8FED.CAS.—56

Case No. 4,567.

EVANS v. PITTSBURG.

[19 Leg. Int. 4; 4 Leg. & Ins. Rep. 3.]

Circuit Court, W. D. Pennsylvania. Jan. 3, 1862.

MANDAMUS TO ENFORCE JUDGMENT AGAINST CITY—JURISDICTION OF CIRCUIT COURTS.

[1. Mandamus to enforce a judgment against a city may issue under the authority given by the Pennsylvania statute of April 15, 1834 (Laws, 1833–34, p. 509); for, although counties and townships only are mentioned in the act, yet cities are clearly within the spirit thereof. Following Monaghan v. City of Philadelphia, 28 Pa. St., 209.]

[2. The federal circuit courts have power to issue writs of mandamus to enforce judgments against public corporations. Following Knox Co. v. Aspinwall, 24 How. (65 U. S.) 383.]

Application for a mandamus execution against the city of Pittsburg. The case was thus: One section of a statute of Pennsylvania (Act April 15, 1834, § 6) enacts that when any person has obtained a judgment against a county, he may have execution thereof as follows, and not otherwise—that is to say: "The court in which the judgment is, may issue a writ commanding the commissioners of the county to cause the amount thereof, with interest and costs, to be paid out of any moneys unappropriated of such county, or if there be no such moneys, out of the first moneys that shall be received for the use of such county." Another section of the same law (section 7) enacts that if judgment be obtained against a township, the like proceeding may be had. The act is entitled, "An act relating to counties and townships, and county and township officers." It is a very long act, comprising one hundred and seventeen sections, and makes, in fact, a whole corpus of statute law relating to counties and townships and to county and township officers, but does not touch upon cities, further than to say, in one section (section 2), that every city shall be deemed and taken to form part of the county in which it is, saving, however, to such city, the rights, privileges, immunities, &c., granted by its charter and the laws. Evans, the plaintiff, had obtained judgment for a large sum against the city of Pittsburg, which occupies a small portion of Allegheny county; the county having its county and township officers, such as the act prescribes, and the city having its officers, according to its charter, &c.; but not after the county names or models, or in any such form as the act above mentioned contemplates for counties and townships.

The question now before the court was, whether Evans was entitled to a mandamus or order upon the controller of the city, to deliver to him an order on the treasurer (these, and not "commissioners," being its fiscal officers), for the amount of his judgment, to be paid out of the first moneys which should come into his, the treasurer's, hands; in other words, to have a mandamus execution.

It is necessary here to state, that in Pennsylvania there is "An act relating to executions" (Act June 16, 1836 [Laws 1835–36, p. 755]), the said act being part of what is known as the "Revised Code," and the act itself having been generally considered to regulate the whole subject of ordinary executions. One of its heads (xi.) is "Of Executions against Corporations." It proceeds to order and regulate, by detailed provisions, the whole subject of executions against corporations generally; but it excepts from these provisions "any corporation being a county, township or other public corporate body." The legislature seemed to have considered that execution by fi. fa., attachment of debt, or other like process, was hardly to be given against municipal corporations, as if so allowed, the wheels of government might be stopped and the whole municipality thrown into complete disorder. The creditor who dealt with a city was perhaps expected to trust largely to public faith; in those times not shamelessly violated by cities as in ours. However, in 1857, the circuit court of the 3rd circuit, at Pittsburg, McCandless, J., constituting it, (Grier, J. being absent,) had allowed a levy by fi. fa. upon stock owned by the city in a gas company; this being done under the authority of an old act of assembly, (March 29,1819,) enacting "that the stock of any body corporate owned by any individual or individuals, body or bodies politic or corporate in his, her, its or their own name or names, shall be liable to be taken in execution and sold in the same manner that goods and chattels are." This act, Judge McCandless, differing, perhaps, from the common opinion, had considered was not impliedly repealed by the reviser's act relating to executions generally. See Oelrichs v. Pittsburgh, [Case No. 10,444]. But the city of Pittsburg now had nothing which fi. fa. attachment, &c., could reach; and unless it was subject to execution of mandamus, could completely defy this creditor.

The City Solicitor, for the city, relied—

1. On the plain general scope and object of the act, of which counties and townships alone, and as distinguished from cities, from the beginning of the act to its distant end, were the subject of the legislation. A mode is provided for getting satisfaction when the defendant is a county; then, by a separate section, a mode is prescribed when the defendant is a township: but no mode is prescribed when the defendant is a borough, nor when it is a city. The inference is plain that process against cities was not meant to be regulated by this act. In fact, the matter of execution against counties and against townships is given only as a part of a general code regulating the whole matter of these divisions of government. It will not do to look at the single section about executions, as we find it in the Digest Looking at a

single section, you might say, the object is to get satisfaction of debts in general against municipal bodies. But this is not so, as will appear by looking at the statutes at large; where it will be seen that counties and townships absorb all the idea of the legislature; the general and particular constitution and regulation of counties and townships, and not the matter of executions, except as one item of the main subject, being the object of the enactment. Cities are mentioned in the act only once; and on this occasion rather to except and protect them; they are mentioned just enough to show that the distinction between them and counties and townships was noticed and meant to be observed, and at the same time to show that the act, in its various provisions and complete system, did not mean to embrace them.

2. On authority. In Oelrichs v. Pittsburgh [supra], a creditor had levied on some gas stock owned by the city, and the execution was sought to be set aside on the ground that the true way was by application for mandamus under the act of 15th April, 1834. This court said, "no." That act does not apply to cities. You can issue a common law execution against them, at least to the extent remaining under the act of 29th March, 1819; though you can't against counties. Here is the language of the court; McCandless, J., who alone on that occasion constituted the court, delivering it: "It is contended," said he, "that the act of 15th April, 1834, is applicable to cities and boroughs. We think not Cites are nowhere mentioned except when embraced within a county. They were independent bodies politic.... They were not merged in the counties; and being already corporate bodies, having all the immunities, and subject to all liabilities as such, there was no legal necessity for the application of the law to them. Counties, on the contrary, were nondescript bodies, called by the courts, before the passage of the act, quasi corporations, against which the creditor had but an imperfect remedy. It was to remedy this defect that the law was passed. It would be manifestly impracticable to execute the act of 1834 as to cities. Upon whom would you serve the writ which commands the commissioner to pay the judgment out of any unappropriated money, &c.? Upon the mayor, who represents the general police of the municipality? Upon the controller, treasurer or finance committee, who may have the custody of the public funds, or upon the select and common councils, the legislature of the city? The act is silent as to cities."

GRIER, Circuit Justice. In that case you argued that this act did apply to cities.

It is unimportant what we argued; though it is very important what the court decided. The language above quoted is the language of this very court: and it was not dicta. It was the point decided. The court allowed a fi. fa. to go against personal property of the city because the act about mandamus executions, while applying to counties and townships, did not apply to cities at all. It will not do for one member of the court to overrule what his brother, who has exactly the same power to constitute the court as he, has solemnly

decided in his absence. There will be no end to difficulty if the judges act respectively on that principle. We must treat each as the court; as each in fact and in law is.

The case of Monaghan v. City of Philadelphia, 28 Pa. St. 209, which might appear to regulate this case, is not in point. There, a mandamus did issue nominally against a city, but really against the county; the county there being incorporated under the name of a city. In the city of Philadelphia, as constituted at the time of that decision, no less than twenty-nine bodies, st, a city proper, and twenty-eight townships and boroughs, many of them absolutely rural, were consolidated. The so-called city occupies more than one hundred and, twenty-nine square miles. More than one hundred and twenty-miles are country, and have no streets nor alleys, but roads only. Enough land remains to make, supposing the new ones to be laid out as the old ones are, nine thousand miles of additional streets, &c. See bill filed in Girard v. Philadelphia, Oct. Sess., 1859, No. 3. The old county of Philadelphia, and all the municipal corporations, were consolidated in 1854, under the name of a city; rights and remedies being no further interfered with than necessary. In Monaghan v. City of Philadelphia, the debt was originally due by the district of Richmond, which we suppose was in fact a sort of township. On the consolidation of all the districts, townships, boroughs, &c., of the old city, the new city of Philadelphia was substituted. A fi. fa. having issued against the city on a judgment obtained, and a motion being made to set it aside, Knox, J., delivering the court's opinion, does indeed say,—"Although cities are not expressly named, yet they are clearly within the spirit of the act:" but he goes right on to say, "besides which, by the consolidation act the municipality is to be considered both a city and a county." And he goes on to argue in a way that shows that this was as much the ground of the judgment as any other thing: in fact, that it was the principal ground.

The act of the Pennsylvania legislature of June 16, 1836, which will be relied on, has no pertinence. Its language is—"It shall be the duty of the supreme court, at their sessions in banc, from time to time, to devise and establish, by rule of court, such new writs and forms of proceedings, as in their opinion shall be necessary or convenient to the full, direct and uniform execution of the powers and jurisdiction possessed by the said court, or by the courts of common pleas, district courts, orphans' courts or registers' courts."

Conceding that a decision when the case

arises, is "devising and establishing by rule of court, and from time to time—such new writs and forms of proceedings as this statute provided for"—which plainly it is not—yet the act does not mean to give the supreme court power to authorise the issuing of old writs in cases where, by law, they could not issue them before the statute was passed. In issuing a mandamus to a city, the supreme court does not either "devise or establish" any "new writ or form of proceeding." It simply applies an old writ devised and established in England generations ago, to a new purpose; and the question will be after the statute as before—is it rightly applied, either independently of the act of 15th April, 1834, § 6, "relating to counties and townships and county and township officers," or under it? What the act of June 16, 1836, § 3, "relative to the jurisdiction and powers of courts" means, is this—that where a "power and jurisdiction" is already "possessed" by the supreme court, by itself or in connection with other courts of the commonwealth, and there is no "writ or form of proceeding" which gives "full, direct and uniform execution of such (admitted) power and jurisdiction," then the supreme court may, "at their sessions in banc, from time to time, devise and establish, by rule of court, such new writs and forms of proceedings as shall be necessary or convenient to the full, direct and uniform execution of the powers and jurisdiction possessed." Thus exemp. grat., when the act of 15th April, 1834 gave the courts power to issue an order or mandamus to the commissioners of a county, commanding them to cause the amount of a debt due, to be paid out of any money unappropriated of such county, no writ of mandamus ad hoc, or form of proceeding had ever been devised, established or in use. The act of June 16, 1836, § 3, made it the duty of the supreme court to devise and establish a form. So in other cases, where new powers were given to the court. But the court was not to apply remedies hitherto applicable to one class of cases to a wholly new class, to which they had never been applied: they were not to usurp remedies when the statute gave none. The construction contended for turns the supreme court into the legislature at once.

On the other side, reliance was placed on Knox Co. v. Aspinwall, 24 How. [65 U. S.] 385. There under the judiciary act of 1789 (section 14), the supreme court held that a mandamus could issue to the commissioners of Knox county, Illinois, ordering them to levy a tax, which by statute they were bound to levy; yet the words of section 14 of the judiciary act [1 Stat. 73] were much like those of the Pennsylvania statute of June 16, 1836, (section 3). They are "that courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, agreeable to the principles of the common law." Grier, J. delivering the opinion, said: "Now the jurisdiction is not disputed, and it is necessary to an efficient exercise of this jurisdiction, that the court have authority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to perform, and by the performance of which alone the plaintiff's

remedy can be effected.... They refuse to perform a plain duty. There is no other writ that can afford the party a remedy—which the court is bound to afford if within its constitutional powers—except that afforded by this writ of mandamus. It is 'agreeable to the principles of the common law,' and consequently within the category as defined by the statute." This decision would authorize the issuing of a mandamus independently of any act of assembly.

Without inquiring whether the decision in Oelrichs v. Pittsburgh was or was not right, upon the facts of that case, it is enough to say here that the city has now no property which under it can be levied on. "There is no other writ which can afford the party a remedy." Then the decision in Monaghan v. City of Philadelphia decides that the act does apply to cities, and being the construction by the state court of a state law, binds this court. The corporation called "The City of Philadelphia," is a city, purely and simply. The fact that it covers what was once or even now is a whole rural district, is unimportant. The county is organized as a city; with a charter, and with city officers, and with a city system. Unlike other similar extent of territory known as counties, none of its functions are performed under the act of 15th April, 1834, "relating to counties and townships," but under a system of city government alone. Monaghan v. City of Philadelphia, therefore, did decide that a mandamus execution could issue against a city.

GRIER, Circuit Justice. The writ of mandamus, though originally treated as a prerogative writ has in modern times been used as a remedial process, and has been liberally interposed for the benefit of the citizen and the advancement of justice. Whenever a party had a legal right, and no other specific legal remedy, this will not be denied—nor will it be a ground of refusal that the party might have a remedy in equity, or even that there may be another remedy, if such remedy be obsolete. The great multiplication of corporations, both municipal and private, of modern times; the readiness of legislatures in conferring on them most extensive and dangerous powers, demand of the courts the most liberal application of this remedy to prevent a failure of justice.

The act of assembly of this state, passed on the 15th of April, 1834, relating to counties and townships, presents a method by which those having judgments against these quasi corporations may have a remedy by

means of the remedial writ of mandamus; and as these corporations have no property which could be properly made subject to levy and sale, it restrains the use of other process. It is but the legislative extension of the common law remedy of mandamus, and a modification of the process to suit the peculiar functions and officers of these anomalous corporations, and make it more simple in practice; as it issues only where a court of justice has given a judgment, which makes it the duty of the officers of the corporation to pay a certain sum of money, it dispenses with the form of an alternative mandamus. It assumes that the officers whose duty it was to lay and collect taxes sufficient to pay all just demands against the corporations have done so, and gives the party aggrieved a right to satisfaction out of the moneys in the treasury unappropriated; and if there be no such moneys, then out of the first moneys that shall be received. Now it is true, that the peculiar form of process is presented in an act relating to these quasi corporations, and in its letter refers only to counties and their peculiar officers called "commissioners;" and that cities, which, are public chartered corporations, having much more enlarged powers, privileges and duties, are not specifically named. Cities often are possessed of stocks and other property not devoted to special public use, which might well be levied on to satisfy a judgment against it. But where a city has no such property, (as in this case,) and its officers obstinately refuse to satisfy a claim which courts of justice have pronounced to be legal and just, there will be an entire failure of justice unless this remedial writ of mandamus be issued and enforced by the court whose judgment is publicly set at defiance. States claiming sovereign, or quasi sovereign powers, may repudiate their contracts if they are content to abide the scorn of the civilized world, because there is no superior with power to compel obedience. But this sovereign right to defraud makes no part of the privileges or immunities granted by the charters of city corporations. They are subject to the laws as much as private corporations or individuals, and where the court has adjudged that they shall pay a sum of money due on their contracts, it is bound to find a remedy for the party aggrieved by their refusal. This modification of the mandamus process by the legislature, has the merit of simplicity in form, while it is effective for the purposes intended, and accordingly the supreme court of the state, in the case of Monaghan v. City of Philadelphia, have unanimously decided, that "although cities are not expressly named, yet they are clearly within the spirit of the act." Besides, by the act of 16th June, 1836, (section 3), "relative to the jurisdiction and power of courts," it is made the duty of the supreme court, to devise and establish such new writs and forms of proceedings as in their opinion shall be necessary and convenient, &c. That court, had, therefore, full power and authority to adopt this remedial writ, devised by the legislature, in the act regulating counties, and apply it to the case of cities—and by this decision they have done so, sic volo sic jubeo would have been a sufficient reason. The suggestion that the city of Philadelphia embraces the whole counties, like many other cumulative reasons, adds nothing to

the heap. This court has by rules adopted the form of state process as construed and confirmed by the supreme court. In a former case in this court, decided by my Brother McCaudless, the motion was to set aside an execution levied on stocks belonging to the city. The counsel for the city then contended that the only remedy which the court had an authority to give was this writ of mandamus. But the court refused to set aside the execution and levy, because the prohibition of other process in the act would only apply to the case of a county, and was very properly intended to prohibit the levy and sale of the court-house, jail and other property held for the public use—and that the process of mandamus adopted by the courts need not be resorted to in this court where the plaintiff had another sufficient remedy by levy and sale of stocks and other property not so used.

The question as to the power of this court to issue a mandamus in such case, is decided in the case of Knox Co. v. Aspinwall, 24 How. [65 U. S.] 383. Mandamus issued.

[NOTE. Subsequently, on a motion for an attachment (Case No. 4,568), this writ was set aside as irregular and void.]