N. J. Court of Errors & Appeals.

JAMES A. HAND,
Appellant,

vs.

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Respondent.

On Appeal.

Brief for Appellant.

The bill of complaint is filed to foreclose a mortgage dated July, 1873, and duly recorded November 28th, 1873.

The bill states, p. 6, line 10: "And your orator "further shows that 'the Mayor and Aldermen of "Jersey City' claim to have a lien on said lands by "reason of an assessment for the improvement of "West Grand street pile foundation, &c., on said "lands, confirmed May 20, 1874 (months after the "record of complainant's mortgage), amounting to "$238.88, and also a lien by reason of a certain other "assessment on said lands for a main sewer in "'Section A,' second drainage district, confirmed "February 26, 1874, amounting to $721.28, and your "orator expressly charges and insists that said "assessments, if a lien at all on said property, are "subsequent to and subject to the lien of your ora-"tor's said mortgage."

The answer of the Mayor, &c., of Jersey City, p. 9, line 35, says:

"And these defendants further admit that they "claim to have a lien on said lands by reason of "an assessment for the improvement of West Grand "street pile foundation, &c., on said lands, con- "firmed May 20, 1874, amounting to $238.88, and "also a lien on said lands by reason of a certain as- "sessment thereon for the main sewer in section "'A,' second drainage district, confirmed February "26, 1874, amounting to $721.28.

"And these defendants further answering say that "they claim and insist *that said assessment* upon said "property *assessed as in complainant's bill mentioned* "are prior liens to the encumbrance of complainant's "said mortgage upon the lands described therein.

The defendants insist that these subsequent assessments should displace this prior mortgage because the seventh section of the act authorizing these assessments (act of 1873, p. 442, entitled "An Act to adjust unpaid assessments)," provides that the assessments, "made thereunder," shall be a lien on "the property on which they are laid and "shall be collected in the same manner provided for the collection of assessments in the charter of said city."

And the charter of the city Laws of 1871, p. 1155, § 151, provides for a sale of the lands assessed for a term of years against the owner and all claiming under him and for a redemption by mortgagee or other encumbrances.

The complainants insist:

I. That the legislative intent that the assessments made under said act entitled "An Act to adjust unpaid assessments" should displace a prior mortgage is not sufficiently clear to justify the decree herein.

II. That the Legislature can not constitutionally make an assessment for a local improvement a paramount lien to a prior mortgage when that local im-

provement has been completed and proceedings consummated and the benefit received once assessed *prior* to the mortgage.

The mortgage foreclosed became a lien July 1, 1873.

The assessments became liens Feb. 26, 1874, and May 20, 1874, respectively, but they became liens by reason of "an act to *adjust unpaid assessments.*" Laws of 1873, p. 442.

The assessments unpaid, which were to be adjusted, were confirmed August 17, 1871, and July 12, 1872, respectively, page 10, one year prior to the mortgage, but these assessments of 1871 and 1872 never became a lien, because the act under which they were attempted to be made required these assessments to be made by frontage, without regard to benefits, and was therefore unconstitutional.

At the time the mortgagee loaned his money on the security of these premises, these premises were free from these assessments for these local improvements, but the increased value of these premises, by reason of these local improvements, was the security on the faith of which the mortgagee parted with his money.

If after a mortgagee has loaned money on the security of premises, of value because of local improvements made years prior, the legislature can afterwards say that the special benefits received by the mortgaged premises from these local improvements shall displace the lien of the mortgage then they have power to confiscate.

The theory upon which an assessment for a local improvement could be alone sustained against this mortgagee would be that the premises so mortgaged were specially benefitted thereby *after* the mortgagee loaned *his money* on such security and that thereby his security was increased.

In the present case the special benefits were received prior to the mortgage and the loan made because they had been so received, and his security was not increased thereby.

That the act under which the assessments of 1871 and 1872 were made, require that such assessment should be by frontage, appears by the Charter. See

Charter of Jersey City, Laws of 1871, page 1094, section 47, as to grading of streets.

And be it enacted, that streets shall be flagged, curbed, guttered, and paved in the following manner. Application in writing to be made, notice, &c.

* * * * * * * * * *

Upon the coming in of said proposals said Board may make a contract with the lowest responsible bidder, on the terms of his proposal for the completion of said improvements, and may complete the same, and when completed the expense thereof shall be assessed by the commissioners of assessment upon the land fronting on said improvement in proportion to the frontage, providing that where intersections are so improved the expense of improving such intersections shall be assessed equally at so much per lineal foot for frontage of all land extending from said intersection one-half of the distance to the nearest street, every direction. Act to reorganize the local government of Jersey City, passed March 31st, 1871, Laws of 1871, pages 1094, 1118, Sec. 48, enacts that streets shall be graded in the following manner: The proceedings shall be the same as for paving the street, except that in assessing the expense thereof each lot or parcel of land shall be assessed only for the labor and materials necessary to grade the street in front of it, and for its share of the intersection in paving the street and

shall be credited, if any credit ought to be allowed, for the materials taken from the street in front of it, and proportionally from any neighboring intersection. p. 1119.

As to sewers see Section 59, which reads : "Shall be assessed according to frontage on the property fronting on said street, and the rest of the expense shall be assessed according to frontage on the property on such main sewer, &c.

An assessment made under the act was unconstitutional, void and not a lien.

State, Van Tassel, Pros. vs. Jersey City. 8 Vroom, 128.

State, Cronan, Pros. vs. Jersey City, 9 Vroom, 410.

New Jersey Court of Errors and Appeals.

JAMES A. HAND, *Appellant,* *and* THE MAYOR AND ALDERMEN OF JERSEY CITY. *Respondent.*	*On Appeal, etc.* — *Brief for Respondent.*

Statement.

The bill in this cause was filed to foreclose a mortgage upon certain lands in Jersey City. Certain assessments having been levied upon these lands, the complainant asks that the lien thereof be decreed subsequent to the lien of his mortgage. By the state of facts agreed upon (page 10 and 11 of Case), the following is the admitted order of the liens upon the lands, as to the date of their creation:

August 17, 1871.—Assessment for improvement of West Grand street confirmed.

July 12, 1872.—Assessment for main sewer confirmed.

July 1, 1873.—Date of complainant's mortgage.

February 26, 1874.—Re-assessment for main sewer confirmed.

May 20, 1874.—Re-assessment for improvement of West Grand street confirmed.

These assessments were made by Commissioners appointed by the Supreme Court, under the provision of an act, entitled "An Act to adjust unpaid assessments in Jersey City," approved March 26, 1873 (P. L., 1873, 442).

Argument.

At the time the complainant's mortgage was given the lands were assessed for the sum of two hundred and fifty-nine dollars and forty-two cents, for the improvement of West Grand street. This amount was reduced by the Commissioners to two hundred and thirty-eight dollars and eighty cents. Also for the sum of two thousand and thirty-one dollars and thirty-nine cents, for "Main Sewer, Section A., Second Drainage District." This was reduced by the Commissioners to seven hundred and twenty dollars and ninety-eight cents.

The original assessments were levied under the provisions of the City Charter (P. L., 1871, p. 1155, § 151), which provides that the assessments shall be a lien *until paid*, notwithstanding any devise, descent, alienation, mortgage, etc. This lien was in nowise suspended or removed by the action of the Commissioners appointed under the act of 1873. It remained until the new assessment was filed and then continued as to the amount of the new assessment.

The law giving these assessments priority over all other liens is constitutional.

Ames vs. *Port Sharon Company*, 11 Mich., 147.

Provident Institution for Savings *vs.* Jersey City, 10 Stew., 36, 627, and affirmance by U. S. Supreme Court. A copy of the opinion of the Federal Court in this case is appended.

Potter's Dwarris on Statutes and Constitution, 409.

The People vs. *Mayor of Brooklyn*, 4 N. Y., 429.

Nichols vs. *Bridgeport*, 23 Conn., 189.
Guilford vs. *Cornell, et als*, 18 Barb., 615.
Williams vs. *Detroit*, 2 Mich., 560.

A change in the ownership would not affect the lien.
Cooley on Taxation, 306.
State vs. *Jersey City*, 12 Vr., 471.
Evans vs. *Walsh*, 12 Vr., 281.
Peterson vs. *O'Neill*, 5 Stew., 387.
Howell vs. *Essex Rail Board*, 5 Stew., 673.
Allen vs. *Drew*, 44 Vt., 174.
Allentown vs. *Henry*, 73 Penn. St., 404.
Durgan's Appeal, 68 Penn. St., 204.
Isaac vs. *Decker*, 41 Ind., 410.
Eschbach vs. *Pitts*, 6 Md., 71.
Bodertha vs. *Spencer*, 40 Ind., 353.

ALLAN L. McDERMOTT,
For Respondents.

SUPREME COURT OF THE UNITED STATES.

THE PROVIDENT INSTITUTION FOR SAVINGS, IN JERSEY CITY, *Plaintiff in Error,* *vs.* THE MAYOR AND ALDERMEN OF JERSEY CITY.	*In Error to the Court of Chancery of the State of New Jersey.* — *March* 2, 1885.

CHARLES H. H. HARTSHORNE, for plaintiff in error.

ALLAN L. MCDERMOTT, for defendant in error.

Mr. Justice BRADLEY delivered the opinion of the Court.

This was a bill in equity filed in the Court of Chancery of New Jersey by the appellant, to foreclose two mortgages given to it on a certain lot in Jersey City by Michael Nugent and wife, and another person, the first being dated January 19, 1863, to secure the payment of $900 and interest, and the second dated July 13, 1869, to secure the payment of $700 and interest. The complainants also claimed, under the stipulations of the mortgages, the amount of certain premiums of insurance paid by them. By an amended bill, making the Mayor and Aldermen of Jersey City a defendant, the complainants alleged that the city claimed a lien on the mortgaged premises prior to that of the mortgages, for certain water rents, for supplying water to the occupants of the same for the year 1871, and from thence to the time of filing the bill; that this claim was made under an act of the Legislature of New Jersey, passed May 25, 1852, authorizing the construction of water works for the city, and the act revising the city charter, passed in March, 1871. The bill denied the validity of this claim, and averred that those

portions of the said acts which purported to give such a priority had the effect to deprive the complainant of its property in the mortgaged premises without due process of law, and were in violation of the Constitution of the United States as well as that of New Jersey; and the complainant prayed for a foreclosure and sale of the lot in question as against all the defendants.

There was annexed to the bill and referred to therein a copy of the "Tariff of Rates and Regulations for the Use of Passaic Water; also Rules regulating the plumbing of houses and the tapping of Sewers;" being the regulations adopted by the Board of Public Works of Jersey City under the statutes referred to in the bill. The water rates specified in this tariff (except for measured water), were graduated in a table according to the width and number of stories of the houses, and were made payable annually in advance on the 1st of May in each year, with a penalty of three per cent. if not paid by the 1st of July, and interest at the rate of seven per cent. from the 20th of December. The regulations extend to many details, making provision for extra charges to certain kinds of establishments, providing penalties for misuse of the water, etc., etc.,

The city authorities answered the bill, admitting that they had assessed upon the mortgaged premises the water rents set forth in the bill, and alleged that they were imposed in pursuance of an act of the Legislature of New Jersey, entitled "An Act to authorize the construction of works for the supplying of Jersey City and places adjacent with pure and wholesome water," approved March 25, 1852, and an act entitled "An Act to reorganize the local government of Jersey City," passed March 31, 1871, and the supplements thereto; and insisted that said water rents were a lien prior to the mortgages, and prayed that it might be so adjudged.

The other defendants made no defence.

The complainant and the city authorities entered into a stipulation to the effect, that the allegations of fact in

the bill were to be taken as true; that, in the assessment of the water rents, interest and penalties, all the requirements of the act "to reorganize the local government of Jersey City," passed March 31, 1871, and the supplements thereto, had been complied with, and that the only question to be determined by the court was, whether upon the facts stated in the bill, the water rents and interest and penalties, mentioned therein, or any of them, were liens upon the property in question prior to the lien of the complainant's mortgages.

The Chancellor decided that the giving of a priority of lien to the water rents over the mortgages, pursuant to the statutes, did not deprive the complainant of its property without due process of law, and did not otherwise conflict with the Constitution of the United States or with that of New Jersey; and he decreed that, for the purpose of raising the money due on the mortgages, the mortgaged premises must be sold subject to such lien, and that the bill must be dismissed as against the city. This decree being appealed from, was affirmed by the New Jersey Court of Errors and Appeals, and the record was remanded to the Court of Chancery. The case is brought here by writ of error, and the errors assigned resolve themselves into the single error of sustaining the priority of the lien of the water rents over that of the complainant's mortgages.

The ground on which the decision below was placed was, that the laws having made the water rents a charge on the land, with a lien prior to all other incumbrances, in the same manner as taxes and assessments, the complainant took its mortgages subject to this condition, whether the water was introduced on to the lot mortgaged before or after the giving of the mortgage; and hence the complainant had no ground of complaint that its property was taken without due process of law.

We do not well see how this position can be successfully controverted. The origin of the city's right to priority of lien goes back to the year 1852, when the Legislature passed the act "to authorize the construction of works for supplying Jersey City and places adjacent with

pure and wholesome water." That act laid the foundation of a scheme for leading water from the Passaic River to Jersey City, a distance of seven or eight miles, across the channel of the Hackensack River, and over the ridges of Lodi and Bergen. Power was given to a Board of Commissioners appointed for that purpose, to take the necessary lands by right of eminent domain, to borrow money on the credit of the city, to lay pipes through the streets, and to make all necessary and proper regulations for the distribution and use of the water, and "from time to time to fix the price for the use thereof and the times of payment;" and, by section 14 of the act, it was declared "that the owner and occupier of any house, tenement or lot, shall be liable for the payment of the price or rent fixed by the Commissioners for the use of the water by such occupier, and such price or rent so fixed, shall be a lien upon said house, tenement or lot, in the same way and manner as other taxes assessed on real estate in Jersey City are liens, and shall be collected in like manner." This law has been substantially continued to the present time. On a revision of the city charter in 1871, the Board of Water Commissioners was replaced by a Board of Public Works, invested with the same powers and duties; and by section 81 of the revised charter, after providing for the fixing of the water rents as in the act of 1852, it was, amongst other things, further enacted as follows:

"And the said board shall from time to time determine and give public notice of the times and places at which the said water rents shall be due and payable, and the penalties to be charged for delaying the payments beyond the times so fixed; and the said water rents shall, until paid, be liens upon the property charged therewith; and the said board may, at any time after the twentieth day of December, in each year, deliver to the Board of Finance and Taxation of Jersey City, an account, certified under the hand of the President, of all such water rents and penalties for delinquency as are then due and remain unpaid; and the said Board of Finance and Taxation

shall, upon receiving said certified account, cause said lands to be sold for the payment of said water rents and penalties, and the interest thereon, from said twentieth day of December, at the rate of twelve per centum per annum, and also costs, charges and expenses of advertising and sale in the same manner as said Board of Finance and Taxation may be authorized by law to sell lands in said city for the payment of taxes thereon, and said proceedings and the effect thereof shall be the same in all things as if the said lands were sold for taxes."

By section 151 of the same charter it was enacted (substantially as the law had been since the year 1839) "that all taxes and assessments which shall hereafter be assessed or made upon any lands, tenements or real estate situate in said city, shall be and remain a lien thereon from the time of the confirmation thereof until paid, notwithstanding any devise, descent, alienation, mortgage or other incumbrance thereof, and that if the full amount of any such tax or assessment shall not be paid and satisfied within the time limited and appointed for the payment thereof, it shall and may be lawful for the Board of Finance and Taxation to cause such lands, tenements or real estate to be sold at public auction, for the shortest term for which any person will agree to take the same and pay such tax or assessment, or the balance thereof remaining unpaid, with the interest thereon, and all costs, charges and expenses." And it was provided: "That all moneys paid for the redemption of said lands, tenements or real estate as aforesaid, together with such taxes and assessments as shall be paid by a mortgagee or other creditor, under a judgment, attachment or mechanic's lien, shall be a lien on said lands, tenements or real estate for the amount so paid, with interest at the rate of seven per centum per annum; and such lien shall have precedence of all other liens on said lands, tenements or real estate; and on foreclosure of any mortgage by such mortgagee redeeming, shall be directed to be made out of said lands, and on sale of said lands under any

such judgment, attachment or mechanic's lien, shall be paid out of the proceeds of sale."

These extracts are sufficient to show the general character of the system by which the water rates are imposed and enforced in Jersey City. Much discussion has taken place in the State courts as to the precise nature of these water rents; whether they are a tax, or an assessment for benefits, or a stipulated compensation resting on implied contract. If regarded as taxes, they have been supposed to conflict with a clause in the State Constitution, adopted in 1875, declaring that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." If regarded as special assessments for benefits arising from a public improvement, they have been held as open to the objection of not being laid on correct principles—being distributed according to the dimensions and measurements of the several lots and buildings, and not according to the benefits received. These objections were held to be conclusive in the case of water rents imposed on unoccupied lots, and lots not supplied with water; both the act of 1852 and the revised charter of 1871, having provided for the imposition of water rents on property of that kind, situated on streets in which water-pipes were laid. The Supreme Court of the State has decided that under the State Constitution this imposition cannot be sustained; because, for the reasons just stated, it is neither valid as a tax nor as a special assessment for benefits. (State *vs.* Jersey City, 14 Vroom, 135.) But the rents imposed for water actually used, as in the case now under consideration, have been held valid on the ground of an implied contract to pay them. The terms being public and well known, persons applying for a supply of water are supposed to assent to them. (Vreeland *vs.* O'Neil, 36 N. J. Eq., 199; S. C. on appeal, 37 N. J. Eq., 574.)

As the case comes before us, it is not necessary to enter into the discussions that have occupied the State courts. We are to assume that the rents, penalties and interest claimed by the city have been imposed and incurred in

conformity with the laws and constitution of the State; and that, by virtue of said laws and constitution, they are a lien on the property mortgaged to the complainant prior to that of its mortgages; and, this being so, we are only concerned to inquire whether those laws thus interpreted are, or are not, repugnant to the Constitution of the United States. The only clause of the Constitution supposed to be violated is that portion of the 14th Amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law. It is contended that the mortgages created in 1863 and 1869, there being then no valid water rents due on the lot mortgaged, invested the complainant with the first lien thereon, and that that lien is property; and that the statutes of 1852 and 1871, by giving a superior lien to water rents afterwards accrued, deprive it of its said property without due process of law.

What may be the effect of those statutes, in this regard, upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to that statute, but long subsequent thereto. When the complainant took its mortgages, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic Water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction. The cases referred to by counsel to the contrary, holding void a consent exacted contrary to the Constitution, have no bearing on the present cases.

It may, however, be contended, (though it is not by the counsel in this case,) that the revised charter of 1871

introduced new impositions, additional to the mere water rent, such as authorizing a penalty to be imposed by the Board of Public Works, if payment of the water rents were not made by a certain time, and a heavy rate of interest on rents continuing in arrear. But we look upon these provisions as merely intended to enforce prompt payment, and as incidental regulations appropriate to the subject. The law which authorized these coercive measures gave to mortgagees and judgment creditors the right to pay the rents and to have the benefit of the lien thereof; so that it was in their own power to protect themselves from any such penalties and accumulations of interest. They are analogous to the costs incurred in the foreclosure of the first mortgage, which have the same priority as the mortgage itself over subsequent incumbrances.

In what we have now said in relation to the anterior existence of the law of 1852 as a ground on which this case may be resolved, we do not mean to be understood as holding that the law would not also be valid as against mortgages created prior to its passage. Even if the water rents in question cannot be regarded as taxes, nor as special assessments for benefits arising from a public improvement, it is still by no means clear that the giving to them a priority of lien over all other incumbrances upon the property served with the water would be repugnant to the Constitution of the United States. The law which gives to the last maritime liens priority over earlier liens in point of time, is based on principles of acknowledge justice. That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the tableau of claims. Mecanics' lien law stand on the same basis of natural justice. We are not prepared to say that a legislative act giving preference to such liens even over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States. Nor are we prepared to say that an act giving preference to municipal water rents over such liens would be obnoxious to that charge. The providing of a sufficient water

supply for the inhabitants of a great and growing city, is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited. It may be difficult to show any substantial distinction in this regard between such a charge and that of a tax strictly so called. But as the present case does not call for an opinion on this point, it is properly reserved for consideration when it necessarily arises.

The decree of the Court of Errors and Appeals of New Jersey is affirmed.

True copy.

Test: JAMES H. McKENNEY,

Clerk Supreme Court U. S.

In Chancery of New Jersey

Between JAMES A. HAND, Compl't, and JAMES H. STARTUP et ux et als., Def'ts.	Bill to Foreclose.

To the Honorable THEODORE RUNYON, *Chancellor of the State of New Jersey.*

Humbly complaining, shows unto your Honor, your orator James A. Hand, of Elizabeth, in the County of Union and State of New Jersey, that on or about the first day of July, in the year one thousand eight hundred and seventy-three, James H. Startup and Mortimer D. Conklin, of Jersey City, New Jersey, and Amos C. Littell of the City of New York, in the County of New York, and State of New York, became and were justly indebted unto one Jane Van Horne in the sum of six thousand dollars; and being so indebted, the said James H. Startup, Mortimer D. Conklin and Amos C. Littell in order to secure the payment of the said sum of money, with interest, did make and execute, under their hands and seals, and deliver unto said Jane Van Horne, a certain bond or obligation, bearing date the same day and year last aforesaid, in the penal sum of twelve thousand dollars, lawful money of the United States, with a condition thereunder written, that if the said James H. Startup, Mortimer D. Conklin and Amos C. Littell, their heirs, executors, or administrators, should well

and truly pay, or cause to be paid, unto said Jane Van Horne, executors, administrators or assigns, the just and full sum of six thousand dollars on the first day of July, in the year one thousand eight hundred and seventy-four, and interest on the same to be comptued from the date thereof at and after the rate of seven per cent. per annum, and to be paid semi-annually on the first days of January and July in each and every year without any fraud or other delay, then the said obligation should be void, otherwise to remain in full force and virtue as in and by the said bond or obligation and the condition thereof, reference being thereunto had, will more fully and at large appear.

And your orator further shows that the said James H. Startup and Elizabeth W., his wife, Mortimer D Conklin and Melvina, his wife, Amos C. Littell and Emeline G., his wife, in order to secure the payment of the said sum of money above mentioned, together with the interest thereon executed and delivered unto said Jane Van Horne a certain indenture of mortgage, bearing date the same day and year first aforesaid, made by the said James H. Startup and Elizabeth W. his wife, Mortimer D. Conkin, and Melvina, his wife, Amos C. Littell and Emeline G., his wife, of the first part, to said Jane Van Horne of the second part; whereby the said party of the first did grant, bargain, sell, alien, convey, and confirm unto the said party of the second part, her heirs and assigns, forever, all those certain lots, pieces or parcels of land, and premises situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and which on a map entitled: "Map of property of Mrs. Jane Van Horne, City of Bergen, Hud. Co., N. J.," are known and designated as lots numbered three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19) and twenty (20) and part of lots numbered one (1), two

(2), and twenty-one (21) in block numbered nine (9). Also lots numbered four (4), five (5), six (6), seven (7), eight (8), nine (9) and ten (10), and part of lots numbered one (1), two (2), three (3), eleven (11), twelve (12), fourteen (14) and fifteen (15), in block numbered fourteen (14).

Together with all and singular the tenements, hereditaments, and appurtenances, reversions, remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower and right of dower, use, property, possession, claim, and demand, whatsoever, as well in law as in equity, of the said party of the first part therein; to have and to hold the said granted and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to their own proper use, benefit and behoof forever; provided always, that if the said party of the first part thereto, their heirs, executors, or administrators, should well and truly pay or cause to be paid, unto the said party of the second part, executors, administrators, or assigns, the said sum of money mentioned in the condition of the said bond, with the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, then the said indenture of mortgage, and the estate thereby granted, should cease, determine, and be void.

And your orator further shows that after the execution of the said indenture of mortgage, the same was in due form of law acknowledged by the said James H. Startup and Elizabeth W. his wife, Mortimer D. Conklin and Melvina his wife, and Amos C. Littell and Emeline G. his wife, on the twenty-seventh day of October, A. D. eighteen hundred and seventy-three, before Jacob Weart, Master in Chancery, and duly recorded in the office of the Clerk in and for the said County of Hudson, in Book 107 of Mortgages, page 437, on the twenty-eighth day of November, in the year one thousand eight hundred and sev-

enty-three, as by the several certificates indorsed on the said indenture of mortgage, more fully appears.

And your orator further shows that after the execution and delivery of said bond and mortgage, to wit, on or about the first day of March, A. D. eighthteen hundred and seventy-six, the said Jane Van Horne departed this life, having first made and executed her last will and testament in due form of law, by which said last will and testament she appointed her daughter, Helen Ackerman, executrix, and her son, John C. Van Horne, and her grandson, John Winner, Junior, executors of her said last will and testament, as by the same now on file and of record in the Surrogate's Office, in the County of Hudson, reference being thereunto had, will more fully and at large appear.

And your orator further shows that said last will and testament was on the tenth day of March, in the year last aforesaid, duly proved by said executrix and executors before Robert McCague, Junior, Surrogate of said County of Hudson, and letters testamentary issued to said executrix and executors, who took upon themselves the burthen of the administration of said estate.

And your orator further shows that afterwards, to wit, on the eleventh day of April, A.D. eighteen hundred and eighty-two, said Helen Ackerman, John C. Van Horne and John Winner, Junior, executrix and executors of the last will and testament of said Jane Van Horne, deceased, by deed of assignment duly executed did grant, bargain, sell, assign, transfer and set over unto your orator the said mortgage herein above set forth, together with the bond or obligation therein described, and the money due and to grow due thereon, which deed of assignment having been first duly proved by Fred. M. Slater, the subscribing witness thereto was on the eighth day of August, A. D. eighteen hundred and eighty-two, recorded in the

office of the Register of the said County of Hudson, in Book 37 of Assignments of Mortgages, page 459, &c., to which deed of assignment or the record thereof for great certainty reference is made.

And your orator further shows that on the twenty-fourth of October, eighteen hundred and seventy-seven, a decree was made in this Honorable Court against said James H. Startup and Mortimer D. Con-klin and others in favor of John V. R. Vreeland, for the amount of seven thousand one hundred and sixteen dollars and sixty-nine cents, and the further amount of three hundred and seventy-nine dollars and thirty-four cents costs, which decree was on the twenty-fifth day of October, eighteen hundred and seventy-seven, docketed in the office of the Clerk of the Supreme Court. And the said John V. R. Vreeland did by assignment dated October twenty-fifth, eighteen hundred and seventy-seven, assign said decree to one Elizabeth Vreeland, which assignment was on the third day of December, eighteen hundred and seventy-seven, recorded in the office of the Clerk of the Supreme Court. And your orator charges that said decree, if a lien at all on said lands, is subsequent and subject to the lien of your orator's said mortgage.

And your orator further shows that on the second day of February, A. D., eighteen hundred and seventy-seven, the said James H. Startup entered into a recognizance to the State of New Jersey in the sum of fifteen hundred dollars conditioned for the appearance of said James H. Startup before the Court of Oyer and Terminer of the County of Hudson to answer to an indictment for malfeasance in office.

And your orator charges and insists that said recognizance, if a lien at all on said lands is subsequent and subject to the lien of your orator's said mortgage.

And your orator further shows that on the fifteenth day of July, eighteen hundred and seventy-eight, said Mortimer D. Conklin filed his voluntary peti-

tion to be adjudged a bankrupt in the United States District Court for the Southern District of New York ; that on the twenty-seventh day of August in said last named year, one John C. Beatty was elected assignee of said Conklin by the creditors of said Conklin and confirmed by said Court. Your orator however charges and insists, that if said Beatty as such assignee has any interest in said lands, such interest is subject to the lien of your orator's said mortgage.

And your orator further shows that The Mayor and Aldermen of Jersey City claim to have a lien on said lands by reason of an assessment for the improvement of West Grand Str. pile foundation &c., on said lands, confirmed May twentieth, eighteen hundred and seventy-four, amounting to two-hundred and thirty-eight dollars and eighty-eight cents, and also a lien by reason of a certain other assessment on said lands for main sewer in section A, second drainage district, confirmed February twenty-sixth, eighteen hundred and seventy-four, amounting to seven hundred and twenty-one dollars and twenty-eight cents. And your orator expressly charges and insists that said assessments if liens at all on said property are subsequent to and subject to the lien of your orator's said mortgage.

And your orator further shows that the entire amount of the principal money mentioned in and secured by the said bond and mortgage, with interest thereon from July 1st, 1875, still remains due and unpaid to your orator, whereby the said mortgage, and the estate thereby granted, have become absolute in your orator and his heirs.

And your orator further shows that the said James H. Startup and Elizabeth W., his wife, Mortimer D. Conklin and Melvina, his wife, Amos C. Littell and Emeline G. his wife, since the execution of your orator's said mortgage have possessed and enjoyed, and do still possess and enjoy, the said mortgaged premises, and have always received, and still receive the

rents, issues, and profits thereof; and that the said premises are a scanty security for the payment of the said principal and interest moneys so due to your orator as aforesaid, and that he or some other person or persons for him have frequently and in a friendly manner applied to the said James H. Startup and Elizabeth W. his wife, Mortimer D. Conklin and Melvina his wife, Amos C. Littell and Emeline G. his wife, Elizabeth Vreeland, the State of New Jersey, John C. Beatty, assignee in bankruptcy of Mortimer D. Conklin, and the Mayor and Aldermen of Jersey City or one of them, and requested them or one of them, to pay and discharge the said principal and interest moneys so due to your orator on the said bond and mortgage and your orator well hoped that they would have complied with such reasonable requests, as in justice and equity they ought to have done.

In tender consideration whereof, and for as much as your orator has not a complete remedy in the premises at the common law, nor can foreclose the equity of redemption of the said mortgaged premises, or safely sell the same for the payment and satisfaction of the said principal and interest moneys without the aid of this honorable Court, where matters of this nature are particularly cognizable and relievable.—To the end, therefore, that the said defendants may, upon their respective oaths, true, full and perfect answers make to all and singular the premises, as fully as if here repeated and they thereto particularly interrogated, and that they or some of them may be decreed to pay to your orator the said principal sum so due on the said bond and mortgage and the interest due and to grow due thereon, with yourorator's costs and charges in this behalf sustained, by a short day to be appointed by this honorable Court; and that in default thereof the said defendants, and all persons claiming or to claim under them, or any of them, may be foreclosed of and from all right, title and equity of redemption in and to the

said mortgaged premises and every part thereof, with the appurtenances and may deliver unto your orator the possession thereof, and all deeds, demises and muniments of title relating to or concerning the same; or that the said mortgaged premises, with the appurtenances, may be sold, and that out of the moneys arising from such sale your orator may be paid the said principal, interest and costs.

And that your orator may have such further and other relief in the premises as the nature of the case may require.

May it please your Honor the premises considered to grant unto your orator a notice or writ to be issued out of this Court and to be directed to the said The State of New Jersey, whereby the said State may be made a party hereto, and bound by the decree of this Court, according to the form of the statute in such case made and provided; and further

May it please your Honor, the premises considered, to grant unto your orator a writ or writs of subpœna, issuing out of and under the seal of this honorable Court, to be directed to the said James H. Startup and Elizabeth W. his wife, Mortimer D. Conklin and Melvina his wife, Amos C. Littell and Emeline G. his wife, Elizabeth Vreeland, John C. Beatty, assignee in bankruptcy of Mortimer D. Conklin, and the Mayor and Aldermen of Jersey City, therein and thereby commanding them on a certain day and under a certain penalty, to be and appear before your Honor in this honorable Court, then and there to answer the premises, and to stand to and abide by and perform such decree therein as to your Honor shall seem meet and agreeable to equity and good conscience. And your orator will ever pray, &c.

JAMES B. VREDENBURGH,
Solicitor and of Counsel with Complainant.

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Answer of the Mayor and Aldermen of Jersey City.

The answer of "The Mayor and Aldermen of Jersey City," one of the defendants to the bill of complaint of James A. Hand, complainant.

These defendants saving and reserving to themselves all and all manner of advantage of exception to the many errors, uncertainties and other imperfections in the said bill of complaint contained for answer unto, or unto so much thereof as these defendants are advised is material for them to make answer unto, answering, say: That they admit that James H. Startup and Elizabeth W., his wife, Mortimer D. Conklin and Melvina, his wife, and Amos C. Littell and Emeline, his wife, did, on the first day of July, eighteen hundred and seventy-three, execute and deliver unto Jane Van Horne, a bond and mortgage as is in complainant's said bill mentioned upon the lands in the complainant's bill described.

And these defendants further admit that they claim to have a lien on said lands by reason of an assessment, for the improvement of West Grand street pile foundation, &c., on said lands, confirmed May twenty, eighteen hundred and seventy-four, amounting to two hundred and thirty-eight dollars and eighty-eight cents, and also a lien on said lands by reason of a certain other assessment thereon for the main sewer in section "A," second drainage district, confirmed February twenty-six, eighteen hundred and seventy-four, amounting to seven hundred and twenty-one dollars and twenty-eight cents.

And these defendants further answering say, that they claim and insist that said assessments upon said property, assessed as in complainant's bill mentioned, are prior liens to the encumbrance of complainant's said mortgage, upon the lands described therein, and these defendants pray that it may be so adjudged and determined.

And these defendants further say, that as to the truth of the other matters, facts and things set forth in complainant's said bill, these defendants are not prepared to dispute or deny, but leave the same to be proved by said complainant to this Court as best he may; all of which matters and things these defendants are ready to aver and maintain and prove as this Honorable Court shall direct, and they pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

ALLAN L. McDERMOTT,
Solicitor and of Counsel with Defendants,
THE MAYOR AND ALDERMEN OF JERSEY CITY.

STATEMENT OF FACTS AGREED UPON.

It is agreed between the parties that the facts in this case relating to the question of priority between the complainant's mortgage and the assessment liens of The Mayor and Aldermen of Jersey City are the following:

On August 17th, 1871, the confirmation of an assessment for the "Improvement of West Grand Street, Pile Foundation, &c.," was approved, whereby the lands in question were assessed the sum of two hundred and fifty-nine dollars and forty-two cents.

On July 12th, 1872, the confirmation of an assessment for "Main Sewer, Section A, Second Drainage District," was approved, whereby said lands were assessed the sum of two thousand and thirty-one dollars and thirty-nine cents.

Complainant's mortgage bears date July 1st, 1873,

was acknowledged October 27th, 1873, and recorded November 28th, 1873.

On March 26th, 1873, the Legislature passed an act entitled: "An Act to adjust unpaid assessments in Jersey City," approved March 26th, 1873, (P. L. 73, p. 442), whereby it was among other things enacted that the Supreme Court should appoint three commissioners to examine, revise, alter and adjust all unpaid assessments in Jersey City which were disputed and assess the cost upon each lot in proportion to the benefit received, &c. And that the proceedings of said board should be filed, "and when so filed the assessments made by said board or a majority thereof should be a lien upon the property on which they are laid and shall be collected in the same manner provided for the collection of assessments in the charter of said city."

Under said act the Supreme Court appointed Daniel Haines, Jesse Williams and Theodore Little as Commissioners who, having been sworn and given due notice, &c., &c., as required by the act, made a new assessment for the "Improvement of West Grand Street, Pile Foundation, &c.," which re-assessmont was confirmed the 20th day of May, 1874, and assessed said lands by virtue of said act the sum of two hundred and thirty-eight dollars and eighty-eight cents, and said commissioners also made a new assessment for "Main Sewer, Section A, Second Drainage District," which re-assessment was confirmed the 26th day of February, 1874, and assessed said lands by virtue of said act the sum of seven hundred and twenty dollars and ninety-eight cents.

Said proceedings were duly filed with the City Clerk of Jersey City in accordance with said act.

JAMES B. VREDENBURGH,
Solr. and of Counsel with Complt.

ALLAN L. McDERMOTT,
Solr. of Defts.

"The Mayor, &c., of Jersey City."

OPINION—11th STEW. 115.

JAMES A. HAND
v.
JAMES H. STARTUP et ux et al.

A municipal charter, passed in 1871, provided that assessments for improvements should be a lien on the premises, notwithstanding any alienation or encumbrance thereof. A supplement, in 1873, provided that former assessments might be adjusted and confirmed, and should then be new assessments and a lien, and collected as provided in the original charter. A mortgage on lands in the city was given in 1873, after an assessment had been laid; this assessment was, after the mortgage was given, adjusted and confirmed, the confirmation taking place in 1874. Held, that the lien of the assessment was, under the charter, paramount to that of the mortgage.

Bill to foreclose. On final hearing on pleadings and state of facts agreed upon.

Mr. J. B. VREDENBURGH, for complainant.
Mr. A. L. MCDERMOTT, for Jersey City.

THE CHANCELLOR.—On August 17th, 1871, an assessment of $259.42 made under the charter of Jersey City for a municipal improvement (a street improvement) upon the mortgaged premises, which are within the bounds of that city, was confirmed, and on the 12th of July, 1872, another of $2031.39 made upon them, under the like authority, for another improvement (a sewer) was confirmed. Those improvements were duly brought before the Board of Commissioners oppointed under the act "to adjust unpaid assessments in Jersey City" (P. L. of 1873, p. 442), and new assessments were made instead thereof.

The assessment on account of the street improvement was reduced to $238.88, and the other to $720.98. The assessments appear to have been confirmed except as to the amounts. The confirmation in the case of the first mentioned improvement took place in May, 1874, and that of the other in February, 1874. The act provides that the proceedings of the board shall be filed and recorded in the office of the clerk of the city, and that when so filed, the assessments made by the board, or a majority thereof, shall be a lien upon the property on which they are laid, and shall be collected in the same manner provided for the collection of the assessments in the charter of the city. The act also declares that when an assessment has been adjusted or confirmed by the board, it shall be a new assessment.

The complainant's mortgage was given and recorded in 1873, after the assessments, as originally made, were confirmed. The complainant insists that, inasmuch as the act just referred to declares that the assessment by the board shall be a new assessment, and that such new assessment shall be a lien when filed in the city clerk's office, the lien of the assessment, as originally made, was lost, and that of the new one did not attach until 1874, and, therefore, is subsequent and subject to the lien of the mortgage. The lien of the assessments has priority over that of the mortgage, by force of the provision of the charter for collecting the assessments. Under the construction which has been put upon like provisions in municipal charters, the assessments are a lien paramount to any mortgage or other encumbrance. The charter declares (P. L. of 1871, p. 1155, § 151) that assessments shall be lien from the time of confirmation until paid, notwithstanding any devise, descent, alienation, mortgage or other encumbrance thereof, and there is a provision for the sale of the property for a term of years, to pay them, and that the purchaser at the sale shall hold the property against the owner or owners, and all persons claiming under him

or them. There is also provision for redemption by mortgage or other encumbrances, and for a record of the sales. Under these provisions, the lien of the assessment is paramount to that of the mortgage. O'Neill v. Dringer, 4 Stew. Eq. 507; Howell v. Essex Co. Road Board, 5 Stew. Eq. 672. There will be a decree accordingly.

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DECREE.

This cause coming on to be heard at the February Term of said Court, A. D. 1884, before his honor, the Chancellor, at the State House, in the City of Trenton, on the bill of complaint, the answer of the defendant, The Mayor and Aldermen of Jersey City, and statement of facts agreed upon (said bill having been ordered and decreed to be taken as confessed against all the defendants other than The Mayor and Aldermen of Jersey City), and being argued before the Court by James B. Vredenburgh, Esquire, of counsel with complainant, and Allan L. McDermott, Esquire, of counsel with defendant, and the Chancellor having considered the same and being of opinion that the lien of the defendant's assessments in said bill set forth upon the mortgaged premises is paramount to the lien of the said complainant's mortgage thereon.

It is on this 17th day of February, A. D. eighteen hundred and eighty-five, ordered and decreed that the said bill be and the same is as against said defendant The Mayor and Aldermen of Jersey City only dismissed with costs.

And it is further ordered that it be referred to Maximilian T. Rosenberg, Esquire, one of the Mas-

ters of this Court, to ascertain and report the amount due to said complainant for principal and interest upon the mortgage held by him upon the premises mentioned and described in the bill of complaint, and the amount due to the other defendants, Elizabeth Vreeland and The State of New Jersey, upon their respective decree and recognizance, and to report accordingly; and also to ascertain and report the priority of the said mortgage and said several incumbrances, and whether they all embrace the same premises; and whether the said mortgaged premises should be sold together, or in parcels, and if in parcels, in what order, and that the said Master do make his report with all convenient speed.

And all further equity is reserved until the coming in of said Master's report.

THEODORE RUNYON, C.

A true copy,

G. S. DURYE, Clk.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JAMES A. HAND,

Appellant,

and

THE MAYOR AND ALDERMEN OF JERSEY CITY,

Respondent.

On Appeal from Chancery.

To the Honorable the Court of Errors and Appeals in the last resort in all causes :

The humble petition of James A. Hand, the appellant in the above entitled cause, respectfully shows that your petitioner finds himself aggrieved by a decree made in the Court of Chancery of New Jersey, by his Honor Theodore Runyon, Chancellor, bearing date the seventeenth day of February, A. D. eighteen hundred and eighty-five, in a cause wherein your petitioner is complainant, and said The Mayor and Aldermen of Jersey City and others are defendants in this respect, to wit, that the said decree orders, adjudges and decrees that the said bill of complaint of your petitioner should be dismissed with costs as against the said The Mayor and Aldermen of Jersey City, on the ground, as is alleged in the recital of said decree, that the lien of the assessments of said The Mayor and Aldermen of Jersey City, on the mortgaged premises described in your petitioner's said bill, is paramount to the lien of your petitioner's mortgage thereon.

And your petitioner humbly appeals from that part of the said decree which decrees as aforesaid, upon the ground that the same is erroneous, for that the said Chancellor should have decreed that the lien of your petitioner's mortgage was paramount and a prior lien on said mortgaged premises to that of the said assessments of The Mayor and Aldermen of Jersey City. Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside, and for nothing holden.

And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

JAMES V. VREDENBURGH,
Solicitor and of Counsel for Appellant.

ANSWER ON APPEAL.

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto, nevertheless says and admits that a final decree was, on the seventeenth day of February, 1885, made in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated, but as to the substance and form thereof this respondent begs leave to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to equity, and prays that the same may be affirmed with costs to be adjudged to this respondent.

ALLAN L. McDERMOTT,
Solr. of Respondent.