13FED.CAS.—69

Case No. 7,517.

JORDAN v. CASS COUNTY.

[3 Dill. 185.][1]

Circuit Court, W. D. Missouri. 1874.

TOWNSHIP RAILROAD AID ACT—REMEDY OF BONDHOLDER.

1. The act of the general assembly of Missouri of March 23, 1868 (Laws 1868, p. 927; 1 Wag. St. p. 312), authorizing township aid to railways, is not in conflict with the constitution of the state.

[Cited in Foote v. Johnson Co., Case No. 4,912.]

[See note at end of Case No. 7,518.]

2. Article 11, § 14, of the constitution of the state, which prohibits the legislature from authorizing any "county, city, or town" to subscribe for the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not restrain the legislature from authorizing township aid to railways, if two-thirds of the voters of the township shall sanction the proposition.

[Cited in Jarrott v. Moberly, Case No. 7,223.]

3. Whether the legislature could, in the case of townships, dispense with the popular sanction, doubted, but not decided.

4. As townships were not incorporated bodies, the act of March 23, 1868, above mentioned, when the proposal has been adopted by the voters of the township, authorized the county court to issue bonds, in the name of the county, on behalf of the township voting the aid. *Held* (construing the legislation of Missouri): (1) That the owner of bonds thus issued by a county (or a township) had no remedy by action against the township, or taxable inhabitants therein. (2) That the remedy of the owner of the bonds was by mandamus to the county court, to compel it to levy and collect the special tax which the act provided as the means to pay the bonds and interest thereon. (3) That such an owner could sue the county in whose name the bonds were issued, in the federal court, and recover judgment thereon; but that such judgment could not be enforced against the county or its property, or the tax-payers of the county at large, but only by mandamus to the county court to compel the levy and collection of a special tax, according to the statute in such case provided.

[Cited in Harshman v. Bates Co., Case No. 6,148; Blair v. West Point Precinct, 5 Fed. 267; Kimball v. Board of Com'rs, 21 Fed. 147; Liebman v. City and County of San Francisco, 24 Fed. 721; Vincent v. County of Lincoln, 30 Fed. 753; Aylesworth v. Gratiot Co., 43 Fed. 352.]

[See note at end of Case No. 7,518.]

This is an action {by Elizabeth J. Jordan} against the county of Cass, upon coupons attached to what are known as "township bonds." The material part of one of the bonds is as follows: "$1,000. State of Missouri. Cass County Bond. Know all men, etc., that the county of Cass, in the state of Missouri, acknowledges itself indebted and firmly bound to the Pacific Railroad of Missouri, in the sum of $1,000, which sum the said county of Cass, for and on account of Mt. Pleasant township, hereby promises to pay said company, or bearer, at, etc, seventeen years after date, with interest, etc. This is one of twenty-five bonds for $1,000 each, issued pursuant to an order of the county court of said county of Cass, made by authority of an act of the general assembly of the state of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' and approved on the 23d day of March, A, D. 1868, and authorized by a vote of more than two-thirds of the voters of said township, to aid in the construction of the Pleasant Hill and Lawrence Branch of the Pacific Railroad of Missouri." The bond is signed by the presiding justice and attested by the clerk, and sealed with the seal of the county court of Cass county. The petition is in due form, and asks a judgment against the county for the amount of the coupons in suit, with interest, damages, and costs. The county demurs to the petition, on the grounds that the bonds are not the bonds of the county, but of Mt. Pleasant township, on which alone they are binding; that two-thirds of the qualified voters of the county did not assent to the issue thereof; and that the act of March 23, 1868, under which they purport to have been issued, is unconstitutional. The constitution of the state of Missouri, which went into force in 1865, contains the following: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall consent thereto." Article 11, § 14. At the time when the constitution of 1865 was adopted, and when the act of March 23, 1868, under which the bonds in question were issued went into effect, there, were statutes, authorizing counties, cities, and incorporated towns to aid in the building of railways; but the above mentioned act of March 23, 1868, is the first that gave such powers to townships. This act (Laws 1868, p. 92; 1 Wag. St. p. 313) provides that, upon the petition of twenty-five "taxpayers and residents of any municipal township for election purposes," the county court shall order an election to be held in the township, to determine whether the proposed subscription to the capital stock of the company building or proposing to build a railroad into, through, or near the township, shall be made. The further provision is, that if "not less than two-thirds of the qualified voters of such township, voting at such election, are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township;" and if so voted, "the county court, in payment of such subscriptions, shall issue bonds, in the name of the county, with coupons for interest attached." To pay for the subscription, or to pay

the principal and the interest on the bonds, if bonds have been issued, the provision is, "that the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription." The further provision is that the revenue officers of the county are to collect this special tax, and apply the same exclusively to pay such subscription or bonds; and the county court is required to cancel bonds which shall be paid. Under this state of the law, the question on the demurrer was, whether an action upon the bonds issued by the county court, under this act, in the name of a county in behalf of a township, could be maintained against the county. Many similar actions are pending, and the question was argued by—

W. B. Napton, T. K. Skinker, and others, for the bondholders.

W. P. Hall, N. Holmes, Gage & Ladd, Robert Adams, Jr., Glover & Shepley, and others, for the county.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. The bonds under consideration were issued under the act of March 23, 1868, by the county court of the county, in the name of the county, on behalf of the township. This act has been held constitutional by the supreme court of the state (State v. Linn County Court, 44 Mo. 505), and it is our opinion that the constitution of the state (article 11, § 14), which prohibits the legislature from authorizing any "county, city, or town" to subscribe to the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not prohibit the legislature from authorizing township aid to railways, if two-thirds of the voters of the township shall sanction the proposition. Whether the legislature could authorize township aid to railways without the assent of two-thirds of the voters therein, need not be determined, for it has not undertaken to do so. The section of the constitution above mentioned does not in terms limit the legislative power, except as respects "counties, cities, and towns;" but other municipal creations would be within the mischief the constitution intended to remedy, and hence, it would seem, within its spirit and meaning. Supposing this to be so, however, the only limitation on the legislature would be, that it could not authorize the

aid by townships, or by the people within them, without the popular sanction which the constitution requires. It would not be a fair or legitimate construction of the provision of the constitution, to hold that it absolutely disabled the legislature as respects municipal creations or civil divisions of the state not therein mentioned.

Treating the act of 1868 as valid, the next question is, whether the holder of bonds issued in accordance with its provisions—that is, by the county court, in the name of the county on behalf of the township, pursuant to a two-thirds vote of the citizens of the township—can maintain an action thereon, for any purpose, against the county in whose name the bonds are made. At the outset of this inquiry, it may be remarked that we do not understand the plaintiff's counsel to contend that the bonds are the proper debt or obligation of the county, or that payment thereof may be enforced against the property of the county, or against the tax-payers or property in the county at large. The bonds recite that they were authorized by a two-thirds vote of the township; and, under the provision of the constitution above mentioned, not having been authorized, or purporting to have been authorized, by a vote of the qualified voters of the county, it is clear that they impose no obligation on the county, and equally clear that the real or ultimate liability is on the taxable property within the township. But how, and against whom, is this liability to be enforced and made available?

It is urged by the counsel for the county that the remedy of the bondholder is by an action against the township, or against the tax-payers and residents of the township, in whose behalf the bonds were issued. But there is no statute in Missouri creating "municipal townships for election purposes" bodies politic, and no provision is made for suits by or against them.

Undoubtedly the legislature designed that there should be a remedy upon these bonds; and if it were consistent with the legislative intent, the court would be justified in holding, if necessary to afford an effectual remedy, that the township was created by implication, as to this particular matter, a body corporate, and, as such, liable to be sued. But such a view is not necessary to give a remedy and seems not to be consistent with the express provisions that the bonds should be issued in the name of the county, and the necessary taxes to pay them be levied and collected by the officers of the county. We are impressed with the conviction that this was done by the legislature because of the want of corporate power in the "municipal township for election purposes."

The next suggestion is that the action should be against the tax-payers and residents of the township in analogy to the principle of the well known case of Russell v. Men of Devon, 2 Term R. 667, and to the personal liability of the inhabitants of towns in New England for judgments against the town corporations. Beardsley v. Smith, 16 Conn, 368; Dill Mun. Corp. §§ 446, 687, 693, note.

Such a personal liability on the part of the inhabitants for the debts of a public, municipal, or quasi corporation, is not elsewhere recognized to exist, and could not be enforced by an action at law without contravening the mode prescribed by the act under which the bonds were issued for acquiring the means of making payment thereof. The legislature has provided the mode of raising the means for making payment of the bonds, which is by the levy and collection of a "special tax" for that purpose, to be "levied on all the real estate lying within the township," and it has specially enjoined upon the county court the duty of levying and causing such to be collected; and, undoubtedly, this is such a duty as, supposing the bonds to be valid, may be enforced by mandamus. It is, to our mind, clear that the bondholder, if he chose to resort to the state tribunals, might, without first obtaining a judgment against either the county or township, file an information for a writ of mandamus, to be directed to the county court, to compel it to levy and cause to be collected the special tax from which alone can come the funds that the law has provided for the payment of the bonds. Dill. Mun. Corp. § 685, etc. But this court has no original jurisdiction in mandamus. It cannot acquire jurisdiction by an original proceeding in mandamus, but when jurisdiction otherwise exists it may issue the writ when necessary to the exercise of such jurisdiction, agreeably to the principles and usages of law. Bath Co. v. Amy, 14 Wall. [81 U. S.] 244; U. S. v. Union Pacific R. Co. [Case No. 16,599]. Therefore, the holder of these bonds cannot have any remedy in the federal court unless he is entitled to recover a judgment thereon, and to enforce such judgment, if necessary, by mandamus. This results not from any intrinsic difference in this respect between the state and federal courts, but from the peculiar language in which the jurisdiction of the circuit court of the United States is conferred by the judiciary act.

We are thus brought to the question whether a holder of bonds issued pursuant to the act of March 23, 1868, may recover judgment thereon against the county in whose name they are issued, to be enforced, if necessary, not by an execution against the county, but by mandamus against the county court to compel it to levy upon the property in the township the special tax which the law has enjoined as a duty upon it.

After some hesitation we have reached the conclusion that such an action will lie, and that this view will best carry out the design of the legislature in the enactment in question. The expressed purpose of the statute was "to facilitate the construction of railroads in the state of Missouri," and to this end it provided for the issue of negotiable bonds with coupons for interest attached. These

were to be negotiated and sold, and as townships were not known to the law as corporate bodies, some provision must be made whereby payment could, if necessary, be enforced. The act met the difficulty arising from the non-incorporation of townships by directing the bonds to be issued in the "name of the county." By the legislation of Missouri, the county has a corporate or quasi corporate capacity, with limited power to contract and sue and be sued. Wag. St. 407, 408.

And the county as a civil subdivision or arm or agency of the state is under the supreme control of the legislature, except so far only as its power is limited by the constitution. It seems clear when the legislature directed the bonds to issue in the name of the county that it meant to give to the bonds additional legal value, and this intent should be carried into effect by the court so far as it is consistent with the provisions of the organic law. The theory of the act is to use the county and the officers of the county to effect the purposes of the enactment. Hence the petition for the election is required to be presented to the county court, which is the official organ of the county; the election is to be ordered by the county court, and by this tribunal, also, the subscription "in behalf of the township" is to be made, and bonds "in the name of the county," issued. The county court is to levy and cause to be collected the taxes to pay the bonds, and the sheriff of the county and the county treasurer are required to see to the collection, and application of the taxes. Thus we see the county and the county officers are the instruments employed by the legislature to give effect to the act under which the bonds were issued. There must have been a purpose in requiring the bonds to be issued in the name of the county; but the constitution will prevent any liability attaching to the county—that is, to the people of the county, for the payment of these bonds. The constitution, however, will not be infringed by allowing the county to be sued if the judgment which is rendered is one which is not to be satisfied out of the private property of the county, if it owns or can own any which is subject to execution, or by a tax upon the people or property of the county at large. It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued so far as is necessary to give effect to the rights of the holders of the bonds consistently with the provisions of the constitution. The right of the non-resident citizen to resort to the courts of the United States is one which is given by the constitution and laws, and it is a right which a citizen would be apt to regard as specially desirable, where if he be compelled to resort to the state courts it must be to a county whose citizens in whole or in part are his real adversaries, and who may constitute the jury to decide the case. This right, so valuable to a plaintiff, but which deprives the defendant of no just advantage, since the federal courts are by their constitution to stand wholly indifferent between all parties, ought not to be considered as unavailable to a non-resident citizen unless a fair construction of the enactments applicable to the question so requires.

It is in our judgment practicable consistently with established legal principles to protect the constitutional rights of the counties, and at the same time to recognize the constitutional right of the non-resident citizen to come with these securities into court to have his rights in respect to them determined. This is to be effected by the nature of the judgment we render, which is not a personal judgment against the county, but only a judgment judicially establishing the plaintiff's debt if no defense shall be sucessfully made. If the debt shall be thus established we must suppose that the proper county court will levy and collect from the property within the township, the necessary tax to pay the debt, but if it should not, this court has the power and in that event it would become its duty, by mandamus, to cause such tax to be levied and collected.

This view, in effect, makes the county a trustee for the township, which is one of the subdivisions of the county, and a necessary party to the action, but not the party personally liable for the payment of the debt which the plaintiff may establish; and such, by the act under which the bonds in suit were issued, is the real relation which is established between the county and the township.

This, it is to be remembered, is a law action, and the judgment to be rendered must be one which, so far as the anomalous legislation under review will admit of it, is consistent with the restricted powers and somewhat rigid rules of a common law court. The provisions of the state statutes warrant the kind of judgment which it is proposed to render, if the plaintiff shall recover: that is, such judgment as may be found necessary to effectuate the rights of the parties. Wag. St. 1051, §§ 1, 2.

But the common law adjudications show that the judgment may be moulded so as to conform to the rights of the parties under the law, and by analogy support the view we take. Thus, in Peck v. Jenness, 7 How. [48 U. S. 612,] where the plaintiff attached goods of his debtor before the latter was proceeded against in bankruptcy, and where, pending the action, the debtor was discharged, the supreme court of the United States held that it was competent and proper for the court to render a judgment, notwitstanding the discharge, for amount of the debt, damages and costs, "to be levied only of the goods of the defendant attached on plaintiff's writ, and not otherwise." "The books," says Mr. Justice Grier, in this case, "are full of precedents for such a judgment. When an administrator pleads plene administravit, the plaintiff may

admit the plea, and take judgment of assets, quando acciderint. When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the plea and have judgment, to be levied only of defendant's future effects." [Peck v. Jenness] 7 How. [48 U. S.] 623. So, subsequently, the supreme court held that when contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars. Bronson v. Rodes, 7 Wall. [74 U. S.] 229.

Upon the whole, our judgment is that the action is well brought against the county; that the county may make defense, but if the plaintiff shall be found entitled to recover, he may have judgment against the county for his debt, damages and costs, to be enforced, if necessary, by mandamus against the county court, or the judges thereof, to compel them to levy and collect a special tax according to the statute in such case provided, and not otherwise. Demurrer overruled.

NOTE. The principle that debts incurred by or in the name of a public or quasi corporation, under legislative authority, cannot under any circumstances be enforced against the private property of the inhabitants, has recently been decided by the supreme court of the United States, in the case of Rees v. City of Watertown (which went up from Wisconsin) 19 Wall. [86 U. S. 107.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

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