

No. 13295

# Supreme Court of Illinois

McAuley

---

vs.

City of Chicago

Supreme Court.

**ABSTRACT OF RECORD.**

HENRY McAULEY,	}	Appeal from Cook Co. Court of Com. Pleas
Appellant.		
vs.		
CITY OF CHICAGO.		
Appellee.	}	

Application for judgment on an assessment warrant under Act of Legislature, approved February 16, 1857.

Page 2    Report of Joseph N. Hendricks, city collector, to Court of Common Pleas, filed January, 1859, stating that the special warrants attached thereto, made out in the manner required by law and countersigned by the city Comptroller, were delivered to the city collector, on or before the second Tuesday of October, A. D. 1858, that immediately after he published a notice in the corporation newspaper, that the warrants were in his hands for collection, briefly describing the warrants and requesting

3    payment; that he gave ten days notice of his intended application for judgment. And that the annexed schedule is a correct list of the lands, lots and parcels of land together with the amounts of taxes and assessments, interests and costs respectively due therein, as set forth in said, warrant.

4    Affidavit of said Collector of truth of report :

SPECIAL WARRANT, No. 308, W.

STATE OF ILLINOIS,    }  
CITY OF CHICAGO,    }

The people of the State of Illinois, to the Collector of the city of Chi-



Chicago, greeting: Whereas, the common council of the city of Chicago, did on the 5th day of October, 1857, confirm the assessment duly made and filed in the Clerk's office by the commissioner appointed by the said common council to assess the sum of seven thousand three hundred and sixty-five dollars and eighty-eight cents, upon the real estate in the west division of said city, deemed benefited by planking Lumber street from North street to South street in proportion to the benefits attached thereto, in pursuance of an order for said assessment made by the said common council on the 29th day of April, 1857, after duly revising the same, and did thereby assess the said sum of money upon the real estate described in the roll of said assessment in the respective proportions thereof, marked assessments, set opposite to each lot, part of lot and real estate described in said roll which roll is in the words and figures following to wit:

#### ASSESSMENT ROLL.

A description of the real estate deemed benefited by the filling and planking of Lumber street, &c.

Canal T. Sub. of S. W.  $\frac{1}{4}$  &c., and so much of S. E.  $\frac{1}{4}$  of Sec. 21, 39, 14, as lies west of Chicago River.

Names of Owners.	Deser'pn	S. Lot.	Lot.	Bl'k.	Valuat'n.	Ass'mt
Henry McAuley,			1	4	\$10,500	311,45
"	N. $\frac{1}{2}$		1	5	7,500	222,33

Then follows names of other owners, &c., as above.

Now therefore you are hereby commanded to levy, make and collect, &c.

Dated, Oct. 9, 1857.

[Seal] and signed by Mayor and Comptroller.

#### COLLECTOR'S RETURN.

Corporation notice of intended application for judgment, dated January 7, 1859, and proof of publication for 21 days.

Judgment against above property, stating that objections had been filed and overruled.

Bill of exceptions filed by H. McAuley.

Objections made by Henry McAuley, to the entering of judgment.

1. That the assessment specified in warrant is alleged to have been made in pursuance of an order passed by the common council for filling and



planking Lumber Street, from the center of North Street to the West line of Canal street, and from the west line of Canal street to South street.

13 2. That the commissioners appointed by the common council to make assessment upon property deemed benefited by such improvement, made such assessment and reported the same to the common council with their assessment roll made out and completed in which assessment roll, lot one block 4 was valued by them at the sum of \$13,500 and assessed at the sum of \$257, and north half of lot one, in block five, was valued at \$12,000 and assessed at \$221.13, that before the assessment was confirmed, McAuley made his objections to the confirmation of said report, that on the 20th of July, 1857, an order was passed directing the commissioners to report to the common council an explanation of the basis of their report; that they made such report and on the 7th of August, 1857, the said commissioners, without any further authority, and while the assessment roll was awaiting the confirmation of the common council, made out another and different assessment roll in which they valued said lot one in block 4 at \$10,500 and said lot one in block 5, at \$7,500, and assessed said lot one in block 4, at the sum of \$311.45, instead of at the sum of \$257, the amount stated in the original assessment roll, and that the assessment first made by the commissioners, was confirmed by the common council and that warrant No. 308, was issued to collect the amount of such new assessment, and insists that the new assessment and the warrant issued therein is authorised by law. That at the time of the making  
14 such new assessment the authority of the commissioners had ceased in the morning and was completely exhausted, and that they had received no authority from the common council to make such new assessment, that the common council had made no order to revise or correct the first assessment, and that said commissioners gave no notice, as required by law, (see sec. 4, chap. 7, city charter, entitled assessments for public improvements,) of the time and place where they would meet to make such new assessment.

15 3. That the city clerk did not cause a notice to be published in the corporation newspaper of the completion of the assessment, and filing of such new assessment roll as required by sec. 6, of said chapter 7.

18 4. That no committee was appointed by the common council to prepare and report a plan for said improvements as required by law with an estimate of the expenses thereof, nor was any plan for said improvements or an estimate of the expenses thereof, ever prepared and reported to said common council as required by sec. 1, chap. 3, of the charter and ordinances of said city, entitled an ordinance concerning assessments for public improvements at page 155, published in 1856.



5. Further that the court had no jurisdiction to enter judgment, and that the application for judgment should have been made at the January term of 1858.

19 The defendant upon the hearing of the defence to the application for judgment, introduced the proceedings of the common council relating to said assessment which are as follows:

"Assessment roll for filling and planking South street."

"In common council, April 27, 1857, ordered that the Superintendent take all proper steps for filling and planking Lumber street, &c."

20 "Commissioners appointed to make such assessment."

21 "Report of commissioners with their assessment roll, as follows:

Part of						
Names of Owners.	L't of Ld.	S. Lot.	Lot.	Bl'k.	Valuat'n.	Ass'mt
Henry McAuley,			1	4	\$13,500	257
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Other names &c.

22 Commissioners return.

23 Notice of Com. that they would meet on the 11th of May, to make assessment and dated May 7th, 1857, first that they would assess the sum of \$5098 40, for planking Lumber street from the centre of North street, to west line of Canal street. Second, the sum of \$2267,24 for filling and planking Lumber street from the west line of Canal street to the center of South street, with proof of publication of three notices, certificate of

25 city clerk, of the return and filing of the foregoing assessment roll.

"Endorsed on same is following:

"Local assessment, June 1, 1857. Referred back to commissioners with instructions to report explaining basis of assessment."

February 20, 1857.

"Referred back to committee for amendment, Aug. 10, 1857, and attached to the other roll is the assessment roll, first above mentioned, upon which the warrant issued,"

27 "Notice of city clerk, dated May 18, 1857, that commissioners had completed the assessment, and returned the same to his office; and that objections must be made on or before the first day of June. 1857, published ten days.

28 "Order of confirmation. Ordered that said assessment, as revised and corrected by common council, be, and the same is confirmed. Dated Oct. 5, 1857.

29 Defence introduced record of proceedings by common council, in relation to said assessment, as follows:



1st. June 1, 1857, "The clerk presented assessment rolls for the planking of Lumber street and opening alleys in block 111, school section, with objections thereto." Referred to committee on local assessments."

2nd. July 30, 1857. Alderman LaRue, of committee on local assessments, to whom was referred the assessment roll for planking Lumber st., together with objections thereto, recommended that assessment roll be rescinded. Referred to commissioners with instructions to report explaining basis of assessment."

3rd. Aug. 10, 1857. "The committee for making assessment for planking Lumber street, to whom was referred the roll for explanation reported thereon, asking leave to make certain amendments. Alderman La Rue moved to proceed to elect commissioners to make a new assessment and demanded the ayes and nays.

Ayes 7. Nays 9.

And on motion the roll was referred back for amendment."

HOYNE, MILLER & LEWIS,

For Apellant.



265-133  
Supreme Court.

Henry McAuley }  
vs }  
City of Chicago }  
v. v.

Abstract of Record  
v. v.

Filed May 5, 1859  
A. Leland  
Clerk

Wayne Miller & Lewis  
Attys for App<sup>t</sup>



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Ayes 7. Nays 9.

And on motion the roll was referred back for amendment."

HOYNE, MILLER & LEWIS,

For Apellant.



265-133

Supreme Court

Henry McCuskey

vs.

City of Chicago

"

Abstract of Record

Filed May 5. 1859

L. Leland

Clerk

Argued March 1859  
at the Court



## SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

OTTAWA, APRIL, 1859.

HENRY McAULEY, }  
Appellant, }  
vs  
THE CITY OF CHICAGO. }

Appeal from Cook County Court of Common Pleas.

This was a suit instituted below upon an *assessment warrant*, by the Collector of Chicago, under the provisions of the Act entitled an "Act to amend the Act entitled an Act to reduce the law incorporating the City of Chicago, and the several acts amendatory thereof; into one Act, and to amend the same, approved Feb. 16, 1857,"

Under sec. 40, of said act, the City Collector, at the January special term of said court, filed his report for judgment against the several lots, set out and described in said warrant, for the planking and filling of Lumber street, in said city; and obtained a judgment against the lots of appellant, described as lots one, block 4, n  $\frac{1}{2}$  of lot 1 on block 5, in canal trustees sub. of w  $\frac{1}{2}$  of and part of s e  $\frac{1}{4}$  sec. 21, town 39, range 14, east, for the sum of \$533 78, besides 10 per cent. added, and costs.

I. It appears that said report of the Collector to said court was a general report of the taxes unpaid of the year 1858, and the annual tax roll, as well as a report on this special warrant for *this* assessment.— While this assessment warrant is dated and issued upon the 9th day of October, A. D., 1857—more than one year previous to this application for judgment,

Record P. 1. 2. 3

Record p 6



It appears that the warrant dated in October, 1857, was delivered to the City Collector, with the other warrants, as appears from his report to the court for judgment, only on or before the second Tuesday of October, 1858, when it had been in fact issued prior to the second Tuesday of Oct. 1857, and a court had been held in January following the first Tuesday of January in 1858, to which the City Collector had returned all his warrants uncollected for 1857—and there is nothing of record to show why this particular warrant was not then duly presented, and a judgment asked, and recovered thereon, with the other warrants for 1857.

That was the only term at which the court had the special jurisdiction conferred by statute to try this case. The presumption must be that the necessary steps had not been taken, or that the court refused to entertain the case at that term, or that it had been paid. It is now too late—no cause being shown why it was postponed. See Sec. 40 of amendment to city charter.

II.—But there were two assessment rolls returned in this case, and only one notice given of the confirmation, one notice given by the commissioners of their meeting, and one notice to present objections to the Common Council and only one opportunity given to take any appeal from the action of the Common Council. (See sec. 38, chap. VII of city charter.) All these notices were given before the new Assessment Roll was filed, and no notice afterwards was given.

#### THE FACTS APPEAR AS FOLLOWS:

1st. The order to fill and plank Lumber street, was passed April 27 1857—and three Commissioners were appointed to make the assessment.

2d. These commissioners returned their Assessment Roll to the city clerk's office on May 18, 1857, and notice was given to all persons interested that they must file their objections in writing in the city Clerk's office on or before the 1st day of June, 1857.

III.—But on the contrary it appears from the record, that the following proceedings were had thereupon, and that a NEW and DIFFERENT roll was in fact filed, *materially variant* and differing from the said roll above returned and to which said notices only applied.

1st. On June 1st, 1857, the following appears on the Common Council proceedings:

"The Clerk presented assessment roll for planking Lumber Street and "opening alley on block 111 school section, together with objections there-  
"to. Referred to committee on local assessments.

2d. July 20, 1857, the following appears:

Record pages -

22 - 26 -

See both Rolls attached  
one set of notices -

Page 19

Page 25

Page - 29



"Alderman La Rue, of committee on local assessments, to whom was referred the assessment roll for planking Lumber street; together with objections thereto, recommended that assessment roll be rescinded. Referred to the commissioners with instructions to report, explaining the basis of their assessments."

3d. August 20th, 1857, the following appears:

"The committee for making the assessment for planking Lumber street, to whom was referred the roll for explanation, reported thereon asking leave to make certain amendments."

"Ald. LaRue moved to proceed to elect commissioners to make a new assessment, and demanded the ayes and nays which resulted as follows:—ayes 7, nays 9. See record, p and on motion the roll was referred back for amendment." And accordingly it will be found that an entirely new roll was filed afterwards, which is attached to the roll previously filed; see record pages and that no notices were published of this new roll or assessment so made, and no day given to persons interested to file any objections or be heard in opposition, nor any opportunity given for appeal according to the section 7 of chap. VII of city charter. But that without such notices being published in violation of law, this last assessment was confirmed on the 5th day of October, 1857, although it does not appear when it was filed or returned by said commissioners, and upon this roll the warrant to collect and obtain judgment was issued.

Upon this abstract the following questions arise and are to be presented to this court.

1st. Prior to the making of this assessment there was no committee of the council to whom the subject was referred to "*prepare and report to the council the plan of the improvement with an accurate estimate of the expense thereof including the cost of making the assessment as required by the ordinances of the city in force at the time.*" (See Municipal laws, chap. 3 of ordinances, page 155.

2d. The assessment was made in 1857, and the warrant for its collection is dated the 9th day October A. D. 1857, and was directed to the city collector of that year, prior to the second Tuesday of October 1857. But the city collector of that year, did not report it with the other warrants of that year to some Court of general jurisdiction held in Chicago, after the first Tuesday in January 1858, for a judgment thereon; but the same is now presented for by a new city collector, after a general city election under the charter was held in March 1858, to the term in 1859 held by said court, together with the annual tax list and the warrants for the collection of the special assessment for the year 1858. The Court did

R. 29

Page 29. 30



3d. The Common Council acted illegally in confirming the Assessment Roll after having referred it back to the same commissioners. The additional Roll filed by them was a NEW ASSESSMENT, and the parties interested were entitled to notice of its filing and completion, the same as required in all other cases, and that a time and place should be designated for hearing objections. A confirmation in the absence of such notice, was simply void. (Sec. 6, Chapter VII, city charter.)

4th. The commissioners had exhausted their functions under their first appointment and were '*functus officio*,' upon the return of the first assessment. Their second return was void for the want of power to act. They were not sworn—gave no notices and acted without taking any of the prescribed steps required by the charter to make a valid assessment. See charter. (Secs. 3 and 4, Chap. VII.)

HOYNE, MILLER & LEWIS.

FOR APPELLANT.

Given Apr. 21, 1859  
 A. L. L. L.  
 A. L. L. L.

On Line as City of New York  
check

265-133



## SUPREME COURT OF ILLINOIS.

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Recd \$ - 1 - 2 - 3 - 4

Recd \$ - 6 - 7 -



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*Rec'd pages*

*22-26-*

*See both Rolls attached  
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*P. 19 —*

*P. 25 —*

*P. 26 —*



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P. 29

Pages 29. 30



not therefore have jurisdiction of this case under the Statute and the judgment is void.

3d. The Common Council acted illegally in confirming the Assessment Roll after having referred it back to the same commissioners. The additional Roll filed by them was a **NEW ASSESSMENT**, and the parties interested were entitled to notice of its filing and completion, the same as required in all other cases, and that a time and place should be designated for hearing objections. A confirmation in the absence of such notice, was simply void. (Sec. 6, Chapter VII, city charter.)

4th. The commissioners had exhausted their functions under their first appointment and were *functus officio*, upon the return of the first assessment. Their second return was void for the want of power to act. They were not sworn—gave no notices and acted without taking any of the prescribed steps required by the charter to make a valid assessment. See charter. (Secs. 3 and 4, Chap. VII.)

HOYNE, MILLER & LEWIS.

FOR APPELLANT.

15995

Filed April 21, 1859.  
at New York City.

265-133  
McSherry vs City of Chicago  
attest.



## SUPREME COURT OF ILLINOIS.

*Third Division—April Term, 1859.*

HENRY McAULEY, }  
vs. } *Appeal.*  
CITY OF CHICAGO. }

### BRIEF.

I. The Warrant is one issued in October, 1857, before the second Tuesday of October of that year, for an assessment made in the year 1857; and it is made the duty of the city collector to "*prepare and make report*" of all such taxes and assessments as are unpaid, from any cause, in each "year, on or before the first Tuesday of January next ensuing the date" of said warrant, to some Court of general jurisdiction, to be held in "Chicago, for judgment against the lands and lots, for the amount of" "taxes and costs respectively due thereon, &c. [Sec. 40 of amendment to Charter.]

This warrant, therefore, should have been returned to some Court held in 1858, after the first Tuesday of January of that year, with the warrant of 1857. It is very clear that the general design of the Act was to have all the taxes and assessments of each year returnable at the same term of Court, and that such Court only acquires a limited and special jurisdiction. Its return to any other Court, or at any other term is void, for want of jurisdiction.

Marh vs. Chestnut, 14 Ill., 225.

Billings vs. Detter, 11 Ill., 219.

Thames Manufacturing Co. vs. Lathrop, 7 Con., 550.

"Sec 52 of these amendments, gives as one reason for the making only "one application and one report for judgment in each year, and only to "one term of Court, by saying "that after the next annual election, *all* "sales of property for the non-payment of taxes and assessments for any "improvement of *what kind soever*, shall be held at the *same time with* "the *general sale of property for the non-payment of city taxes in each* "year, &c.; the intent hereof being that there shall be but one general "collection by sale of *all taxes and assessments whatsoever in each year* "and every year, and at the *same time in each year*."

The warrant in this case, although issued in 1857 for an assessment levied in 1857, is presented with the *general tax warrant* for the City taxes of 1858, to a term of Court held more than *one year* after the first Tuesday of January in 1859. This Court will take notice that several Courts of competent jurisdiction were holding six regular vacation and trial terms each at Chicago during the year 1858, making twelve or fourteen terms, at one of which Courts the judgment on the general city tax list was obtained. This special warrant for an assessment in 1857, be it remembered, is presented with the "*General Tax Warrant*" of 1858, and *not the General Tax Warrant of 1857*.

II. The Common Council in this case never referred to an appropriate committee, the subject of the improvement, the expenses of which this warrant was issued to collect. No plan of such improvement, with an accurate estimate of the expenses thereof, was ever made, *and this is a*



*prerequisite* expressly required by the ordinances of the city, made a part of the public law of the corporation in the amendments of 1857.

Sec. 85 of Amendments, 1857, to Charter.  
Chap. 3 of City Ordinances, p. 155.

This power cannot be delegated, nor exercised in any other manner than as the same is prescribed. The proceeding is one *in rem*, or derogation of the common law, and seeks to divest, title and transfer the real estate of one person to others, and every requirement having the semblance of benefit to the owner must be strictly complied with.

Corwin vs. Merritt, 3 Barb., S. C. 341.

Thompson vs. Schermerhorn, 2 Seld., 96.

This last case raised the question whether the warrant on which the improvement shall be made could be left to a city superintendant and a committee, and the court decided that as the law devolved that duty upon the council, the power could not be exercised in any other manner. The *trust*, they say, is too important, and must be exercised as provided, in strict accordance with the Statute. So, in this case, the power was delegated, subject to certain preliminary *reports, estimates and plans*, upon which the council were authorized, and not before, to make the improvement and levy the expense upon property benefitted.

But I wish to refer, also, to the numerous cases in which it is decided, that powers like the one in question must be exercised with the greatest care, in the observance of all the statute requirements, or else the whole *proceeding is void*.

Bloom vs. Burdick, 1 Hill, 140.

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Sharp vs. Johnson, 4 Ibid, 96.

Striker vs. Kel'y, 7 Ibid, 21.

Marsh vs. Chestnut, 14 Ill., 224.

It is deemed unnecessary to cite all the cases in which this strictness is required, where the proceedings as here are *in rem*, and not *in personam*.

III. But we come now to another point which must decide this case adversely to the power claimed, even if there were no other.

The three commissioners appointed to make the assessment performed that duty, and returned the roll into the city clerk's office on the 18th day of May, 1857, and the usual notice up to that time had been given to owners and parties interested. But another and different roll was afterwards filed, but at what time does not appear, there having been no notices given or published of its return, *time of filing, time of confirmation, time of assessment*, and *no opportunity* was ever given to parties interested to make *objections*, or take an *appeal* from the final order of confirmation made by the common council upon which the warrant was issued.

The Statute (see charter, chap. 7, sec. 6,) requires certain things to be done by the commissioners; such as—

- 1st. The oath to impartially discharge their duty;
- 2nd. Before entering upon their duties, to give 6 days public notice of time and place of meeting in the corporation newspaper.
- 3d. To make the assessment, designating the manner, &c.
- 4th. When the roll is completed to make a corrected copy thereof, "within 40 days, signed by all the Commissioners," and deliver the same to the city clerk.
- 5th. The city clerk shall cause a notice to be published in the corporation newspaper for 6 days, of the completion of the roll and filing of the assessments.



6th. Time and place shall be designated by the common council therein for hearing objections.

All and every of these requisites are necessary to the making a valid assessment, and to the making every assessment no one requisite can safely be dispensed with.

The commissioners, when they returned their roll, on the 18th of May, had exhausted all their power. They had then become *functus officio*. They had no power of assessment, continuance or correction, because upon the filing of their assessment they had discharged the whole of the functions conferred upon them by the statute. They could not be reanimated or re-organized for the purpose of correction or amendment, because the statute only confers limited and special power upon them; confers no such power of re-organizing or re-convening for correcting or amending their assessments. This whole subject of revising, correcting or amending is specially delegated to the common council; from whose action the remedy (if any) is by appeal. [Sec. 7 of chap. 7, city charter.]

12 Barb. 221, 15 Ibid, 617

The common council have only power to correct, revise, conform and amend the same. They may, however, direct a NEW ASSESSMENT to be made by the *same commissioners* in the manner directed by the Act. But there is no power or discretion vested in the common council to send it back to the same commissioners for "*amendment*."

In this case therefore, all the orders passed after the filing of the roll in the first instance; by the common council referring it back to the same commissioners without a direction to make a *new assessment* were *coram non judice* and void.

And the filing of the new roll, which was attached to the old one by the commissioners, after being referred back by the council, and which new roll was materially varied from the old one, was simply an unauthorized and illegal exercise of power, which rendered all the proceedings taken afterwards void.

And even if such amendments had been authorized as within the powers of the common council, yet the notices required by statute should have been given. It was substantially and in fact a "*new assessment*," and notice should have been given of time of hearing objections and place, so that parties might be heard and take an appeal. The new roll is *not signed* by the commissioners, nor does it appear that the commissioners ever even *amended the roll*. It is uncertain *which* of the two rolls was confirmed by the common council, because both are *attached together* and only one is signed by the commissioners, and appears to have any filing on the back of it which designates it as any document of the city clerk's office.

If the court could be satisfied that this roll ever emanated from the commissioners, it is not known whether they acted together in making the corrections, or whether such corrections are not the work of some stranger or clerk in the city offices. There is an entire want of certainty and information upon this subject.

But we may admit all this to be certain, yet without a *single notice* having been given, no oath taken, *no owner notified of the filing*, no time and place designated to hear objections to the changes made in the roll, the court might still conclude that every substantial provision of the statute has been violated, and that all the proceedings have been simply void, as acts of no binding force or validity whatever.

We refer the court to the following cases, as substantially upholding every position we have taken in this case:

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HOYNE, MILLER & LEWIS.



265-133  
Supreme Court

Henry McAnulty  
265-133

The City of Chicago

Briefs

of Appellants

Filed April 26. 1859.  
L. Island. Ch.



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HOYNE, MILLER & LEWIS.



265-133  
Henry Lee Auley

265-24  
The City of Chicago

265 Brief  
Points of Appelland

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