KELLEY TRUST COMPANY *v.* PAVING DISTRICT NO. 46 OF FORT SMITH.

Opinion delivered October 19, 1931.

1. MUNICIPAL CORPORATIONS—ASSESSMENT FOR IMPROVEMENT—DIRECT ATTACK.—A suit by property owners to set aside a paving assessment, brought within the designated time under Crawford & Moses' Dig., § 5668, as amended by Acts 1929, p. 252, § 130, constituted a direct attack on the assessment.
2. MUNICIPAL CORPORATIONS—IMPROVEMENTS—BASIS OF ASSESSMENT. —The special benefit conferred on private property by a public improvement is the foundation of the power to assess it for the cost of the improvement.
3. MUNICIPAL CORPORATIONS—IMPROVEMENT—VALIDITY OF ASSESSMENT.—The general test of the validity of an assessment for a

proposed improvement is whether the assessment will enhance the actual value of the property, not whether, as now used by the present owner, any advantage is received.

4. EVIDENCE—VALIDITY OF ASSESSMENT FOR IMPROVEMENT.—The situation and conditions surrounding property may be considered in determining the weight to be given to the opinions of witnesses on the question whether property will be enhanced in value by the amount of the assessment of benefits.
5. EVIDENCE—OPINION OF WITNESSES.—That the assessors of an improvement district intended to charge the lots proportionately to the cost of the improvement may be considered in testing the credibility of their opinion with reference to the benefit to be derived from the improvement.
6. MUNICIPAL CORPORATIONS—IMPROVEMENT.—Regardless of whether a general depression or the financial condition of the country has caused lands to depreciate in value, where they are sought to be improved by a public improvement, the assessment therefor must not exceed the special or peculiar enhancement in value of the property by reason of the improvement.
7. MUNICIPAL CORPORATIONS—ASSESSMENT FOR IMPROVEMENT.—Evidence *held* to show that an assessment for a paving improvement substantially exceeded the enhancement in value of the property.

Appeal from Sebastian Chancery Court, Fort Smith District; *C. M. Wofford,* Chancellor; reversed.

STATEMENT OF FACTS.

This suit was brought by appellants, property owners, against appellee, Paving District of the city of Fort Smith, under § 5668 of Crawford & Moses' Digest, as amended by § 13 of act 64 of the Acts of 1929, to set aside the assessment of benefits in a street improvement paving district.

Leigh Kelley, vice president of the Kelley Trust Company, engaged in the real estate business in Fort Smith, Arkansas, was the principal witness for appellants. According to his testimony, he had been engaged in the real estate business in Fort Smith for twenty-two years, vice president of the Kelley Trust Company for fifteen years, and was well acquainted with the property and streets in Paving District No. 46 in the city of Fort Smith. The streets are dirt streets, graded but not paved. There are sixty lots in the paving district and twenty-two houses. Slightly over one-third of the lots

have houses. It is possible that some of the improved property may be benefited to the extent of the assessments levied against it. The vacant lots will not be benefited in any way, and their value will not be increased by putting in the contemplated pavement. The lots belonging to the Kelley Trust Company were graded and laid out for residence purposes. They are vacant lots, and there is at present no reasonable market value for them. It was proposed to put a general price of $1,000 on the lots at the time the Park Hill Addition was laid out. Some lots have been sold at $500, and an occasional buyer can now be had at that price. If put on the market and sold, they would not bring more than $100 per lot now. The lots could not be sold for the assessment of benefits laid on them. Witness said that he did not think any speculator would take the vacant lots with the assessments against them with the hope of selling them for the amount of the assessments if the lots were given to him. There has been a shrinkage of business in Fort Smith for the last two or three years. There is no benefit from the contemplated improvement to the vacant property.

J. C. Pierce was also a witness for appellant. He had lived in Fort Smith thirty-five years and owned no property in the district. He was acquainted, however, with the property in the district and the value thereof. He looked over the cost of benefit assessments and does not believe that the vacant lots would be benefited at all. There would be some benefit to the improved lots. Not over one-third of the lots in the district are improved. The proposed improvement will not increase the value of the property at all.

W. C. Morris testified that he had been engaged in the real estate business in Fort Smith since 1904, and is familiar with real estate values and conditions affecting such values. Witness has looked over the assessment of benefits in Paving District No. 46 and does not think the unimproved property in the district will be benefited by the proposed improvement to the amount of the benefits assessed against it. As a concrete example, witness said

he owned one unimproved lot which he was trying to sell for $300. The assessment against the lot is $276. He would let the lot sell for the assessment if it is put on. This means that the assessment would confiscate the property because witness would not pay the same. Witness stated that if he had a house in the district, he would pay the assessment to get away from the mud and dust because of the comfort of it. The property would not be enhanced in value by the proposed improvement.

E. R. Noe was a witness for the defendant. According to his testimony, he was one of the assessors in the district and owned a house in it. In his judgment, each lot in the district would be benefited by the making of the improvement in an amount equal to the assessment of benefits. He stated that, in making the assessment, the assessors went out, looked over the property, and took into consideration the area, lot frontage, and the value of the improvements. He stated further that the assessors first obtained the amount of the estimated cost from the engineer of the district which they needed to raise by means of the assessment. He was asked the question if their purpose was to charge each piece in proportion to the entire amount, and answered, "Yes, sir." He stated that the assessors figured the amount that was needed to do the paving. Five per cent. was levied for the improvements on the property, and the other was divided on the area of the lots, taking into consideration that some of the lots were not so valuable as others. The assessors used five per cent. of the value of the improvements on the improved lots and spread out the balance on all the lots according to frontage. He thought the property would be enhanced in value to the amount of the assessment of benefits. His testimony was corroborated by that of W. L. Winters, the engineer of the district.

Fagan Bourland, who owned several hundred thousand dollars' worth of real property in Fort Smith, stated he was familiar with real estate values in Fort Smith, and had lived there all of his life. In his judgment, the effect of the improvement on the property in the district would

be to enhance the value as much as the pavement would cost. C. E. Steuart, one of the assessors for the district, testified that in assessing the benefits, the assessors took into consideration the area, frontage, and valuation, including the value of the improvements.

Other facts will be stated or referred to in the opinion.

The chancellor found that the complaint had been filed within thirty days after the passage of the ordinance levying the assessment of benefits and constitutes a direct attack on the assessment. The court, however, found that the complaint was without equity, and it was decreed that it should be dismissed for want of equity. The case is here on appeal.

George F. Youmans, for appellants.

George W. Dodd, for appellee.

HART, C. J., (after stating the facts). The suit was brought within the time required by statute and therefore constitutes a direct attack upon the assessment of benefits. The question thus presented by the record is mainly one of fact.

At the outset, it may be stated that the special benefit conferred upon private property by public improvement is the foundation of the power to assess it to pay the cost of the improvement. This is the only theory upon which, under our Constitution, an assessment can be justified. An assessment cannot be levied if the amount of it is in excess of the benefits in the enhancement of the value of his property received by the owner from the improvement. *Kirst* v. *St. Imp. Dist. No. 120,* 86 Ark. 1, 109 S. W. 526; *Osborne* v. *Board of Improvement of Paving District No. 5 of Fort Smith,* 94 Ark. 563, 128 S. W. 357; *Mullins* v. *City of Little Rock,* 131 Ark. 59, 198 S. W. 262, L. R. A. 1918B, 461; and *Johnston* v. *Conway,* 151 Ark. 398, 237 S. W. 80.

Many other authorities in support of the general rule might be cited, but the principle is so firmly established in this State that a further citation of authorities is unnecessary.

The only difficulty is to apply the rule correctly under the facts of each particular case. The general test is whether the proposed improvement will enhance the actual value or worth of the property. The test is not whether, as now used by its present owner, any advantage is received, but whether its general value has been enhanced. While the mere fact of improvement or failure to improve is not the controlling question, yet the situation and conditions surrounding the property may be looked into to ascertain the weight to be given to the testimony of the witnesses with regard to their opinion as to whether or not the property will be enhanced in value by the amount of the assessment of benefits against it.

Two streets were to be paved in the present district, each of them being two blocks in length. The two streets proposed to be paved run east and west and are parallel to each other and are connected with paved streets on each end. It will be seen from our statement of facts that the witnesses differed widely in their judgment or opinion as to whether the proposed improvement would enhance the value of the property to the amount of the special assessment against it.

The assessors and witnesses for the improvement district testified that the property would be enhanced in value in the amount assessed against each lot in the district, but they in the main contented themselves with the general statement that they were familiar with real estate values in Fort Smith and believed this to be true. According to the testimony of Noe, one of the assessors, they began by getting an estimate of the cost of the paving from the engineer of the district, and thus obtained the amount necessary to be raised by means of the assessments. He said their purpose was to charge each lot in proportion to the entire amount, figuring five per cent. for the improvement. This is a proper matter for consideration in testing the credibility to be given this witness. Doubtless his judgment was at least unconsciously affected in the assessment by the knowledge that the as-

sessments of benefits must be high enough to cover the estimated cost of the improvement and leave a margin for unforeseen contingencies. The test is whether the general value of the property will be enhanced to the amount of the assessment.

The testimony for the witnesses for the property owners was directly contrary to that of the witnesses for the district. The witnesses for the property owners stated positively that the property of appellants is not worth the cost of the improvement or of the assessment of benefits against the property. They stated that no one would assume the burden of the cost of the assessment upon the property, for the property. They stated that under present conditions, which have existed for more than two years, no one would buy the property and improve it with the probability of having to pay the assessment of benefits levied against it. They stated that the property had no salable value for any reasonable amount, and that it would have to be greatly sacrificed in order to sell it at all. They stated further that if the property was sold for speculative purposes, it could not be given away to any one who would pay the assessment of benefits against it. While witnesses for the defendant contradict this testimony, they all admit that there has been no market for the property of this kind for the past year.

It does not make any difference whether the general depression and the financial condition of the country caused this or whether there are other extraneous causes for it. The test is whether the property will be enhanced in value to the amount of the special benefits assessed against it. As we have already seen, where lands are improved by legislative action for a public improvement, the cost of such improvement may only be imposed on the property to the extent of the special or peculiar advantages received by it. In this way it is not considered that the property of the individual or any part of it is taken from him for the public use, for the reason that he is compensated by the enhancement of the value of his property. In short, the principle is only applicable where

the assessed benefits is commensurate to the burden. If the sum is exacted of the property owner in excess of the enhanced value, then to that extent private property is taken for public use without just compensation to the owner.

A majority of the court is of the opinion that, when the situation of the property and the conditions existing at the time the assessment of benefits was made are considered, the assessors levied against the property of appellant an amount of benefits substantially in excess of any enhancement in the value of the property, and that the chancellor erred in not so holding. Therefore the decree 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. It is so ordered.

Justices SMITH, KIRBY and MCHANEY dissent.