debts, — as for example, railway aid bonds, — and there is no valid defence alleged or claimed, and no question made as to the genuineness of the bonds or coupons, and they are in the possession of the relator, that a prior judgment at law was not essential to give the right to a *mandamus* to compel the proper officers to levy and collect the tax.[1] Undoubtedly, in such cases the court *may* award the writ without a prior judgment; but if there is any doubt as to the validity of the debt, the court may well decline to grant the writ until applied for to enforce a judgment obtained. And in the Federal court, as we shall presently see, there must be a prior judgment.[2]

§ 854. **Right of Creditor as depending on Legislation at the Date of the Creation of the Debt.** — In ascertaining *the rights and remedies of municipal creditors* special reference must always be had to the legislation under which the debts were created. If the legislature authorizes the creation of a debt, and provides no special mode for its payment, it is a sound proposition that it was intended that it should be paid in the usual way in which such debts are paid, viz., by the levy and collection of a tax for that purpose, if there is nothing to rebut such intention.[3]

In respect of railway aid bonds of municipal and public corporations, the settled rule of law is that the power to issue them must be expressly conferred; and in the legislative act conferring it, or in the general legislation of the State concerning the subject, express provision is usually made, authorizing or requiring the levy and collection of taxes, or of a special tax, to pay the debt thus created. Such provisions are of great consequence, and have often

[1] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859); Maddox *v.* Graham, 2 Met. (Ky.) 56 (1859): State *v.* Clinton Co. Comm'rs, 6 Ohio St. 280, 287 (1856); Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277 (1860); Columbia Co. Comm'rs *v.* King, 13 Fla. 451; Rahway Sav. Inst. *v.* Rahway, 49 N. J. L. 384. See State *v.* Davenport, 12 Iowa, 335, where the point was left open.

What the relator, who is the *holder of bonds* issued by a municipal corporation under express authority of the legislature, *must show in order to entitle him to a mandamus* against the corporation to compel it to levy and collect a tax to pay such bonds, see Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859), where it is fully considered; Commonwealth *v.* Allegheny County, 32 Pa. St. 218; Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277 (1860); State *v.* Milwaukee, 20 Wis. 87.

In The State *v.* Clinton Co. Comm'rs, 6 Ohio St. 280, 287 (1856), it is held that an agreement of the railroad company to pay the interest on the bonds of the county is collateral, and does not relieve the county from primary liability to the holder. Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859).

[2] *Post*, secs. 856, 860.

[3] United States *v.* New Orleans, 98 U. S. 391; Kelley *v.* Milan, 127 U. S. 139, 150; Norton *v.* Dyersburg, 127 U. S. 160; *supra*, sec. 851, and note.

proved to be the sole ultimate legal reliance of the creditor; and they are so far connected with the obligation of the contract as to come under the protection of the Federal Constitution, and hence they cannot be impaired by subsequent legislation.[1] The doctrine, where the act authorizing the issue of the bonds contains a provision for the levy and collection of a special tax to pay the same, that such provision enters into and becomes a part of the contract with the creditor, which cannot be repealed by the legislature without substituting a remedy legally equivalent or equally efficacious, or be otherwise impaired, has been recently re-asserted by the Supreme Court of the United States, under circumstances which impressively show that this tribunal not only recognizes but means to enforce it whenever and so far as it has the power to do so.[2]

[1] Von Hoffman *v.* Quincy, 4 Wall. 535, is the leading case on this point, but there are numerous others in which the principle has been applied, which are cited and referred to. *Ante*, secs. 69, 70.

[2] Seibert *v.* Lewis (*mandamus* to levy and collect taxes), 122 U. S. 284 (1886). In this case the Missouri Act of March 23, 1868, which authorized the issue of the bonds, provided "that in order to pay the interest and principal thereof, the county court [of the county issuing the bonds] shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax" upon the taxable property of the township making the subscription. Under this provision, and long prior to 1879, bonds were issued and negotiated. Subsequently (March 8, 1879), the legislature passed an act, known as the "Cottey Act," repealing the provisions in the Act of 1868 giving the creditor the aforementioned right to a special tax, and substituting a provision to the effect that State taxes, taxes for current county expenditures and for schools, should be levied as theretofore, but that no other tax, which would include taxes to pay these bonds, should be levied except upon petition and an order of the Circuit Court of the county, or the judge in vacation, and making it penal for any county officer to levy or collect such taxes without such order of the circuit court or judge.

After the Act of March 8, 1879, the relator obtained judgment in the Circuit Court of the United States on bonds issued prior to that act, and applied therein for a writ of *mandamus* to collect a special tax pursuant to the Act of March 23, 1868. The county officers resisted the application, on the ground that the Act of 1868 was repealed by the Act of 1879, which made it penal for its officers to undertake the collection of taxes pursuant to the Act of 1868; and upon the further ground that the State Circuit Court had enjoined the county officers from the levy and collection of taxes pursuant to the Act of 1868, and that its action in this respect had been affirmed by the Supreme Court of the State, which had decided that there was no authority to levy or collect taxes except pursuant to the Act of 1879, and that it was illegal to attempt it. The county, therefore, claimed that the Circuit Court of the United States had no power to command it or its officers to do an illegal act. But the Supreme Court of the United States, in Seibert *v.* Lewis, *supra*, held that the provision in the act authorizing the issue of the bonds, giving to the bondholder the right to the levy and collection of a special tax in the same manner as county taxes, entered into and constituted a material part of the contract with the creditor; that, although it was competent for the legislature of the State to change or modify the revenue laws, yet this could not be done unless the substituted remedy was legally equivalent, — that is, as efficacious as the repealed provision; that, in this case, the Act of 1879, which discriminated against this class of indebtedness, and in the place of the repealed provisions substituted a remedy clogged with limita-

§ 855. **Remedy of Bondholder is by Mandamus, and not in Equity.** — The proper mode of enforcing or compelling the performance of the duty of levying and collecting taxes in such cases is by *mandamus*, and not by a bill in equity. This was first decided by the United States Supreme Court in Walkley *v.* Muscatine;[1] and that tribunal subsequently,[2] under circumstances which made a strong appeal to its sense of justice, has reaffirmed the principle, and refused to exercise *equity jurisdiction* over a repudiating municipality to compel it to pay a judgment which the process of *mandamus* had proved (by reason of successive resignations of the municipal officers,

tions and conditions which seriously embarrassed and delayed the creditor, was not a legal equivalent to the creditor for the provisions in his behalf contained in the repealed statute; and that the result was that the Act of 1868 was still in force for the purpose of levying and collecting the tax necessary for the payment of the relator's judgment. The Supreme Court declined to follow the contrary judgment of the Supreme Court of *Missouri* on the point, and ordered a peremptory writ for the collection of the taxes, in accordance with the law under which the bonds were issued, and disregarded the intermediate injunction of the State courts. To the objection that such action on the part of the Federal court was in violation of the laws of the State as contained in the Act of 1879, the Supreme Court of the United States said: "The question is not whether a tax shall be levied in *Missouri* without the authority of its law, but which of several of its laws are in force and govern the case;" and its judgment was that the Act of 1868 was in force so far as necessary to pay the relator's judgment, and that to order a tax to be levied and collected in pursuance thereof was not to order a tax to be levied and collected contrary to, but in accordance with, the laws of the State of *Missouri* as applicable to relator's case.

The Circuit Court of the United States had previously held that the said Act of March 8, 1879, known as the "Cottey Act," if it could be construed as applicable to judgments rendered in the Federal court, was, as to bonds issued prior thereto, in conflict with the Constitution of the United States, which prohibits a State from impairing the obligation of contracts, and had ordered writs of *mandamus* pursuant to the laws in force at the time when the bonds were issued. United States *v.* Lincoln County, 5 Dillon, 184; United States *v.* Johnson County, *Ib.*, 207, note.

[1] Walkley *v.* Muscatine, 6 Wall. 481 (1867); *supra*, sec. 850; *infra*, sec. 861 *a*.

[2] Rees *v.* Watertown, 19 Wall. 107 (1873); followed and affirmed in Heine *v.* The Levee Comm'rs, 19 Wall. 655; *ante*, sec. 851. The principle that a *court of equity cannot enforce the levy and collection of taxes* to pay the debts of municipal corporations, first decided in Walkley *v.* Muscatine, was re-asserted in Rees *v.* Watertown; Heine *v.* The Levee Comm'rs; Barkley *v.* Levee Comm'rs, 93 U. S. 258, and is re-affirmed in Thompson *v.* Allen County, 115 U. S. 550 (1885), where it was held that *mandamus* was the remedy, and that *equity had no jurisdiction to collect taxes through a receiver appointed by it*, even though no public officer with authority from the legislature to perform the duty can be found, or person who would accept the office.

It seems to the author to be the result of the cases in the Supreme Court of the United States, taking them together, that the levy and collection of taxes cannot be enforced in or by the Federal Circuit Courts exercising equity jurisdiction, but only by appropriate remedies in a court of law, namely, by actions to recover judgments and the enforcement of such judgments by *mandamus*. *Ante*, sec. 170, and cases cited and comments thereon. How far cases like Mount Pleasant *v.* Beckwith, 100 U. S. 514, are an exception to this rule is not very clear. *Post*, secs. 861 *a*, 861 *b*.

Rights of creditors, see *ante*, chaps. iv., vii., and viii.

aided by the character of the legislation of the State), for a period of fourteen years, ineffectual to enforce. The court reasserted the doctrine that *the regular and appropriate remedy of the creditor is the writ of mandamus;* and declared that in legal contemplation, judged by its nature and ordinary results, and not by its failure in exceptional cases, it was an adequate remedy, and that the difficulty of its execution in a particular instance afforded no sufficient ground for equitable jurisdiction.

§ 856. **Remedy in Federal Court; Prior Judgment required; Course of Procedure.** — The remedy of the municipal or county bondholder *in the Federal courts is to sue at law and obtain a judgment* to establish the validity and amount of his debt.[1] Thereupon it is usual to issue execution, if the corporate debtor *can* by law have property subject to execution. On a return of the writ *nulla bona* or unsatisfied, application is made upon an information or relation under oath reciting these facts for a *mandamus* to compel the levy and collection of a tax to pay the judgment. But if the bondholder is by the statute expressly entitled to a levy of a *special* tax to pay such judgment, and if the duty of levying it has been neglected or refused, it is not necessary that an execution should in such case be returned *nulla bona* in order to give such judgment creditor the right to a *mandamus*. As the course of procedure in the Federal courts is in such cases assimilated to that at common law, and is not controlled by State statutes, a *demand* of the respondent and a *refusal* must be shown, or circumstances which will dispense with the demand. When a demand is made, it should be upon the corporation, or the particular officers whose duty it is, and who have the legal power, to comply

[1] Heine *v.* The Levee Comm'rs, 19 Wall. 655, 657 (1873); Queensbury *v.* Culver, 19 Wall. 83, 92. In such cases the Federal courts have no power to issue a writ of *mandamus* as an *original* proceeding, and hence a bondholder cannot (as it is held in some of the State courts he may do under certain circumstances), *before* putting his claim into judgment, apply for a *mandamus*. In the Federal court he *must*, as stated in the text, first obtain his judgment. Bath County *v.* Amy, 13 Wall. 244 (1871); *post*, sec. 860. Then, upon making the proper relation, he becomes entitled, under what was sec. 14 of the Judiciary Act (now Rev. Stats. sec. 716) to a writ of *mandamus*, as the appropriate remedy to enforce his judgment. It is, when thus issued, the *final process* to enforce the judgment, and performs, in substance, against municipal corporate debtors the office of a writ of execution, with the operation of which the State courts can no more interfere than they can with the other process of the Federal courts. These are settled principles in the jurisprudence of the United States. The leading case is Riggs *v.* Johnson County, 6 Wall. 166 (1867), and its doctrines have been frequently re-asserted and applied. *Post*, sec. 861, note. The Circuit Court of the United States cannot acquire jurisdiction of a *mandamus* suit to compel levy of taxes, *by way of removal from the State court*, under the Act of 1875 and Rev. Stats. U. S. sec. 716. Rosenbaum *v.* Bauer, 120 U. S. 450 (1886), three judges dissenting.

therewith, and the demand should be for the performance of the exact duty due to the creditor; as, for example, to levy and collect the necessary tax. It is probable that an execution issued and a demand upon the proper officers thereunder for payment, would ordinarily be treated as a demand to levy a tax, as it would then, we think, become the duty of the officers to levy the proper tax. At all events, such an effect is in practice usually ascribed to an execution. The prudent and very cautious practitioner would accompany the writ of execution with a specific written demand to levy and collect the tax, and have it served at the same time with the writ of *mandamus*, the service whereof should be upon *the* officers upon whom the legal duty rests to do the act demanded.[1]

§ 857 (689). **Creditor entitled to enforce full Exercise of Power.** — Although there may be a *discretion* in the city council *as to the amount of tax* which they are authorized to levy for ordinary purposes, yet a creditor who has obtained judgment is entitled to have the whole power of the corporation exerted, if it be necessary, for the payment of his judgment.[2] So where an act of the legislature provided that the city council "*may, if it believe* that the public good and best interests of the city require" it, levy a tax to pay its funded debt, a judgment creditor on a debt of this character may, by *mandamus*, compel it to levy a tax if it refuses to do so.[3] So, also, where an act of the legislature declared that the "board of supervisors of counties owing debts which their current revenue, under existing law, is not sufficient to pay *may, if deemed advisable*, levy a special tax, to be used in liquidation of such indebtedness," the Supreme Court of the United States held that this power was mandatory, if its exercise was necessary in order to pay judgments rendered against the county.[4] The court places the decision upon the principle that where power is given to public officers, though conferred in language which is permissive in form, it will be regarded as peremptorily imposing a positive and absolute duty, whenever public interests and individual rights call of right for its exercise, and distinguishes the case from those which involve the exercise of a discretion judicial in its nature, and which the courts cannot control.[1]

[1] The course of procedure here outlined is stated upon the author's knowledge of it in the Eighth Federal Circuit, and it is believed to be substantially coincident with the practice in the other circuits.

[2] Coy *v.* Lyons, 17 Iowa, 1 (1864); Butz *v.* Muscatine, 8 Wall. 575 (1869), denying Clark *v.* Davenport, 14 Iowa, 494; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, 513, 517 (1859). *As to limitation on rate or amount of taxation*, see Butz *v.* Muscatine, *supra;* Iowa Railroad Land Co. *v.* Sac Co., 39 Iowa, 124 (1874); *ante*, secs. 162, 851; *ante*, chap. xix. on Taxation; Britton *v.* Platte City, 2 Dillon C. C. 1 (1871).

[3] Galena *v.* Amy, 5 Wall. 705 (1866).

[4] Rock Island Co. Sup. *v.* United States, 4 Wall. 435 (1866); s. p. Robinson *v.* Butte Co. Sup., 43 Cal. 353 (1872); State *v.* New Orleans, 30 La. An. 129; Memphis *v.* Brown, 97 U. S. 300 (1877); United States *v.* Memphis, 97 U. S. 284 (1877); Memphis *v.* United States, 97 U. S. 293 (1877). In the case of Memphis *v.* Brown, *supra*, a creditor, having a decree against the city of Memphis for the payment of money, obtained in March, 1875, a *mandamus*, commanding it to levy upon all the taxable property of the city a tax sufficient in amount to pay the decree, which proceeding was authorized by the laws of the State. The city thereupon passed an ordinance levying a special tax, in professed conformity with the writ. The creditor, finding that such special tax did not include merchants' capital, which, under the laws of the State, was taxable for general purposes, and that the required sum would not be raised, moved for a further peremptory *mandamus*, commanding that such merchants' capital, assessed and returned for taxation for the year 1875, be included by the city within the property to be taxed for the payment of the decree, in accordance with the original writ. The court awarded the writ accordingly. It was held by the Supreme Court that the *mandamus* to compel the city to levy and collect the tax for the payment of the decree was process in the nature of an execution, and that the court below rightfully exercised control over it in deciding that its order to levy a tax upon all the property of the city included the capital of merchants taxable under the laws of the State for general purposes.

§ 858 (690). **Officers compelled, if necessary, to meet to levy the Required Tax.** — If the municipal officers *fail or neglect to perform the duty of levying a tax at the annual or regular meeting*, they may be compelled by *mandamus* to meet again and do their duty, the same as if it had been performed at the proper time and place, and this without the aid of any special legislative enactment.[2] In Arkansas while it is admitted by the Supreme Court of the State that the Federal courts may in proper cases, by *mandamus*, compel county courts therein to levy taxes to pay judgments rendered in the Federal courts, yet it is denied that this writ, under the Constitution and laws of that State, can command the county court to convene for this purpose at a *time* not authorized by law, as the meeting of the court at such a time would not be a lawful meeting, and its acts would be *coram non judice*. The reason for this conclusion, as given by Chief-Justice English, is that the writ of *mandamus* "cannot impart power to the county court; it can only enforce the exercise of power conferred upon it by the laws of the State."[3]

§ 859 (691). **Liability to Private Action by the Creditor for Neglect of Duty.** — On the ground that where the law absolutely requires a ministerial act to be done by a public officer, and he neglects or

[1] As to mandatory and discretionary powers, see further, *ante*, sec. 98; *supra*, sec. 832; People *v.* Albany Co. Sup., 12 Johns. (N. Y.) 416.

[2] People *v.* Chenango Co. Sup., 8 N. Y. 317, 330 (1853), and prior cases in that State, cited by *Willard*, J.

[3] Graham *v.* Parham, 32 Ark. 676 (1878).

refuses to do it without sufficient legal excuse, he is *liable in a private action to the person injured by his misconduct*, the Supreme Court of the United States held, where a judgment creditor of a public corporation had procured a peremptory *mandamus* to county supervisors to levy a tax sufficient to pay his judgment, which they refused or neglected to obey, that they were liable to him in a civil action in damages to the extent of the injury thereby occasioned. The court observed that honest intentions or a mistake as to their duty would constitute no defence to such an action; but it gave no opinion as to the rule by which to measure the damages, that is, whether the plaintiff would be limited in his recovery to the actual injury sustained, or whether his recovery would be the amount of his judgment, with interest.[1]

§ 860 (692). **Jurisdiction of Circuit Courts of the United States in Mandamus; Prior Judgment required.** — The *power to issue the writ of mandamus*, as an original and independent proceeding, has not been conferred by the Judiciary Act of 1789 upon the Circuit Courts of the United States, and these courts are by that act and its revisions authorized to issue this writ only when ancillary to a jurisdiction already acquired.[2] Applying this rule, the Supreme Court of the United States has decided that the holder of coupons attached to bonds issued by a public or municipal corporation, and which have not been put into judgment, is not entitled to a *mandamus* from the Federal Circuit Court to compel the levy and collection of a tax to pay such coupons.[3]

§ 861 (693). **Mandamus is in nature of Execution of Judgment; May issue to State Officers; Relation of Federal and State Courts.**

[1] Amy *v.* Des Moines Co. Sup., 11 Wall. 136 (1870). The refusal of the treasurer of a public corporation to pay a certified demand against the corporation will not, unless, perhaps, where it can be shown that the refusal was wilful, and that he had funds in his hands applicable to the purpose for which they were demanded, make the treasurer *personally responsible* in an action at law, and the appropriate remedy of the party injured is, by *mandamus*, to compel him to make payment. Huff *v.* Knapp, 5 N. Y. 65 (1851), affirming s. c. 3 Sandf. Superior C. R. 299. See Bartlett *v.* Crozier, 17 Johns. 439; People *v.* Lawrence, 6 Hill (N. Y.), 244; People *v.* Kelly, 5 Abb. New Cas. 383; *supra*, sec. 829, note. *Further, as to personal liability of public officers.* *Ante*, sec. 237, and note; *post*, sec. 910, note.

[2] McIntyre *v.* Wood, 7 Cranch, 504; McClung *v.* Silliman, 6 Wheat. 601; Kendall *v.* United States, 12 Pet. 584; Secretary of Int. *v.* McGarrahan, 9 Wall. 311; Bath County *v.* Amy, 13 Wall. 244 (1871). *Ante*, sec. 856.

[3] Bath County *v.* Amy, *supra;* Labette County Comm'rs *v.* Moulton, 112 U. S. 217 (1884); Rosenbaum *v.* Bauer, 120 U. S. 450; affirming 28 Fed. Rep. 223; Greene Co. *v.* Daniel, 102 U. S. 187; Davenport *v.* Dodge Co., 105 U. S. 237; Smith *v.* Bourbon County, 127 U. S. 105, 112 (1887). *Ante*, sec. 856; chap. xiv. on Contracts.

— But where the Circuit Court of the United States has rendered a judgment against a public or municipal corporation, it has the authority, under the fourteenth section of the Judiciary Act, and under the corresponding provision of the Revised Statutes, to issue the writ of *mandamus* where it is the appropriate remedy to enforce such judgment. By means of this writ, the Circuit Court of the United States may compel the officers of public and municipal corporations, though deriving their existence from State legislation, to perform their duty to levy and collect the necessary taxes to pay judgments rendered therein against such corporations. The writ of *mandamus*, when so issued, is the final process of the court for the enforcement of its judgment, and performs, in substance and effect, the office of a writ of execution. It is considered by the Supreme Court of the United States to be a writ necessary to render effectual the jurisdiction of the Circuit Court, which attached when the action was commenced, which existed when the judgment was rendered, and which continues until it is collected. It is a result of these principles, and of the nature of the relations of the Federal and State jurisdictions, that neither the State legislatures nor the State courts can enjoin, or in any manner interfere with, the Federal tribunals in the exercise of the power of enforcing their own judgments.[1] To enforce the payment of judgments rendered therein, the Federal courts, on the refusal of the State officers to levy taxes as commanded, have, in a few instances, *under special circumstances*, exercised, with reluctance, the high and delicate authority of appointing the United States marshal as a commissioner for that purpose. The decisions on this subject are referred to in the note to this and a subsequent section.[2] Taking the decisions of the Supreme Court

[1] Riggs *v.* Johnson County, 6 Wall. 166 (1867), which is the leading case on this subject. Approved and followed. Weber *v.* Lee County, *Ib.* 210; United States *v.* Keokuk, *Ib.* 514, 518; Washington Co. Sup. *v.* Durant, 9 Wall. 415; Davenport *v.* Lord, *Ib.* 409; Amy *v.* Des Moines Co. Sup., 11 Wall. 136 (1870); Knox Co. Comm'rs *v.* Aspinwall, 24 How. 376, 384 (1860); Seibert *v.* Lewis, 122 U. S. 284; United States *v.* Silverman, 4 Dillon, 224 (1878); State *v.* Rainey, 74 Mo. 229; Hill *v.* Scotland County, 32 Fed. Rep. 716; *ante*, chap. xiv. secs. 511–534.

Illustrative of the controversy between the Federal and State authority in Iowa, growing out of the municipal railway aid bonds. See Riggs *v.* Johnson County, 6 Wall. 166; Weber *v.* Lee County, *Ib.* 210; United States *v.* Keokuk, *Ib.* 514, 518; Lee County *v.* Rogers, 7 Wall. 181 (1868); *ante*, chap. xiv. secs. 511–553; Holman, *In re*, 28 Iowa, 88 (1869). In King *v.* Wilson, 1 Dillon C. C. 555 (1871), the history of the State adjudications in Iowa on the subject of municipal aid to railways is given. *Ante*, sec. 153.

[2] Lee Co. Sup. *v.* Rogers, 7 Wall. 175 (1868). The appointment of the marshal, in this case, as such commissioner, was considered to be authorized by the statute of the State (Revision of *Iowa* of 1860, sec. 3770) adopted in this particular case, and not by a general rule of practice. See also Lansing *v.* County Treasurer, 1 Dillon C. C. 522 (1870); Welch *v.* Ste. Gene-

together they appear to the author to establish that such a commissioner cannot be appointed without statutory authority therefor.

vieve, *Ib.* 130 (1871). See further on this point, *infra*, secs. 861 *a*, 861 *b*.

In Morgan *v.* Beloit, in the United States Circuit Court for *Wisconsin*, the question of the right of a judgment creditor of a municipality which would not levy and collect the necessary taxes to pay his judgment, *to resort to equity* for relief, was presented. The debt of the town, in that case, was incurred under a special act of the legislature, approved Feb. 10, 1853, authorizing the town of Beloit to issue bonds in aid of a railroad, and the third section of the act provided that "the board of supervisors of the town of Beloit, *whenever the same shall become necessary, shall annually levy a tax upon the taxable property of said town*, sufficient to pay the interest upon such bonds, after deducting the dividends due to such town on said shares of stock." The complainant recovered a judgment in the Federal court in 1860, and a peremptory *mandamus* was issued in 1862, commanding the board to levy a tax to pay the judgment; but by repeated resignations, causing vacancies and want of quorum, no tax had ever been levied, and no attachments for contempt (as the bill alleged) could be had or made effectual. The bill made the town, in its *corporate capacity*, and its *inhabitants*, *defendants*, and asked for a decree subjecting the taxable property of the town and of the inhabitants to sale at auction by the marshal. A demurrer to the bill was sustained and the bill dismissed by *Miller*, District Judge, holding the Circuit Court. On appeal, the Supreme Court, after one argument, ordered a reargument upon this question: "Whether or not it is competent for the Circuit Court of the United States, on a bill filed for the purpose, to appoint a master or commissioner to levy and collect a tax, under and in pursuance of the third section of an act passed by the legislature of *Wisconsin*, Feb. 10, 1853, upon the taxable property of the town, sufficient to pay the judgment of the plaintiff, in case of a refusal of the supervisors of the town to levy the same, after service of a peremptory writ of *mandamus*." At the December term, 1869, the decree below, dismissing the bill, was affirmed by an equal division of opinion, there being at the time eight judges on the bench. No opinions were delivered, and no report of the case has been published. The arguments of counsel (Mr. Carpenter for the bill, and Messrs. Palmer and Ryan, *contra*) were mainly addressed to the question of *equity jurisdiction* in such a case, and the right to subject the *private property* of the inhabitants to the payment of the debts of the municipality. *Ante*, secs. 576, 849, note, 851, 855.

In Rees *v.* Watertown, in the Circuit Court of the United States for the Western District of *Wisconsin*, June term, 1872, the bill, which was similar to the one in the case of Morgan *v.* Beloit, *supra*, was dismissed. *Hopkins*, District Judge, expressing an opinion against the right claimed, and *Drummond*, Circuit Judge, in view of the diversity of opinion among the judges in Morgan's Case, concurring in that disposition of the matter. In Rees *v.* Watertown, 19 Wall. 107 (1873), the decree below was affirmed, and the Supreme Court denied the right of the creditor to resort to a court of equity, although the remedy by *mandamus*, in consequence of successive resignations of the municipal officers, had for years proved unavailing; and the same principle was applied in Heine *v.* Levee Comm'rs, 19 Wall. 655 (1873).

In Hubbell *v.* Waterloo, the Circuit Court of the United States for the Eastern District of *Wisconsin* (present *Drummond* and *Miller*, JJ.), in April, 1872, in an application in a *mandamus* proceeding supplemental to a judgment against the town of Waterloo for the appointment of the marshal as commissioner to levy and collect the taxes, which the local officers evaded, and refused (by successive resignations) to levy and collect, the judges were divided in opinion as to the power of the court to make the appointment, and the question was certified to the Supreme Court of the United States. Review of cases in the Supreme Court concerning the power and jurisdiction of equity in respect of the levy and collection of taxes,

Other Points concerning the Enforcement of Judgments in the Federal Courts.

§ 861 *a* (885). **Boutwell's Case; Case of City of Watertown.** — In the *enforcement of judgments on municipal bonds*, the creditors have encountered obstacles arising or supposed to arise from two decisions of the Supreme Court, — The United States *v.* Boutwell,[1]

and as to the general result thereof, see *ante*, secs. 170, 826, 855, and notes.

[1] United States *v.* Boutwell, 17 Wall. 604 (1873). The Supreme Court in its opinion says: "The office of a writ of *mandamus* is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of *mandamus* is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that, previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred. Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory *mandamus* be awarded, the costs must fall upon the defendant. It necessarily follows from this, that on the death or retirement from office of the original defendant the writ must abate, in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed, in the absence of some statute authorizing it On the contrary, after the statute of 9 Anne, chap. xx. sec. 1, it was the acknowledged doctrine in England that the rules and practice as to abatement by death, resignation, or removal from office were the same in cases of *mandamus* as in personal actions. By that statute it was enacted that the prosecutor or relator may plead to or traverse all or any of the material facts averred in the return, the defendant having liberty to reply, take issue, or demur; and it was directed that such further proceedings might be had as might have been had if the prosecutor had brought his action on the case for a false return. Thus *mandamus* became in effect a personal action against the defendant. This statute was in force in *Maryland* when the District of Columbia was a part of that State, and hence it is in force in the District now. Therefore, whatever may be the rule elsewhere, *here* a writ of *mandamus* must abate whenever the performance by the defendant of the personal duty it seeks to enforce has become impossible. The law was changed to some

and Rees *v.* City of Watertown.[1] The case against Mr. Boutwell arose when he was Secretary of the Treasury, and was an application in the inferior court for a *mandamus* to compel him to pay a certain order. The writ was refused, and a writ of error taken to the Supreme Court, after which Mr. Boutwell resigned and his successor was appointed. The Supreme Court refused the application to substitute the successor, and one ground of refusal was, that in the absence of a statute altering the common-law rule, the writ of *mandamus* abates by the death, *resignation*, or removal from office of the officer to whom it is directed. In the view of the court, the office of a writ of *mandamus* is to compel the performance of a personal duty resting on the respondent: "if he be an officer, and the duty an official one, still the writ is aimed exclusively against him as a person, and *he* only can be punished for disobedience; the writ does not reach the office and cannot be directed to it; it is the personal default of the defendant that warrants the impetration of the writ; it necessarily follows from this that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary." The burden of the reasoning of the Supreme Court is that the duty is personal, not official. But in fact and in substance, was not the duty which it was here sought to have Mr. Boutwell perform, official, and not personal? While the technical correctness of the court's views

extent in England by the later Act of Parliament of 1 William IV. chap. xxi. sec. 5, by which it was enacted that in case the return to any writ (of *mandamus*) within the purview of the act should, in pursuance of an allowance made by it, be expressed to be made on behalf of any other person than the defendant, the further proceedings on such writ should not abate or be discontinued by death, resignation, or removal from office of the person who made such return, but the same might be continued and carried on in the name of such person, and if a peremptory writ should be awarded, it might be directed to any successor of such person in office or right. No similar statute exists with us, and its enactment in England was a recognition of the rule that the death, resignation, or removal from office of the defendant worked an abatement of the action. It required a statute to change the rule; and, to avoid injustice, the costs of the writ, when issued and obeyed, were committed to the discretion of the court. If the retirement of the defendant from office, and his consequent inability to perform the act demanded to be done, does not abate the writ or necessitate its discontinuance, there is still an insuperable difficulty in the way of our directing the substitution asked for. We can exercise only appellate power. We have no original jurisdiction in the case. But any summons issued, or rule upon his successor requiring him to become a party to the suit, would be the exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor. Marbury *v.* Madison, Sec. State, 1 Cranch, 137; Kendall, Postm. Gen., *v.* United States, 12 Pet. 526; Secretary of Int. *v.* McGarrahan, 9 Wall. 313." Boutwell's Case followed; Wardin *v.* Chandler, Sec. Navy, 122 U. S. 643.

[1] Rees *v.* Watertown, 19 Wall. 107 (1873). *Ante*, secs. 170, 826, 855, and notes.

and conclusion cannot perhaps be impugned, they seem to savor of that refinement which formerly pervaded everywhere the common-law procedure, and in a striking degree the proceedings in *mandamus*.

The Supreme Court in the other case referred to[1] decided, in effect, these propositions: 1. That in the enforcement of his judgment against the municipality, the plaintiff was confined to his remedy at law by *mandamus* or otherwise, no ground of equity jurisdiction being made out. 2. That the neglect and refusal of the municipal officers to levy the taxes, their disobedience of the writs of *mandamus*, and their resignations to evade the duty of levying and collecting the taxes, did not authorize the court to appoint officers of its own to levy and collect them, denying, on this point, Welch *v.* Ste. Genevieve,[2] and distinguishing Supervisors *v.* Rogers,[3] and Lansing *v.* County Treasurer.[4] 3. That it was not competent for the court, in virtue of its general jurisdiction as a court of equity (there being *no individual liability* on the part of the taxpayers or inhabitants of the municipality to pay the debts of the corporation), itself to subject individual property within the corporation to pay the judgment, the exclusive remedy being by *mandamus* directed to the municipality or its proper officers, commanding *them* to levy and collect, under the powers vested in them in that behalf, the requisite taxes.[5]

[1] Rees *v.* Watertown, *supra*.

[2] Welch *v.* Ste. Genevieve, 1 Dillon C. C. R. 130.

[3] Lee Co. Sup. *v.* Rogers, 7 Wall. 175.

[4] Lansing *v.* County Treasurer, 1 Dillon C. C. R. 522.

[5] A direct effect of the decision in Rees *v.* Watertown, in connection with the protracted and successful evasion of the city of Watertown, was to encourage municipalities and counties elsewhere to adopt the same mode of escaping payment, viz., by successive and repeated resignations. This was practised to a considerable extent in the State of *Missouri* by several counties that were burdened with a large indebtedness; but it was measurably checked by the action of the executive of the State, Governor Hardin, in refusing to accept the resignation of the county court judges when he had good reason to believe that the resignation was tendered for this purpose.

The case of Lee Co. Sup. *v.* Rogers, 7 Wall. 175 (1868), in which the United States Circuit Court, after the county officers had evaded the law and disobeyed the peremptory writ, directed the *mandamus* to the *marshal* of the United States for the District of *Iowa*, commanding *him* to levy and collect the taxes named in the writ, and which was sustained by the Supreme Court, is declared in the Watertown Case to depend, in this respect, wholly upon a statute of the State of *Iowa* (Rev. of 1860, sec. 3770). That statute had no special reference to this class of cases, and was simply to the effect that the court, in cases of *mandamus*, "besides or instead of proceeding against the defendant by attachment, may direct that the *act* required to be done *may be done by the plaintiff or some other person appointed by the court*." The practice of the Federal court in *mandamus* cases is as at common law, and this statute had never been adopted by rule; but it was held "competent to adopt it in the particular case," and that it authorized the court to appoint a third person or officer of its own