

## Syllabus.

Direct decision of this court in the case of *Smith v. Tra-  
bue's Heirs*,\* was that such an order was no more than the  
action of a court on its own process which is submitted to  
its own discretion, and that it was not a final judgment in a  
civil action nor a decree in a court of equity.

Where a case is brought into this court from the Circuit  
Courts by a writ of error, regular in form, if there is no error  
in the record the judgment will be affirmed. Affirmance  
in such a case is the proper judgment, because the writ of  
error, being addressed to the record, brings up the whole  
case, and the court, under the twenty-second section of the  
Judiciary Act, has jurisdiction to re-examine the record in  
such cases and to reverse or affirm; and if there is no error  
in the record, of course the judgment must be affirmed.†

Present case, however, does not fall within that rule, be-  
cause the writ of error is special in form and is addressed to  
a mere order of the court, passed nearly six years after the  
final judgment of the Circuit Court was affirmed, the writ  
of possession issued, and the possession of the premises  
given to the plaintiff, as commanded by the writ.

The case is

DISMISSED FOR THE WANT OF JURISDICTION.

## CAMPBELL v. CITY OF KENOSHA.

1. Where the legislature of a State passes two acts, one (which by the con-  
stitution it had the power to pass) authorizing a city to subscribe a  
*limited* amount (\$150,000) of stock to a railroad, another (which, by  
the constitution, it had no power to pass) authorizing it to subscribe an  
*unlimited* amount, and the city, professing to act under the one which  
authorized the *unlimited* amount, subscribes the *limited* amount  
(\$150,000), a subsequent recognition by the legislature of the subscrip-  
tion as legal, validates the subscription.
2. The legislative recognition may be made by implication.
3. A statute which, in the case of such an issue, creates as part of the mu-  
nicipal government an officer whose duty it is to attend to the city's in-

\* 9 Peters, 7.

† Taylor v. Morton, 2 Black, 484

## Statement of the case.

terests and concerns, in regard to the railroad subscribed to, and who, the act declares, "*shall* redeem all scrip which has been issued for it," constitutes a ratification of the originally irregular issue.

ERROR to the Circuit Court for the District of Wisconsin ;  
the case being this :

The constitution of Wisconsin ordains :

*"It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."*

With this provision in force, the legislature of the State, on the 22d March, 1853, authorized the city of Kenosha "to issue the corporate bonds of the said city to the Kenosha & Beloit Railroad Company for the payment of a sum not exceeding \$150,000." It was provided, however, that no bonds should be issued under this act unless a majority of the legal voters voted in favor of it.

By section 8 of an act passed the next day, "An act to amend the charter of the city of Kenosha,"—approved March 23d, 1853, the legislature enacted as follows :

*"The city council shall have power to levy and collect special taxes for any purpose (aside from what may be specially provided for in the city charter) which may be considered essential to promote or secure the common interest of the city ; or may borrow on the corporate credit of the city for such purposes, any sum of money for any term of time, at any rate of interest not exceeding ten per centum, and payable at any place that may be deemed expedient."*

This act also provided that no tax should be levied or money borrowed, unless in accordance with a certain section—"section 44 of 'An act to incorporate the city of Kenosha,'" (the original city charter),—a section which, like one in the first-named act, provided for a submission of the matter to a vote of the people ; when the amount and object

## Statement of the case.

of the proposed tax or loan to be voted upon should be specifically stated.

In this state of statutory enactments, the city, in August, 1855, passed an ordinance :

“That under and in accordance with section 8 of ‘An act to amend the charter of the city of Kenosha,’ approved March 23d, 1853, and section 44 of the ‘Act to incorporate the city of Kenosha,’ a question shall be submitted to the legal voters whether a tax to the amount of one hundred and fifty thousand dollars shall be levied and collected for the promotion of the common interest of the city in aid of the Kenosha and Beloit Railroad.”

The question of the tax and loan was thus submitted, the reader will observe, under the act of March 23d, amendatory of the charter, and not under that of March 22d, authorizing a subscription for a specific sum, \$150,000.

A majority of the voters having voted for the subscription, under the ordinance just quoted, the city issued scrip, in the form of small drafts, by the mayor and clerk, on the city treasurer, for different sums of money payable “out of any funds in the treasury belonging to the city, the same having been allowed for scrip *in aid of the Kenosha and Beloit Railroad Company.*”

In 1857, the next year after the city had thus subscribed for stock and issued its scrip, and so become a stockholder in the new railroad, the legislature passed an act giving a revised charter to the city, which it accepted. This new charter provided that a railroad commissioner should be annually elected thereafter as a city officer, and, prescribing his duties, proceeded :

“He shall have, generally, the charge and control of all interest the city of Kenosha now has, or may hereafter have, in the Kenosha and Beloit Railroad. He shall receive all funds paid into the hands of the city treasurer, on account of the tax for the benefit of the Kenosha and Beloit Railroad Company, and shall hereafter redeem all scrip which has been issued to said railroad company, as the same becomes due, making such provision therefor,

## Argument against the liability.

*or recommending such measures to the common council as he may deem necessary for the benefit of the tax-payers of the city."*

The scrip issued as above-mentioned was not paid at its maturity, and, in 1859, the city councils of Kenosha made arrangements by which the city obtained from the holders of it an enlargement of the time of payment. Being at the efflux of the enlarged term still unpaid, one Campbell, who held a quantity of it, brought suit in the Circuit Court for Missouri against the city.

On the trial the holder of the scrip offered the same in evidence. The city objected to its reception on the ground that section 8 of the act to amend the charter of the city of Kenosha, approved March 23d, 1853, and also the ordinance and other proceedings under it, were void, as being in contravention of the constitution of the State of Wisconsin. And that the scrip had not been validated either by the subsequent act of 1857, making it the duty of the railroad commissioner to redeem the scrip, nor by the proceeding of the city council in 1859, procuring an enlargement of the time; inasmuch as it was not in the power of either the city council or of the legislature itself, to give validity to that which was, by the constitution, void.

The court sustained the objection, and judgment was given for the city.

*Mr. Cary, for the city and in support of the judgment:*

It will be conceded that under no act of legislature in this case, could the bonds be valid without a previous submission of the question of their issue to the people, and an approval of such issue by them. Now the only question of this sort submitted to them was "under and in accordance with section 8 of an act to amend the city of Kenosha, &c., approved March 23d, 1853."

This act, therefore, of March 22d, 1853, authorizing the city to subscribe to "a sum not exceeding \$150,000," has no reference to the matter in dispute, and is out of the case.

That section 8 of the act of March 23d, is a violation of

## Argument against the liability.

the provision of the constitution which says, that it shall be the *duty* of the legislature to *restrict* the power of cities to contract debts, so as to prevent abuses in that matter by them, is clear. It looks as if it were made in studied defiance of the constitution. Over and above what the charter authorizes, cities, under the act, may borrow *any* sum for *any* time, payable *anywhere*, and pretty much at *any* rate of interest.

As an original proposition, it would be the duty of this court to hold this section unconstitutional and void.

But the question is not an open one in this court. It has already been passed upon by the Supreme Court of the State of Wisconsin.

In *Foster v. The City of Kenosha*,\* a party sought to enjoin the city of Kenosha from collecting a certain tax levied upon real estate in the said city, for the purpose of paying this identical scrip and the remainder of the same issue, and an injunction was obtained, restraining its collection. On appeal to the Supreme Court of the State the judgment was affirmed, on the ground that the section was in conflict with the constitution of Wisconsin and void.

We need not say that the construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is binding upon the courts of the United States. This is settled law.†

The issue of the scrip then was not the case of a power granted by the legislature, and defectively or improperly executed, but was a void act, an act void *in toto*; void in its inception, execution, and result.

If this is so, certainly no ratification of it by the *city council* would make it valid. The council could give no more validity to the scrip by ratifying it than they did by issuing it. What *they* meant and wished was plain by the latter act; but their meanings and wishes are of no importance, the constitution intervening.

But could they ratify the scrip even had the legislature attempted to confer upon them the power? Could they, by

\* 12 Wisconsin, 616.

† See *Christy v. Pridgeon*, 4 Wallace, 197

## Opinion of the court.

mere ratification, make valid what was before void *in toto* and of no binding force whatever?\* Did mere change of the scrip change its character in respect to obligation? Void in its inception, would not nullity follow all its mutations?

But did the legislature ever ratify or direct the councils to ratify the debt? The act of the legislature providing for the election of a railroad commissioner certainly does not ratify the debt expressly.

And in regard to a debt which, by the constitution, was forbidden to be contracted, and was void *in toto*, how can a ratification be implied merely?

The meaning of the act was, that the commissioner "shall pay it;" assuming it, of course, to be valid; issued according to law, held by honest holders, and having the other requisites required by courts to give force to obligations: not to say that he "shall pay" all the drafts which, by being signed, were "scrip," constitutional or unconstitutional, legal or illegal, honestly held or dishonestly held. Such a construction would be very forced.

The provision of the constitution is in restraint of municipal corporations embarking in wild schemes of adventure under the fancy of improvements, and is a wise one. It has become a necessary protection to holders of property and payers of taxes. It ought not to be made nugatory by judicial legislation.

The judgment should therefore be affirmed.

*Mr. Lynde, contra, for the creditor.*

Mr. Justice DAVIS delivered the opinion of the court.

The species of securities on which this suit is brought has been frequently before this court for consideration, and there are very few questions connected with them that have not been decided. This action involves the validity of the bonds or scrip issued by the defendant in aid of the Kenosha and Beloit Railroad Company. In Wisconsin there is nothing in the organic law restraining the legislature from

\* *Town of Rochester v. Alfred Bank*, 13 Wisconsin, 432.

## Opinion of the court.

conferring on municipal corporations the power to subscribe for stock in a railroad or other work of public improvement; and the highest court of the State has sustained the validity of securities given for such purposes by towns and cities benefited by their construction, where the power to do so had been granted by the General Assembly.\*

But it is insisted the bonds in controversy were executed and issued without the authority of law previously conferred, and therefore the city of Kenosha must be relieved from their payment.

The question presented is an important one; but, in our opinion, easily solved, when the whole legislation on the subject is taken into consideration. On the 22d day of March, 1853, an act of the legislature was passed authorizing the city, if a majority of the people voted for it, to issue its corporate bonds, not exceeding \$150,000, to aid in the construction of the Kenosha and Beloit Railroad, and to levy taxes to pay for them; and provision was made that the railroad company should secure the city, by a lien on its property, when the bonds were executed and delivered to them. This law conferred full power on the city to contract an indebtedness (limited in amount) for the promotion of a work of internal improvement, of common benefit to all its inhabitants. A majority of the people did vote to extend the required aid, and the city issued its obligations and delivered them to the company, taking in exchange certificates of stock and indemnity against loss. All parties rested in the belief that these proceedings were according to law, and the securities were negotiated in good faith, and the city received the benefit of them. So far as the corporate authorities could ratify them, they have done it, by a series of unmistakable acts: by voting to levy taxes; redeeming a portion of the securities first issued, and exchanging the residue for new ones; issuing scrip in settlement of unpaid interest, and selling the securities obtained from the company by way of indemnity.

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\* *Clark v. City of Janesville*, 10 Wisconsin, 136; *Bushnell v. City of Beloit*, Id. 195.

## Opinion of the court.

The city also, in pursuance of an express act of the legislature, evidently passed to protect the very interests created by the subscription to the capital stock of the road, elected a commissioner to represent it in the meeting of the board of directors, vote its shares of stock, and exercise a general oversight over its affairs in connection with the road.

But it is insisted, that the holders of these bonds or *scrip* (which is the form the securities assumed) cannot recover, because the common council, in submitting to the legal voters the question of whether a tax of \$150,000 should be levied and collected to aid the Kenosha and Beloit Railroad, declared, by ordinance, that the question was submitted in accordance with the provisions of section eight of "an act to amend the charter of the city," approved March 23, 1853, and section forty-four of "an act to incorporate the city," approved February 8, 1850. It is unnecessary to notice the latter-named section, as the consideration of the first one is alone material to the subject of this inquiry.

Section eight of the amended charter authorizes the city council of Kenosha to levy and collect special taxes to any amount, and for any purpose, which may be considered essential to promote or secure the common interest of the city; and it is contended that it is in conflict with the third section of the eleventh article of the Wisconsin constitution, and that the proceedings of the common council under it cannot be sustained. The Wisconsin constitution provides that the legislature, in organizing municipal corporations, shall restrict their power to tax, assess, borrow money, contract debts, and loan their credit. The provision was a wise one, and has undoubtedly tended to prevent abuses on the part of incorporated cities and villages, in levying taxes and raising money.

The Supreme Court of the State, in the interpretation of the foregoing provision of the constitution,\* has declared that the legislature could not confer on a municipal corporation unlimited power to levy taxes and raise money, beyond

\* *Foster v. City of Kenosha*, 12 Wisconsin, 616.

## Opinion of the court.

what was proper for purely municipal purposes; and as this was attempted to be done in section eight of the amended charter of the city of Kenosha, that the taxes levied under it, to aid the Kenosha and Beloit Railroad, were unauthorized, and the city authorities could be restrained from collecting them at the instance of a party interested. This is the extent of the decision. The learned court expressly declined to decide whether the scrip issued by the common council to aid the road was valid or not.

In fact, the whole decision is based on the unconstitutionality of section eight, above referred to, which, as it purported to confer upon the city unlimited powers to levy taxes and borrow money, was in violation of the constitution of the State. The court say that "the suit was by Foster in his own behalf, and in behalf of other land-owners, to restrain the city of Kenosha from collecting a special tax of \$18,625, levied by the city upon the real estate therein situated, for the purpose of paying a debt originally contracted by the stock subscriptions of the city to the Kenosha and Beloit Railroad Company." This is all that appears in the report of the case as to the character of the suit. It is apparent that the special act of the legislature authorizing the subscription, and the further amendment to the charter of the city substantially ratifying it, were not before the court. They are not referred to in the opinion of the court, and the fair presumption is, that they were not referred to in the pleadings, as the purpose which the complainant had in view did not require that they should be. We are, therefore, unembarrassed by any adverse decision upon the character of the securities in suit, and the question of their validity is an open one for discussion and decision.

It is manifest, that the common council of Kenosha did not attempt the exercise of the unlimited power to raise money conferred on them, because they limited the amount to be raised to the exact sum, which the legislature, by an express act, authorized. Under the provisions of this act, ample power was given to accomplish the object which the city had in view—aiding to build a railroad which would

## Opinion of the court.

bring trade and travel to it. By the very terms of this act, the subscription of \$150,000 could be made, and taxes levied to pay for it, if the people voted in favor of it. It is conceded, if the submission had been in words under the special act, instead of the amended charter, all controversy would be at an end.

It is argued, notwithstanding there was complete authority to raise the money and levy the taxes under a valid law, yet, as the common council, in taking the vote, named a provision of their charter, which is invalid, that, therefore, not only the payment of the tax can be avoided, but also the payment of the scrip.

Whether this position is well taken or not the necessities of the case do not require to be decided, for, in our opinion, subsequent legislation has cured all antecedent irregularities.

In 1857, after the scrip had been issued to the railroad company, under the proceedings of the common council, the legislature passed a revised charter for the city. Among other things, provision was made for the election of a railroad commissioner, annually, as a city officer. There had been previous legislation in relation to this officer, but his duties and powers by the revised charter were much enlarged. He was constituted, *ex-officio*, a member of the board of directors of the Kenosha and Beloit Railroad, with power of voting as an individual stockholder, and, in addition, was required to receive from the city treasurer all moneys which were paid on account of the tax for the road, and commanded to redeem all scrip which had been issued to the company as the same became due, making such provision for it, or recommending such measures to the common council as he should deem necessary for the benefit of the tax-payers of the city.

This is not in terms a curative act, but it has that effect by fair implication. It is not doubted the legislature could, by a direct act of confirmation, legalize the issue of this scrip, notwithstanding the submission of the question to the vote of the people was under the wrong law. If by a direct

## Opinion of the court.

act, equally in any other way, if the intention of the legislature to legalize, clearly appears.

It is conceded the legislature had the right to authorize the city of Kenosha to take stock in a railroad, issue bonds to pay for it, and provide for their redemption by the levy and collection of a tax. It did authorize these things to be done, if the people approved them; but as their sanction was obtained in the wrong way, thereby involving the legality of their proceedings, good faith and sound policy required, at the hands of the legislature, a full legislative recognition of the legality of the subscription and the issue of the scrip. This was done by the provisions of the revised charter of 1857.

Of such importance did the legislature consider the interests of Kenosha in the railroad to Beloit that a commissioner, of the dignity of a city officer, was deemed necessary to look to them. And that the legislature intended to ratify the proceedings of the common council, which resulted in the subscription of stock to the railroad and issue of scrip, is very clear, else why was the commissioner directed to provide for the payment of the scrip as it matured? The words of the law are imperative. The commissioner *shall* redeem the scrip. Surely the legislature would not command this to be done unless it intended to recognize the validity of the scrip.

“To redeem all scrip which had been issued to said railroad company as the same became due”—the very words of the law—can mean nothing else than that such issue of scrip had received legislative sanction, and, in the opinion of the law-makers, ought to be paid.

If this is so, the ratification of the disputed proceedings of the common council is as complete as if they had been particularly named, and their issue of scrip is relieved from all taint of illegality.

After the revised charter was given to the city, the common council, at different times, and in various ways, recognized the validity of the scrip, and finally, in June, 1859, settled with some of the holders of it, who were willing to

## Statement of the case.

extend the time for payment—taking up the old securities and issuing new.

This suit is brought upon the scrip received on that settlement, and we think the learned court below erred in excluding it from the jury.

The judgment of the Circuit Court is reversed with costs, and the cause is remanded to the court below, with instructions to issue

A VENIRE DE NOVO.

## MYERS v. FENN.

The practice of permitting judgment creditors to come in and make themselves parties to a creditor's bill, and so obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled. And a proceeding of this sort will not be reversed because the party so coming in has not obtained an order of court to come on; the want of such order not being objected to and the proceeding having gone on to its conclusion as if it had been obtained.

*Semble* that in Illinois, in the case of a perfectly fair assignment for the benefit of creditors, where the trust will give considerable trouble and property assigned is of a sort that little or no cash will pass into the hands of the assignee, a payment by the debtor previously to the assignment's being made, of a certain sum on account of commissions, need not of necessity vitiate the assignment.

MYERS, Kinsly, and Stout, having obtained judgment against Fenn, filed a bill against him and three other persons named respectively, Thompson, Green, and Roberts,—which last-named person had been Fenn's general assignee, charging a fraudulent transfer of property by him to them. Before issue was had on this bill, one Bowen, having a judgment against Fenn for \$3260.96, and a certain Reed having one for \$3916.75, upon each of which execution had been returned unsatisfied, united by petition in the bill of Myers, Kinsly, and Stout. The petitions were filed without any order of court; but no objection was made, and the hearing went on as if an order had been granted. The bill set forth that Fenn, being hopelessly insolvent, had conveyed large