the *Southwestern Bell* case: "The most serious vice of the present rule for fixing the rate base is not the existing uncertainty, but that the method does not lead to certainty. Under it, value for rate-making purposes must ever be an unstable factor. Instability is a standing menace of renewed controversy. The direct expense to the utility of maintaining an army of experts and of counsel is appalling. The indirect cost is far greater. The attention of officials, high and low, is necessarily diverted from the constructive tasks of efficient operation and of development. The public relations of the utility to the community are apt to become more and more strained. And a victory for the utility, may in the end, prove more disastrous than defeat would have been."[35]

It is not within the scope of this paper to discuss the merits of prudent investment or of reproduction cost, but whichever view is adopted, or if rate-making is declared to be a legislative function, or if the rate be determined on the basis of index numbers, it is clear that the rule of *Smyth v. Ames* is no longer applicable. Nor is this view shared alone by those advocating original cost; those in the camp of reproduction new also favor it. As says Professor Goddard,[36] a strong advocate of the prudent investment theory, "It is time *Smyth v. Ames* went into the discard. It served as a good temporary bridge. It is no longer safe and nobody trusts his weight on it, though nearly all claim to be trusting it to carry their weight across the stream." And, as is said by Mr. Frederic G. Dorety,[37] an advocate of reproduction cost, after pointing out Mr. Justice Brandeis's reasons for reconsideration of the *Smyth v. Ames* doctrine, "The necessity for the statement in some definite principle in valuation has not been exaggerated by him."

TOBIAS LEWIN, '32.

THE APPLICATION OF THE FRONT FOOT RULE TO PROPERTY OF IRREGULAR SHAPE

The apportionment of the cost of public improvement has, for the most part, been accomplished by one of two methods. Either the benefit accruing to each specific piece of property so affected is determined and the assessment made upon that basis, or a benefit district is designated and the assessments are levied uniformly against the property owners within that district. The latter plan has been most widely used in distributing the expense of paving or resurfacing city streets, the district being laid out

[35] *Ibid.*

[36] N. 12 above.

[37] Dorety, *The Function of Reproduction Cost in Public Utility Valuation and Rate Making* (1923) 37 HAR. L. REV. 173.

so as to encompass the property abutting on the improvement. The cost of the work is then divided among the property owners according to some uniform principle. A standard most frequently used is the so-called front foot rule. Presumably the property owners are benefited in proportion to the amount of frontage which they own along the street. But frequently, it happens that lots are irregular in shape. For instance, a lot adjacent to an oblique intersection might be comparatively less valuable than other property in the district, because of its peculiar shape or its small area. The application of the front foot rule to such situations precipitates a problem which has not been considered by many courts in this country.

It will be profitable, in approaching this question, to advert to the principles which underlie special assessments and to consider the application of those principles to the apportionment of the cost of public improvement by the front foot rule.[1] It is clear that the power to levy special assessments arises from the sovereign taxing power of the states. Judge Cooley,[2] citing a large number of authorities, remarks, "That these assessments are an exercise of the taxing power has over and over again been affirmed until the controversy must be regarded as closed." It has been argued that since special assessments are a form of taxation and since no *quid pro quo* is necessary in the levy of a tax, that benefits need not be rendered to the property owner in order to validate a special assessment, since to require such would be in effect demanding that the state give a consideration for the exercise of its sovereign power of taxation. But the law has been settled to the contrary by the leading case of *Norwood v. Baker*,[4] in which the court invalidated a special assessment, saying, "In our judgment, the exaction . . . of the cost of a public improvement in substantial excess of the special benefits accruing to the property owner is *to the extent of such excess at least*, a taking of private property without compensation." The special assessment is predicated upon the existence of a special benefit conferred upon the abutting property by the object of the assessment or tax.[5] But it is not necessary to base the assess-

[1] No attempt has been made to consider the question as it impinges upon cases where there has been a street widening project wherein the use of the power of eminent domain is exercised.

[2] Cooley, TAXATION (2d ed. 1886) 623.

[3] This argument is well made by Mr. Harry Hubbard, *Special Assessments on Real Estate* (1900) 14 HARV. L. REV. 1, 98.

[4] (1898) 172 U. S. 269; French v. Barber Asphalt Co. (1901) 181 U. S. 324. See also to the same effect, Tonawanda v. Lyon (1901) 181 U. S. 389; Wight v. Davison (1901) 181 U. S. 371.

[5] McQuillin, MUNICIPAL CORPORATIONS (1928) sec. 2166 *et seq.* Moore v. Yonkers (C. C. A. 2, 1916) 235 F. 485; N. W. Imp. Co. v. John Day Irr. Dist.

ment upon the precise amount of benefit accruing to a particular piece of ground.[6] The existence of benefit is a matter of fact within the discretion of the legislative body so that whenever a tax, assessment, or other burden is imposed by it, the owner of property ordinarily cannot be said to have been deprived of his property without due process of law, provided the legislature has decided that special benefit will accrue.[7] A presumption is thus created to the effect that the legislative body has considered the benefits and has provided for the assessment according to those benefits.[8] This, furthermore, is subject to rebuttal only where it is shown that the assessment has been made arbitrarily and without such considerations.[9] Under these cases it becomes possible to establish benefit districts. The apportionment within the district by means of the front foot rule has been repeatedly sanctioned.[10] Of course it is true that the front foot rule is not productive of exact equality. But the courts have recognized that no system of taxation or assessment can achieve precise equality, and have refused to give much credence to the objection.[11] In *Gas Realty Co. v. Schneider Granite Co.*,[12] the court said, ". . . the legislature may create taxing districts to meet the expense of local improvements and may fix the basis of assessment unless its action is palpably arbitrary or plain abuse." It has become firmly established that the law-making power may determine by statutory enactment that the property abutting upon public improvements is specially benefited thereby and that the frontage rule is a practicable and reasonably accu-

(D C. D. Ore. 1921) 286 F. 294; Carr v. Kissimmee (1920) 80 Fla. 754, 86 So. 701; Mt. Meyers v. State (1928) 95 Fla. 704, 117 So. 97; Tillman v. Valdosta (1924) 159 Ga. 105, 125 S. E. 71; Asel v. Jefferson (1921) 287 Mo. 195, 229 S. W. 1046; Peterson v. Phillips (1926) 189 Wis. 246, 207 N. W. 268.

[6] Davidson v. New Orleans (1877) 96 U. S. 97.

[7] *Ibid. l. c.* 99.

[8] Tarboro v. Statton (1911) 156 N. C. 504, 72 S. E. 577; Lyon v. Hyattsville (1915) 125 Md. 306, 93 Atl. 919; State *ex rel.* Oliver Mining Co. v. Ely (1915) 129 Minn. 40, 151 N. W. 545; Dineen v. Rider (1927) 152 Md. 343, 136 Atl. 754; Tarboro v. Forbes (1923) 185 N. C. 59, 116 S. E. 81.

[9] Martin v. District of Columbia (1906) 205 U. S. 105.

[10] French v. Barber Asphalt Paving Co. (1901) 181 U. S. 324; Avis v. Allen (W. Va. 1919) 99 S. E. 188; Memphis v. Hill (1919) 141 Tenn. 250, 208 S. W. 613; Barber Asphalt Paving Co. v. Munn (1905) 158 Mo. 552, 83 S. W. 1062; Driscoll v. Northbridge (1912) 210 Mass. 151, 96 N. E. 59; Stingily v. Jackson (1925) 140 Miss. 19, 104 So. 465.

[11] Wendt v. Tucker (Ky. 1919) 216 S. W. 61; Philadelphia v. Salt Mfg. Co. (1926) 286 Pa. 1, 132 Atl. 792; *contra*, Taylor & McBean Co. v. Chandler (Tenn. 1877) 9 Heisk. 349, 24 Am. Rep. 308; but see Nashville v. Madison Park Land Co. (1927) 155 Tenn. 382, 293 S. W. 533.

[12] (1915) 240 U. S. 55.

rate method of apportioning such benefits. Such legislative judgment is presumed to be correct and in accordance with the facts until the contrary is shown.[13]

It was held in a leading case of *Louisville & Nashville R. R. Co. v. Southern Roads Co.*,[14] that the application of the front foot rule did not violate the equal protection clause of the Fourteenth Amendment. In that cause a railroad right of way was assessed to pay the cost of the street. The court said:

> The mere fact that the appellant's lot is . . . only 45 feet in depth, while property on the other side of the street is 200 feet in depth, does not of itself establish an unreasonable discrimination . . . Essentially the benefit derived from a street improvement is the improved method of ingress and egress to the abutting property. While in some measure the value of the property will vary somewhat with the depth of that property, the variation is by no means in arithmetical proportion to that depth. And a lot but 45 feet in depth, though it may not be as valuable as a lot opposite which is 200 feet in depth, may have its value increased by practically the same amount. . . . Further it must be remembered that exactitude is not required in these matters, and, if no substantial discrimination is worked, the apportionment will be upheld.

It may readily be seen from the foregoing that what the court requires to invalidate an assessment is a substantial showing that there has been an injustice done. The appellant's evidence had not shown such an unwarranted discrimination. There are some cases which achieve a squarely contra result,[15] but they are clearly in the minority. But even in these jurisdictions, the later cases permit the commissioner to "take into consideration the number of front feet of the lot as an element in making the assessment."[16]

The whole tenor of the cases on the subject is to maintain an equal front foot assessment on all property, proportionate to the benefits, giving discretion to the assessing authorities to assess for a number of feet less than that actually owned, but at the regular price per front foot where justice and equity require it.[17]

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[13] State v. Ely (1915) 129 Minn. 40, 151 N. W. 545.

[14] (1927) 217 Ky. 575, 290 S. W. 320.

[15] Glencoe v. Uthe (1912) 253 Ill. 518, 97 N. E. 1057; Belleville v. Miller (1913) 257 Ill. 244, 100 N. E. 946.

[16] Stauton v. Bond (1918) 281 Ill. 586, 118 N. E. 47.

[17] Richardson v. Hardie (1923) 85 Fla. 510, 96 So. 290; Memphis v. Hill, n. 10 above; K. C. S. R. R. Co. v. Road Imp. Dist. No. 6 (1921) 256 U. S. 658; Huntington v. Gallagher (1926) 101 W. Va. 110, 132 S. E. 866; but see Swayne v. Hattiesburg (1927) 147 Miss. 244, 111 So. 818.

This can be done without running afoul the Fourteenth Amendment unless the action is palpably arbitrary. Consequently the owner of a lot which is irregular in shape may avoid the payment of an excessive assessment if he can show that the actual benefit derived is plainly less than that derived by his neighbors.[18] If he cannot show a palpable abuse of discretion with regard to his property, he will not be heard to complain, because the courts feel that to permit trifling objections to be raised will impede the making of city improvements. There is little possibility of making an accurate determination of the precise benefits in any case. Mathematical accuracy cannot be attained in such matters as this. Real estate values are fluctuating, influenced by a host of factors besides public improvement. Ordinarily the beneficial effect of an improvement will be uniformly felt throughout the area or district in which it operates, and the courts have recognized the practical truth of such an assumption.[19] But where through the operation of peculiar circumstances, such as the shape of the lot, this beneficial effect will not be as great as otherwise, the courts can insist that an equitable adjustment be made. For instance in the case of *Johnson et al. v. Rudolph et al.*,[20] involving a piece of property in the city of Washington, D. C., the complainant's lot while fronting on the street for a distance of 200 feet varied in depth from 1 foot to 50 feet, whereas a neighboring lot owned by another person, having a frontage of 280 feet ranged in depth from 261 to 326 feet. Nevertheless these two properties, so obviously disproportionate in value were taxed in such a manner (by the frontage rule) that the smaller, with about 1/16 the area, paid 5/7 as much as the larger lot. The court, on the authority of the *Gast Realty Co.* case,[21] quashed the assessment. An assessment entirely ignoring the matter of depth of an owner's property as a factor in determining the assessment it should bear, has been held improper as not proportional to the benefits.[22] An assessment whereby a triangular lot bore a relatively heavy share of the burden has been held to be inequitable.[23] It is generally conceded that the rule is one of expedience. As mentioned above, public work would be greatly impeded without it. Thus the courts have kept step with the

[18] Cote v. Highland Park (1913) 173 Mich. 201, 139 N. W. 69, 71; West v. Burke (1921) 286 Mo. 358, 228 S. W. 775. And see the following, Watts v. City of Winfield (1917) 101 Kan. 470, 186 Pac. 319; Robert Noble's Estate v. Boise City (1927) 19 F. (2d) 927.

[19] Peterson v. City of Philips (1926) 187 Wis. 246, 207 N. W. 268.

[20] (C. C. A. D. C. 1926) 16 F. (2d) 525.

[21] N. 12 above.

[22] Benshoof v. City of Iowa Falls (1916) 175 Iowa 30, 156 N. W. 898.

[23] *In re* St. Raymond Ave. in the city of New York. (1916) 175 App Div. 578, 162 N. Y. S. 185.

pace of modern municipal government and have recognized the necessity of sanctioning this convenient and expedient method of collecting the costs of public improvement. But they have not lost sight of the fact that it is simply a rule of thumb, so to speak, rather than a sacred principle of law. Thus, they find no difficulty in adjusting a particular case wherein the rule has operated to the manifest harm of an individual. There is nothing in the front foot rule, or in the constitutional sanctioning of it, that will prevent the courts from relieving a property owner from a situation of palpable hardship.

A. W. PETCHAFT, '33.