

1954

The Denver and Rio Grande Western Railroad Company v. Central Weber Sewer Improvement District et al : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation, et al.,

Respondents,

vs.

CENTRAL WEBER SEWER IM-
PROVEMENT DISTRICT, a munic-
ipal corporation; LYMAN M. HESS,
ARTHUR P. BROWN, ELMER
CARVER, constituting the Board of
County Commissioners of Weber
County, a municipal corporation; and
LYMAN M. HESS, ARTHUR P.
BROWN and ELMER CARVER,
County Commissioners of Weber
County, a municipal corporation,

Appellants.

Case Nos.

8171, 8172,

8173, 8174,

8175, 8176

RESPONDENTS' BRIEF

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Supreme Court, Utah

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Appellants.

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8173, 8174,

8175, 8176

RESPONDENTS' BRIEF

STATEMENT OF FACTS

Respondents concur generally with the statement of facts as set forth in the brief of appellants. However, by concurring, respondents do not, of course, stipulate that the

facts as stated by the appellants constitute all of the relevant facts in this matter. In this connection it should be brought to the attention of the court here that appellants' brief fails to set forth the properties of all respondents in the stipulations which appellants set forth in their statement of facts, and that the properties which respondents Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Union Railway and Depot Company seek to have eliminated from the district are set forth in detail in the stipulations of fact with respect to those respondents on file therein.

The attention of the court is invited to the fact that although appellants have made eight assignments of error in the case, they have grouped said assignments for purpose of argument into three main points. Respondents will treat these and other points in this brief.

STATEMENT OF POINTS

1. The District Court properly received in evidence stipulations of the parties as to the material facts in this case.

2. The District Court properly eliminated from the district the properties of respondents which will not be directly benefited by the proposed improvements.

A. The statutory requirements of elimination, upon protest, of property which will not be directly benefited by the proposed improvements, is not limited to the elimination of real property.

B. The Trial Court properly considered the phrase “directly benefited” as that phrase appears in the 1951 act, and properly denied appellants motion to strike the word “directly” from respondents pleadings.

C. The finding of the District Court that the property will not be directly benefited by the proposed improvements is supported by the undisputed evidence.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY RECEIVED IN EVIDENCE STIPULATIONS OF THE PARTIES AS TO THE MATERIAL FACTS IN THIS CASE.

The primary question to be considered here is whether or not plaintiffs and respondents will have received due process of law if appellants prevail in their contention that the hearing in district court is legally limited to purely a review of the proceedings held before the Board of County Commissioners. That the requirements of due process must be met is conceded by appellants who, on page 29 of their brief, allege that the requirements of due process will have been met if this court agrees with their contentions. In support of their arguments, appellants cite merely “Laws of Utah, 1951,” Chapter 32, Section 3 and Rule 65 (B) (b) (e)—Utah Rules of Civil Procedure. They dismiss the entire matter of due process with a vague citation to *Tygeson*

vs. *Magna Water Company*, 226 P. 2d 127. The matter of due process cannot be treated so lightly.

Plaintiffs and respondents contend that the proceedings before the district court necessarily involved the introduction of evidence, and that the evidence was not only admissible but was essential in order that the district court might make proper findings, conclusions and judgments in each case.

42 American Jurisprudence, Public Administrative Law, Section 116, sets forth the requirements of due process in the exercise of judicial or quasi-judicial power, which may be summarized as follows:

“(a) The trier of the facts must be an impartial tribunal legally constituted to determine the right involved.

“(b) No findings shall be made except upon due notice and opportunity to be heard.

“(c) The procedure at the hearing shall be consistent with the essentials of a fair trial.

“(d) Witnesses shall be sworn on oath, examined and cross-examined, and evidence offered and received in accordance with recognized principles of justice.

“(e) The hearing shall be conducted in such a way and appropriate findings made so that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.”

If all of the above requirements were complied with by the Board of County Commissioners in determining the

issues of facts involved, then the contention of the appellants that the hearing in district court should have been limited to a determination of whether or not the board properly applied the law to facts as found, would have substantial merit. We believe, however, that an examination of the nature of the proceedings taken before the Board of County Commissioners readily demonstrates that any hearing held by that body did not meet the requirements of due process of law.

A brief examination of Chapter 32 demonstrates that the Board of County Commissioners is not constituted a fact finding body in any sense of the term and is apparently not empowered to determine any facts. The statute simply states that the board shall eliminate from the proposed district any property which it shall determine will not be directly benefited by the proposed improvements, and the determination, so far as the statute discloses, can be made entirely in the breast of the Board of County Commissioners. They are not required to nor did they try or determine any facts to reach their decision, and the resolution which the board passed establishing the district so demonstrates (see paragraph 4 of the Resolution, page 7, appellants' brief, which simply states that all property will be directly benefited and no property will be eliminated).

Respondents further contend that the hearing before the Board of County Commissioners was not conducted consistently with the essentials of a fair trial, which requires that witnesses may be sworn on oath, examined and cross-examined, and evidence offered and received in accordance with recognized principles of law. While the provisions of Section 17-5-5 U. C. A. 1953 authorize a member of the

Board of County Commissioners to administer oaths, no provisions are made in said Chapter 32 empowering the Board of County Commissioners to hear evidence, subpoena witnesses, make findings or perform any acts universally regarded as being essential to the conduct of a fair and impartial hearing for the determination of issues here involved.

A final essential requirement of due process in connection with the proceedings of administrative bodies is that appropriate findings be made setting forth the basis upon which ultimate facts are found or principles of law applied. Paragraph 4 of the resolution creating the district referred to above clearly demonstrates that the Commissioners neither made nor undertook to make any findings whatever, but on the contrary simply concluded that none of the property would be eliminated from the district and created the district without any such elimination. It is universally recognized that in the absence of findings by an administrative body nothing is presented upon which a court may determine whether or not the administrative body acted pursuant to its jurisdiction and regularly pursued its authority.

The appellants' position, namely that the failure of the Board of County Commissioners to abide by the requisites of due process is attributable solely to the fault of plaintiffs and respondents who should have insisted that the board follow the requirements of due process, seems somewhat untenable here. Due process would indeed become purely ethereal if the burden of guaranteeing its requirements were cast upon those whom the doctrine is designed to protect.

This is particularly true here where plaintiffs and respondents were entitled to assume that the Board of County Commissioners correctly interpreted the extent of the authority conferred upon them by Chapter 32, which authority manifestly falls far short of meeting the requirements of due process. It is therefore obvious that the Legislature, in enacting Chapter 32, did not intend the hearing before the Board of County Commissioners to be a judicial or quasi judicial inquiry meeting the requirements of due process, and wisely provided in the enactment for appeal to a tribunal ideally constituted to determine facts and render due process.

The propriety of the exercise of judicial power by the administrative creatures of legislatures has been the subject of discussion and litigation since the inception of "board government." The arguments which have persuaded courts that such exercise has been proper are (1) that the board in question is peculiarly well qualified by training and experience (or will become so) to determine questions of fact within a special field of inquiry outside the general ken of the judiciary, and (2) that such exercise is necessary in order to produce an efficient and effective administrative enforcement of the public interest in matters of executive character (See Re Opinion of Justices, 87 N. H. 492, 179 A 344).

It must have been as obvious to the legislature as it is to us that the County Commission is not specially qualified by training and experience to determine such abstruse questions as are here involved and will not become so by daily organizing new districts. The strong likelihood is

that this commission will never organize another district under this act. It is apparent also that the exercise of judicial power by the commission is not necessary in order to produce an efficient enforcement of the public interest. The courts are readily available and well constituted to consider these problems, and their calendars will not become cluttered with a plethora of such cases, as they would with tax cases or rate cases or compensation cases.

The usual reasons for conferring judicial power on an executive body are simply absent here.

Treated in the light of the principles here considered, it seems abundantly clear that the essential requirements of due process were not complied with in the proceedings taken before the Board of County Commissioners and that the plaintiffs and respondents were entitled to introduce evidence before the district court and that that court did not err as alleged by the appellants. The authorities support these propositions.

In *Patterick vs. Carbon Water Conservancy District*, 145 P. 2d 503, our Supreme Court reviews the statute authorizing the creation of water conservancy districts under the Water Conservancy Act of 1941. This act provides, among other things, for the taking of certain proceedings before the district court in connection with the organization of such districts. The court in concluding that the Act affords due process of law observes that:

“As we have already shown, the proceedings creating a Water Conservancy District is a judicial proceeding. The sections quoted above provide for notice of hearing to all persons interested. Such

persons are given an opportunity to come into court and object to the creation of the district, if they so desire. This is the due process of law."

The foregoing statement clearly demonstrates that an interested party must be given his day in court in order to comply with due process of law.

In *Tygeson v. Magna Water Co.*, 226 P. 2d 127, our Supreme Court considered the constitutionality of Chapter 24, Laws of Utah 1949, which was amended by Chapter 32, Laws of Utah 1951, here directly involved. The court appears to take for granted the proposition that any property owner affected would be entitled to present facts before a court, for it points out that:

"Before the district is organized any owner whose property may be affected and who has complied with the provisions of the Act as to written protest may come into court and have the matter of *whether his property will be benefited* or whether the proceedings in establishing the district have been made in compliance with the statute, *reviewed by the court*. This is due process." (Italicizing ours.)

It is to be noted that the Court did not say that the record or actions of the Board could be reviewed, but clearly stated that the matter of whether or not his property would be benefited was to be reviewed by the Court.

The case of *New England T. & T. Co. v. Department of Public Utilities*, 159 N. E. 743, 56 A. L. R. 784 (Mass.), further illustrates this rule. In that case, an appeal was taken from an order of the Massachusetts Department of Public Utilities. The appeal was taken to a trial court. In

the trial court, the telephone company undertook to prove certain facts by evidence. The trial judge ruled that the telephone company was not entitled to introduce any evidence under its petition and that the case must be decided upon the record of the proceedings before the commission. The Supreme Court of Massachusetts in holding that the telephone company was entitled to introduce evidence in the proceeding before the court, stated that:

“The law is established that, upon an appeal under Gen. Laws, chap. 25, section 5, the court will not hear evidence to review or revise findings of fact made by the department. No power is given to rehear facts, (citing cases). The parties must not withhold evidence from the department and produce it in court, (citing cases). Where, however, there is no finding of fact material to petitioner’s right to review, this rule does not forbid the presentation of evidence to establish it. Such evidence is not offered in rehearing of issues of fact decided by the department, but as the basis in fact to support a claim of right. Unless such evidence is admissible, the right to review given by the statute is not broad enough to secure due process of law, and the statute may be rendered unconstitutional, (citing cases). There must be a fair opportunity for submitting the issue of confiscation or undue interference with the right of management to a judicial tribunal for determination upon its own independent judgment as to both law and fact, (citing cases).”

If the respondents had been denied the right to introduce evidence before the district court and denied the right to have appropriate findings of fact made in these cases, such denials would unquestionably render Chapter 32 un-

constitutional. It goes without saying that the Legislature did not intend that its act would be unconstitutional, and it therefore accordingly follows that it must necessarily have been the Legislative intent to afford property owners standing in the position of respondents the right to present evidence upon the issues of fact and law herein involved and to have such evidence passed upon and the issue determined in accordance with the requirements of due process of law.

The principles announced in the Massachusetts case are further illustrated in the case of *Virginian Railway Co. v. System Federation No. 40 et al.*, 57 S. C. T. 592, 300 U. S. 515. That case involved a certification of representation of a labor union by the National Mediation Board. The certification was made as a result of an election held for the purpose of determining representatives for collective bargaining purposes. After certification by the National Mediation Board, suit was brought by the labor organization against the railroad company in the district court of the United States to compel enforcement of the certification of the board. In the district court, evidence was introduced pursuant to which the trial court found that the labor union was the duly authorized representative of certain of the employees of the railroad company. The railroad company, in the Supreme Court of the United States, insisted that the Certificate of the Mediation Board was fatally defective upon the ground that the findings on which it was based were not set forth. However, the trial court heard independent evidence on the subject and entered its own find-

ings. In holding that the court was entitled to hear evidence and make its own findings, the Supreme Court said:

“Whether the certification, if made as to those facts, is conclusive, it is unnecessary now to determine. But we think it plain that if the Board omits to certify any of them, the omitted fact is open to inquiry by the court asked to enforce the command of the statute, (citing cases). Such inquiry was made by the trial court which found the number of eligible voters and thus established the correctness of the Board’s ultimate conclusion.”

In the case at bar, inasmuch as respondents actually had no hearing before the Board of County Commissioners of such character as to meet the requirements of due process of law, and since no findings whatever were made, it becomes essential that the court hear the evidence in order to make appropriate findings and decisions.

By reason and authority, it therefore appears abundantly clear that the district court did not err in receiving any material or relevant evidence in connection with these proceedings.

POINT II.

THE DISTRICT COURT PROPERLY ELIMINATED FROM THE DISTRICT THE PROPERTIES OF RESPONDENTS WHICH WILL NOT BE DIRECTLY BENEFITED BY THE PROPOSED IMPROVEMENTS.

A. THE STATUTORY REQUIREMENT OF ELIMINATION, UPON PROTEST OF PROP-

ERTY WHICH WILL NOT BE DIRECTLY BENEFITED BY THE PROPOSED IMPROVEMENTS IS NOT LIMITED TO THE ELIMINATION OF REAL PROPERTY.

Though the appellants devote some space in their brief in support of the proposition that a *district* is a *geographical* area, this point, we believe, can be conceded inasmuch as the act itself provides for geographical definition thereof. Respondents, however, take issue with appellants' proposition that only real property may be eliminated from the district.

In this connection it should be pointed out that one of the strongest reasons advanced by appellants for their contention is that Chapter 32 provides that only real property is included in the district. Beginning at the bottom of page 32 of appellants' brief, they state as follows:

"Nowhere in the action is anything said about *including* personal property in the district. In fact the only thing that is discussed in the act as being *included* is *real property*. Then when that same statute goes on to say what shall be *eliminated* under certain specified conditions, in the following language:

" 'In such resolution establishing such district, the board of County Commissioners shall *eliminate* from said proposed district any *property originally included therein*, but which it shall determine will not be directly benefited by the proposed improvements.' "

it can only mean what it says, that the property which might be *eliminated*, under the conditions

specified, is *any* of the *property* which was *originally included* in the proposed district. And the only *property* which was *included* in the proposed district was *real property*; and hence nothing but *real property* could be *eliminated* from the district or could have been *eliminated* from the proposed district in the first instance on the protest of the respondents."

Appellants maintain that any contrary view results in absurdities, yet respondents feel that the viewpoint advanced by appellants is itself absurd. The only reason *any* properties are included within a district of this type is for taxation purposes. If personal property is taxable, it is unquestionably included within the district. If, as appellants maintain, personal property is not included within the district, then appellants have suffered no injury by the judgment of the lower court eliminating personal property. It should be further pointed out that the respondent railroad companies did request and obtain elimination of certain real property from the district. (Rights of way.)

Respondents' theory is that any kind of property, real or personal, must be excluded from the district if it will not benefit directly from the improvement proposed.

Respondents believe the legislative concept in the enactment of the chapter now under scrutiny was that the districts should be financed in part by general taxation, but only by the taxation of one kind of property, the kind which "will be directly benefited" by the installation. The Legislature directed the County Commissioners to eliminate from the district any other kind of property by this

language from Section 3 of the Act: "In such resolution establishing such district the Board of County Commissioners shall eliminate from said proposed district any property originally included therein but which it shall determine will not be *directly benefited* by the proposed improvements."

What does the word "property" mean?

Appellants contend in their Motion that "property" as used in the above quotation means "real property" only, but they then point up some cogent evidence to the contrary. The word "property" appears ten times in Sections 2 and 3, and eight of those ten times it appears in the phrase "real property." Obviously, every time there was an intention to talk about real estate only, the phrase "real property" was used. When the intention was to talk about property in the broad natural sense, no limiting adjective was employed.

The court is familiar with the rule that words in a Statute should be given their commonly accepted meaning. (See 50 Am. Jur. 228; *Emmertson vs. State Tax Commission*, 93 Utah 219; 72 P. (2d) 476.) The commonly understood, natural, popular and recognized meaning of the word "property" embraces all things with respect to which legal relations between persons exist. In *Metropolitan Trust Company vs. Jones*, 51 N. E. (2d) 256, the court adopted a definition of property including "Every interest one may have in any and every thing that is the subject of ownership by man, together with the right to freely possess, enjoy and dispose of the same." American Jurisprudence acknowledges that the general and popular understanding has been held to be that property includes chattels. (42 Am. Jur.

188.) A perusal of "Words and Phrases" reveals no case in which the word "property" alone has been held to mean real property only.

Is there any reason to assign a restricted meaning to "property" in this Statute?

To give the word "property" a narrow and restricted meaning in the section of Statute above quoted can be justified only if the application of the commonly accepted meaning would defeat the purpose of the Statute and intent of the Legislature. Appellants must, therefore, contend that the purpose of the Statute and the intent of the Legislature were that taxpayers in the district who owned no real property should have no opportunity to attack the procedure under which a tax will be imposed upon them even though they may be the source of the majority of tax funds. Such an unnatural and inequitable intent should be ascribed to the Legislature only if the Statute is reasonably susceptible to no other interpretation. Appellants position is that the Statute is reasonably susceptible to no other interpretation because only real property owners may (1) petition for the creation of the district or (2) by petition defeat the creation of the district and because there are provisions with reference to the manner in which protests by real property owners should be signed. Respondents submit that the Legislature could reasonably and did intend that only real property owners could force the creation of the district but that other kinds of taxpayers could protest the inclusion of their property within it. There is nothing about the context of this Statute or the circumstances of this legislation which would justify a different construction.

A construction restricting exclusion to real property would in fact do violence to the principle that tax statutes should be construed in favor of the taxpayer. The Utah court approved and applied this principle in the case of *Norville vs. State Tax Commission*, 98 Utah 170; 97 P. (2d) 937. At page 177 the court says: "The doctrine that taxing statutes are, in case of doubt as to the intention of the Legislature, to be construed strictly against the taxing authority and in favor of those on whom the tax is levied, has been well set out in the case of (Citing cases).

The Utah Legislature has enacted many laws contemplating territorial exclusions from political subdivisions. In each case language unequivocally relating to real property has been employed.

Some of the most persuasive evidence that the Legislature intended more than a territorial exclusion in the quoted section of the Statute is that it has frequently enacted laws which would contemplate only territorial exclusion, and it has always used language which left no doubt of its intention. For example, the water conservancy act which provides for the creation of "districts" for the purpose of providing water for irrigation, industrial and domestic purposes has a provision in it authorizing the district court which creates the district to exclude certain lands from the district. The section of the Statute involved is Section 73-9-30, Utah Code Annotated 1953. The Statute reads:

"The owner or owners in fee of any *lands* constituting a portion of the district may file with the board a petition praying that such *lands* be excluded and taken from said district." (Italicizing supplied.)

In drafting that Statute, the members of the Legislature had real property in mind and had in mind geographical and area elimination, solely, and consequently they specifically so provided by using the term "lands." It is reasonable to assume that the drafters of the water and sewer improvement district act were well acquainted with the language of the water conservancy act because of the general similarity in purpose and nature of the type of district contemplated. As is evidenced in the case of *Tygeson vs. Magna Water Co.*, 226 P. (2d) 127, counsel for the Magna Water Company, an improvement district which was created under a 1949 version of the same act under which the defendant district was created, relied heavily on the court's treatment of the water conservancy act to establish the constitutionality of the water and sewer improvement district act. The constitutionality of the water conservancy act was adjudicated in the case of *Patterick vs. Carbon Water Conservancy District*, 145 P. (2d) 503. The two acts involve very similar constitutional law problems, and so the writer repeats that, in all likelihood, the drafters of the law being construed in this action were well acquainted with the language used in the water conservancy act. They undoubtedly took note of the use of the term "lands" in the water conservancy act and, instead of repeating that term in drafting the improvement district statute, they used the term "property." Such a fact indicates that the intention of the drafters and the intention of the State Legislature was that the term "property" should include all types of property and not merely "lands."

It is also of significance to note that the drainage district statute, Section 19-1-5, Utah Code Annotated 1953,

the language of which should also have been well known to the drafters of the water and sewer improvement district act, provides as follows:

“Provided that any person whose *lands* will not, in the opinion of said board, be benefited by drainage by said system, may have such *lands* excluded from such district upon application to said board,
* * *” (Italicizing supplied.)

An additional example is provided by the Statutes of the State of Utah relative to disconnection of territory from an incorporated city or town. This Statute (10-4-1 Utah Code Annotated 1953) provides that land owners desiring to disconnect *territory* from the incorporated limits of a city or town may do so by filing a petition in the District Court setting forth the reason for the disconnection and *accompanied by a map or plat of the territory* sought to be disconnected. This, again, is an example of legislative intent to provide for disconnection of territory or geographical and area elimination as opposed to elimination of all types of property as is provided in the Statute here under consideration. (Italicizing supplied.)

There is precedent in Utah for statutory elimination of classes of property other than real property from a taxing district.

Exclusion, exemption or elimination of types of property other than real property from taxation or assessment is not unknown to general law or to Utah law. In 51 Am. Jur., Sec. 501, page 506, under the subject of Taxation and Legislative Power, it is stated:

"It is inherent in the exercise of the power to tax that the sovereign state be free to select the subjects of taxation and to grant exemptions therefrom, and unless restrained by some particular provision of the state constitution the legislature has full power to exempt any person or corporation or *class of property* from taxation, according to its views of public policy and expediency." (Italicizing supplied.)

Utah's water conservancy district act provides an example of elimination of property from assessment and taxation on a basis other than that of geographic or area considerations. Section 73-9-24, Utah Code Annotated 1953, which is part of the water conservancy act, reads as follows:

"All property of *whatever kind and nature* owned by the state and by towns, cities, school districts, drainage districts, metropolitan water districts, irrigation districts, park districts, water districts or any other governmental agency or agencies within the said district shall be exempt from assessment and levy by the board as provided by this act for the purposes herein contained." (Italicizing supplied.)

Consequently, eliminating or exempting property *within* the boundaries of a district of "whatever kind an nature" from assessment and levy is nothing new to Utah law.

Appellants may argue that, inasmuch as the Supreme Court of the State of Utah (*Tygeson vs. Magna Water Co.*, supra), has adjudicated that the tax involved in this district is a general tax and not a special assessment, that the tax must be imposed upon all property within the boundaries of

the district, with the assessment based upon the value of the property. Such an argument has no foundation. The water conservancy act language quoted in the previous subparagraph provides an instance in which the State provides for a general tax but, at the same time, eliminates from the imposition of that tax certain classes of property located within the boundaries of the district.

A general tax is one which is imposed uniformly on property, with the assessment based upon the value of the property. Special assessment is a "tax" in which the assessment is based upon the degree of benefit provided the various properties upon which the assessment is imposed. Examples of special assessments are those where assessments for an irrigation district are determined by the number of acres of land owned by a property owner, or the number of acre feet of water allotted to an owner's lands. Another example of a special assessment is that imposed upon the basis of the number of front feet which an owner of land may have abutting on a street improvement. It is true that the Statute to be construed in this action imposes a general tax because it imposes a tax based upon the value of all of the property which is included within and not eliminated from the sewer district. The tax is not assessed, for example, on the basis of the number of sewer connections which an owner of property may have. However, the Statute provides for the elimination from any taxation property which is not "directly benefited" by the proposed improvement. In other words, this Statute provides for a general tax upon all property within the sewer district which is directly benefited, assessed uniformly upon the

value of the property which is directly benefited. Consequently, there is nothing inconsistent about acknowledging that a general tax is contemplated by this Statute, and, at the same time, concluding that certain types of property are to be exempted and eliminated entirely from taxation.

Some of the properties eliminated from the district by the lower court consisted of real properties of the various respondent railroads. Appellants do not contend that the elimination of such real properties from the district constituted error by the lower court.

Even appellants have proceeded as if the Commission had authority to exclude personal property.

It is significant that the Weber County Commission apparently proceeded on the theory that property other than real property could be excluded in that they defined the district in other than geographical terms so as to include personal property. In its Resolution of March 3, 1953, the Commission declared "that the boundaries of said district are defined as follows, and all *area* and *property* lying within these described bounds is now within and henceforth a part of this sewer district:" The words of this Resolution can only be interpreted to express an intent that all real, personal and mixed property within the boundaries described should be a part of the district. Since the property respondents seek to exclude was included by definition they could reasonably seek its exclusion by the statutory procedure provided.

There is further reason why respondents feel the Board had statutory authority to exclude personal property. If

only real property directly benefited could be included in the district, then the Commission could properly define the district only on the basis of evidence of the specific installation the district proposed. Hereafter in this brief it will be demonstrated that property is directly benefited by a sewer only if it is connected or capable of direct connection. A Commission could decide what real property could be directly connected to a proposed sewer only if it had before it a map or detailed description showing exactly where the lines would be laid. Since the district has made no concrete plans, the Commission could not have had such evidence before it. It must, therefore, have proceeded on the theory that the exclusion intended was the exclusion of the kinds of property which by their nature are incapable of connection to a sewer. These are exactly the kinds of property which respondents seek to exclude.

In summary it should be pointed out that nowhere in appellants' brief do they attempt or undertake to show that the property eliminated from the district by the trial court was or would have been directly benefited by the sewer facility proposed, and appellants do not undertake to apprise the court of what constitutes a direct benefit. This particular matter will be discussed by respondents later in this brief.

POINT II B.

THE TRIAL COURT PROPERLY CONSIDERED THE PHRASE "DIRECTLY BENEFITED" AS THAT PHRASE APPEARS IN

THE 1951 ACT, AND PROPERLY DENIED APPELLANTS' MOTION TO STRIKE THE WORD "DIRECTLY" FROM RESPONDENTS' PLEADINGS.

In the lower court the appellants moved for an order striking from the pleadings of plaintiffs and respondents the word "directly" wherever that word was used or combined with the word "benefited" in the phrase "directly benefited" on the ground that the Legislature, after passing Chapter 32, Laws of Utah 1951, later amended that Act by eliminating the word "directly" from the phrase "directly benefited" as that phrase related to property to be eliminated from the district. In their brief appellants cite the 1947 Act, the 1949 Act, the 1951 Act, and the 1953 Act and point out that only in the 1951 Act does the word "directly" appear before the word "benefited" where the Act refers to the type of property which must be eliminated upon protest from the district. Appellants then argue that obviously the word "directly" must have been inserted in the 1951 Act by mistake, inadvertence or some other reason, but certainly not by intention of the Legislature. The trial court had little difficulty with this contention. Appellants, of course, must concede that their district was organized under the 1951 Act and not under any other Act, and respondents do not believe that appellants can seriously support their motion to strike with the simple statement that they believe the Legislature erred in inserting the word "directly" in the 1951 Act. What obviously happened was that the 1951 Act, as proposed before that Legislature, was

amended during the regular session in one particular only, and that was simply to add the word "directly" before the word "benefited" in the Act. This fact is plainly shown by the House Journal for the 29th Regular Session of the Legislature of the State of Utah and was further stipulated to by the appellants in the various stipulations entered into herein and now a part of the file in these cases (see paragraph No. 4, appellants' brief, page 11). In view of the foregoing legislative history, it seems ridiculous for the appellants to argue that the word "directly" crept into the Act by inadvertence or accident.

POINT II C.

THE FINDING OF THE DISTRICT COURT
THAT THE PROPERTY WILL NOT BE DI-
RECTLY BENEFITED BY THE PROPOSED
IMPROVEMENTS IS SUPPORTED BY THE
UNDISPUTED EVIDENCE.

As previously pointed out, the appellants nowhere in their brief allege or cite authority for the proposition that the properties excluded in these cases by the trial court are or could be directly benefited by the proposed sewer facility. The appellants' brief seems to concede the fact that the property eliminated from the district by the lower court is not and could not be directly benefited by the proposed sewer. In addition appellants have stipulated with each of the respondents as follows:

"That none of the property of the (respondents)
* * * sought to be eliminated from said district

in this Act is presently physically connected to any sewage facility, and in the conduction of (respondents) operations it is not desirable or feasible to make a physical connection of any of such property to any sewage facilities."

Inasmuch as the Legislature specifically and intentionally inserted the phrase "directly benefited" in the 1951 Act, respondents feel the court should have the benefit of authorities defining this phrase.

The Property which Respondents seek to have Eliminated from the District will not be Directly Benefited by the Proposed Improvements.

The only Utah case which the writer has been able to find in which the term "direct benefits" is treated is the case of *Hatch vs. Edwards*, 269 P. 138, and in that case some light is shed upon the court's understanding of the term "directly benefited." This case is not of value in this action except as it throws enlightenment upon the court's definition of that term. In other respects the case is not analagous.

That case involved the Cache County Water Conservation District, an irrigation district which was organized under Chapter 68, Laws of Utah 1919, as amended by Chapter 73, Laws of Utah 1921. This law provided for the creation of irrigation districts and for special assessments, and the statute said:

"Assessments are to be made on the basis of value per acre foot of water allotted to the lands within the district."

The statute further provided that an allotment of water should be made to each 40-acre tract or smaller tract in separate ownership and that the final allotment would be on that basis for all assessments, tolls and charges levied against the land. The allotments were made by the board of directors of the district. The plaintiff in this case was complaining because he claimed that water had been allotted to 30 acres of his land but that 40 acres were being assessed. The minutes of the directors provided for an allotment of 60 acre feet of water to a 40-acre tract, but the minutes contained this further notation, "10 acres no allotment, wet, 30 acres, 2 acre feet per acre, total allotment 60 acre feet." No change, however, was made in the description of the 40-acre tract of land in the record book of allotments, and the entire 40-acre tract was subjected to assessment. The court held that the assessor was justified in relying upon the record of allotments and that it had been proper, therefore, to assess the entire 40-acre tract. The ruling of the court in this case is not pertinent to this action but the writer is interested in pointing out the language of the court in its opinion with regard to the subject of direct benefit. The pertinent language of the court is as follows:

"The contention of appellants is that from the records referred to it conclusively appears that 10 acres of the land referred to was not benefited by irrigation, and could not be subjected to assessments for the purpose of the district, and that the proceedings resulting in the subsequent sale of the 40-acre tract were void, because there was a sale of 10 acres of land not benefited by the improvement, and the 30 acres which were benefited and subject to assessment were not described. In support of this

contention, if it is argued that assessments for improvements of this kind must correspond to the benefits resulting to the land assessed, and that an assessment of property which is not benefited is void. This general principle is indisputable. But in applying it to a particular case it is not essential that every part of the property subjected to the assessment shall be *directly* benefited by the improvement. It is not only competent but necessary to classify property into units for the purpose of estimating benefits, and, unless the classification is arbitrary or unreasonable, the owner may not defeat the assessment by showing that some particular part of the unit assessed is not directly benefited. * * *

(Italicizing supplied.)

The supreme court acknowledged that the land to which no allotment of water was made was not *directly* benefited. It appears reasonable to the writer that a court which will say that land is not directly benefited because irrigation water is not allotted to it and will not flow over it when water is allotted to and will flow over adjacent land, could and would consistently also hold that property which cannot be attached or connected to a sewer is not directly benefited, though property adjacent to it or used in connection with it is directly benefited.

In the case of *Ferguson, et al. vs. Borough of Stamford*, (Connecticut), 22 A. 782, page 787, the court made some contribution to the definition of the term "direct benefits" in the following language:

"The word 'benefits' when used unqualifiedly, is a comprehensive term, including *direct* or *special* benefits, and indirect or general. But when the con-

nection in which it is used, and the subject matter to which it is applied, are such as to indicate that it is used in a limited or qualified sense, it is the duty of the court to give it that interpretation. It is used here in the charter of the borough. In the ninth section of the charter of 1854 it is qualified by the use of the adverb 'specially'. In the act of 1881 the adverb is dropped. But it is apparent that it is used in the same sense, and signifies *special and direct benefits*. This will appear more clearly, perhaps, from a consideration of the subject matter. It is used with reference to an improvement undertaken by the community for the general benefit of the community, but it results in a *direct benefit* to those who have immediate access to the sewer, a benefit in which those more remotely connected with it do not participate." (Italicizing supplied.)

The appellants cite the case of *Morton Salt Company* vs. *City of South Hutchinson*, 159 F. 2d 897, 10th Circuit Court of Appeals, 1947, as authority for the proposition that it is no constitutional defense to a tax that the taxpayer is not directly benefited thereby. Respondents feel that this point raised by appellants has no bearing whatsoever on the case at bar since we are not concerned with a constitutional defense to a general taxing statute but are relying upon a statutory right to have eliminated from the district property which is not directly benefited. As a matter of fact the *Morton Salt Company* case is excellent authority defining the meaning of the term "direct benefit", for the court states:

"The benefit conferred may be direct and tangible, such as * * * water or sewer line to the taxpayer's door, or it may be indirect and intangible,

such as a water works or sewer system which, although not available to the taxpayer, nevertheless redounds to the benefit of the whole community of which he is a part."

In that case the federal court referred to the case of *Thomas vs. Kansas City Southern R. Co.*, 261 U. S. 481, a case which had arisen in Arkansas and which involved the assessment of railroad right of way to assist in financing a road improvement. In that case the Supreme Court of the United States determined that the assessment against the railroad property was discriminatory inasmuch as it was on a basis inequitably different from the special assessment on other property within the road improvement district. The federal court in the *Morton Salt Company* case analyzed this supreme court decision and stated:

"that the supreme court unanimously nullified (the) assessment on the property of a railroad company on the grounds that no direct benefits were conferred, and the indirect benefits, if any, were so completely disproportionate and remote as to be grossly discriminatory. * * *"

The United States Supreme Court itself in that case, found in 261 U. S. 481, stated:

"It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values,
* * *."

Inasmuch as there are few, if any, cases involving a general tax where the meaning of the words "direct benefit"

is adjudicated, it is necessary to refer to special assessment cases where the meaning of the term "benefit" is frequently adjudicated and the meaning of the term "direct benefits" has been elucidated in a few instances. In their brief, appellants do not claim that the property eliminated by the lower court is or could be directly benefited because they realize that to establish such direct benefits they must rely entirely upon such indirect benefits as might accrue to the respondents by virtue of the general benefit which will accrue to the community as a result of the proposed sewer improvements, and that improvement of the community will result in increased future earnings to the respondents. It appears to the writer that the language of the United States Supreme Court quoted above is very persuasive to demonstrate that in legal contemplation such benefits are not direct benefits, for that court denounces the "fanciful view" that "future earnings and distributed values" are direct benefits.

In *New York Bay R. Co. vs. City of Newark*, 83 A. 962, the question arose as to whether or not a railroad right of way was benefited by the paving of a street which was adjacent to the railroad right of way. The Court said:

"The rule, therefore, with respect to assessments for local improvements is that the right of way of a railroad company, being in legal contemplation land used for railroad purposes, cannot be assessed upon the basis either of the general or special enhancement of its market value, but only for actual benefit to such land *for the public uses for which it was acquired.*" (Italicizing supplied.)

In the case of *Lehigh Valley R. Co. of New Jersey, et al. vs. Mayor of Jersey City*, 80 A. 228, a railroad company

had its right of way through a marshy district and also owned certain lots therein which it used for railroad purposes. Its tracks were upon high trestles. A sewer was put through the marsh. The court held that, as to the right of way, the railroad was not liable for any assessment having received no benefit, but as to the other property if not used for railroad purposes it was liable to assessments the same as any other property, but if used it was liable only to the amount of the benefits. The court's actual language is as follows:

"As the matter goes back for reassessment it is proper to deal with the special points made by individual prosecutors. The railroad company claims that it should not be assessed at all, and we think that, as to its right of way strip, this claim is well founded. Its railroad runs on a high trestle resting on stone or concrete piers built in the marsh, and by dumping from the trestle an embankment may be gradually substituted. In any case the question of drainage is quite immaterial to the railroad company. If the trestle stood in a pond it would make no difference to it. There is manifestly no benefit to this property for the purposes for which it is used. And this is the test in such case. (Cases cited.) But the railroad owns besides the right of way, over 60 city lots, some adjoining the right of way strip, some disconnected from it. It does not appear whether these lands are used in whole or part for railroad purposes. If not so used they are assessable like any other lands; if so used, and if benefited for such purposes by the sewer, they are assessable, not to the extent of enhancement of market value but to the extent of benefit for railroad purposes. * * *

In the case of *City of Lincoln vs. Chicago & A. R. Co.*, 104 N. E. 277, the question again arose as to whether or not the right of way of a railroad was benefited by street improvement. The court went into considerable detail to say that the determination of benefits must be based upon the benefit to the property in its particular use and concluded that, based on that standard, the right of way was not benefited. Excerpts from the opinion of the court are as follows:

“Counsel for the appellant insist that the evidence on the question of benefits, on the hearing before the jury, should have been restricted to the market value of the property limited to railroad purposes; while counsel for the appellee argue that the measure of benefits for this improvement was the enhanced value of the property by reason of the pavement for any purpose for which the property could be used, without regard to its being restricted to railroad purposes. Cases have arisen in this and other jurisdictions in which the improvement would confer a special benefit upon the property assessed if it were used for ordinary purposes, but when used for the special and peculiar purpose the improvement conferred no special benefit upon the property while devoted to such special use * * *

“* * * Where the property is restricted by statute or grant to a particular use, and cannot be legally applied to any other use, and is at the time of the improvement devoted to such particular use, the true measure of the benefit which the improvement will confer is the increased value for the restricted use, in the absence of proof reasonably tending to show that the property in question, having regard to present conditions and the existing

business and wants of the public, is about to be devoted to other uses. * * *

“* * * ‘The question, then, here must be, in the absence of proof tending to show that the property in question is devoted to other than right of way purposes, or is about to be so devoted, will it, for the purposes of right of way for the two tracks of appellee, be benefited by the improvement of the street upon which it borders? It must be borne in mind that railroad right of way cannot be put upon the market by a railroad company for general business purposes, as can private property.’

“* * * Under these rules it is clear that any evidence as to benefits that might be taken concerning the 100-foot strip of right of way included in the assessment should be restricted to the special and peculiar use for which the property was thus devoted. * * *”

The New Jersey and Illinois cases cited above place considerable emphasis upon the factor that those attempting to prove benefit to a railroad right of way must show that the benefit is to the property in its use as a right of way. It is clear that the proposed improvements of the appellant district in this case will not render the railroads' right of way, or the transmission lines or rails located thereon, or the rolling stock, any more beneficial to the railroads for railroad purposes or the property of the other parties respondents any more beneficial to said respondents for the purposes for which said properties are used. Under the rulings of the New Jersey and Illinois cases it is adjudicated that there is no “benefit,” let alone no “direct benefit.”

Dillon on Municipal Corporations, at page 2619, cites the New York case of *People vs. Kingston*, 53 N. Y. App. Div. 58, and states as follows:

“Where the authority conferred was to assess the cost of a sewer ‘against the property immediately benefited thereby’ it was held that an assessment could not be made on property on a parallel street which could only be connected with the sewer by the construction of a connecting sewer 350 feet long.”

Dillon, on the same page, refers to several New Jersey cases, including *Kellogg vs. Elizabeth*, 40 N. J. Law 274, and states as follows:

“In New Jersey it was held by the supreme court that the special and peculiar benefit justifying a sewer assessment is a present benefit immediately accruing from the construction of the work, and that intended benefits which may never be realized were not sufficient, mere speculative benefit not being a benefit which can be recognized. Hence it was held that the land which cannot be drained into a trunk sewer until connecting laterals are built cannot be assessed for the cost of the trunk sewer until the laterals are constructed.”

In 37 A. L. R., at page 249, the editors refer to a pertinent New Jersey case with the following language:

“* * * *New Jersey, R. & Transp. Co., Prosecutor, v. Elizabeth* (1875) 37 N. J. L. 330, it was contended that a railroad right of way was a public highway, and, therefore, not liable to assessment for sewer improvements. In answer the court states: ‘The premises are the property of the company and are owned and used by it for the emolument of the

company and its stockholders. The drainage of land devoted to that purpose, and so used, by the construction of sewers, may be a direct benefit to it in the use to which the lands are appropriated, in making more solid the foundation of the roadbed and relieving it from the flow of surface water. Benefits accruing in this manner from the construction of a public improvement are of a character that will justify the laying of assessments for the cost and expenses thereof within the limit of the benefits conferred.' It was held, however, in that case, that the fact that the nearest point of location of the sewer improvement to the right of way was one-half mile, without any connection therewith, showed that the sewer in its present condition was of no benefit to the right of way, and that, therefore, the right of way was not liable for the assessment, even though there was a possibility that in the future another sewer would be constructed to connect the right of way with the existing one."

The facts stipulated in the case at bar reveal that no drainage is contemplated and that it is not feasible or desirable that the sewer be connected to any of the properties described in respondents protests. In 37 A. L. R. 261, the editors refer to a Connecticut case with the following language:

"Property of a railroad company purchased for the purpose of storing freight cars and, so far as used, used exclusively for that purpose, the greater portion of which is wholly unoccupied, which is eligibly situated for mechanical and manufacturing purposes, and for such purposes would be especially benefited by a sewer, is liable for a sewer assessment. *New York, N. H. & H. R. Co. v. New Britain* (1881) 49 Conn. 40. The intimation is, however,

that had the land been permanently dedicated to railroad purposes, such as a right of way for its through line, it would not have been liable, probably on the theory that no benefit could have accrued. * * *

The language contained in the "intimation" above is applicable to the case at bar because the properties which the respondent railroads are attempting to have eliminated from the district are properties which are permanently dedicated to railroad purposes.

What has been said with reference to railroad rights of way applies a fortiori to the interests and properties of the respondent utilities. The cases establish without dissent that a "direct benefit" is at least of equal magnitude with the "special benefit" necessary to support a special assessment. The described properties of respondent utilities certainly do not derive such benefit from an improvement district that they can be specially assessed.

"The equipment and fixtures in the street, used by public service corporations, and the rights and privileges and franchises enjoyed by them, which have been availed of for the purpose of placing this kind of property in the street, is not subject to assessment for public improvements, such as street improvements." (Citing cases.) McQuillan—Municipal Corporations, 3rd Edition, Volume 14, Section 38.77, page 205.

Such property therefore does not benefit directly, consequently it can not properly be included in a district organized under this statute.

In conclusion, the only evidence before the trial court consisted of the stipulations on file herein that none of the properties eliminated by the lower court could be physically connected to the sewer facility proposed, and that such a connection would not be desirable or feasible, and all of the case authority is that there can be no direct benefit from a sewer facility to property which is not and cannot be directly connected to the facility. It follows, then, that none of the property excluded could be directly benefited because none of that property could be directly connected, and as a consequence there was ample evidence before the trial court to support the judgments rendered herein.

CONCLUSION

In conclusion respondents submit that the trial court did not err as contended by appellants and that the judgments rendered by that trial court should be upheld and affirmed.

Respectfully submitted,

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