to the assessors. Such a change in the methed of pursuing the remedy the legislature could constitutionally make; and though it had tended somewhat to dely, rather than to expedite the creditor, it would not have invaded any of his rights: his remedy would have still been substantially preserved. Clearly, therefore, although the relator is pursuing his remedy under the act of 1878, it is proper for

him to insist that it is the same remedy as he had when his contract was made.

It remains to consider whether the act of 1880, if enforced, would deprive him of that remedy.

This statute requires the court to ascertain—1 : the total indebtedness of the municipal corporation, the time when payable and the rate of interest payable thereon ; 2 : the real value for purposes of taxation of the taxable property within such corporation ; 3 : the amount required to be raised within
10 such corporation for necessary expenses for municipal and other purposes during the current year ; and to determine, 4 : the highest rate of taxation capable of being imposed on such corporation without injury to the interests of the creditors of the corporation whose claims are not yet due. Then the mandamus must direct the raising of no more than the highest rate so determined will realize ; and the sum so raised is to be brought into court and distributed pro rata among the relator and such other judgment creditors of the corporation as shall apply and make proof of their judgments. This process is to
20 be repeated annually until the claims so proved are satisfied.

It is imposible to give effect to this legislation consistently with the relator's former rights. Its central feature is the protection of the interests of creditors whose claims are not yet due. Before its passage, the court, on the application of the relator, would have considered only the amount of his judgment, and would have commanded that to be raised, regardless of outstanding debts. In City of Galena v. Amy, 5 Wall 705, an effort was made to restrain the court from issuing a mandamus for the levy of a tax to satisfy a judgment, because of the
30 diminished revenues of the city and the disproportionate magnitude of its debt. But the court declared : "We can give no weight to considerations of this character when placed in the scale as a counterpoise to the contract, the legal rights of the creditor and our duty to enforce them." Such was the language of the Supreme Court of the United States concerning a suitor who had no rights in his remedy save as they inhered in

the obligation of his contract. With less hesitation, if there could be any hesitation in either case, would it be applicable in a court where the specific remedy is as inviolable as the contract itself. But, according to this statute, these considerations thus ignored are to be held paramount to the relator's demands. He who before was, among creditors, preferred in right because first in time, must now be subordinated to those whose unripened claims should naturally be postponed to his debt, Thus the act would strip him of his priority, and attempts what, in Martin v. Somerville Water Power, 3 Wall., Jr., 206, was decided to be beyond legislative power. It is as if the legislature enacted that no execution should issue to enforce a pre-existing judgment to the prejudice of the interests of creditors whose claims were not yet due. Certainly no one would contend that such a law could be valid; nor would it be saved from invalidity because it substituted for the absolute right to execution a conditional and less advantageous remedy. A law, to be forbidden, need not deprive the party of all remedy; it is enough if it take away any remedy to which he was entitled. And by the term "remedy" is here meant, not the form, nor perhaps the forum, (Newark Savings Ins. v. Forman, 6 Stew. 436,) in which the creditor is to seek redress, but the substance of his right to resort to the person or any property of his debtor for satisfaction. Rader v. Southeasterly Road District, 7 Vroom 273.

But it is suggested that Meriwether v. Garrett, ubi supra, gives countenance to the idea that private property in cities does not constitute a fund to which corporate creditors have any right to look for payment of their debts. We do not so understand that decision. The second resolution of the court, "that private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation," plainly implies that, through taxation, it may be. The opposite inference would be contrary to all previous decisions. Clearly, creditors have the right to resort to such property if the power of taxation exists in subordinate bodies for its enforcement, and if the

right and power were cotemporary with the inception of their debts, they become a constitutional remedy. The statute of 1880, by denying this right to the relator and conceding to him instead, a right to claim the exercise of the power of taxation only so far as may not injure the interests of others creditors, aims to destroy the substantial value of his remedy. Indeed, if necessary, it would not be difficult to show that it goes even further, and impairs the obligation of the contract; for, after some wavering, the Supreme Court of the United States has at length declared, in Louisiana v. New Orleans, 102 U. S. 203, "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, qui cito dat bis dat—he who gives quickly gives twice—has its counterpart in a maxim equally sound—qui serius solvit minus solvit—he who pays too late, pays less. Any authorization of the postponement of the payment, or of means by which such postponement might be effected, is in conflict with the constitutional inhibtion." This censure is plainly applicable to the act of 1880 in its effect upon the relator.

Again, it is urged that the writ of mandamus is a preragative writ, which, without this statute, might be issued or withheld in our discretion, and consequently may now properly be denied, except on conditions which will meet the provisions of the act. But such was not the range of our discretion in the class of cases for which the writ is now invoked. The right of judgment creditors of municipal bodies to this writ was about as clearly defined as is that of any suitor to any writ which does not issue of course. The writ had become substantially a private remedy in these cases. The court was bound to allow it whenever the proper facts were shown, and those facts were not such as this law contemplates. If the legislature can control the discretion of the court as to the necessary facts,

then it can deprive the party of his remedy; if the court yields to an attempt at such control, the same result is equally accomplished.

We are constrained to declare this act unconstitutional.

The second objection made by the relator to this statute seems to be equally well grounded; that it undertakes to cast upon the courts a purely legislative function, and so is invalid.

The third article of our constitution provides, "The powers of the government shall be divided into three distinct departments: the legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided." 10

"In the creation of three distinct departments of the government, and the apportionment of power among them, the authority to tax necessarily falls to the legislative." Cooley on Tax. 32.

"As a general rule, the taxing power has been treated by the judiciary as vested in the absolute discretion of the legislative bodies." Sedg. on Stat. and Const. Law 554. 20

And in the latest decision of the Supreme Court of the United States touching this subject, (Meriwether v. Garrett, ubi supra,) all the judges concur in the view that the power of taxation is legislative, that the levying of taxes is not a judicial act, but one which belongs to the legislative department exclusively, to be performed upon considerations of policy, necessity and the public welfare.

The same doctrine has been frequently enunciated in our state courts. State v. Newark, 2 Dutcher 519; State, Ruckman, v. Demarest, 3 Vroom 528; State, Gaines, pro.s, v. Hudson Co. Ave. Com'rs, 8 Vroom 12. See 2 Dill. on Mun. Corp, § 737, (588), note 2, (3d ed.) 30

But by the law now under review, the court is required to determine what rate of taxation can be imposed on the corporation without injury to the interests of the creditors whose claims are not yet due. These claims aggregate something like $1,000,000, about forty per cent. of the taxable property

in the city, and will mature in various amounts during the next eight years. The problem thus presented for solution involves considerations upon which the courts have never assumed to pass, and which seem to me improper for judicial investigation and determination. As against the relator, the interests of a large body of creditors are identical, or closely interwoven, with the interests of the municipality. Whatever rate of taxation will injure the latter will jeopardize the former. The amount of tax which can be borne without material prejudice to the city depends upon the prosperity of its inhabitants, the inducements which the place affords to manufacturers, merchants, artisans, taste and wealth, whether its local government is honest, ecnomical and public-spirited or the contrary, and other such matters of general concern. These are questions of fact, of which the courts cannot take judicial cognizance without proof, and if this statute is to be intelligently enforced, every creditors who seeks a mandamus must enter into a contest with the city to lay before us the truth concerning them by such evidence as is available. And when the truth appears, the point for determination will still be one to be decided, not by any known rules of law, but upon grounds of public policy; what rate of taxation may, in view of these facts, be imposed without working detriment to the community. In State v. Demarest, ubi supra, the Court of Errors directly decided that the question whether the interests of the people of the state would be best promoted by levying a tax for bounty to volunteers, or by other measures, was one of which the legislature was the sole judge. The question whether the interests of the city will be injured by levying a tax of $10,000 or $100,000 is of exactly the same character; and either the legislature or some legislative body to which it may be delegated, must decide it; but the delegation cannot be made to any branch of the judicial department. "It is as incompetent for the legislature to confer the power to tax upon the judiciary as upon the executive." Cooley on Tax. 34. Courts can determine whether constitutional or legislative restraints and rules as to taxation have been observed, and whether any individual is

called upon to pay more than his due proportion, and can compel subordinate legislative bodies to exercise the powers conferred upon them for purposes of taxation, but never has it been held that they could either assume or control the legislative function of deciding what sums the public interests require or permit to be raised.

We therefore are of opinion that a writ of mandamus should issue, commanding the assessors to levy a tax sufficient to pay the relator's judgment. We think the relator is entitled to a peremptory writ; but if the defendants desire to bring a 10 writ of error, an issue may be framed by an alternative writ, a return thereto setting forth the proceedings under the statute of 1880 and the facts thereby shown, and a demurrer to such return, with a judgment thereon in favor of the relator, and if such issue be framed and error brought with due promptness, proceedings upon the peremptory writ will be stayed till the determinaion of the court above.

COURT OF ERRORS AND APPEALS.

THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY. vs. THE STATE ex. rel. BENJAMIN P. JOHNSON,	*Assignment of Errors.*	20

And now at this day in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, come the said The Assessors of Taxes of the City of Rahway, by Garret Berry, their Attorney, and say that in the record and proceedings aforesaid, and also in giving judgment, there is manifest error in this, to wit: First, Because the Supreme Court in sustaining the demurrer filed to the return to the alternative writ of mandamus, erred in this, that the said return was good and sufficient in law and a full and complete defense to the issuing of a writ of peremptory mandamus, in that the 30 proceedings taken in said cause under and by virtue of an act entitled "A further supplement to an act entitled 'an act for the better regulation of proceedings upon writs of mandamus passed the second day of December one thousand seven hun

dred and ninety-four" approved March 3d, 1880, was interposed and the act fully complied with, and properly interposed under and by virtue of an order of the Court therein made, and that the said Court erred in not giving full force and effect to said statute, but pronounced the same unconstitutional upon certain grounds in the opinion of said Court named, whereas the judgment of the Court should have been that said act was constitutional and a bar to the issuing of a peremptory writ, and that said Court should have fully considered the provisons of said act and given full force and effect thereto.

Second. There is error in this that it also appeared by said return that the said city is and was in a bankrupt condition and had by virtue of an act entitled "An act in relation to cities," approved March 10th, 1880, declared their inability to raise and pay the annual charge upon the municipal indebtedness of said city, and declared under said act how much they could pay by way of compromise, and had otherwise fully complied with said act, and therefore it was against public policy to compel the payment of the whole of the defendant's judgment, and for that reason the Court erred in not holding the same was a sufficient cause for denying the writ of peremptory mandamus in this cause, and giving judgment in favor of the respondents in said cause.

Third. There is error in this, be cause it was insisted in said return that it was against public policy inasmuch as the city could not raise and pay the annual charge on its indebtedness, and pay the current expenses of the city government, and to do so would amount to confiscation of the taxable property within said corporate limits, and that the Court should have so decided and sustained said return in this behalf, and in giving of judgment sustaining the demeanor in that particular, error was committed.

Fourth. There is error in this, that by the record aforesaid it appears that judgment was given for the said defendant and against the plaintiff in error, when by the law of the land judgment should have been given in favor of the plaintiff and against the defendant in error, upon the demurrer to the re-

turn to the alternative writ of mandamus, interposing the said acts above referred to, and as being against public policy and that the said return should have been adjudged to be a good and sufficient answer at law and that said Court erred in sustaining the demurrer to said return.

And the said, The Assessors of Taxes of the City of Rahway, pray that the judgment aforesaid for the errors aforesaid and for other errors in the said record and proceedings may be reversed, annulled and all together holden for naught.

GARRET BERRY, 10

Attorney for and of Council with the Assessors of Taxes of the City of Rahway Pl'ff. in Error.

Filed August 26th, 1881.

HENRY C. KELSEY, Clerk.

THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY, vs. BENJAMIN P. JOHNSON, } *Joinder in Error.*

And whereas, afterwards, to wit: on the sixth day of August, in the term of July, in the year eighteen hundred and eighty-one, the said Benjamin P. Johnson, by Woodbridge Strong & Sons, his attorneys, comes in Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the Court 20 may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that judgment aforesaid in manner aforesaid given may in all things be affirmed, &c.

WOODBRIDGE STONG & SONS,

Attorneys for and of Council with Defendant in Error.

Filed August 27th, 1881.

HENRY C KELSEY, Clerk.

~~Opinion Dixon.~~

~~Writ of Error and Return, Judgment Compled.~~ 30

~~Assessments of Error.~~

~~Joinder in Error.~~

~~Stay.~~

We do hereby consent to the above as a state of the case to be printed, and that one case shall be sufficient to be printed and the other two to abide the event.

WOODBRIDGE STRONG & SONS,
Attorneys and of Counsel for defendant in Error.

GARRETT BERRY,
Attorney for Plaintiff in Error.

10

N. J. COURT OF ERRORS AND APPEALS.

THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY, vs. THE STATE ex. rel BENAJAH MUNDY,	*On Error to Supreme Court.*

THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY, vs. THE STATE ex. rel BENAJAH MUNDY.	*On Error to Supreme Court.*

20

THE ASSESSORS OF TAXES OF THE CITY OF RAHWAY. vs. THE STATE ex. rel. BENJAMIN P. JOHNSON.	*On Error to Supreme Court.*

We agree that the three cases above entitled shall be argued together and that the record and proceedings, as they appear in the above state of the case above argued upon, brought up by the writ of error in one case and the proceedings in error to be printed, shall be deemed and taken for the purposes of such argument to be the same in each of the other two cases, except only as to the dates of issuing the bonds or coupons wherein judgments were rendered in the Supreme Court against The Mayor &c. of the City of Rahway (to enforce which the several writs of mandamus were issued) and the

30

dates and amounts of the said several judgments therein which are hereby agreed to be respectively as follows, viz:

In the first case of Mundy, the coupons were issued October 1st, 1877, and judgment thereon was entered in Supreme Court, September 20th, 1879, for $366.01 of debt, damages and costs.

In the second case of Mundy, the bonds and coupons were issued July 1st, 1875 and judgment thereon was entered in Supreme Court, September 20th, 1879, for $2,204.05 of debt, damages and costs. 10

In the case of Johnson, the bonds and coupons were issued part September 1st, 1875, and part October 1st, 1875, and judgment thereon was entered April 2d, 1880, for $3,432.81 of debt, damages and costs.

GARRET BERRY,
Att'y for Pl'ff in Error.

WOODBRIDGE STRONG & SONS,
Attorneys for Defendant in Error.