

election, and not the certificate of the result, which confers the right, and that right may be enforced without the official certificate as effectively as with it. Paine, Elect. § 625, note 2, and authorities there cited. The assent of the voters of this township to the compromise upon which these bonds were based could not have been withdrawn by the failure of the county commissioners to ascertain and declare the fact, and, as the assent was all that was required to validate the bonds, they are not void.

3. We cannot assent to the proposition that the board of county commissioners was required to canvass the returns or declare the result of this election. That conclusion was only reached by importing into the act of 1879 the provision of the act of 1875, which declares that an election held under the latter act shall be conducted and the returns thereof ascertained in the manner prescribed by law for holding general elections, and by then citing the general law which requires the board of county commissioners to canvass the returns for general elections for state, county, and township officers. The act of 1879 contains no such provision. It is not an amendment of any other act or law, and it is complete and efficacious in itself. It imposes upon the township officers the duty of calling and holding the election and the duty of issuing the bonds. They must count the votes and ascertain the result in any event, and no reason is perceived why a provision from another law which would require them to return to the board of county commissioners a statement of the result which they had found, for the sole purpose of enabling that board to read this statement and certify back to them the same result, should be read into this law after the legislature wisely, and we must presume purposely, omitted it. When the legislature of Kansas by the act of 1879 imposed upon this township the duty of calling and holding the election, it undoubtedly intended to impose upon them the duty of canvassing the returns and declaring the result. People v. Dutcher, 56 Ill. 144, 147. The judgment below is reversed, and the case is remanded to the court below, with directions to render judgment for the plaintiff in error for the amount claimed in her petition.

DEUEL COUNTY, NEB., et al. v. FIRST NAT. BANK OF BUCHANAN
COUNTY, MO.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1898.)

No. 975.

1. **MANDAMUS—TO COMPEL TAX TO PAY JUDGMENT.**

The federal courts may issue writs of mandamus to compel the levy of a tax to pay judgments which they have rendered against counties or other municipal corporations, when, by the laws of the state, it is expressly or impliedly made the duty of the officers of such municipalities to make provision for the payment of such judgments by an exercise of the power of taxation.

2. **SAME.**

Where, by the laws of Nebraska, it is made the duty of county officials to levy a tax to pay all judgments against their respective counties, when such

judgments remain unpaid for want of sufficient funds a prima facie right to mandamus is made out by an information which alleges the recovery of a judgment against a county, and the failure of the county officials to pay it, or take any steps looking to its payment.

3. SAME—APPORTIONMENT OF REVENUE.

When, as under Code Neb. 1875, art. 9, § 5, the county authorities are prohibited from levying a tax in excess of a certain amount, for all purposes, and the estimate of expenses is sufficient to exhaust the revenue, where such expenses can be reduced by judicious management, and a portion of the revenues applied to the payment of judgment creditors, that course ought to be pursued, and the court may, by mandamus, require that it shall be pursued.

In Error to the Circuit Court of the United States for the District of Nebraska.

This is a proceeding by mandamus, which was brought to compel the levy of a tax to pay a judgment in the sum of \$5,102.40, with accrued interest and costs, which was recovered by the First National Bank of Buchanan County, St. Joseph, Mo., the defendant in error, against the county of Deuel et al., the plaintiffs in error, in the circuit court of the United States for the district of Nebraska, on July 1, 1896. The Consolidated Statutes of Nebraska of 1893, at pages 977, 978, contain the following provisions relative to the collection of judgments against counties which appear to be still in force:

"4112. That whenever any judgment shall be obtained in any court of competent jurisdiction in this territory for the payment of a sum of money against any county, * * * or against any municipal corporation, or when any such judgment has been recovered and now remains unpaid, it shall be the duty of the county commissioners, * * * city council, or other corporate officers, as the case may require, to make provisions for the prompt payment of the same.

"4113. If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remaining unpaid, it shall be the duty of the proper officers of the corporation against which any such judgment shall have been obtained and remaining unsatisfied, to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments.

"4114. The tax shall be levied upon all the taxable property in the district, county, township, town, or city, bound by the judgment, and shall be collected in the same manner and at the same time provided by law for the collection of other taxes.

"4115. The corporate officers whose duty it is to levy and collect taxes for the payment of the current expenses of any such corporation against which a judgment may be so obtained, shall also be required to levy and collect the special tax herein provided for, for the payment of judgments.

"4116. If any such corporate authorities whose duty it is, under the provisions of this act, to so levy and collect the tax necessary to pay off any such judgment shall fail, refuse, or neglect to make provisions for the immediate payment of such judgment, after request made by the owner, or any person having an interest therein, * * * he or they having such interest may apply to the district court of the county in which the judgment is obtained, or to the judge thereof in vacation, for a writ of mandamus to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness, as provided in this act; and when a proper showing is made by the applicant for said writ, it shall be the duty of the court or judge, as the case may be, to grant and issue the writ to the delinquents, and the proceedings to be had in the premises shall conform to the rules and practice of said court, and the laws of this territory in such cases made and provided."

The respondents below, who are the plaintiffs in error here, filed a motion to quash the alternative writ of mandamus, which motion was overruled. Subsequently they filed an answer or return to the writ. A motion was made to strike out parts of the return, but the record does not disclose any action with reference to said motion. The cause was submitted to the circuit court upon the pleadings, "together with all the evidences," as the record recites, and the

trial judge made a special finding of the facts, upon which he awarded a peremptory writ, directing the levy of a tax for the year 1897 sufficient to pay one-third of the relator's judgment. To vacate this order the respondents below have sued out a writ of error.

W. T. Wilcox and John J. Halligan, for plaintiffs in error.
Alfred Hazlett and F. N. Prout, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The questions open for review in this court upon the present record are: First, whether the motion to quash the alternative writ of mandamus was properly overruled; and, second, whether a peremptory writ of mandamus was properly awarded on the facts found and reported by the trial judge.

The principal ground urged by the respondents below in support of their motion to quash the alternative writ of mandamus is that, as the authority to issue a writ of mandamus against a county must be found in the laws of the state, and as the laws of the state of Nebraska quoted above only authorize an application for a writ of mandamus against a county to be made to a particular court, to wit, the district court of the county, the circuit court of the United States had no right to entertain the application for a writ of mandamus, and in granting it acted wholly without jurisdiction. With reference to this contention it is only necessary to say that it has long been settled that the federal courts may issue writs of mandamus to compel the levy of a tax to pay judgments which they have rendered against counties or other municipal corporations, when, by the laws of the state, it is expressly or impliedly made the duty of the officers of such municipalities to make provision for the payment of such judgments by an exercise of the power of taxation. This power has been exercised repeatedly by the federal courts, and of its existence at the present time there can be no reasonable doubt. If the courts of Nebraska can compel the officers of a county to levy a tax to pay a judgment rendered against a county,—as they doubtless may do,—then the circuit court of the United States for the district of Nebraska can exercise a similar jurisdiction to compel the payment of a judgment by it rendered. *Stryker v. Board*, 40 U. S. App. 585, 599, 23 C. C. A. 286, and 77 Fed. 567; *Riggs v. Johnson Co.*, 6 Wall. 166; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Butz v. City of Muscatine*, 8 Wall. 575, 581; *U. S. v. New Orleans*, 98 U. S. 381, 393; *Loan Ass'n v. Topeka*, 20 Wall. 660; *Wolff v. New Orleans*, 103 U. S. 358; *U. S. v. Clark Co.*, 96 U. S. 216; *Ralls Co. Ct. v. U. S.*, 105 U. S. 733.

Another ground upon which the motion to quash appears to have been based was as follows: That the information upon which the alternative writ had been obtained was fatally defective, in that it did not show the nature of the original cause of action on which the judgment was founded, so that the court could decide whether,

under the laws of the state, the right existed to compel an exercise of the power of taxation for its payment. This position, however, must be regarded as untenable, for the reason that the federal courts take judicial notice of the general laws of the several states, and by the laws of Nebraska it is made the duty of county officials to levy a tax to pay all judgments which are recovered against their respective counties, when such judgments remain unpaid for want of sufficient funds wherewith to pay them. A prima facie right to a writ of mandamus was, therefore, made out by the information, which alleged the recovery of a judgment against Deuel county, and the failure of the county officials of that county to pay it, or to take any steps looking to its payment.

The constitution of Nebraska adopted in 1875 (article 9, § 5), which is still in force, provided, in substance, that county authorities should never assess taxes for county purposes the aggregate of which should exceed \$1.50 per \$100 valuation, except for the payment of indebtedness existing at the adoption of the constitution, unless otherwise authorized by a popular vote. This limitation, it seems, was applicable to the indebtedness represented by the relator's judgment. In view of that provision of the organic law, the trial court found, in substance, that on January 12, 1897, the board of county commissioners of the county of Deuel met, as required by law, for the purpose of making their annual estimate of the expenses of the county for that year; that the relator's attorney was present, and requested the board to include in their annual estimate of expenses the amount requisite to pay the relator's judgment, interest, and costs; that such request was denied, and that said board failed to include in said estimate any sum whatsoever for the payment of said judgment. It further found that the assessed valuation of county property for the year 1896 was \$836,467, that the estimated assessed value of county property for the year 1897 would not exceed the valuation for the year 1896, and that the estimated county expenses as fixed by the board in January, 1897, amounted to \$14,370. It further found that it would be burdensome on the taxpayers of said county if the board of commissioners was obliged to levy a tax sufficient to pay off the entire amount of the relator's judgment, interest, and costs, in addition to the necessary current expenses of the county for the year, but that it would not be burdensome to levy a tax sufficient to pay one-third of said judgment, interest, and costs. It accordingly concluded as a matter of law that it was the duty of the board of county commissioners to have included in their estimate of the expenses of said county for the year 1897 the amount of the relator's judgment, and it therefore ordered a levy of taxes for the year 1897 adequate to pay one-third of said judgment and the accrued costs, amounting in the aggregate to the sum of \$1,872.49. Such action on the part of the trial court necessarily required the board of county commissioners to appropriate to the payment of the relator's judgment a portion of the county revenue for the year 1897, which the board had intended to apply exclusively to the discharge of the

estimated county expenses, inasmuch as a levy of 1½ per cent. on the assessed valuation of county property would not produce a fund adequate to pay one-third of the relator's judgment and the other estimated expenses. It is strenuously urged that this was an unauthorized interference with a discretionary power vested in the board of county commissioners. The supreme court of Nebraska, however, in *State v. Weir*, 33 Neb. 35, 39, 49 N. W. 785, has decided, in effect, that a board of county commissioners in that state may be compelled by mandamus to appropriate a part of the county revenue to the payment of a judgment against the county, notwithstanding the fact that the other estimated expenses are enough to absorb the entire revenue, provided the amount devoted to such object is not so large as to leave the county board practically without means to meet the necessary current expenses of the county government. The court in that case remarked, in substance, that, if such control could not be exercised over the action of the board, then it would be entirely feasible for the board to exhaust all the revenues of the county in the payment of current expenses, without making any provision for the payment of the just indebtedness of the county already incurred, and that by this means judgment creditors might be deprived of all means of enforcing the payment of their claims. We do not understand that the doctrine enunciated in the case last cited has been overruled or disturbed by the recent decision in the case of *State v. Sheldon* (Neb.) 73 N. W. 694. It seems to us to be an entirely just and reasonable view that boards of county commissioners, under the laws of Nebraska, are not vested with such an absolute control over the disposition of the county revenues as will enable them to defeat the claims of judgment creditors by swelling the estimate for county expenses to such a sum as will exhaust the entire county revenue for a given year, or a series of years. If a judgment is recovered against a county, its board of commissioners ought to make a fair effort to pay it,—if need be, by cutting down to some extent the outlay for current expenses. Such expenses, by judicious management, are usually capable of being reduced to some extent without serious injury to the public service; and when they can be so reduced, and a portion of the current revenue applied to the payment of judgment creditors, that course ought to be pursued, and the courts may properly require that it shall be pursued. In view of the special finding of facts contained in the present record, we understand that the trial court was satisfied by the evidence that the public would suffer no harm, and that the board of county commissioners of the defendant county would not be seriously embarrassed in maintaining the county government, if enough of the current revenue for the year 1897 to pay one-third of the relator's judgment was applied to that purpose. We must accept that finding by the trial court as conclusive, and it results therefrom that the judgment awarding a peremptory writ should be affirmed. It is so ordered.

JOHNSON et al. v. C. & N. W. SAND & GRAVEL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1897.)

No. 435.

1. TRESPASS—DAMAGES TO THE FREEHOLD.

An action of trespass, or trespass on the case, to recover damages for injury to the freehold, or for severance and conversion of a portion of the freehold, cannot be maintained by the true owner, out of possession, against one in open, notorious, exclusive, adverse, and hostile possession, claiming under color of title.

2. SAME—TITLE.

In an action of trespass, or trespass on the case, the courts are not at liberty to try the title to land, and therefore cannot decree that the possession of the defendant has ripened into a perfect title.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The plaintiffs in error, deriving title as heirs at law of Francis Johnson, deceased, on September 18, 1893, filed their præcipe for a summons in a plea of trespass, to recover certain sand and gravel taken from their lands by the defendants in error, and by them converted to their use. In 1858 Francis Johnson acquired title, through mesne conveyances from the government, to sections 26, 27, 34, and 35 in town 46 N., of range 12 E. of the third P. M., Lake county, Ill.—four miles northeast of the city of Waukegan. Section 26 has a frontage of one-quarter of a mile, and section 35, which lies immediately south of section 26, a frontage of one-half mile, on Lake Michigan. Sections 27 and 34 do not reach to the lake. Francis Johnson died intestate in August, 1860, leaving the plaintiffs in error (and a daughter, who afterwards, and before this suit, died unmarried, intestate, leaving no descendants), his only heirs at law. The premises in question had never been actually possessed by Francis Johnson, or by any of his heirs, up to the time that the grantors of the defendants in error took possession. As hereafter stated, the lands were unoccupied and unfenced. There were no buildings upon them. They were not fit for cultivation, being mainly sand and gravel washed up from the lake, and in small part swamp-grass land, with a little scrub-oak timber, fit only for firewood. On September 30, 1892, the plaintiffs in error conveyed their respective interests in these lands to James B. Hobbs. The deed contained a recital that it should not be construed to have the effect to transfer to the grantee any claim or right of action that the grantors, or either of them, had against any corporation or person for rents and profits of the premises prior to August 25, 1892, or any claim or right of action for waste upon the premises, or damage for injury thereto by taking and carrying away sand and gravel, or otherwise, prior to August 28, 1892. The original declaration contained two counts in trespass. On September 9, 1895, an amended declaration was filed, containing two counts, the first of which, after stating that the plaintiffs were seised in fee of the premises on the 1st day of November, 1888, charged that on that day, and on each day thereafter until October 1, 1892, the defendants entered upon the said premises, "and then and there, with a large force of men, with tools, rakes, shovels, wheelbarrows, and other instruments, and machinery, tramways, and cars moved by hand, with animal power, and steam engines, took and carried away large quantities of said sand and gravel, to wit, ten carloads each and every day, the property of the plaintiffs, being then and there of great value, to wit, of the value of \$100,000; and the defendants then and there seized, took, and carried the same away, and converted the same to their own use." The second count charges that on the day, and each of the days, and during all the time and at the place in the last count mentioned, the plaintiffs were the owners, as tenants in common in freehold, of the same land and premises, and that "the said defendants then and there, in and upon said premises, seized, took, and carried away, by the means and in the manner mentioned in the above count, divers other large quantities of sand and gravel, water-washed and of superior quality, to wit, thirty thousand car loads, each