N. J. Court of Errors and Appeals.

REINHARDT GERKE, *et als*, constituting The Board of Assessment and Revision of Taxes in The City of Elizabeth, *Ats.* THE STATE, *ex rel.*, THE SINGER MANUFACTURING COMPANY.	*On Application for Mandamus.*

BRIEF FOR PLAINTIFFS IN ERROR.

The writs of error in these cases bring up for review the judgments of the Supreme Court in thirteen different cases on applications for writs of mandamus to require the plaintiffs in error to assess and levy the amounts of the judgments held by the relators against the City of Elizabeth. The aggregate amount of the judgments is $880,715.78, on which interest is claimed from June 5, 1880.

The applications for the writs of mandamus were made at the last March term of the Supreme Court, whereupon the City of Elizabeth made the request

as directed by the Mandamus Act of 1880. (L. p. 102.) The Supreme Court granted a rule to take testimony in all the cases, which rule was returned with evidence establishing the facts set forth in the return to the alternative writs. (State of case, p. .) The relators in the Elizabeth cases did not question the constitutionality of the Mandamus Act of 1880, and would have taken their writs under that act if it had not been for the decision in the case of Munday vs. Rahway which prevented the Supreme Court from recognizing that law as a valid enactment.

On the argument of the Munday case the Court was requested to permit a review of that decision by this Court in case it should be in favor of the relator. The case was decided in favor of the relator, and at the close of the opinion a method was prescribed by which it might be reviewed on error. It was also ordered that the Elizabeth cases should take the same course, our effort therefore has been to frame the issues in such a way that the decision in the Munday case may be fully considered and reviewed by this Court. Alternative writs were issued, returns made, demurrers and joinders filed upon which the Supreme Court gave judgment in favor of the relators. Those judgments are brought up for review. The issuing of the peremptory writs have been stayed pending these writs of error.

It is the object of this brief to allude to the assignments of error which do not depend on the the question of the constitutionality of the mandamus act, and to refer to that question in a general way. Other counsel in another brief will discuss it fully.

I.

The first objection to the judgments of the Supreme Court is a question of practice under the fifth

section of the act in controversy. The Court's attention is respectfully directed to the said fifth section for the reason that it is insisted on the part of the plaintiffs in error that this section v. *per se* is perfectly valid. It is in itself complete and practical, whatever may be said as to the rest of the act this fifth section is entirely without objection.

Part of a law may be constitutional.

Payne vs. Mahon, 12 Vroom, 292.

A fair regulation of practice is entirely within the power of the legislature.

Gabler vs. Elizabeth, 13 Vroom, 79.

The records show that this provision of the statute was not followed; that, in fact, judgment were ordered for a separate writ in each of the thirteen cases.

II.

The judgments are that writs issue directed to Reinhardt Gerke, et als., (naming them) constituting the Board of Assessment and Revision of Taxes in the City of Elizabeth." The writs should have been directed to "The Board of Assessment and Revision of Taxes in the City of Elizabeth," which is the agency by which assessments are made in the city.

The act of 1869 (L. p. 1255) abolished the office of assessor in the city and erects the said Board. It is the duty of the Board to make valuations and assessments. It requires a quorum of the Board to act. It is a *quasi* corporation that exists continually, without reference to the change of membership. The writs therefore should have been directed to the Board, commanding it to perform the duty, and should have been served on each member of the Board.

III.

The Condition of the City.

The debt of the City of Elizabeth is of principal including the amounts in judgments.	$5,394,000.00
Upon this about three years' interest at 7 per cent. is due, amounting to	1,132,740.00
Total debt (approximate),	$6,526,740.00
The assessed value of the property in the city is	$11,841,000.00
The judgments before the Court amount to	880,715,78

On which interest is due from June 5th, 1880.

When it is remembered that this debt depends on the power of taxation for payment and must be carried and paid, if at all, by an organized municipal government, it will appear at once that the city as a corporation is insolvent. A man is said to be insolvent when he has not sufficient property to pay his debts when it shall be converted into money. A municipal corporation is insolvent when it cannot by the exercise of its taxing powers collect enough revenue to meet its obligations and running expenses.

The *corpus* of the property in a city does not belong to the municipality. Its property right is a *power* to extract revenue. Hence authorities that are based on the analogy of litigation between citizens are misleading, for such cases seek to convert the *corpus* of one man's property to the payment of the claim of another, while proceedings against political corporations to collect claims depend on the power of such corporations to raise revenue by taxation. When that power fails the city is bankrupt.

The legality of this immense debt must not be de-

nied on this argument, and any discussion of the hardship of calling upon property owners who have paid their assessments in full to pay other assessments in distant parts of the city under the forms of taxation must be omitted. It may be conceded that the judgment creditors of the city of Elizabeth have a right to require the authorities of that city to exercise the power of taxation within reasonable limits for their benefit. These limits mark the extent of the Court's power to command. The Court will not command the city to do what is impossible, therefore before commanding the Court must ascertain the city's capacity to obey.

If it shall be held that the power of a public creditor over a municipal corporation is unlimited, that will end the discussion. But is that so?

In Lyon vs. Elizabeth, 14 Vroom, 158, the Supreme Court said on page 161:

"The unrestricted right in the creditor to pursue the corporation by execution, would for all practical purposes as effectually annul a city charter as its absolute repeal." And see cases cited on page 161.

The applications in the pending cases are for writs of mandamus in aid of executions which were served on the Board of Assessment under the act of 1878, L., p. 182. If, therefore, the pursuit by execution is restricted, this pursuit by mandamus must be restricted also within the same bounds. The counsel for the judgment creditors of the city of Elizabeth have never contended that they have a right to writs of mandamus that will, in the very nature of things, crush the city government and yield them nothing. No constitutional remedy can be held to extend to futile destruction of public or private property. There must be a limit to the creditor's right, to be ascertained by the Court before granting the writs of mandamus. The Supreme Court said that it had the right to grant the writs, but no right to regard the effect or consequence. It is respectfully submitted to this Court that the substantial effect that can be pro-

duced is the remedy which the constitution preserves not legal formalities that may be successful and may fail.

To compare remedies it is necessary to compare legal and logical consequences.

To say therefore that a remedy is impaired by looking at the forms of procedure only without examining the result that will follow is to judge without evidence, and decide without hearing. To require the City of New York to assess $1,000,000 to pay judgments against that city would be a complete and successful remedy, because it is legally possible for the city to obey the writ. To command the town of Princeton to assess that sum would be a fruitless and destructive exercise of power. Courts administer the law by applying it to facts. If the Court acts, it must act by the light of evidence. The fact that the writ of mandamus is discretionary implies that evidence must be considered, for discretion operates on evidence not on law.

Municipal Governments.

Before considering the opinion in the case of Munday vs. Rahway, it may be worth while to recall the true character of municipal corporation.

In the case of U. S. vs. R. R. Co. 16 Wall on page 329, the Supreme Court said:

"A Municipal Corporation, like the City of Baltimore, is a representative, not only of the State, but is a portion of its governmental power. it is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may through its Legislature or other appointed channels, govern the local territory as it governs the State at large."

Tinsman vs. B. D. R. R. Co. 2d Dutch, 148.
Gilman vs. City of Sheboygan. 2 Black, 510.

In the more recent case of Merriwether vs. Garrett 102 U. S. 472, the Court said:

"Municipalities are mere instruments of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudication on the subject of municipal bodies, and repeated by text-writers. There is no contract between the State and the public that the charter of a city shall not at all times be subject to legislative control; *All persons who deal with such bodies are conclusively presumed to act upon knowledge of this power of legislature.*"

This statement of the law is supported by many cases cited in the opinion by Judge Field. See also Cooley's Const. Lim, pp. 192-3.

In which it is said, "if the legislative action in these cases operates injuriously to the municipalities, or to individuals, *the remedy is not with the Courts.*"

It is true that an attempt has been made in some cases to impress a dual character on municipal corporations—public and private. The limits of this duplex theory have never been defined with anything like clearness. It is purely a judicial idea conceived for the purpose of promoting the administration of justice in litigation against cities.

Dillon on Mun. Corp. See 20 and 67, 3d ed.
Lyon vs. Elizabeth, 14 Vroom, 163.

Upon the theory that a municipal corporation is simply a part of the State organized government, it is entitled to the protection of the principle that a State cannot be sued except by its own consent (which may be withdrawn at any time), and in the manner prescribed by the legislative department.

This view of the nature of a municipality was adopted by the Supreme Court of California in the case of Hunsacker vs. Borden, 5 Cal., 288.

In the month of February, 1855, the Legislature of California passed an act to fund the debt of the county of Contra Costa, and provided in the act that all the indebtedness of the county, prior to the first day of February, 1855, should be paid only by fund-

ing. A suit was brought on a claim that had not been funded under the said act. The statute was interposed as a defence, and the plaintiff insisted that it was in conflict with the constitution of the United States, because it impaired the obligation of his contract by taking away his remedy. The Court held the act to be constitutional.

"The mistake in the argument" said the Court, "is in supposing that the plaintiff had any remedy whatever at any time. * * * "The sovereign cannot be sued in whatever form it may owe, whether through its own principal treasury, or one of its subordinate treasuries, unless by its consent. Its creditors have nothing to rely upon except its good faith, and the sovereign has equally the power to postpone the time of payment or refuse to pay at all." * * * * "A county government is a portion of the State government, and the county debt created by authority of law is a part of the public State debt, and in the same manner, as there is no remedy against the State there can be none against the county. A county is not a person in any sense. It is not a corporation It cannot sue or be sued, except where specially permitted by statute, and such permission can be withdrawn or denied at any time the Legislature may think proper."

See also Beers vs. Arkansas, 20 How., 527,
And Loder vs. Baker, Arnold & Co., 10 Vr., 40.

If it is correct to hold that, as to creditors, a municipal government is a private corporation, then the consequence is irresistable that an insolvent city is subject to assignment and insolvent laws, just as other private corporations are under the common law.

Burrill on Assignments, Sec. 64.

And the delays attending the marshalling and distributing the funds of such corporations that are applicable to the payment of their debts cannot be be urged as injuries to the remedy, for the contracts were subject to that treatment at the time they were made. The difficulties of administering the law does not change it. Both these theories of the corporate character of municipalities have been strongly asserted and as strongly denied by respectable authorities, which are referred to in the above citations. If the creditors have a right to treat a city as a private corporation for the purpose of en-

forcing their claims the strongest objections to the law in question will disappear at once. If this claim cannot be maintained the remedy of the relators is under the absolute control of the legislature to be accorded or withheld, as the public interests require in the judgment of the legislature.

The Relators' Remedy.

The principal question before the Court must be decided by comparing the remedy that existed when the contracts in suit were made with the remedy that is provided by the mandamus act of 1880. For dates of contracts see 13 Vr., 235, &c. It is only important to observe that the debts were created between the passage of the city charter in '63 and before the passage of the act of 1878, p 182.

When the contracts were made the general law relating to the enforcement of judgments against municipal corporations consisted of the ninth section of the act concerning executions. Rev. p. 391. This act in reference to the city of Elizabeth was modified by the city charter, and entirely repealed in 1879.

Gabler vs. Elizabeth, 13 Vroom, 79–83.

By that case it was decided that the said ninth section was practicably inapplicable to the city of Elizabeth. It was, in the words of the Court, "the mere shadow of a remedy." p. 86. The real remedy at the time the debts were contracted consisted in the duty of the Council to act under the power of taxation delegated to them by the legislature in the 64th section of the charter L, 1863 p.

"And be it enacted, That the said City Council shall have power to raise by taxation in each year such sum or sums of money as *they shall deem expedient* for the following purposes:

I. For lighting the streets.

II. For the maintenance and support of the poor.

* * * * * * * *

XI. For the payment of the interest on the city debt and upon temporary loans, and such part of the principal as may be due and payable."

This is a legislative delegation of the power of taxation to be exercised upon the sound principles that govern the imposition of a tax. The amount of the burden in each year to be such as the City Council should deem expedient for the public welfare and within the capacity of the city to endure it. The duty of the Council to the public creditors required the imposition of a tax to pay them, but not such a tax as would paralize the local government and destroy the obligations of other creditors. The tax should be laid in the exercise of sound discretion.

This was the limit of the creditor's right when his contract was made, and its extent should be defined clearly before a command is issued to enforce it. The duty to confine the operation of the writ of mandamus within the bounds of reason cannot be separated from the power to issure it at all. But it is said this permissive language to impose a tax is in fact peremptory, and two cases are cited in the Supreme Court's opinion to support this view (4th Wall 435, 5th Do. 705). But the cases refer only to special laws requiring the assessment or a tax *not to exceed one per cent.* to form a sinking fund for the payment of specified debts. The duty to levy a tax that cannot possibly be collected, has never yet been announced.

The Third Article of the Constitution.

By this article the powers of government in this State are distributed among three departments, legislative, judicial and executive, and each department is forbidden to exercise the duties of the other,

except as permitted in the constitution. In view of this article it is said the mandamus act of 1880 cannot be enforced. If it can be shown that a proceeding to levy a tax to pay a judgment is an exercise of the ordinary function of taxation, the argument would be valid, not only against the statute under review, but against the authority of the Court to issue the writ in any form or for any sum. In the case of Cannon County vs. Hoodenpyle 7 Humph. (Tenn.) 145. The Court construed an article in the constitution of Tennessee which is written in the identical words of the third article of the constitution of this State. The conclusion reached by the Court was that it had no power whatever to issue a writ of mandamus commanding the levy of a tax for the reason that it would be a violation of the constitutional assignment of powers. The arguments which deny the Courts power to control and regulate its process disprove the authority to issue it. The granting of the writ would be the first false step. Such is the view maintained by the Supreme Court of Tennessee, and it is still the law in that State. There seems to be considerable force in this opinion, especially when compared with the doctrine announced by the Supreme Court in the Munday case, which deprives the City Council of all discretionary power over the subject, renounces its own power to regulate the proceeding and refuses to observe the directions of a legislature enactment drawn with so much regard for the rights of creditors that counsel representing bonds amounting to millions declined to question its validity.

To enforce this law according to its terms is consistent with the doctrine announced in those cases which have "impressed a private character on municipal corporations." The statute itself is the clearest declaration of that theory which has yet appeared. The opposite idea stated in the California case would close the doors of the Court against the defendants in error. There is no middle course.

To start the engine of taxation and compel it to run without regulation in blind disregard of consequences, is consistent with no principle, either legal or political.

The act of 1878, p. 182, which provides for the service of executions on assessors, as was done in the pending cases, is a remedy created by the legislature since the relator's contracts were made. It is an enlargement of the prior remedy against the city of Elizabeth, which is, of course, within the power of the legislature. But that enlargement may be reduced as against the relators so that the remedy shall be no more extensive than it was before the act of 1878 was passed. The remedy provided by the act of 1880 must be compared with the remedy that existed prior to the act of 1878, judged in that way its enforcemet is not inconsistent with the remedy that existed when the contracts in suit were made.

VI.

It was urged in the Supreme Court on the part of the respondents that the remedy on municipal obligations is *sui generis*, for the reason that the remedy depends on the power of general taxation which is under the absolute control of the legislative department of the government. This suggestion did not refer to such bonds as were issued by virtue of statutes which contain a specific direction for the assessment of taxes to pay them; but only to obligations like those before the Court which depend on general tax laws for payment. The Courts power over the remedy to enforce the two classes of bonds is not the same.

The distinction is stated by Justice Field in the case of Meriwether vs. Garret. *Supra.*

"When a tax has been authorized by law to meet them [municipal bonds] this Court has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect

it, and apply the proceeds. In some instances *where the tax was the inducement and consideration of the contract*, all attempts at its repeal have been held invalid. *But this has been the limit of the Court's power.*"

In 1862 it was denied by the Supreme Court of the United States that even a special tax law could not be modified regardless of contracts. In the case of Gilman vs. The City of Sheboygan, 2 Black, 510, it was said:

"When a Legislature of a State authorizes a city to borrow money, and issue bonds, *and tax all the property in the city to pay them, this is not a contract with the bondholders, that the State shall not afterwards exercise its power to modify the taxation or exempt portions of the property from taxation.*"

There are *dicta* to the contrary, but the authorities hold, that by virtue of its sovereign power over municipalities and taxation the Legislature may impair the remedy on a municipal contract. It was recently held in this State that a statute which sought to make the lien of taxes prior to the lien of mortgages was a constitutional act.

Lydecker vs. Palisade L. Co., 6 Stew., 415, and the case of Meriwether vs. Garrett hold, as cited in the Munday case "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."

This may be fairly paraphrazed as follows:

The Legislature may "pass a law depriving a party of a remedy for enforcing a contract which existed when the contract was made," provided the contract is a municipal bond depending on taxation for payment. To deny this power would be to hold that when a city issues a series of bonds it thereby crystalizes its charter and must remain *in statu quo* until the bonds are paid, unless the Legislature shall carefully preserve the remedy in all its general legislation in respect to cities. The power to impair the

obligation of contracts or the remedy to enforce them is not contended for in these cases. But the suicidal remedy claimed by the relators in the Rahway cases is firmly denied. On the part of all the plaintiffs in error, it is claimed that the Supreme Court has power with the statute of 1880, or without it, to look forward as well as backward in making up its judgment on an application for mandamus against a municipal government, and the discretionary nature of the writ implies the authority and imposes the duty to do so in all cases where the writ can lawfully issue.

Note.—It is worth while to remark just here that since the Federal Courts have held that a change of a substantial remedy for one less effectual impairs the obligation of a contract, and the Courts of this State have decided that a party may be deprived of one remedy, provided another is supplied, the words in our constitution (which are peculiar to it), "or depriving a party of any remedy for enforcing a contract which existed when the contract was made," do not make the constitutional prohibition in this State differ in meaning or effect from that in the Constitution of the United States and of other States in which the quoted words do not appear.

So that cases decided by the Courts of the United States and of other States are pertinent authorities in the pending cause.

The Writ is Discretionary.

Burrill defines discretion to be "the liberty or power of acting according to one's own idea of right without being bound by any fixed rule. The exercise of judgment, the liberty of adopting one's conduct to circumstance." Mandamus is the broad supplemental remedy to be issued where no other remedy exists and when in the sound judgment of the Court it will accomplish a legal purpose. The thing to be commanded must be possible, as well as

just. The Courts control over the writ is as wide as the principles of equity. The rights of the relators cannot be determined fairly by looking only at the judgment records and the unsatisfied executions. Their equities must be determined as they stand related to the equities of others, and the rights of all are subject to the public welfare. The judgment of the Court can act only on evidence. Rights that should be regarded must be known. This power to issue a discretionary writ, an equitable writ, without knowledge of the facts, rights and equities that surround it, seems to be a contradiction in terms. We must deal with facts not theories only, and judge of remedies by logic and knowledge. Following the mere definition may be the most effective means of destroying the remedy. Between the definition and the application of the remedy is the reasonable judgment of the Court. The writ of mandamus ought to issue where it will promote justice; but whether it will promote justice, or wreck a city, is a question that should be decided before the writ goes. Moses on Mandamus p. 18. Ex parte Fleming, 4 Hill 583.

To assess these judgments and the current expenses on the property of the City of Elizabeth in one year would make the tax rate more than ten per cent. The wealthy few would be able to pay it; but for the mass of the people it is impossible. They could not even mortgage their property to pay it for investors refuse to loan on land in the city. The police force, the public schools and the other departments of the city government could exist no longer, for no rational man would ever expect to be paid for serving a city under such conditions. The Legislature has passed a law forbidding such a burden to be laid on any city of this State. To prevent destruction is not impairing remedies. The act gives to creditors all that can be obtained, and the difficulties about applying the law are far more imaginary than real.

The fact is that in all the cases before the Court

the testimony contemplated by the act has been taken, an hour's examination of the evidence would solve every difficulty suggested. The act provides for one examination only in each year of a city's condition. The first year's examination with trifling additions, would be all that is necessary in subsequent years to enable the Court to administer the law intelligently. To the objection that the law distributes the fruit of one suitor's diligence among several, it may be confidently answered that the law may be administered by paying the judgments in the order of priority. It is a question between the creditors to be decided after the fund is raised and paid into Court. The municipality that pays may have no concern in the question.

It is respectfully submitted to this Court that by well settled rules of construction, an act of the legislature should not be declared void except upon clear and certain grounds. "The finding of an uncertainty with respect to the subject under consideration is to resolve the question involved against the defendant. The power of the legislature cannot be circumscribed except upon sure grounds. Such is the familiar rule of construction."

Moore vs. State, 13 Vroom, 208–234.

The purpose of the act is equitable. It aimed to regulate and make clear a proceeding that was before involved in contradiction and uncertainty. It is not only a declaratory act, but in so far as it changed the remedy provided by the legislature, since the contracts were made it is a repealing act and against it as such no objection can be urged. To declare this statute void is to reenact the law of 1878 in its original vigor. That law the legislature determined to modify by the exercise of its sovereign power over the subject. There can be no question of the legislative power to repeal the act of 1878 entirely and leave the relators to their original rights, with the duty of showing clearly to the

Court what substantial remedy exists in the imposition of a tax that will crush the city government of Elizabeth, and yield them nothing. This has been the result in many cases in the West and South. The Legislature recognizing this certainty have passed a law to guard against it, which I submit should be upheld.

Respectfully,
FRANK BERGEN,
Of Counsel with Plaintiffs in Error.

AUTHORITIES ON QUESTION OF DISCRETION.

The following cases are referred to for the purpose of showing that the writ of mandamus is subject to the equitable discretion of the Court, and ought not to be issued in cases of doubtful right or in cases where its effect will not with reasonable certainty accomplish its purpose; and to show that if issued it must be regulated so as to accomplish a legal object without unnecessary injury to the rights of others or to the public:

Insurance Co. vs. Wilson, 8 Pet., 291.
Fitch vs. MacDiarmid, 26 Ark., 482.
People vs. Silvers, 2 Abb. Pr. N. S., 348.
" " Dowling, 37 How. Pr., 394.
" " Croton Aq. Bd., 49 Barb., 259.
" " Fay, 3 Lans., 398.
Ackerman vs. Descha Co., 27 Ark., 457.
Tapping on Mand., 67 ed. 1853.
Ball vs. Leaffins, 3 Oregon, 55.
Insurance Co. vs. Board, &c., 13 How. Pr. 305.
10 Jurist, 159.
Golden vs. Elliot, 13 Kan., 92.
State vs. Marston, 6 Kan., 537.
Bac. Abb. Tit E.
State vs. Gallard, 11 So. Ca., 309.
Affirmed in U. S. S. C. Mch. 2d, 1880.
See 6 Stew. 437, note.

N. J. Court of Errors and Appeals.

REINHARDT GERKE, JAMES J. DONAHUE, PETER P. STEPHAN, JACOB D. E. RITTER, WILLIAM MCCULLEY, WILLIAM STILES, CHARLES H. Ross and JOHN MCGRATH, constituting the Board of Assessment and Revision of Taxes in the City of Elizabeth, *Plaintiffs in Error;* *Ats.* THE STATE *ex rel.*, THE SINGER MANUFACTURING COMPANY, *Defendants in Error.*	*On Error to Supreme Court*	10 $323,029.43 Nov 23rd 1876 July 28th 1877

And twelve other cases in which the records are exactly the same, except name and amount entitled as follows;

THE SAME, *Ats.* THE STATE *ex rel.*, WILLIAM F. PROCTOR.	$53,898.30	20 Sept 24th 1877

THE SAME, *Ats.* THE SAME.	$5,607.66 Apr 1st 1875
THE SAME, *Ats.* THE SAME.	$3,898.79 Dec 1st 1877
THE SAME, *Ats.* THE STATE *ex rel.*, EDWARD CLARK.	$323,028.24 Sept 12th 1877 " 24th "
THE SAME, *Ats.* THE SAME.	$5,615.60 Apr 1st 1876
THE SAME, *Ats.* THE SAME.	$3,715.33 Dec 1st 1877

THE SAME, *Ats.* THE STATE *ex rel.*, GEORGE R. MCKENZIE.	$53,879.73 Sept 24th 1877
THE SAME, *Ats.* THE SAME.	$2,291.91
THE SAME, *Ats.* THE SAME.	$1,316.79 Dec 1st 1879
THE SAME, *Ats.* THE STATE *ex rel.*, ALEXANDER F. STERLING.	$1,678.96 April 1st 1875
THE SAME, *Ats.* THE STATE *ex rel.*, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.	$67,633.61 Oct 12th 1878 Nov 30th " Jany 16th 1879

THE SAME,	Nov 1st 1877
	Apr 1st 1876
	" " 1875
	" " 1873
Ats.	$35,121.43 " 1872
THE SAME.	May 1st 1866

Judgments were entered in all the above thirteen cases on the 5th day of June, 1880, and it is agreed that the record as printed in the first of the said cases shall be taken as the record of all the cases for the purpose of this argument.

STATE OF NEW JERSEY, *ss.*:

The State of New Jersey to Reinhardt Gerke, *et als.*, constituting "The Board of Assessment and Revision of Taxes in the City of Elizabeth," Greeting:

Whereas, The Singer Manufacturing Company heretofore, to wit, on the fifth day of June, in the year eighteen hundred and eighty, recovered a judgment in our Supreme Court, against the City of Elizabeth, for $323,029.43 debt and damages, including costs, and thereupon caused to be issued thereon out of said Court, a writ of execution tested on the day and year last aforesaid, returnable the first Tuesday of November in said year, and directed to the Sheriff of our county of Union, which having been duly recorded, was delivered to the said Sheriff to be executed, according to law; and

Whereas, There was no property belonging to the said The City of Elizabeth to satisfy the same whereon to levy, and the said Sheriff did thereupon, pursuant to the statute in such case made and provided, serve copies of the said writ of execution not only on the collector or collecting officers of the said city, but on all the members of "The Board of Assessment and Revision of Taxes in the City of Elizabeth," who by law are required to assess the taxes

in and for said city; whereupon and whereby it became the duty of the members of the said "The Board of Assessment and Revision of Taxes in the City of Elizabeth," to assess and levy, in addition to the regular taxes, the amount due upon the said writ of execution, with interest to the time when the same should be paid to the said Sheriff, upon all the taxable property within the said city; yet you, the said assessors or members of the said "The Board of Assessment and Revision of Taxes in the City of Elizabeth," and each of you, have refused, and do refuse, to perform the said duty in contempt of us, and to the damage of the said The Singer Manufacturing Company, as by its complaint made to us in that behalf we have been informed.

We, therefore, being willing that due and speedy justice be done in this behalf, do command you, and each and every of you, that immediately after the receipt of this our writ, you, and each and every of you, do proceed to assess and levy, in addition to the regular taxes, the amount due upon the said writ of execution, being the debt and damages aforesaid, with interest thereon from the date of the recovery thereof, as aforesaid, to the time when the same shall be paid to the said Sheriff, and the execution fees of the said Sheriff, amounting to
dollars and cents, upon all the taxable property within the said city of Elizabeth, or that you show cause to the contrary thereof, that the same complaint may not, by your default, be repeated to us; and how you shall have executed this our writ, certify to our said Supreme Court, at Trenton, on the twenty-eighth day of June instant, and have you then there this our writ.

Witness, Mercer Beasley, Esquire, Chief Justice of our Supreme Court, at Trenton, the twenty-second day of June, in the year eighteen hundred and eighty-one.

BENJAMIN F. LEE,
Clerk.

JOHN W. TAYLOR,
Attorney.

NEW JERSEY SUPREME COURT.

REINHARDT GERKE *et als.*, constituting the Board of Assessment and Revision of Taxes in the City of Elizabeth, *Respondents;* *ats.* THE STATE *ex rel.*, THE SINGER MANUFACTURING COMPANY.	*On Application for Mandamus. Return to Alternative Writ.*

The return of the respondents in the above stated cause to the Writ of Alternative Mandamus, issued out of this Court on the twenty-second day of June, 1881, respectfully represents that by virtue of an Act of the Legislature of the State of New Jersey, 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, 1794, approved March 3d, 1880, it was among other things enacted that whenever application should be made for a writ of mandamus to require a municipal corporation to raise by taxation any judgment against it, the Court to which such application should be made should at the request of such municipal corporation, upon rule to show cause, or upon affidavits taken on due notice or otherwise in such manner as the Court should prescribe, ascertain and determine.

First.—The total indebtedness of such municipal corporation, the time when payable, and the rate of interest payable thereon.

Second.—The real value for purposes of taxation of the taxable property within such corporation.

Third.—The amount required to be raised within such corporation for the necessary expenses for municipal and other purposes during the current year; and

Fourth.—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.

That in and by said Act it was further enacted that it should not be lawful to require any municipal corporation by mandamus to raise for any such judgment in any one year more than such sum as in addition to the amount found to be required for necessary expenses as aforesaid would be raised in such municipal corporation by imposing the highest rate of taxation as determined in the manner aforesaid.

That when application was made for the aforesaid writ of mandamus in this behalf, the said The City of Elizabeth requested said Supreme Court to ascertain and determine in such manner as the Court should prescribe the aforesaid facts, which in and by said Act said Court was directed to ascertain and determine, and said Court did in pursuance of said Act at the last February term of this Court grant a rule to take testimony for the purpose of ascertaining the matters required by said Act; that in pursuance of said rule testimony was taken on the part of the said The City of Elizabeth, by which it appears—

First.—That the total debt of the said city is the sum of $5,394,000, bearing interest at the rate of seven per cent. per annum, and is due and will become due as follows:

Amount now due, including interest, -	$1,400,000
Amount due in 1881, - - - -	52,000
Amount due in 1882, - - - -	146,000
Amount due in 1883, - - - -	129,000
Amount due in 1885, - - - -	490,000
Amount due in 1886, - - - -	510,000

Amount due in 1892, - - - -	30,000
Amount due in 1893, - - - -	232,000
Amount due in 1895, - - - -	961,000
Amount due in 1896, - - -	746,000
Amount due in 1897, - - - -	672,000
Amount due in 1907, - - - -	20,000
	$5,394,000

And upon which amounts, except the first, interest is due from October, 1878.

Second.—That the real value of the property in the City of Elizabeth for purposes of taxation is the sum of $11,841,000.

Third.—That the amount required to be raised within said city for necessary expenses for municipal and other purposes during the current year (exclusive of interest on said debt), is the sum of $220,-133.67.

Fourth.—The highest rate of taxation capable of being imposed on said city without injury to the interests of the creditors of the same, whose claims are not yet due, is two and one-half per centum of the value of the property in said city.

And these defendants in fact say that the writ of mandamus in this behalf is subject to the provisions, conditions and requirements of said Act, and that they are not bound in law to levy and assess the amount mentioned in said, writ until this Court shall have considered aud adjudicated upon the facts proved as aforesaid, and these defendants say, that they are not required by law to assess and levy the said sum, or any part thereof, except in pursuance of such adjudication according to the terms of said Act.

And these respondents further certify and return that when the application for the writ of mandamus

in this behalf was made, there was pending under the above mentioned Act of the Legislature an application for a writ of mandamus upon a like judgment against said city, and that under and in accordance with the terms of said Act, the application and writ in this behalf should be consolidated with such prior one, and proceeded with as one proceeding.

To which return there was filed a general demurrer and joinder in demurrer.

Judgment in favor of Relator on demurrer and that a writ of peremptory mandamus issue directed to Reinhardt Gerke, *et als.*, constituting the Board of Assessment and Revision of Taxes in the City of Elizabeth, commanding therein to assess and levy the amount of the relator's judgment.

N. J. COURT OF ERRORS AND APPEALS.

NEW JERSEY, *ss.*:

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting:

For as much as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you between The State *ex rel.*, The Singer Manufacturing Company, relator, and Reinhardt Gerke, James J. Donahue, Peter P. Stephan, Jacob D. E. Ritter, William McCulley, William Stiles, Charles H. Ross and John McGrath, constituting the Board of Assessment and Revision of Taxes in the City of Elizabeth, respondents, upon a writ of alternative mandamus, manifest error hath intervened to the great damage of the said Reinhardt Gerke,

James J. Donahue, Peter P. Stephan, Jacob D. E. Ritter, William McCulley, William Stiles, Charles H. Ross and John McGrath, constituting The Board of Assessment and Revision of Taxes in the City of Elizabeth, as it is said: we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the tenth day of September next, together with this writ, that the record and proceedings aforesaid being inspected we may cause to be further done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and Presiding Judge of our said Court of Errors and Appeals at Trenton aforesaid, the thirteenth day of August, in the year of our Lord one thousand eight hundred and eighty-one.

HENRY C. KELSEY,
Clerk.

FRANK BERGEN,
Attorney.

For date of Contracts &c.
See 13th Vroom p. 235 &c.

N. J. COURT OF ERRORS AND APPEALS.

REINHARDT GERKE, JAMES J. DONAHUE, PETER P. STEPHAN, JACOB D. E. RITTER, WILLIAM MCCULLEY, WILLIAM STILES, CHARLES H. ROSS and JOHN MCGRATH, constituting the Board of Assessment and Revision of Taxes in the City of Elizabeth,

Plaintiffs in Error;

ats.

THE STATE, *ex rel.*,
THE SINGER MANUFACTURING COMPANY,

Defendants in Error.

Assignment of Errors. 10

Now at this day the plaintiffs in error assign the following causes of error:

First.—Because the Supreme Court decided that an Act entitled "A further supplement to an Act entitled 'An Act for the further regulation of proceedings upon writs of mandamus,' passed the second day of December, 1794,' approved March 3d, 1880," was unconstitutional and void. 20

Second.—Because the Supreme Court decided to refuse to consider, and did refuse to consider, the evidence or the facts proved by the evidence, taken on the rule to take testimony which rule was granted and evidence taken in pursuance of said statute.

Third.—Because the Supreme Court decided to issue a peremptory writ of mandamus on the return of the alternative writ in disregard of the provisions of the said statute.

Fourth.—Because the Supreme Court decided not to consolidate the relators application for mandamus with another application for like writ of mandamus against the same respondents that was then pending in said Court, in disregard of the provisions of the above entitled Act.

Fifth.—Because, notwithstanding the said City of Elizabeth requested the said Supreme Court when the application for said writ of mandamus was made to ascertain and determine—

First.—The total indebtedness of said city, the time when payable, and the rate of interest payable thereon.

Second.—The real value for purposes of taxation of the taxable property within said city.

Third.—The amount required to be raised within said city for the necessary expenses for municipal and other purposes during the current year; and

Fourth.—The highest rate of taxation capable of being imposed in said city without injury to the interests of the creditors of the corporation whose claims are not yet due.

The said Court refused to ascertain and determine the same.

Sixth.—Because the Supreme Court gave judgment against Reinhardt Gerke, James J. Donahue, Peter P. Stephan, Jacob D. E. Ritter, William Mc-

Culley, William Stiles, Charles H. Ross and John McGrath, constituting the Board of Assessment and Revision of Taxes in the City of Elizabeth.

Seventh.—Because the said Supreme Court refused to consider the matters, facts and things set forth and shown in and by the return to the said alternative writ of mandamus.

Eighth.—Because the said Supreme Court upon the demurrer to the return made to the said alternative writ of mandamus gave judgment in favor of the relators and against the respondents, in disregard of the provisions of said statute and of the matters and facts set forth in said return.

And the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgments.

FRANK BERGEN,
Attorney for and of Counsel with the Plaintiffs in Error.

COMMON JOINDER IN ERROR.

"SEC. 9. Whenever a writ of execution shall be issued against the inhabitants of any township, city or borough of this State, by any Court authorized to issue the same, in case there should be no property belonging to said township, city, or borough, sufficient to satisfy the same, whereon to levy, then the officer authorized to execute said process shall serve a copy of the same on the collector of said township, city, or borough, who is hereby required to pay and satisfy the same out of the first moneys belonging to said township, city, or borough, which shall come into his hands."

See Executions, Rev. Stat., p. 391.

This section was repealed. See P. L. 1879, p. 292.

"*And be it enacted*, That the said City Council shall have power to raise by tax in each year such sum or sums of money as they shall deem expedient for the following purposes:

I. For lighting the streets of the city.

II. For the maintenance and support of the poor.

* * * * * * *

XI. For the payment of the interest upon the city debt, and upon temporary loans, and such part of the principal thereof as may be due and payable."

See Sec. 64 City Charter. P. L. 1863, p. 133.

A Supplement to an Act entitled "An Act respecting executions," approved March twenty-seventh, eighteen hundred and seventy-four.

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That when any execution shall be issued against any town, township, borough or other municipal corporation of this

State, by any Court authorized to issue the same, upon any judgment against such town, township, borough or municipal corporation, whether upon a judgment recovered before the passage of this Act or subsequent thereto, and there shall be no property belonging to such town, township, borough or other municipal corporation sufficient to satisfy the same whereon to levy, then the officer authorized to execute such process shall serve a copy of the same, not only on the collector of such town, township, borough, or other municipal corporation, as is now required by law, but also upon the Assessor thereof, who is by law required to assess the taxes in and for such town, township, borough, or municipal coporation; and upon receipt of such copy of execution it shall be the duty of such Assessor to assess and levy in addition to the regular taxes, the amount due upon the said execution, with interest to the time when the same shall be paid to the officer serving such process upon all the property within such town, township, borough, or other municipal corporation; and this tax shall be assessed and collected at the same time and in the same manner and under the same conditions, restrictions and regulations as taxes for other purposes are required to be assessed and collected in such town, township, borough, or municipal corporation, and when collected shall be paid over to the officer serving the said process.

2. *And be it enacted*, That this act shall be a public act and take effect immediately.

Approved March 27, 1878. P. L. 1878, p. 182.

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 hundred and ninety-four.

1. BE IT ENACTED *by the Senate and General As-*

sembly of the State of New Jersey, That whenever application is made for a writ of mandamus to require a municipal corporation to raise, by taxation, any judgment against it, the court to which such application is made, shall, at the request of such municipal corporation, upon a rule to show cause, or upon affidavits taken on due notice, or otherwise, in such manner as the court shall prescribe, ascertain and determine.

I. The total indebtedness of such municipal corporation, the time when payable and the rate of interest payable thereon;

II. The real value for purposes of taxation of the taxable property within such corporation;

III. The amount required to be raised within such corporation for necessary expenses for municipal and other purposes during the current year; and

IV. The highest rate of taxation capable of being imposed on such corporation without injury to the interest of the creditors of the corporation whose claims are not yet due.

2. *And be it enacted*, That it shall not be lawful to require any municipal corporation by mandamus to raise for any such judgment, in ony one year, more than such sum as, in addition to the amount found to be required for necessary expenses as aforesaid, will be raised in such municipal corporation by imposing the highest rate of taxation as determined in the manner aforesaid, and any sum ordered to be raised by taxation shall be included in the next annual tax levy for such municipal corporation.

3. *And be it enacted*, That the sum so ordered to be raised may be required to be paid into said court, and may be distributed by said court pro rata among creditors having judgments against said corporations, and who, during a time to be fixed by the court, shall apply to the court and make due proof of their judgments as required by said court.

4. *And be it enacted*, That if the sum so ordered to be raised shall not discharge all the claims so proved, the court shall have the power to make the same determination in the next year, and thereon to issue a mandamus in the same manner as is above provided, and so afterwards, until the sums so raised shall discharge the judgments so proved.

5. *And be it enacted*, That after one application is made for a mandamus against a municipal corporation to require it to raise by taxation any judgment against it, all subsequent applications, while the first is pending under this act, shall be consolidated with the first, and shall be treated and considered as made at one and the same time and be proceeded with in only one proceeding, and one writ of mandamus alone shall issue upon all the applications on which the court shall determine a writ should issue.

6. *And be it enacted*, That this act shall take effect immediately.

Approved March 3, 1880. P. L. 1880, p. 102.