

Supervisors Vs. United States

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Court : US Supreme Court

Decided On : 1866

Appeal No. : 71 U.S. 435

Appellant : Supervisors

Respondent : United States

Judgement :

Supervisors v. United States - 71 U.S. 435 (1866)

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Supervisors v. United States

71 U.S. (4 Wall.) 435

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

SYLLABUS

1. On application by a creditor for mandamus against county officers to levy a tax to pay a judgment, the defendant cannot impeach the judgment by setting up that interest was improperly given in it. This would be to impeach it collaterally.

2. The statute of Illinois which enacts that when a judgment is given against a county, the county commissioner shall draw a warrant upon the treasurer for the amount, "which shall be paid as other county debts," cannot be taken advantage of on error, in case of an application for a mandamus to levy a tax to pay a judgment, where such a warrant was applied for and refused, and where there are no funds in the county treasury with which to pay the judgment.

3. Where power is given by statute to public officers, in permissive language, as that they " *may*, if deemed advisable," do a certain thing -- the language used will be regarded as peremptory where the public interest or individual rights require that it should be.

A statute of Illinois of February 16, 1863, enacts as follows:

"The board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable*, levy a special tax, not to exceed in anyone year one percent upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court of board of supervisors, as the case may be, in liquidation of such indebtedness. "

With this statute in force, the state bank, relator in the

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case, was the holder of certain coupon bonds of the County of Rock Island, originally issued and negotiated in payment of stock of the Warsaw and Rockford Railroad Company, for which the county had subscribed. They were issued pursuant to law.

The coupons representing the interest for one year were paid by the county, the necessary tax having been levied and collected for that purpose. Subsequent payments, however, were not made, and at the March Term, 1863, the relator

recovered a judgment in the court below upon coupons overdue and unpaid for \$2,554 and costs. Nothing was paid upon it, and there was no money in the county treasury which could be so applied.

The relator subsequently requested the supervisors to collect the requisite amount by taxation and to give him an order on the county treasury for payment. They declined to do either.

He then applied to the court below for a mandamus compelling the supervisors, at their next regular meeting, to levy a tax of sufficient amount to be applied to pay the judgment, interest, and costs, and when collected to apply it accordingly. An alternative writ was issued.

The supervisors made a return wherein numerous objections were taken to the issuing of a mandatory writ. Among them were:

1. That the court below, in rendering judgment, had allowed interest on the coupons from the day they became due.
2. That the respondent had no power to pay the judgment except by issuing an order on the treasurer of Rock Island County, the ground of this objection being a statute of Illinois which enacts that when a judgment is rendered against a county, no execution shall issue, but that the county commissioners' court shall draw a warrant upon the treasurer for the amount, "which shall be paid as other county debts."
3. In substance, that the respondent had levied and collected the regular county taxes and that the same had all been needed and used for the ordinary current expenses of the county.

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The court below disallowed the return and ordered that a peremptory writ should issue commanding the respondents, at their next meeting for levying taxes, to levy a tax of not more than one hundred cents on each one hundred dollars' worth of

taxable property in the county, but of sufficient amount fully to pay the judgment, interest, and costs, and that they set the same apart as a special fund for that purpose, and that they pay it over without unnecessary delay to the relator.

The main question here in the case was whether, under the Act of February 16, 1863, the respondents were compellable to levy and collect by taxation the amount specified in the order of the court below -- that is to say, in other words, whether that expression of the statute "*may if deemed advisable*" was permissive merely, or, under the circumstances of this case, obligatory.

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MR. JUSTICE SWAYNE delivered the opinion of the Court, having first stated the case.

We have not had the benefit of an oral argument upon either side. The case was submitted upon printed briefs. We shall confine our examination to the points thus brought to our attention.

In the return of the respondents to the alternative writ, numerous objections were taken in regard to which their brief is silent. We take it for granted they have been abandoned, and shall not consider them.

I. It is said the court below, in rendering the judgment, allowed interest upon the coupons from the time they became due.

The judgment cannot be thus collaterally questioned. It can be impeached only in a proceeding had directly for that purpose. [[Footnote 1](#)]

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II. A statute of Illinois provides that when a judgment is rendered against a county, no execution shall issue, but that the county commissioners' court shall draw a warrant upon the treasurer for the amount, "which shall be paid as other county debts."

Such a warrant was applied for and refused after the rendition of the judgment. If the judgment of the court below is sustained, a warrant can yet be issued when the fund to pay the judgment is provided if a warrant be necessary to complete the obedience of the respondents in paying over the money according to the command of the writ. There is nothing in the objection as a matter of error.

III. The important question in the case is whether the respondents are compellable to levy and collect, by taxation, the amount specified in the order of the court below.

The writ, if issued, must conform to the order.

The court below proceeded upon the act of February 16th, 1863. We have not found it necessary to consider any of the other acts referred to in the briefs.

That act declares that

"The board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable,* levy a special tax, not to exceed in anyone year one percent upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness."

The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, "*may, if deemed advisable,*"

which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument.

In *The King v. Inhabitants of Derby*, [[Footnote 2](#)] there was an indictment against "diverse inhabitants" for refusing to meet and make a rate to pay "the constables' tax." The defendants moved to quash the indictment, "because they are not compellable, but the statute only says that *they may*, so that they have their election, and no coercion shall be." The court held that

"'may,' in the case of a public officer, is tantamount to 'shall,' and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt."

In *The King and Queen v. Barlow*, [[Footnote 3](#)] there was an indictment upon the same statute, and the same objection was taken. The court said:

"When a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall.' Thus, 23 Hen. VI, says the sheriff 'may' take bail. This is construed he 'shall,' for he is compellable to do so."

These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries.

In *The Mayor of the City of New York* [[Footnote 4](#)] and in *Mason v. Fearson*, [[Footnote 5](#)] the words "it shall be lawful" were held also to be mandatory. [[Footnote 6](#)]

The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language -- whenever the public interest or individual rights call for its exercise -- the

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language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is

given not for their benefit, but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless.

In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose "a positive and absolute duty."

The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category. [[Footnote 7](#)]

The circuit court properly awarded a peremptory writ of mandamus. We find no error in the record. The judgment below is

Affirmed.

[[Footnote 1](#)]

Bank of Wooster v. Stevens, 1 Ohio St. 233.

[[Footnote 2](#)]

Skinner, 370.

[[Footnote 3](#)]

2 Salkeld 609.

[[Footnote 4](#)]

3 Hill 614.

[[Footnote 5](#)]

[50 U. S. 9](#) How. 248.

[[Footnote 6](#)]

See *The Attorney General v. Locke*, 3 Atkyns 164; *Blackwell's Case*, 1 Vernon 152; Dwarris on Stat. 712; *Malcom v. Rogers*, 5 Cowen 188; *Newburg Turnpike Co. v. Miller*, 5 Johnson's Chancery 113; *Justices of Clark County Court v. P. & W. & K. R. T. Co.*, 11 B.Monroe 143; [Minner v. Merchants' Bank](#), 1 Pet. 64; *Com v. Johnson*, 2 Binney 275; *Virginia v. Justices*, 2 Virginia Cases 9; *Ohio ex Rel. v. Governor*, 5 Ohio St. 53; *Coy v. City Council of Lyons*, 17 Ia. 1.

[[Footnote 7](#)]

The People v. Sup. Court, 5 Wendell 125; *The People v. Sup. Court*, 10 Wendell 289; *The People v. Vermilyea*, 7 Cowen 393; *Hull v. Supervisors*, 19 John. 260.

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