

## Statement of the case.

## CITY OF GALENA v. AMY.

1. Where an act, amending a city charter, says that the city council "*may, if it believe that the public good, and the best interests of the city require*" it, levy a tax to pay its funded debt, a mandamus will lie, at the suit of a judgment creditor, to make it levy a tax, if it does not. *The Supervisors, &c., v. United States* (4 Wallace, 435), approved.
2. Where a city has a power, such as the one above given, it is no return to an alternative mandamus, commanding it to lay a special tax of one per cent. to pay the principal, and one per cent. to pay the interest and costs of judgments obtained against it for non-payment of its funded debt, or show cause, &c., that it did, in one year, levy such a tax, and that the funds raised by it are wholly exhausted.  
Nor is it an argument against the issuing of a peremptory mandamus, that the city owes a large amount of other debts, and that if these taxes are collected, other creditors will be entitled to share in the distribution of the proceeds.
3. The acts of the General Assembly of Illinois passed June 30th, 1857, and February 6th, 1865, amendatory of the act of June 21st, 1852, giving by its fourth section the power to tax as quoted in the first paragraph above, do not repeal that fourth section.

THE fourth section of a statute of Illinois, passed June 21, 1852, and incorporating the city of Galena, declares that the city council "*may, if the said city council believe that the public good and the best interests of the city require,*" annually collect a tax, not exceeding one per cent. on a dollar on the assessed value of all estate taxable in the city, in addition to all other taxes; the fund to be kept separate, and annually, on the 1st of January, paid over, *pro rata*, upon the funded indebtedness of the city. "This section to continue and be in force until the whole amount of the city's indebtedness, with the interest to accrue thereon, is fully paid."

With this provision in force, the city issued a large amount of bonds to enable it to make various public improvements. One Amy having become possessed of a number of them, and the interest being unpaid, he brought suit and obtained judgment against the city upon them in the Circuit Court for Northern Illinois. The validity of the bonds was not drawn in question. The judgments being wholly unsatisfied, and the city having no property liable to execution,

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Amy demanded of the mayor and aldermen that they should levy a tax to pay principal, interest, and costs of the judgment. They refused to do so. He then filed an information in the Circuit Court for the Northern District of Illinois, for a mandamus. He set forth the above quoted fourth section of the act of June 21st, 1852, empowering the city council to levy a specific tax of one per cent. to pay the interest on its funded debt, and that this tax had not been levied. That, by an act of June 30th, 1857, the city council was authorized to levy, 1st, a tax of one per cent. for general and contingent expenses; 2d, five mills for school purposes; 3d, one per cent. to pay interest on public debt; 4th, an unlimited tax for market halls, &c., and other public improvements. That none of the taxes to which the plaintiff, as a bond creditor, has a right, had been levied and applied to his principal or interest after a period named, long past. And he prayed the court to issue a mandamus, commanding the city council and their successors in office, at their next regular term, to levy a *special* tax upon the taxable property of the city of one per cent. to pay the principal, and one per cent. to pay the interest and costs of the judgments; "and to pay the same out of the proceeds, and to continue to levy a like amount for each succeeding year until said judgments, interests, and costs are wholly paid."

The city made a return, that in 1865 they levied a tax of one per cent. to pay interest on public debt, and that it had been applied to a proper and lawful purpose.

They set up in bar of the plaintiff's right, that the only powers to tax which they had were by the acts of June 30th, 1857, already mentioned, and an act of February, 1865, amendatory of the act of 1852. Sections of these last two acts relating to taxation, and stating for what purposes taxes might be laid, were set forth. In the act of 1857 were these:

"Section 1. The city council shall have power, by ordinance, to levy and collect annual taxes not exceeding one per cent. on the dollar on the assessed value of all real and personal estate

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and property within the city, &c., made taxable by the law of the State for State purposes, to defray the *general and contingent expenses of the city*, not herein otherwise provided for; which taxes shall constitute the *general fund*.

"Section 3. To levy and collect taxes *not exceeding one per cent.* on the dollar per annum on all property subject to taxation, to meet the interest accruing on the debt of the city."

In the act of 1865 the following:

"Section 12. The city council shall levy and collect a tax of *one per cent.* on the dollar per annum on all property subject to taxation; which tax, when collected, shall be set apart for the sole and exclusive purpose of paying the interest upon the public debt of the city, whilst the same is in existence."

The latter act, the act of 1865, also contained the section set forth in the return.

"Section 19. All acts, or parts thereof, which conflict with the provisions of this act are also repealed; but nothing in this act shall be so construed as to deprive the city council of said city of any power or authority conferred upon the same by the act incorporating the city, and the various acts amendatory thereof, except so far as such powers and authority have been *expressly* modified or repealed by this act or the acts heretofore mentioned."

The return further set forth that the principal of the debt was \$142,272, and the assessed value of the property, real and personal, within the city jurisdiction, was \$740,000, and that the annual interest upon the debt now exceeded one per cent. upon the assessed value of the property in the city liable to taxation. It added that the councils intended, in good faith towards the city and its creditors (the relator included), to levy all the taxes which it had a right by law to levy. But that the General Assembly having, by the acts aforesaid, placed a limit upon the power of taxation, the councils were wholly unable to raise money for the payment of the judgments, excepting by means of proper ordinances passed under and in pursuance of section one of the act of Jan-

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uary 30, 1857 (above quoted), and that by that section moneys raised were first to be applied to the payment of the ordinary and contingent expenses of the city, and unless so applied that the government of the city could not be administered.

To this answer the relator demurred. The court sustained the demurrer; and the respondents electing to stand by the return, it was ordered that a peremptory mandamus should issue. The respondents now brought the case before this court for review.

*Mr. Jewett, for the city, plaintiff in error; Mr. Grant, contra.*

Mr. Justice SWAYNE delivered the opinion of the court, having first stated the case.

Most of the legal principles which are involved in this case, and which must govern its determination, have been settled in other cases decided at this term.

Was there any error in the rulings of the Circuit Court?

The fourth section of the act of 1852 declares that the city council, if they believe the public good and the best interests of the city require it, may levy and collect an annual tax of not exceeding one per cent., and that the amount thus collected shall be kept separate; and that annually, on the 1st of January, it shall be paid over *pro rata* upon the funded debt of the city, that may be presented by the holders; and that this section shall continue in force until the principal and interest of the indebtedness is fully paid.

This power has not been exercised by the city authorities, and they have made no other provision for liquidating the debts due to the relator. They have no other means of payment, in possession or prospect. Under such circumstances, the discretion thus given cannot, consistently with the rules of law, be resolved in the negative.

The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. In such cases the power is in the nature of a trust for his benefit, and it was the plain duty of the

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court below to give him the remedy for which he asked, by awarding a peremptory writ to compel the imposition of the tax, as was done.

These principles were fully considered in *The Supervisors of Rock Island County v. The State Bank*, of this term,\* and it is sufficient to refer to that case for a fuller exposition of our views upon the subject.

This section of the act of 1852 is not repealed by either the act of 1857 or the act of 1865. There is no express repeal, and we think there is none by implication. The latter is not favored in the law. Repeal by implication, when the prior and the later act can consistently stand together, is never admitted.† Here there is no irreconcilable conflict, if indeed there be any. This point seems not to be relied upon by the counsel for the plaintiffs in error.

It is conceded that this act was in force when the bonds in question were issued. If so, it was beyond the power of the legislature to repeal it, so far as it concerns the bonds in question, unless some other adequate remedy were substituted in its place.‡

The third section of the act of 1857 and the twelfth section of the act of 1865 each authorizes the collection of one per cent., to be applied to the payment of the interest upon the city debt. The latter re-enacts the former. The efficacy of this provision is not denied. The order of the Circuit Court with respect to this tax was correct.

The return of the respondents showed no sufficient reason why a peremptory writ of mandamus should not issue, as was ordered. The demurrer of the relator was properly sustained.

It is insisted that the city owes a large amount of other debts, and that if these taxes are collected the other creditors will be entitled to share in the distribution of the proceeds.

It is not competent for the respondents to make this objection. When any other creditor complains in a proper pro-

\* 4 Wallace, 435.

† *McCool v. Smith*, 1 Black, 471.

‡ *Van Hoffman v. The City of Quincy*, 4 Wallace, 535.

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ceeding, and asks that the funds be marshalled, it will be time enough to consider the subject.

The counsel for the plaintiffs in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them. Such securities occupy the same ground in this court as all others which are brought before us. When clothed with legal validity, it is our purpose to sustain them, and to give to their holders the benefit of all the remedies to which the law entitles them. When invalid, we have not hesitated and shall not hesitate to say so. But we cannot recognize a distinction, unknown to the law, between this and any other class of obligations we may be called upon to enforce.

The judgment of the Circuit Court is

**AFFIRMED.**

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BATES v. BROWN.

The rule of the common law, commonly called "the rule of shifting inheritance," is not in force in Illinois.

THIS was a writ of error to the Circuit Court for the Northern District of Illinois.

Kinzie Bates, the plaintiff in error, brought an action of ejectment in that court against Brown, the defendant in error, to recover certain premises. The cause was submitted upon an agreed statement of facts, which, so far as it was necessary to consider them, were as follows:

1. On the 29th of September, 1830, Alexander Wolcott bought of the State of Illinois certain lands, of which those in controversy were a part. At the time of the transaction