

## Statement of the case.

my estate to the legitimate child or children of John M. Barr and his heirs forever, remainder over to the testator's sons-in-law in case of failure of such issue of the son." Such is the language. By construing the remainder to vest before "the decease of Maria Barr," the executory devise to the sons-in-law is entirely defeated, and the clear intention of the testator frustrated by factitious rules intended to facilitate its discovery.

It often happens that legislative acts require the same liberal rules of construction as wills, where the testator is presumed to be *inops concilii*. It only requires the reading of the fifth section of the statute before the fourth in order to effectuate the intention of the legislature, and to clear it from the absurdity of giving an intestate's estate, not to his next of kin, but to his brothers and sisters, instead of his own children.

## WALKLEY v. CITY OF MUSCATINE.

After judgment at law for a sum of money against a municipal corporation, and execution returned unsatisfied, mandamus, not bill in equity, is the proper mode to compel the levy of a tax which the corporation was bound to levy to pay the judgment.

APPEAL from a decree of the Circuit Court of the United States for Iowa.

A bill had been filed in that court to compel the authorities of the city of Muscatine to levy a tax upon the property of the inhabitants, for the purpose of paying the interest on certain bonds, to the amount of \$130,000, that had been issued for the benefit of the Mississippi and Missouri Railroad Company. It appeared that a judgment had been recovered in the same court against the city for \$7666, interest due on the bonds held by the plaintiff; that execution had been issued and returned unsatisfied, no property being found liable to execution; that the mayor and aldermen had

## Opinion of the court.

been requested to levy a tax to pay the judgment, but had refused; that the city authorities possessed the power under their charter to impose a tax of one per cent. on the valuation of the property of the city, and had made a levy annually, but had appropriated the proceeds to other purposes, and wholly neglected to pay the interest on the bonds before the judgment, or to pay the judgment since it was rendered. The bill prayed that the mayor and aldermen might be decreed to levy a tax, and appropriate so much of the proceeds as might be sufficient to pay the judgment, interest, and costs. An answer was put in, and replication and proofs taken. On the hearing the court dismissed the bill. The creditor appealed.

*Mr. J. Grant, for the appellant:*

In *The Board of Commissioners of Knox County v. Aspinwall*,\* where the application was for a mandamus to compel the levy of a tax, this court, in answer to an argument that the creditor could have relief in equity alone, say:

“A court of equity is sometimes resorted to as ancillary to a court of law in obtaining satisfaction of its judgment. It is no objection to the writ of mandamus that the party might possibly obtain another remedy by new litigation in a new tribunal.”

The court holds, apparently, that a writ of mandamus is a cumulative remedy, and does not oust the court of equity of its jurisdiction.

*Mr. W. F. Brannan, contra.*

Mr. Justice NELSON delivered the opinion of the court.

We are of opinion the complainant has mistaken the appropriate remedy in the case, which was by writ of mandamus from the Circuit Court in which the judgment was rendered against the defendants. The writ affords a full and

---

\* 24 Howard, 385.

## Opinion of the court.

adequate remedy at law. There are numerous recent cases in this court on the subject.\*

We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus. An injunction is generally a preventive, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases where it is used by the court to carry into effect its own decrees—as in putting the purchaser under a decree of foreclosure of a mortgage into the possession of the premises. Even the exercise of power to this extent was doubted till the case of *Kershaw v. Thompson*,† in which the learned chancellor, after an examination of the cases in England on the subject, came to the conclusion he possessed it; not, however, by the writ of injunction, but by the writ of assistance. Chancellor Sanford, who adopted the practice in *Ludlow v. Lansing*,‡ observed that it was not usual before the case of *Kershaw v. Thompson*, but that he had examined all the cases cited, and that the English cases seemed to warrant the decision. He further observed that if the decision of the late chancellor was in any respect new, the innovation was, in his opinion, judicious and fit.

The counsel for the complainant has referred to some expressions by the learned judge in the opinion delivered in the case of *The Board of Commissioners of Knox County v. Aspinwall*, as giving countenance to the remedy by bill in equity; but this is a clear misapprehension. It is there observed, “that a court of equity is sometimes resorted to as auxiliary to a court of law in obtaining satisfaction of judgments. But no court,” he observes, “having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice.” We add, that a court of equity is invoked as auxiliary to a court of law in the enforcement

\* *Board of Commissioners of Knox County v. Aspinwall*, 24 Howard, 376; *Supervisors v. United States*, 4 Wallace, 435; *Von Hoffman v. City of Quincy*, Id. 535; *City of Galena v. Amy*, 5 Id. 705.

† 4 Johnson's Chancery, 609.

‡ 1 Hopkins, 231; see also *Valentine v. Teller*, Id. 422.

---

Statement of the case.

---

of its judgments in cases only where the latter is inadequate to afford the proper remedy. The principle has no application in the present case.

DECREE AFFIRMED.

---

UNITED STATES v. ECKFORD.

When the United States is plaintiff and the defendant has pleaded a set-off (as certain acts of Congress authorize him to do), no judgment for any ascertained excess can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in such amount. *De Groot v. United States* (5 Wallace, 432) affirmed.

APPEAL from the Court of Claims, the case being thus:

An act of Congress\* of the 3d of March, 1797, § 3, provides that where a suit is instituted against any person indebted to the United States, the court shall, on motion, grant judgment at the return term, unless the defendant shall, in open court, make oath or affirmation that he is *equitably entitled to credits* which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury and rejected, specifying each particular claim so rejected in the affidavit. The same act provides, § 4, that in such suits no claim for a credit shall be admitted upon trial but such as shall appear to have been submitted to the accounting officers of the treasury for their examination and by them been disallowed, unless it shall appear that the defendant, at the time of trial, is in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident.

With this act in force, the United States sued the executors of Eckford, who had been collector of New York, on his

---

\* 1 Stat. at Large, 515.