TURNER *v.* ADAMS.

Opinion delivered October 22, 1928.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—DIRECT ATTACK.—A suit to enjoin collection of an assessment of benefits in an improvement district, if commenced within 30 days after the publication of the passage of the assessment ordinance, constitutes a direct attack upon such assessment.
2. MUNICIPAL CORPORATIONS—WITHDRAWAL OF ASSESSMENT OF BENEFITS.—Until the assessment of benefits for a public improvement has been acted upon by the city council, it is lawful for the assessment to be withdrawn by the board of assessors for the purpose of equalizing the assessments and correcting errors, or for reconsideration of the assessment as a whole.

3. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—PURPOSE OF ASSESSMENT.—The purpose of the statute requiring the board of assessors to assess the value of the benefits from a public improvement to accrue to each piece of property and requiring the board to consider the value, area and location of the property, the improvements thereon, and its relation to other property, is to determine the effect of the proposed improvement upon the market value of real property, including the buildings upon it.
4. MUNICIPAL CORPORATIONS—ATTACK UPON ASSESSMENT—BURDEN OF PROOF.—Property owners of an improvement district, attacking the validity of the assessment of benefits as a whole, have the burden of proving that the assessment was made upon a wrong basis.
5. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Findings of fact made by a chancellor will not be disturbed upon appeal unless clearly against the preponderance of the evidence.
6. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—BASIS OF ASSESSMENT.—While the board of assessors in an improvement district is authorized to double the assessment of benefits if, in their opinion, this should be done after taking into consideration all the elements that should be considered in making the assessment, doubling the assessment because that was necessary in order to construct the improvement, was made upon a wrong basis, and was arbitrary and void.
7. MUNICIPAL CORPORATIONS—ASSESSMENT ON WRONG BASIS.—An assessment of benefits upon a wrong basis is illegal and void, and may be set aside upon a direct attack.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to enjoin them from proceeding further in the construction of a waterworks system and a sewer system in the town of Ozark, Arkansas, or from collecting the assessment of benefits against the real estate in each of said districts, on the ground that the assessment of benefits was void because made upon the wrong basis. The suit was defended on the ground that the assessment of benefits in each district was properly made, and that the same constituted a valid and enforceable lien against the real property in the district.

The facts, in so far as material to decide the issues raised by the appeal, may be briefly stated as follows: In 1926, separate improvement districts, consisting of all the real property in the town of Ozark, Arkansas, were properly formed for the purpose of constructing a waterworks system and a sewer system in said town. A board of assessors was appointed for each district, and a separate assessment of benefits was filed with the common council of the town, and remained on file, unacted upon, for something more than ten days. The members of the board of assessment were then informed by the members of the council that the estimated cost of the improvement in each district exceeded the total amount of the assessment of benefits. Thereupon the assessors asked for permission to withdraw their assessment of benefits for further consideration, and the council granted their request. After further consideration of the matter, the board of assessors decided that it did not wish to change its assessment or to raise it to nearly double the original assessment, which, they had been informed, was necessary to make the assessment of benefits greater than the estimated cost of improvement in each district. The assessors then sent in their resignations to the council. These were duly accepted, and a new board of assessors was appointed in each district.

The new board proceeded to make an assessment of benefits in each district which amounted to about twice the amount of the assessment of benefits made by the original board of assessors. The new assessment of benefits for each district was filed with the council and adopted by it as the assessment of benefits for each district. The validity of the assessment of benefits in each district as a whole was attacked by the real property owners on the ground that it was made on the wrong basis.

J. W. Roach, one of the members of the new board of assessors, was the principal witness for the plaintiffs. According to his testimony, when the new board was formed the members thereof were informed by the

city attorney, in the presence of the members of the council, at a regular meeting in the council chamber, that the original assessment of benefits was not sufficient to pay the estimated cost of the improvement in each district, and that it would have to be made greater in order to construct the improvement for a waterworks system and a sewer system. The city attorney said that the assessment of benefits would have to be about doubled for each district. The members of the board of assessors then went and made the assessment of benefits in accordance with that advice. The assessment of benefits in each district was nearly double that made by the original board of assessment.

Will Hill, a member of the old board of assessors, was also a witness for the plaintiffs. According to his testimony, the members of the common council told them that the assessment of benefits in each district was insufficient, and that the board would have to practically double it in each district in order to construct a waterworks system and a sewer system. In other words, the board of assessors was told by the city council that the assessment of benefits filed by it for each district was not sufficient to pay the estimated cost of the improvement in each district.

The chancellor found the issues in favor of the appellees, who were plaintiffs in the court below; and appellants, who were defendants in the court below, were permanently enjoined from taking any action to put said assessment of benefits into effect. The case is here on appeal.

J. D. Benson and *Daily & Woods*, for appellant.

Linus A. Williams, for appellee.

HART, C. J., (after stating the facts). At the outset it may be stated that the present suit was commenced within thirty days after the publication of the passage of the assessment ordinance, and therefore constitutes a direct attack upon the assessment of benefits filed with the council. *Missouri Pacific Rd. Co.* v. *Waterworks Improvement District,* 134 Ark. 315, 203 S. W. 696;

Ingram v. *Thames,* 150 Ark. 443, 234 S. W. 629; *Henry* v. *Board of Improvement,* 170 Ark. 673, 280 S. W. 987; and *Carney* v. *Walbe,* 175 Ark. 746, 300 S. W. 413.

The original assessment was filed with the common council, and remained on file there without being acted upon for a little over ten days. The board of assessors was then informed by the city council that the assessment of benefits was insufficient to meet the estimated cost of the improvement in each of said improvement districts. Therefore the board of assessors requested and was granted permission to withdraw its assessment of benefits for the purpose of reconsidering the assessment. After due consideration the board decided not to change its assessment of benefits, and the members of the board of assessors resigned without again filing the assessment of benefits with the council. Their resignations were accepted. Before the assessment of benefits was acted upon by the council, it was lawful for the assessment of benefits to be withdrawn and reconsidered by the board of assessors. *Thomas* v. *Street Improvement District No. 216,* 158 Ark. 187, 249 S. W. 590.

From that decision and other decisions of this court it is plain that, until the assessment of benefits had been acted on by the city council, the board of assessors might be granted permission to withdraw it for the purpose of equalizing the assessment of benefits, correcting errors in it, or for reconsideration of the assessment as a whole. This the board of assessors did, and concluded not to change its assessment. The resignation of the members of the board was accepted by the city council without requiring the board to again file the assessment of benefits. Hence there was no assessment of benefits for either district made by the original board of assessors.

A new board was appointed, and it proceeded to a discharge of its duties, and filed with the city council an assessment of benefits for each district which was practically double that of the first or original assessment. This it had the right to do, if it had proceeded

upon a proper basis and had complied with the statute in making its assessment of benefits. The statute requires the board to assess the value of the benefits to accrue to each piece of property, and in doing so the board must consider the value, area, location of the property, the improvements thereon, its relation to other property, and every other element which might go to make up the sum total of benefits. The purpose is to determine the effect of a proposed improvement upon the market value of the real property, including the buildings on it. *Kirst* v. *Street Improvement District No. 120,* 86 Ark. 1, 109 S. W. 526.

The burden was upon appellees, who attacked the validity of the assessment as a whole, to prove that it was made upon the wrong basis. The chancery court found that appellees had met the burden of proof in this respect imposed upon them, and a decree was entered of record enjoining appellants from proceeding further in the collection of the same. It is the settled rule of this court that the findings of fact made by a chancellor will not be disturbed upon appeal unless they are clearly against the preponderance of the evidence. In the case at bar one of the members of the new board of assessors testified that the city attorney, in the presence of the city council, told them that it would be necessary to practically double the assessment of benefits in each district in order to construct the improvement. In other words, they were told that the cost of the improvement exceeded the original assessment of benefits made by the old board, and that it would be necessary to practically double the original assessment in order that the assessment of benefits might exceed the estimated cost of the improvements. This was tantamount to arbitrarily doubling the assessment for the purpose of constructing the improvement. This could not be done. As above stated, the new board might double the assessment of benefits if, in its opinion, this should be done after taking into consideration all the elements that should be considered in making an assessment of benefits in accord-

ance with the rule above announced. An assessment of benefits made upon a wrong basis is illegal and void, and may be set aside by a direct attack made by the property owners upon it in the time provided by statute. *Kirst* v. *Street Improvement District No. 120,* 86 Ark. 1, 109 S. W. 526; *Lee Wilson Co.* v. *Road Improvement District,* 127 Ark. 210, 192 S. W. 371; *Sikes* v. *Douglas,* 147 Ark. 469, 227 S. W. 988; and *Desha Road Improvement District No. 2* v. *Stroud,* 153 Ark. 587, 241 S. W. 882.

This leaves each district without an assessment of benefits having been made, because the assessment as a whole has been set aside and held void as having not been made upon a proper basis A new assessment may be made by the board of assessors upon a proper basis; and, if the assessment of benefits so made shall be greater than the estimated cost of improvement, the construction of the improvement may be proceeded with. Otherwise, the plan of the proposed improvements must be abandoned.

It follows from what we have said that the decree of the chancellor was right, and must be affirmed.