STEVENS v. SHULL.

Opinion delivered June 17, 1929.

1. APPEAL AND ERROR—ABANDONMENT OF EXCEPTIONS.—In a suit attacking the validity of an improvement district where only one ground for reversal was insisted upon on the appeal, other grounds of attack stated in the complaint were abandoned.
2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—VALIDITY OF ASSESSMENT.—In a suit attacking the validity of an improvement district, evidence that all members of the board of assessors participated in the assessment, that they were residents of the district and familiar with the location and character of each lot in the district and the nature of improvements thereon, that in their

opinion each lot would be benefited by the amount of the assessment against it, and that in making the assessment they considered the value of the property, the front footage, and everything that they thought might affect the benefits assessed against each piece of property, *held* to sustain the chancellor's finding that the assessment was lawful.

3. JUDGMENT—RES JUDICATA.—Where the validity of an improvement district was sustained by the chancellor's decree in a suit attacking the validity thereof, such decree operated as a bar to all grounds of attack in subsequent suits which might have been interposed in the first suit; though there may have been different plaintiffs in the various suits.

4. MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCE—DE FACTO ALDERMAN.—Objection cannot be raised collaterally that an ordinance creating an improvement district was not properly passed because one of the aldermen whose vote was necessary to its passage did not reside in the city, since he was at least a *de facto* officer.

Appeal from Miller Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

STATEMENT OF FACTS.

The appeals in both these cases are by landowners to reverse decrees of the chancery court sustaining the validity of a street improvement district and the assessment of benefits therein. They are companion cases to *Stevens* v. *Shull,* 178 Ark. 269, 10 S. W. (2d) 511.

On September 6, 1928, certain landowners brought suit in equity against the commissioners and assessors of a street improvement district organized for the purpose of paving certain streets in the city of Texarkana, Arkansas. The complaint attacked the validity of the district on the ground that the plans were too indefinite and uncertain to be the basis for the levy of assessment of benefits against the lands in the district, and that the proposed improvement varied from the purposes for which the district was formed. The complaint also alleged that the cost of the improvement would exceed fifty per cent. of the assessed value of the real property in the district as prayed for in the petition asking for the formation of the district.

The chancery court made a specific finding that the plans for the improvement were proper, legal and valid, and that the estimate of the cost of the improvement did not exceed fifty per cent. of the assessed value of the property in the district according to the last county assessment. The court further found, however, that the assessment of benefits made by the board of assessors was arbitrary and void. A decree was entered in accordance with the findings of the chancery court, and the landowners have duly prosecuted an appeal to this court. Upon hearing of the appeal, the landowners abandoned all grounds of attack on the district except that the estimated cost of the improvement exceeded fifty per cent. of the assessed value of the real property in the district as prayed for by the landowners seeking to form the district.

Our statute makes it the duty of the council to determine whether the proposed improvement will exceed the percentage of the assessed value of the real property in the district, and the form and nature of the evidence the council is to act on is the last county assessment. The court held that the statute meant the assessment roll in existence at the time the council determined whether the estimated cost of the improvement was less or more than the value of the real property in the district as shown by the last county assessment in force when the cost of the improvement, as estimated, and the assessment of benefits were filed with the council. Therefore the decree of the chancery court was affirmed.

On the 21st day of November, 1928, certain landowners in the district filed what they termed an amended and substituted complaint in the chancery court against the board of improvement, attacking the validity of the district as being illegal for certain specified reasons, and also attacking the new assessment of benefits which had been made. On the 5th day of January, 1929, the chancery court entered of record a decree sustaining the validity of the district and approving the assessment of benefits as a proper and valid one. It was therefore

decreed that the complaint in that case be dismissed for want of equity. That case is on appeal as No. 1213, under the style of Stevens *et al.* v. Shull *et al.* The evidence relating to the assessment of benefits made by the board of assessors will be referred to under an appropriate heading in the opinion.

On the 25th day of February, 1929, certain landowners of the district brought another suit in equity against the board of commissioners, attacking the validity of the district and the assessment of benefits. Certain additional grounds of attack were alleged in the complaint, and they will be stated under appropriate headings in the opinion. Upon the hearing of the case, the validity of the district was again sustained and the assessment of benefits held to be valid. The decree was entered of record on the 6th day of April, 1929, and an appeal was duly prosecuted to this court; and the case number is 1173.

A plea of *res judicata* was filed by the defendants in each case, and on appeal the cases were consolidated for hearing.

James D. Shaver and *Frank S. Quinn,* for appellant.

J. M. Carter and *B. E. Carter,* for appellee.

HART, C. J., (after stating the facts). It will be noted from our statement of facts that in each of the above cases the validity of the paving district was attacked by landowners in the district. In the first case the court sustained the validity of the district, and upon appeal to this court no ground for reversal was insisted upon except that the estimated cost of the improvement exceeded fifty per cent. of the value of the real property in the district as prayed for by the landowners, within the meaning of the statute on the subject. *Stevens* v. *Shull,* 178 Ark. 269, 10 S. W. (2d) 511. Under the settled rules of this court this constituted an abandonment of other grounds stated in the complaint.

When the second case was filed, an assessment of benefits had been made in accordance with the holding of

the chancery court in the first case, and this was held by the chancery court to be a proper and valid assessment of benefits. We are of the opinion that the holding of the chancery court on this point was correct. All the members of the board of assessors were present and participated in the new assessment. They were all residents of the improvement district, and were familiar with the location and character of each lot in the district and the nature of the improvements thereon. They had an engineer present, who figured the areas of the lots which the assessors included in the proposed assessment. They had a list of the assessed value of all the property in the district; they considered the fact that some of the lots were already on paved streets; they considered the character and value of the houses in the district; and they considered everything that would affect the assessment of benefits. It was the opinion of the members of the board that each piece of property would be benefited by the amount of the assessment against it; and in making the assessment they considered the value of the property, the front footage, and everything that they thought might affect the benefits to be assessed against each piece of property. They had a map before them, showing the situation and relation of the different pieces of property to each other, and they made an examination of the district in addition. Hence we are of the opinion that the finding of the chancellor, that the assessment appears to have been made in accordance with the principles of law laid down by this court, is not against the weight of the evidence. *Kirst* v. *Street Improvement District No. 120,* 86 Ark. 1, 109 S. W. 526; *Moore* v. *North College Avenue Improvement District No. 1,* 161 Ark. 323, 256 S. W. 70; *Paving Districts Nos. 2 and 3 of Blytheville* v. *Baker,* 171 Ark. 692, 286 S. W. 945; and *Board of Commissioners of Street Improvement District No. 349* v. *Little Rock,* 172 Ark. 549, 289 S. W. 478.

Upon the hearing of the last case filed by the landowners, the chancery court sustained the validity of the

district and also a plea of *res judicata* made by the commissioners. The validity of the improvement district was sustained by the chancery court in the first case, and this operated as a bar to all grounds of attack in subsequent suits which might have been interposed in the first suit. *Howard-Sevier Road Improvement District No. 1* v. *Hunt,* 166 Ark. 62, 265 S. W. 517; and *Tri-County Highway Improvement District* v. *Vincennes Bridge Co.,* 170 Ark. 22, 278 S. W. 627. It does not make any difference that there may have been some different plaintiffs in the various suits. In the two cases last cited it was expressly stated that the remedy in suits of this character is in the interest of a class of individuals of common rights that need protection, and, in the pursuit of a remedy, individuals have the right to represent the class to which they belong. In this connection it may be stated that the present attack made on this district came from different members of the same family. It was also decided in the cases just referred to that the record on appeal in this court may be looked to to see whether the issues in the different cases are substantially the same. An examination of the record in the case of *Stevens* v. *Shull,* 178 Ark. 269, 10 S. W. (2d) 511, will show that the same attack was made upon the validity of the district as was made in the second suit, which was No. 1213.

In the last suit, which is No. 1173, two additional grounds of attack upon the validity of the district were added. But these grounds might have been offered in the first two suits, and for that reason the plea of *res judicata* should be sustained. As pointed out in the cases referred to, if this were not true, litigation would not end until the parties had no more money nor the ingenuity of counsel in suggesting additional grounds in support of the issue had been exhausted. Different landowners could prosecute different suits and make different attacks on the validity of the district, so that it would be practically impossible to make any proposed improvement in a city within a reasonable time. Therefore we

hold that the chancery court properly sustained the plea of *res judicata* in case No. 1173.

Besides this, we do not think that the additional grounds of attack could be sustained on the merits. In the first place, the validity of the district was attacked on the ground that the ordinance creating the district was not properly published. We do not deem it necessary to set out the facts relating to this phase of the case. It is sufficient to say that the same point was raised and was decided adversely to the contention of the appellants in the case of *Drainage District No. 9 of Miller County* v. *Merchants' & Planters' Bank,* 176 Ark. 474, 2 S. W. (2d) 79. The same facts appeared in this case as were proved in that case, and we hold that this case is ruled by that.

Again, it was contended that the ordinance creating the district was not properly passed. It is alleged that one of the aldermen who voted for suspending the rules on the passage of the ordinance creating the district did not reside in the city at the time, and that the rules could not have been suspended without his vote. There is no merit in this attack on the validity of the district. The alderman was at least a *de facto* officer, and, as such, his qualification to serve cannot be inquired into in this suit. *McClendon* v. *State ex rel.,* 129 Ark. 286, 195 S. W. 686, L. R. A. 1917F, 535.

We find no reversible error in the record, and the decree in each case will therefore be affirmed.