

## LENON v. STREET IMPROVEMENT DISTRICT No. 512.

Opinion delivered March 17, 1930.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—DIRECT ATTACK.—A suit brought to obtain relief against the commissioners of an improvement district to have an assessment declared void as being excessive is a direct attack when brought within the time prescribed by the statute.
2. MUNICIPAL CORPORATIONS—PRESUMPTION IN FAVOR OF ASSESSMENT OF BENEFITS.—The burden of showing that an assessment of benefits for a street improvement was excessive was on the property owners.
3. MUNICIPAL CORPORATIONS—PURPOSE OF ASSESSMENT OF BENEFITS.—The purpose of an assessment of benefits in a proposed improvement district is to determine the effect of the proposed improvement upon the market value of the real property in the district, including buildings.
4. EVIDENCE—VALUE—OPINIONS OF WITNESSES.—The value of benefits from improvements is a matter for the judgment of witnesses, and, in testing the correctness of their testimony, regard may be had to the value, area, and location of the lots, the improvements on them, the value of such improvements and their character, and everything else connected therewith.
5. MUNICIPAL CORPORATIONS—VALIDITY OF ASSESSMENT OF BENEFITS.—An assessment of benefits for a local improvement can stand only when the property assessed is peculiarly benefited, and, when the cost of the improvement exceeds the total value of the assessment of benefits, the proposed improvement must fail.
6. MUNICIPAL CORPORATIONS—ATTACK ON ASSESSMENT OF BENEFITS—EVIDENCE.—In a direct attack on an assessment of benefits in a proposed improvement district, refusal to hear witnesses who would testify that the cost of the improvement would exceed a proper assessment of benefits to the real estate *held* error.
7. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—EXCESSIVE ASSESSMENT.—When an assessment for improvements substantially

exceeds the benefits which the property assessed receives, it is contrary to the Constitution.

8. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—RIGHTS OF LANDOWNERS.—Landowners have a right to sue in chancery within 30 days to have an improper assessment set aside where the common council fails to give relief from an assessment which exceeds the value of benefits conferred on the property assessed.

Appeal from Pulaski Chancery Court; *Frank H. Dodge*; Chancellor; reversed.

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellees to enjoin them from proceeding further in the construction of a street improvement district on the ground that the assessment of benefits was excessive.

The improvement district was duly organized under the statute to pave Center Street in Little Rock, Arkansas. There were eight blocks of approximately 107 lots in the district, and it was proposed to pave Center Street from Twenty-third to Thirty-first Street. Appellants are property owners within the proposed district; and, within the time prescribed by statute, they appealed to the city council from the assessment of benefits made by the assessors of the district, on the ground that it was arbitrary and excessive. The city council declined to grant them any relief; and, within the time prescribed by statute, appellants brought this suit against the district in the chancery court.

They proposed to introduce as a witness four persons connected with the real estate departments of the various banks in the city of Little Rock, and two other persons, who were owners of large amounts of real estate in said city, and all of whom were familiar with real estate values therein. The court refused to hear the testimony of these witnesses, and their testimony as shown by the record would have been to the following effect:

“That they are familiar with the property in Street Improvement District No. 512, Center Street, from Twenty-third to Thirty-first, Mr. Bodeman having sold a large portion of the above property, a certain amount of said

property being beneath mortgage at the present time; that the assessment roll shows an assessment of over 75 per cent. against said property for the paving of Center Street; that a pavement upon Center Street could not possibly increase the value of this property or benefit it in any way at more than ten per cent. to twenty per cent., if to that extent; that the effect of the improvement of this section is to render such property unsalable; that certain lots are for sale at \$100 along said street, others range as high as \$500 and \$600, tax assessment running \$400 in most instances, and above, and such an increase in value is absolutely impossible, it being cheap negro residence property, sold upon small installments, and the people along Center Street who own the property, paying on contract, wage earners, are unable to pay said tax; that the street, at the present time, is cindered and gravelled, and in fairly good condition.”

Appellants also offered to introduce the testimony of two colored witnesses, residents of the proposed improvement district, who would testify to the same effect.

The testimony of the county surveyor of Pulaski County, who lives near the proposed district, would have been to the effect that there is already a good street of gravel and cinders; that the property in the district would not support a pavement of the nature proposed; that most of the property in the district consisted of negro residences, and that the class of houses was not very valuable.

It was proposed to construct a paved street. The assessed value of the property in the district, according to the last county assessment, was \$50,700, and the cost of the improvement was estimated at \$25,331.02. The aggregate assessment of benefits was \$47,731. According to the testimony of the three assessors, the assessment of benefits was neither excessive nor arbitrary. The assessors considered every element which should enter into their findings on the assessment of benefits. One of the assessors was connected with the real estate department of a local bank, and had had considerable experience in

assessing property in local improvement districts. The other two members were colored, and had had very little experience in such matters.

The chancellor found the issues in favor of appellees, and it was decreed that the complaint should be dismissed for want of equity. The case is here on appeal.

*Henry C. Reigler* and *John F. Clifford*, for appellants.

*Dillon & Robinson* and *Murray O. Reed*, for appellees.

HART, C. J., (after stating the facts). Appellants were property owners within the proposed street improvement district, and appealed to the city council for relief from the assessment of benefits, on the ground that it was excessive. Having been denied relief by the city council, appellants brought this suit in equity against the commissioners of the improvement district to have the assessment declared void on the ground that the assessment of benefits was excessive, and practically amounted to a confiscation of their property. The suit was brought within the time provided by statute, and constitutes a direct attack upon the assessment of benefits filed with the city council. *Turner v. Adams*, 178 Ark. 67, 10 S. W. (2d) 41.

There was a presumption in favor of the validity of the assessment of benefits, and the burden was upon the property owners who assailed it to show that it was excessive. *Ahern v. Paving & Improvement District No. 32 of Texarkana*, 168 Ark. 385, 270 S. W. 513.

The purpose of the assessment of benefits is to determine the effect of a proposed local improvement upon the market value of the real property in the proposed district, including the buildings on the lots. This is clearly a matter of the judgment of witnesses; and, in testing the correctness of their testimony, regard may be had to the value, area, and location of the lots, the improvements on them, their relation to other property in the district and out of it, the value of the improvements, their character and everything else which might be considered in deter-

mining the value of the benefits assessed. This court has uniformly held that the only sound principle upon which the assessment of benefits for a local improvement can stand is that the property assessed is specially and peculiarly benefited by the improvement. Consequently, when it is found that the cost of the improvement exceeds the total value of the assessment of benefits, the proposed improvement must fail.

Tested by these principles of law, we are of the opinion that the chancery court erred in refusing the testimony offered by appellants. In no other way could appellants get before the court their theory that their property had been assessed too high. They had a right to show that the assessment of benefits made by the assessors was greater than any special and peculiar benefit which would be received by their property from the proposed improvement. The record shows that there was already a good street of gravel and cinders. The buildings in the district consisted chiefly of negro residences of comparatively little value. It was proposed to change the street from one of gravel and cinders to a paved one. The assessed value of the property as shown by the last county assessment amounted to \$50,700. The estimated cost of the improvement was something over \$25,000. The witnesses for appellants testified that this character of property would not support a paved street. They all agreed that the cost of the improvement would greatly exceed a proper assessment of benefits made against the property. When the topography of the district, the character of residences in it, and everything which goes to make up the value of property is considered, we are of the opinion that the proposed evidence would have established that the cost of the improvement would exceed the value of the special benefits which might be derived from paving the street.

Under these circumstances, the city council should have ordered a reassessment of the property; and, not having done so, the chancery court should have admitted

the proof offered by appellants and have rendered a decree in accordance with the views herein expressed. Having failed to do so, the decree of the chancery court will be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

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OPINION ON REHEARING.

HART, C. J. Counsel for appellee insist that the original opinion is in conflict with *Kirst v. Street Improvement District No. 1*, 86 Ark. 1, 109 S. W. 526, but we do not think so. On the contrary, we think it is in conformity with the principles of law there decided, as well as those in *Turner v. Adams*. 178 Ark. 67, 10 S. W. (2d) 41, cited in our original opinion.

The record shows that the property owners sought to attack the assessment before the city council on the ground that it was arbitrary and made for the purpose of making the assessment of benefits exceed the cost of the improvement without any regard being had to the actual benefits received by the property. The assessment as a whole was attacked on the ground that each piece of property in the district was assessed at a sum greatly in excess of any actual benefit it might receive, and testimony was offered which tended to establish the fact that the assessment of benefits was made in an arbitrary manner without any relation to the benefits received. Evidence to that effect was offered.

If this cannot be done, there is no use in holding that the individual owner shall never be required to pay a greater sum than the actual value of the benefits received. Assessments for street improvements can only be upheld on the ground that the property assessed is enhanced in value to an amount equal to the sum assessed against it. An allegation that the assessment on the property is substantially in excess of the benefits received raises a con-

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stitutional question; and, if the allegation is true, then the assessment is contrary to the Constitution. On a direct attack, this is a question of fact, and we pointed out in our original opinion that the proof offered showed that the assessment made upon each piece of property was shown to be greatly in excess of any special benefit it might receive. The common council of the city had jurisdiction to pass upon the validity of this assessment; and, if the proof showed that it was arbitrary within the meaning above indicated, the council should have refused to confirm the assessment and have set it aside. This would have left it within the power of the assessors to have made a new assessment conformable to law, which would be subject to attack in the manner provided by statute as in the case of the first assessment. If the council fails to give the landowners the relief to which the proof shows they are entitled, they have the right to bring a suit in the chancery court within thirty days to accomplish that result. Therefore, the motion for a rehearing and to modify the opinion will be overruled.

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