214-246-247
113-114-115

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

APRIL TERM, 1860.

214.	MARTIN O. WALKER *ads.* THE CITY OF CHICAGO.	*Error to Superior Court of Chicago.*
247.	ROSENFELD & ROSENGERG *ads.* THE SAME.	*Same.*
246.	L. D. HURD *ads.* THE SAME.	*Same.*

DEFENDANTS' POINTS.

WALTER B. SCATES,

Of Counsel for Defendants.

Filed May 14, 1860
L. Leland
Clerk

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For the Defendants I submit the following points:

I.

The first point is fully set forth in the 6th point of the defendant's brief, in No. 273, *The City of Chicago* v. *P. T. Burtice et al.*, for want of jurisdiction in the Superior Court to hold a special term during the regular term of said Court.

No. 214.

I. The only point in this case is, as to the right to show by parol evidence, what the Commissioners meant by the figures in the tabular statements in the assessment roll.

The counsel for the City has strenuously contended, both at the former term of this Court and at this term, that the acts of the Commissioners are judicial, and conclusive upon property holders as to the facts, and actings of the Commissioners.

Yet in this case he very inconsistently claims that he may alter that judicial record by parol evidence. Whether these acts be judicial or ministerial, yet there can be no just pretence that parol evidence can be received to alter or explain them.

There is no question as to the defendant's right to show the unauthorized alteration.

Nos. 246, 247.

II.

The Charter makes the assessment a *lien* upon the real estate from the date of the confirmation, for two years, and also upon the personal property, and no sale shall defeat this lien.

Mun. Code, p. 43, Sec. 4.

These liens, when enforced by judgment and sales, convey paramount title against the owner and all claiming under him, whether by incumbrance before or after the assessment. For this is a burthen to which the fee is subjected, and under it title in fee will pass.

Such being the effect of making and enforcing an assessment, it becomes a matter of great importance, not only to the owner, but also to the incumbrancer, to see that an assessment can be made for the effect intended, that it has been legally made, and that a lien exists, with a right to enforce it.

For, otherwise the security of the mortgagee, or *cestui que trust*, may be destroyed to him wholly without fault or negligence on his part.

The incumbrancer falls within the letter and spirit of the charter allowing defences to be made.

Amendment, p. 15, Sec. 43.

"It shall be the duty of the Court, upon calling the docket of said term, if any defence be offered by any of the owners of said property, *or any person having a claim or interest therein*, to hear and determine the same in a summary way without pleadings."

Although the American authorities treat the mortgagor as the owner, for the purpose of paying his debts; yet, in law, the mortgagee not only holds the legal estate in fee, but has also the legal and equitable right to satisfaction of his debt. And, therefore, he has a "*claim or interest therein*," and is entitled to defend that claim and interest, as well against the acts and frauds of the mortgagor to his prejudice, as against the acts of the State and municipal governments.

The extent of that defence is held to be general in

Pease vs. *The City of Chicago*, 21 Ill. R. 500.

III.

Having established the right of making defensive objections in the mortgagee, we have only a word and one authority as to the defence itself.

There was no contract on the part of the City for this work; nor was the City in any way liable.

Peck vs. *The City of Chicago*, 22 Ill. R. 578.

No. 246.

IV.

The defendant in this case, by his agent, has shown that he was lulled into security, and prevented from making a defence by the false assurances of the owner, the morgagor, who had promised to make such a defence, and which his agent believed he was making until this default was taken.

I feel assured that the grounds set out in the affidavit are so full and satisfactory, for setting aside this default, that I shall not enlarge upon it; but leave the Court to the mere inspection of the affidavit.

WALTER B. SCATES,
Of Counsel for Defendants in Error.