

1959

Moon Lake Electric Association Inc. et al v. Utah State Tax Commission : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH

FILED

MAY 11 1959

MOON LAKE ELECTRIC ASSOCI-
ATION INCORPORATED, a cor-
poration, and UINTAH BASIN
TELEPHONE ASSOCIATION,
INC., a corporation,

Plaintiffs,

vs.

THE UTAH STATE TAX COMMIS-
SION,

Defendant.

Clerk, Supreme Court, Utah.

Case No.
9010

Respectfully submitted,

George E. Stewart

Ferdinand Erickson

Attorneys for Plaintiff

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IN THE SUPREME COURT of the STATE OF UTAH

MOON LAKE ELECTRIC ASSOCI-
ATION INCORPORATED, a cor-
poration, and UINTAH BASIN
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Plaintiffs,

vs.

THE UTAH STATE TAX COMMIS-
SION,

Defendant.

Case No.
9010

PRELIMINARY STATEMENT

It appears desirable that something of the history of the Plaintiff Cooperatives, and those similarly situated precede the presentation of the issues and proofs involved in the instant matter. There are eleven such cooperatives serving in the State of Utah; four of this number are cooperative corporations domiciled in the States of Idaho, Colorado and Wyoming, while the remaining seven are non-profit corporations of the State of Utah. These cooperatives are generally referred to as R E A Cooperatives, since they are financed by the Rural Electrification Administration, an agency of the U. S. Department of Agriculture. The Congress of the United States created this agency in 1936, and the act set out the purpose of

the Agency as an instrument designed to '*Finance the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service.*'

Later the Act of 1936 was amended to include the financing of telephonic service to these same rural areas, where no such service was available. It should be pointed out that private existing facilities would be given the first opportunity to provide such telephonic service, and upon their refusal, the R E A would, upon proper application, provide the requested financing. Three such telephone cooperatives came into existence; one at Orangeville, Emery County, one at Escalante in Garfield County and one at Roosevelt, Utah. These three cooperatives are non-profit corporations of the State of Utah.

An applicant desiring to secure the services of R E A makes an application setting out the proposal it intends to follow. This application is examined by R E A and ultimately a plan is agreed upon between the applicant and the engineering and planning division of R E A.

The management of the cooperative is vested in the cooperative, subject to the approval of the Administrator of this Federal Agency. Many management matters are controlled by the managing body of the Cooperative. Rates are fixed by the Cooperative subject to their approval by R E A. When the plans have been agreed upon a Loan Contract is entered into between the Cooperative and the United States of America. The Cooperative secures the Government for the money so advanced, with

a first mortgage on all real and personal property owned by it. As additional plant or equipment is needed, the Loan Contract is amended to include these additions and improvements. At no time can a cooperative borrow from any other institution or agency.

There are some seven to eight thousand members being presently served by the various electric and telephone cooperatives in the State of Utah. (This will approximate some 25 to 30 thousand rural people.) A consumer, patron or subscriber must be a member of the cooperative before he or it can be served. Each member is required to pay a reasonable membership fee. Each member of a telephone cooperative is required to pay, in addition to this membership fee, a payment of \$45.00 which is termed an equity.

Since the people thus served fall within the lower income groups, the rate fixed is placed at a level that will theoretically yield sufficient revenue to provide for debt service, replacement and operating costs; due to competing rates of public utilities in adjacent areas, this level of rates has not yet been achieved. Any appreciable raise in rates will further depress and lessen the income per mile of line, since the consumer is not disposed to pay more for a service than a like service is costing in adjacent areas at or near the level of rates charged by power and telephone companies serving in adjacent areas.

It is believed that this brief and general picture may assist the Court in the determination of the issues involved in this matter.

STATEMENT OF FACTS

The Plaintiffs in this cause, and those similarly situated, have been, since their beginning, assessed and taxed as is provided in the following Sections of the Utah Code 1953:

Section 16-6-16 U C A 1953:

“Property of cooperative nonprofit electric corporations organized under this chapter and operating facilities financed pursuant to the Rural Electrification Act of 1936, shall not be valued for the purpose of ad valorem taxation in excess of \$50.00 times the number of miles or primary distribution of transmission lines.”

Section 16-6-17 U C A 1953, as amended:

“Property of cooperative nonprofit telephone corporations organized under this chapter and financed pursuant to the United States Rural Electrification Act of 1936 as amended, shall not be valued for the purpose of ad valorem taxation in excess if \$10.00 times the number of circuit miles of line constituting the telephone system.”

Sometime prior to July of 1958 the Chairman of the State Tax Commission of the State of Utah Addressed an inquiry to the Attorney General of the State of Utah, asking these questions:

- (1) Is Section 16-6-16 U C A 1953, constitutional?
- (2) Is Section 16-6-17 U C A 1953, constitutional?
- (3) Should the property of the Moon Lake Electric Association be assessed by the State Tax Commission, rather than by the County Assessor?

On July 2nd, 1958 the Attorney General sent to the State Tax Commission an opinion wherein he held that questions (1) and (2) should be answered in the negative, while the third question was answered in the affirmative.

On September 3, 1958, the Attorney representing the State Tax Commission advised the Plaintiffs in this cause and all other electric and telephone cooperatives doing business in the State of Utah to this effect:

“You are no doubt aware that on July 2nd, 1958, the Attorney General of Utah advised this office that in his opinion Sections 16-6-16 and 17, Utah Code Annotated, 1953, were unconstitutional.

This will advise you, therefore, that the State Tax Commission intends to assess the property belonging to Moon Lake Electric Ass’n., Inc., according to the same formulas which are applied to other utilities operating in more than one County in the State of Utah.

Very truly yours,
John Marshall, Attorney
Division of Law.”

While we differ strenuously with the Attorney General on the question of the constitutionality of the two sections of the Code, we do agree that the property of a cooperative, or other utility, “when they are operated as a unit in more than one County *** must be assessed by the State Tax Commission ***”

STATEMENT OF POINTS

POINT I

DO SECTIONS 16-6-16 AND 16-6-17 VIOLATE SECTIONS 2 AND 3 OF ARTICLE XIII OF THE CONSTITUTION OF THE STATE OF UTAH;

POINT II

DO THESE SAME SECTIONS OF THE CODE VIOLATE SECTION 26 OF ARTICLE VI OF THE CONSTITUTION?

ARGUMENT AND AUTHORITIES

POINT I

Section 2 of Article XIII of the Constitution provides in part: "All tangible property in the State, not exempt under Laws of the United States, or under this constitution, *shall be taxed in proportion to its value*, to be ascertained as provided by law*** (Emphasis added.)

"The Legislature shall provide by law *a uniform and equal rate of assessment and taxation on all tangible property in the state according to its value in money***.*" (Emphasis added.)

In presenting the argument and authorities covering the two points raised, the plaintiff finds some difficulty in limiting its proof to the respective points. The question of "assessment and taxation . . . according to value in money" as required by Article 13 of the Constitution, and the further question raised by Section 26 of Article 6, Constitution of Utah, prohibiting "private or special laws affecting the assessment and collection of taxes and the granting to an individual association or corporation any privilege, immunity or fran-

chise," are so inter-related and so interwoven, that it is quite impossible to keep these two subjects distinct and apart.

It is the plaintiff's contention that we must first determine a method or formula for determining this question of "value in money" then supply such formula as will enable the taxing authorities to arrive at a base upon which the levy can be made. The only formula or rule that can find general acceptance in the classification of property. If this classification prescribed by law is such that if the uniform and equal rate of taxation is applied, the property is then taxed in the same proportion to its value as is all other tangible property, the method of arriving at the assessed valuation is not subject to constitutional objections.

It may be contended that classification must be employed if we are to have uniformity as required in Article 13 of our Constitution and it may well be urged that such classification contravenes Section 26 of Article 6, in that such classification becomes special or private in its application.

The opinion of the Attorney General holding these sections unconstitutional, concedes that legislation is valid, and the enactments must be sustained unless in violation of fundamental law.

This opinion holds that the language "*according to its value in money*" means that all property shall be valued, for the purpose of assessment, as near as is reasonably practicable, at its full cash value; in other words, that the valuation for assessment and taxation

shall be as near as is reasonably practicable, *equal to the cash price for which the property valued would sell in open market, for this is doubtless the correct test of the value of property.* (Emphasis added.)

In reaching the above conclusion the Attorney General refers to the case of "*State v. Thomas*, 16 U 86, 50 P. 615." There can be little dispute over the language of the Court in this case, yet it leaves some doubt as to how the State Tax Commission or a County Assessor could use this formula or yardstick to enable it or him to place a value upon any given property. The saleability of property is inexorably tied to many factors. It can hardly be contended that any taxing body could give effect to the provisions of Section 2 and 3 of Article XII, if their only instruction was to this effect: "You will place a value upon property in an amount equal to the price the property would sell for in the open market." It must be admitted that the Legislature did provide rules which it presumptively had a right to do, which rules are set out in the Section 16-6-16 and 16-6-17.

There can be no doubt that in the assessment and taxation of property, the Constitution intended that all taxable property shall bear its just proportion of the burdens of taxation. With this end result there can be no dispute. The practical problem of reaching this end result is quite a different thing.

The Thomas case did define the language "according to its value in money" as applied to assessment and taxation, to mean "Equal to the cash price for which the property valued would sell in open market, for this

is doubtless the correct test of the value of property." If we accept this definition as the measure of "value in money", then we would be compelled to make this determination before we could fix an assessment and levy a tax. If the various types and classifications of taxable property had a recognized market value, the problem would be reasonably simple. Actually, as a practical matter, various type of property are not frequently bought and sold on this open market, hence fixing a market value on such property would be, at best, a speculative thing. As Justice Cordozo said in *Williams v. Mayor and City Council of Baltimore*:

"Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. *If so, the correcting statute may be as narrow as the mischief.* The Constitution does not prohibit special laws inflexibly and always. It permits them where there are special evils with which the general laws are incompetent to cope***" (Emphasis added)

Because of the complexities of this problem, the legislature has in many instances provided a yardstick or formula which will enable the assessing and taxing authorities to arrive at these market values.

This approach by the Legislature is done pursuant to constitutional mandate. (Section 2 of Article XIII provides: "* * * shall be taxed in proportion to its value, *to be ascertained as provided by law.*" (Emphasis added), while Section 3 of the same Article 13 provides "* * * according to its value in money * * * *to be ascertained as provided by law*) * * *" (Emphasis added.)

This Court in more recent cases has, we believe, qualified the rule as announced in the Thomas case.

It must be kept in mind that the Constitution is applicable to every conceivable kind of property, anywhere within the jurisdiction of the State. To contend that the legislature must avoid a means calculated to give effect to the language of the Constitution by generalizing as to value, is a contention that can find little warrant in legal terminology or the practicality of any given situation. Land is assessed on the basis of its area; livestock on a per head basis; mines are usually assessed on its area together with some formula calculated to arrive at its worth. These illustration could be multiplied without end. This thing value is a relative term, affected and influenced by use, location, earning power and a variety of factors too numerous to mention. There *must be classification of property if there is to be compliance with these Constitutional provisions.* (Emphasis added.)

In the case entitled *State ex rel Public Service Commission v. Southern Pacific Co.*, reported in 79 Pac. 2nd at page 25 (A Utah case) the Court had this to say:

“The fair value as a rate base and the value in money for purposes of taxation of a public utility are not necessarily the same,” and the Court goes on to say: *“For the purposes of taxation of a public utility, where it is the present value of property in money that is to be determined, the present, past, and prospective future capacity to earn and the market value of stocks and bonds of the utility for a reasonable period*

antecedent to the making of the assessment constitutes the most reliable influential evidence of value."

The Court in the instant case makes these further observations concerning the question of value: "*The elements to be considered for determining value of a public utility's property for purposes of taxation are original or historical cost, cost of reproduction, less depreciation, conditions of competition in the industry, efficiency or lack of it in management, bonded indebtedness, current market value of stocks and bonds, actual present earnings and earnings over a period of years.*" (Emphasis added)

This Court has on frequent occasions considered this matter of value in its tax application. One of its most recent decisions is that contained in the case entitled "*United States Smelting Refining & Mining Co., v. Haynes, County Treasurer.*" reported in 176 P. 2nd. at page 622. Although the factual situation differs, yet the Court had occasion to consider the same constitutional matters as are here involved. The Haynes case involved the construction of a statute relative to determining the base or valuation of metalliferous mines for tax purposes. The Appellant contended in the Haynes case that to include premium payments in "proceeds realized" for the purpose of determining the valuation of the mine for assessment purposes, would violate the constitutional requirements as to uniformity of assessments and taxation as required by Sections 2, 3 and 4 of Article XIII, Constitution of Utah, and Section 8 of Article I, and Section I of 14th. Amendment to the

Constitution of the United States. In considering this contention of the Appellant, the Court had this to say:

“It will be observed that these provisions (Sections 2, 3 and 4 of Article 13 of the Constitution of the State of Utah) require that all tangible property, including metalliferous mines, shall be subjected to a uniform and equal rate of assessment according to its value in money. *The method or yardstick by which the valuation in money is to be determined shall be prescribed by the Legislature. It is not required that the same yardstick or method of determining value shall be used with respect to all kinds of property. But the different formulae which may be applied to different kinds of property must be such that they aim and tend to secure for assessment purposes a valuation fair and equitable in comparison with and commensurate with the valuation of other kinds of property. When the valuation thus secured is such that if the uniform and equal rate of taxation is applied the property is taxed in the same proportion to its value as is all other tangible property, the method of arriving at the assessed valuation is not subject to constitutional objections as violative of Article XIII.*” (Emphasis added)

It is conceded that the statutory method of valuing metalliferous mines for taxation purposes at \$5 per acre plus a multiple or sub-multiple of the net proceeds is a proper and constitutional formula for determining the value of the mines for assessment purposes. See *South Utah Mines and Smelters v. Beaver County*, 262 U.S. 325, 43 S. Ct. 577, 67 L. Ed. 1004; *Mercur Gold Mining & Milling Co. v. Spry*, 16 U. 222 52 P. 382; *Salt*

Lake County v. Utah Copper Co. 10 cir., 294 F. 199; *Tintic Standard Mining Co. v. Utah County*, 80 Utah 491, 15 P. 2nd. 633; *Byrne v. Fulton Oil Co.*, 85 Mont. 329, 278 P. 314.

But it is argued that to include premium payments in the gross proceeds of mines violates the rule because: (a) it amounts to classification of mines into different groups for taxation purposes. (b) in determining the value of the mine in 1944, it takes into consideration the production of the mine 1941 as well as the proceeds in 1943. (c) The value of the mine would be based inversely upon the production quotas fixed by the Government instead of upon the net proceeds. (d) It amounts to fixing values upon gross costs rather than upon net proceeds. The argument to sustain these points are rather abstruse and tenuous. Instead of analyzing and answering each argument, we shall consider the basic question and therein dispose of all points raised.

The Court then goes on to consider the question of whether the inclusion of premium payment infringes the uniformity clause of the Constitution. The Court has this to say:

“Use of proceeds as a basis for determining valuation for taxation purposes has been used not only for mines but railroads, motor carriers, and other public utilities. The uniformity clause, when applied to formulae based on proceeds, does not require that all individuals or companies within the class to which the formula is applied have the same income or the same source of obtaining their proceeds but merely that the rule for com-

putation of proceeds apply alike, uniformly, to all within the class to which the proceeds formula applies."

The Court in the Haynes case quotes with approval the case of *State v. Great Northern R. Co.*, 174 Minn. 3, 218 N.W. 167, 169, in which case a railroad complained because of its assessment based on gross earnings; the railroad had enjoyed a windfall because of certain ore contracts. The law was assailed on the ground that it might result in a higher tax on one railroad than on another although the cost of building and replacing the roadbed of each would be the same. The Court said: "The taxing authorities must take gross earnings as they find them. They do not fix earnings * * * Large earnings give value, and the road has a unitary value which cannot be disregarded * * * such earnings give the defendant's property great value which reflects itself in taxes."

In the case entitled: *Anaconda Copper Mining Co. v. Junod*, 71 Mont. 132, 227 P. 1001, which case involved again the computation of net proceeds, and the Appellant complained that to apply the rule would violate the application of the uniformity of assessment clause of the Constitution. The Court in answer to this claim had this to say: "The Constitutional requirements of uniformity and equality were not violated because some mines had bigger incomes or smaller expenses on the same mining operations."

It is not difficult to find a multitude of cases wherein this question of value, has received the close and

scrutinizing attention of many Courts, both State and Federal. As the tax burden ever increases in local, County, State and Federal spheres, it is fair to assume that this matter of value will ever grow more provocative. It is difficult to conceive of an expression more difficult to define, one more widely misunderstood, than the value of any article, or service. Rates based on value, taxation linked to value, these and the many other facets of the word, has yet to find common acceptance. The unquenchable hunger for more taxes, and the diminishing types of property, which can be reached for revenue, combine to make this problem one of concern to the people who pay, and the unit of government bent on spending. How far beyond its present level this tax and spend orgy can go, poses a problem that confounds he who makes even a casual inquiry into its effect. It is not the purpose of the authors of this presentation to avoid its just share of this common burden. It is our earnest contention that "value" or its "value in money" as used in the Constitution can and is best arrived at by the formula or method set out in Sections 16-6-16 and 16-6-17 UCA 1953.

In *Parson v. Detroit & Canada Tunnel Co.*, 15 F. Supp 986 (1936) and affirmed 92 F. (2nd.) 893 (1937), the taxpayer operated a tunnel between Detroit and Windsor, Canada. Its property was required to be taxed at its *true cash value*. The total cost of the property was over \$3,600,000. Its replacement cost was approximately \$2,500,000. During 1932, 1933 and 1934, the property was annually assessed at over \$3,500,000. A

fair capitalization of earnings showed a valuation of approximately \$850,000. The Court found that the tunnel company had operated efficiently and economically, and that all reasonable efforts had been made to increase its income and reduce its expenses.

The District Court, in rejecting the assessment based solely on original cost less depreciation, said (page 997):

“It is well established principle of law in arriving at the true cash value, within the provisions of the Michigan Laws and other similar statutes of a single purpose, public utility property, such as here involved, whose only value is derived from its capacity to earn money by its use for a definite single purpose, the so-called *capitalization of net income method sometimes called the net earning methods*, should be given a *primary and paramount weight* either as the sole method of valuations or used in combination with the stock and bond valuation method, so-called, *where as in the present case, it appears that the property has received economical and prudent management and that such method shows a valuation substantially less than the depreciated cost of such property, as to render an assessment based on such cost clearly and grossly excessive and arbitrary.*” (Underscoring supplied.)

The Court accordingly reduced the assessment from \$3,600,000.00 to \$848,000 for each of the years in question, basing the new assessment solely on the earning power of the property.

The Circuit Court of appeals for the 6th Circuit Court affirmed the above decision of the District Court.

In its opinion, reported in 92 F (2d) 833 at page 836, the Court said:

"It is clear that if the assessments made by the taxing authorities were so grossly excessive as to be unreasonable, and were arrived at by the adoption of fundamentally wrong principles, they were not final and a Federal Court of Equity has power to grant relief because taxation based upon such valuations deprives the company of its property and denies it the equal protection of the law * * *" *"The assessors and reviewing boards deliberately refused to take into consideration the earnings or earning power of the tunnel property as factors in determining its cash value for taxation purposes, Thus the most fundamental element in value was set at naught * * ** (p. 837), There is no evidence that the taxing authorities were guilty of any actual fraud, but we think that, in persistently adhering to cost less depreciation as a formula for arriving at 'true cash value' and in ignoring the capitalized income method adopted by both the master and the Court, they proceeded upon a fundamentally wrong basis." (Underscoring supplied.)

In People ex. rel. Lehigh Valley Ry Co. v. Harris, 168 Misc. 685, 6 NY.S. (2d) 794 (1938) affirmed by the New York Court of Appeals 281 N.Y. 786, 24 N. B. (2d) 476 (1939) The Court said:

"The Empire State Building is a valuable property, not only because of the large sum of money expended in its construction, but on account of its location in the business center of New York City, where the demand for stores and offices is great. In arriving at its value for assessment purposes its reconstruction cost would be

an important item in determining that amount. But would anyone be bold as to suggest that, if the building were to be taken out of its environment and placed in the center of the Adirondack Mountains, remote from business activity, and where few, if any tenants were to be found to occupy the offices and stores, and the revenue to be derived from rentals would be practically nothing, the construction cost would then be decisive of the value of the building? *Would a railroad three hundred miles long, connecting two important industrial centers, and running through a prosperous and thickly inhabited country, be as valuable as one of the same length built in the wilds where but few people resided, and where there was no industrial or business activity? Yet the reconstruction cost of the two roads would be substantially the same. To ask these questions is but to answer them * * **" (Underscoring supplied.)

The case of *State v. Illinois C. R. Co.*, 27 Ill. 64, involved the taxation of the property of a railroad company under a constitutional provision that "every person and corporation shall pay a tax in proportion to the value of his or her property."

In holding that the present earning capacity of such property is of prime important in determining value for taxation, the Court said:

"Where property has a known and determinate value ascertained by commerce in it, as in most kinds of personal property, or fixed by law, as money, there can be no difficulty. But there are so many kinds of property as to which the assessor has no such satisfactory guide. Such is peculiarly the case with railroad property

and other similar property. In such cases, the inquiry should be, What is the property worth to be used for the purpose for which it is constructed, and not for any other purpose to which it might be applied or converted, or for which it might be used. In such cases, if the property is devoted to the use for which it was designed and is in a condition to produce its maximum income, one very important element for ascertaining its present value is discovered and that is net profits." (Emphasis added.)

In *State v. Halliday*, 61 Ohio St. 352, 56 N. B. 118 (1899), the Court said,

"... That the income-producing capacity of an article is an important factor in determining its value is so obvious as to seem beyond the bounds of controversy. This doctrine was sanctioned in its application to real estate in State v. Jones, 51 Ohio St. 513, 37 N. E. 945, and in Express Co. v. Ohio State Auditor, 166 U. S. 220, 17 Sup. Ct. 504 41 L. Ed. 965, and no reason is perceived, nor has any been assigned, why a principle so plain and just should not be applied universally to all species of property. This is the first inquiry that a prudent Prospective purchaser would make..." (Italics added.)

Floyd v. Manufacturers' Light & Heat Company, 111 Ohio St. 57 144 N. E. 703 (1924)

"The true value in money of any property is affected by the same considerations throughout as would render the property desirable as an investment. (Italics added.)

People ex rel. Walkill Valley R. Co. v. Keater, 36 Hun. 592; affirmed 101 N. Y. 610 3 N. E. 903 (1885).

It would seem unwise to burden this brief with extensive quotations from the authorities. The problem has arisen in most states under statutes having a similar meaning and calling for assessment at "fair value" or "True value" or "Cash value" or the equivalent of these phrases. The courts have held uniformly that earning power is the most important and accurate index of value in the tax assessment of property of this kind. Without attempting an exhaustive citation, the following cases are typical:

Trustees of the Cincinnati Southern Ry. v. Guenther, 19 F. 395 (1884)

Railroad & Teleph. Cos. v. Bd. of Equalizers, 85 Fed. 302 (1897)

Chicago & N. W. Ry. Co. v. Eveland, 13 F. (2d) 442 (1926)

Stein v. Mobile, 17 Ala. 234 (1850).

Harvey Bldg. Corp. v. Hannon, 191 So. 784 (Fla. 1939).

Cleveland C. C. and St. L. Co. v. Backus, 133 Ind. 513, 33 N E. 421 (1894) aff'd 154 U. S. 439, 38 L. Ed. 1041 (1894).

State ex rel. Bee Bldg. Co. v. Savage, 65 Neb. 714, 91 N. W. 716 (1902)

Western Union Telegraph Co. v. Dodge County, 80 Neb. 18, 113 N. W. 805 (1907) aff'd 80 Neb. 23, 117 N. W. 468 (1908).

State v. Virginia & T. R. Co., 24 Neb. 53, 49 Pac. 945 (1897)

State v. Nevada Cent. R. Co., 28 Nev. 186, 81 Pac. 99 (1905)

People ex. rel. Ogdensburg & L. C. R. Co. vs. Pond. 13 Abb. N. C. 1 (N. Y. 1882.)

People ex. rel. Fitchburg R. Co., v. *Haren*, 50 Hun. 605, 3 N. Y. Supp. 86 (1888)

People ex. rel. Powers v. Kalbfleisch, 25 App. Div. 432 49 N. Y. Supp. 546 (1898) appeal dismissed 156 N. Y. 678, 50 N. E. 1121 (1898)

People ex. rel. Buffalo & S. L. R. Co. v. Fredericks, 48 Barb. 173 (N. Y. 1860) aff'd 48 N. Y. 70 (1871)

People ex. rel. Dela & H. Canal Co. v. Keetor 2 How. Prac. (N.S.) 479 (N. Y. 1885)

People ex. rel. Dela & H. Canal Co. v. Roose 2 How. Prac. (N. S.) 454 (N. Y. 1885)

Louiseville & N. R. Co. v. State, 55 Tenn. 663 (1875)

Franklin County v. Nashville C. & St. L. R. Co. 80 Tenn.

State v. Pullman Co., 178 Wisc. 240, 189 N. W. 548 (1922)

Summarizing the rules of law laid down by these cases, the following statements of the courts are exactly applicable to the valuation of the property of rural electric cooperatives:

It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation.

The income-producing capacity of an article is an important factor in determining its value and this is the first inquiry that prudent prospective purchaser would make.

Particularly pertinent to a rural electric system is the above-quoted New York Case of *People v. Harris* 6 N. Y. S. (2d)794, in which the Court stated as self-evident that a railroad line of *equal length and cost in more sparsely settled rural areas could not possibly be as valuable as a railroad line in more prosperous areas*. Similarly, the original cost of the rural electric line or its replacement cost has little or no significance with reference to value for tax purposes. An electric distribution line in prosperous, thickly settled areas might have net earnings of \$10,000 a year; but would a similar line constructed at exactly the same cost but operating in a sparsely settled, less profitable area, have the same value for purposes of tax assessment? As stated by the New York Court, merely to ask this question is to answer it. A prudent investor would pay many times as much for the more profitable property, exercising his common sense business judgment that it would be many times more profitable and correspondingly more valuable. Valuation for tax purposes must be regarded as the same in value "for purposes of income and sale."

In most states, the taxing authorities have assessed the property of rural electric cooperatives at sums much less than \$100 per mile. In a great majority of states, the assessments have been considerably less than this figure for the early development years before earning power

has been established. There is nothing peculiar in tax assessments that are below the book value of the property. Whatever may be the justification of this practice with respect to highly profitable enterprises that have reached full earning power, it is abundantly clear, under court decisions of every state, that valuation based upon earning power is peculiarly appropriate to the enterprises here under discussion. This is not because they are cooperatives but because of the kind of territory in which they operate. A stock corporation organized for profit and operating in similar territory, should of course be assessed on the same basis and with the same results. It is a fundamental theory of all kinds of taxation that taxes should be adjusted according to the ability to pay. This is true of ad valorem assessments of business property of this kind since the value of the property is in direct ratio to net earnings. Excessive taxation, beyond ability to pay, will jeopardize the successful development of these new enterprises. If they are not unduly burdened by operating costs in their early and development years they will contribute increasingly, both directly and indirectly, to the taxable wealth of the community.

From a practical standpoint, assessment at actual value based upon earning power (even though less than \$100 a mile has been the practice in most states) has not been prejudicial to the administration of local government. These properties, at any rate, constitute new wealth which was not existent when current tax rates were established. They do not add to the cost of government as is true of many kinds of new property which increase

the need for greater expenditures for education, roads, etc. In many indirect ways they add to the wealth and prosperity of the rural communities which they serve. In calling attention to these facts we do not imply that they are entitled to favored treatment by tax officials unless such encouragement is authorized by the legislature. What we do mean is that there is every reason, both in law and in practical tax administration for tax assessments at their true value based upon earning power and upon present ability to pay.

POINT II.

Are Section 16-6-16 and 16-6-17 U C A 1953 unconstitutional as violative of Section 26 of Article 6 of the Constitution of Utah, which prohibits special laws affecting: (1) assessing and collecting taxes, and (2) granting to an individual, association or corporation any privilege, immunity or franchise.

The Attorney General in his July 2nd opinion, and the Defendant in its Answer, complain that the two Sections of the Code contravene Article 6 of the Constitution, since the Code Sections are limited in their application and result in "identification" rather than a legitimate classification.

ARGUMENT

The plaintiff contends that the following authorities plainly indicate that this position of the Defendant is not tenable. May we call to the attention of this Court an Indiana case entitled: **TAX COMMISSION v. JACKSON** 283 U. S. Reports 527 (Indiana case):

In this case the State of Indiana required that a business must before it could operate, secure a license. The license fee was a graduated one; a single owned store was permitted to secure such a license by the payment of a fee much less than a store belonging to a chain. The chain contended that the classification was arbitrary and unconstitutional. It was contended by the chains that there was no difference between the operation of a singly owned store and one of a chain. The trial court held that "all persons engaged in the operation of one or more stores *** belong to the same class, for occupational tax purposes *** and should pay the same license fee, regardless of the number of stores owned and operated by them." And that any other classification is arbitrary and unconstitutional.

The U. S. Supreme Court on appeal said: "The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws, does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation of properties, nuisances, trades, callings or occupations. (*Bell's Gap R. Co. v. Penn.* 134 U. S. Reports 232; *Southwestern Oil Co. v. Texas* 217 U. S. Reports 114; *Brown-Foreman Co. v. Kentucky* 217 U. S. Reports 563.)

The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction. See: *American Sugar Refining Co. v. Louisiana* 179 U. S. 89; or

if any state of facts reasonably can be conceived to sustain it. (Rast v. Van Deman 240 U. S. Reports 342.)

This Court in the case of GARRETT FREIGHT LINES v. STATE TAX COMMISSION et al, a Utah case decided in 1943, and reported in 135 P. 2nd. at page 523, said this:

“Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry *** nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses ****”

This Court then quoted with approval the case of NICOL v. AMES 173 U. S. 509 and KNOWLTON v. MOORE 178 U. S. at page 41. In the Nicol case the Supreme Court made this observation: “Taxation is eminently practical, and is in fact brought to every man’s door; and for the purpose of deciding upon its validity, a tax should be regarded in its actual, practical results rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.”

This Court in the the Garret case then goes on: “*The ability to bear the burden is everywhere recognized as reasonable ground upon which to base a classification in tax measures.*” In conclusion we reiterate a statement

heretofore made by this Court: *"It is too well settled to require more than passing mention that State Constitutions are mere limitations and not grants of power. It is equally settled that the power of taxation is a legislative function, and unless restrained by the Constitution, the exercise of this power is vested in the legislature and its power over the subject is plenary and supreme."* (See *Salt Lake City v. Christensen Co.*, 34 U. 38: 95P. 523.)

I believe it is a fair conclusion that the rule adopted in the case of *BROWN-FORMAN CO. v. KENTUCKY*, Reported in 217 U. S. at page 342, fairly states the attitude of both State and Federal Courts with reference to this matter of classification; the U S. Supreme Court in the *Brown-Forman* case concluded: *"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."*

Rural electric cooperatives ask no special tax status unless such is conferred by proper legislation as has been done in certain states. They ask only that they be assessed according to sound principles, guaranteed by federal and state constitutions and established by decisions of the courts. It is thoroughly established as a fundamental principle of sound taxation that earning power is the most important criterion of value with respect to business

properties of this kind. As stated by the United States Supreme Court in *Adams Express Co. vs. Ohio State Auditor* 166 U S. 185 41 L. ed. 965, 977 (1897),

“Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale, it is also worth for purposes of taxation”

The courts have said, over and over again, that such property is worth only what a prudent investor would pay for it. What is it that a prudent investor does in reaching his estimate of the value of a property? He considers earning power—sometimes as his sole criterion of value, always as his most important criterion. He is not primarily interested in the construction cost or the replacement cost. It is largely immaterial to him that the construction cost — let us say — was \$100,000. If the property has no earning power, or very little earning power, he would be willing to pay only a small fraction of that amount. To arrive at the value of the property, the prudent investor ascertains its net earning power. In arriving at net earnings he necessarily includes a fair depreciation charge as an item of expense. This is in accord with elementary principles of sound business accounting. There can be no continuing gross income — let alone, net income — unless proper replacements are made as the property wears out. A reserve for such replacements must necessarily be set up as a charge against gross earnings. After arriving at the annual net earnings which the property is able to yield, he capitalizes such amount at the rate of return which prudent investment

requires for the property in question. If it is a business of little risk with established and stable earning power, a proper rate of capitalization might be five or six per cent. For a new business or one with uncertain future earning power a proper rate might well be ten per cent.

There is nothing new in this method of arriving at the value of business properties for purposes of tax assessment. It is a principle that has been long established in tax administration and has been insisted upon by the courts. The only problem that is new is the factual situation to which this old principle must be applied.

The new and special fact situation is this. These properties of rural electric cooperatives would not and could not have come into being by the usual investment of capital seeking a profit. They have been financed by the United States Government through the Rural Electrification Administration because of the great public problem that is inherent in rural electrification. They represent an unprecedented investment in a type of electric power and light properties that has extremely low earning power. They are constructed in sparsely settled rural areas where private capital has been unwilling or unable to go. They ask no favored treatment; they recognize that they should be taxed according to established principles of valuation; but they claim that the proper application of these principles leads to far different results (at least in their early years of development) than would be true with respect to properties of greater earning power.

The purposes which have led to the creation of this new wealth are highly relevant to the question of *valuation for tax purposes*. These rural electric lines are of incalculable value to the communities they serve; but for tax purpose they should be valued according to ability to pay. Any other theory of tax assessment not only is unsound as a matter of law, but might make it impossible for these new enterprises to prosper and render adequate service to the life and wealth of the communities they serve. Agriculture continues to be one of the cornerstones of our civilization. But the widening gap between rural and urban standards of life and work has become a problem of major public concern in almost every state. It is an accepted fact that electricity is no longer a luxury but is a common convenience and necessity in the American economy of business and in home life. The farm is a place of business as well as a home, and under present day conditions a farmer has special need for electric power. The farmer needs electricity in his home to maintain a basic standard of living. He needs it in his business in order to improve production methods and decrease the costs of production. Increased industrial and farm activity increases the need for electricity on the farm and in unserved small towns to enable the farmer and the worker in rural industry better to serve the nation. Widespread rural electrification is long over-due in the United States. Fifteen years ago only one Nebraska farm in fifteen had electric service. Today, in spite of the long strides that have been made toward the solution of the public prob-

lem of bringing electric service to the farms of Nebraska, almost half of them are still without service.

It is for these reasons that it is appropriate in this important field of rural electrification for the government to take financial risks which private capital is unable to assume. The result is a new type of electric enterprise—one in which there is an unprecedented disparity between capital investment and earning power. Considering the enormity of the public problem as well as the prospects for repayment, the investment is justified. The Government confidently expects that its REA loans will be repaid. But this expectation is based upon a look ahead — 25 to 35 years — and upon a maintenance of farm income at a decent American standard, to which electricity will greatly contribute. There is not the slightest inconsistency between this belief in the economic feasibility of rural electrification and our contention that earning power is the only proper criterion for valuation for tax purposes. If rural electric cooperatives had the earning power which is normally required by private capital in the business world, there would be a close and normal correlation between construction cost and a value based upon a capitalization or earnings. The fact is, however, that they probably will never have such earning power and certainly they do not have it in their early and development years. Considering the nature of the territory in which they operate—territory which private capital is unwilling to venture toward — they probably will never do more than break even in their profit and

loss account, after paying interest and making the proper charges for depreciation.

This lack of net earning power is not due to abnormally low rates or inefficient management. Rates are closely comparable to those charged by utility companies in rural areas. Higher rates would prevent the extensive use of electricity for power which is possible on the farm and reduce the upward trend of net revenues. The operating expenses of these cooperative associations are at a low level that is unprecedented in the light and power industry. It is apparent therefore that present earnings of these electric cooperatives, as shown by their profit and loss statements, are an accurate index of earning power. Since earning power is the only proper criterion of value for tax purposes, the inquiry of taxing officials should be addressed to such net earnings rather than to construction cost. Before analyzing the tax status of typical electric cooperatives in the light of sound and lawful principles of valuation, it might be helpful to cite a number of leading court decisions which have established such principles.

We find some difficulty in discovering the reasons which prompted the Attorney General in reaching his conclusions. Nothing therein is revealed why the statutory method he attacks would not result in these cooperatives paying a tax in proportion to the value of its property. Although the Attorney General and counsel for the appellants herein may differ as to what constitutes proper criteria for determining value, yet this alone would not enable this Court to reach a proper conclusion.

In order that the Court may have some factual information concerning these cooperatives, there is hereinafter set out the profit and loss statement of 3 of such cooperatives. There is also attached a statement of total number of miles of line of five of these electric cooperatives, the number of members so served, and the revenue per mile of line. There is added to this data a statement showing the average revenue per mile of all electric cooperatives in the State of Utah, Vermont, Virginia, Idaho and Wyoming.

May we point out the financial operation of at least three of these Utah Cooperatives, namely (1) Garkane Power Association, serving the rural areas of Sevier, Wayne, Piute, Garfield and Kane Counties in the State of Utah; (2) Uintah Basin Telephone Association, Inc., serving the rural areas of Duchesne and Uintah Counties in the State of Utah and (3) The South Central Utah Telephone Association, serving the rural areas of Sevier, Piute, Garfield, Kane and Iron Counties in the State of Utah.

It is equally interesting to note that in five of the eleven cooperatives serving the rural population of the State of Utah, the total number of miles of line is 1964, while the total number of consumers served is 5423, resulting in an average of 2.76 customers or consumers per mile of line.

Considering the 949 active cooperative borrowers in operation in the U. S. for the year 1957, the median average miles for each cooperative is 1283, while the median average customers is 3640. This gives a national aver-

age in these 949 cooperatives of 2.84 consumer per mile of line. There follows a tabulation of 4 of such cooperatives in Utah, 3 in Vermont, 10 in Virginia, 9 in Idaho and 10 in Wyoming, showing the revenue per mile of line in each of these cooperatives in each of these five states. It will be noted that the average revenue per mile in Utah iss \$33.26—in Vermont the average revenue per mile iss \$28.94, while the average in Virginia is \$29.20, in Idaho \$27.20 and in Wyoming \$34.40.

Exhibit "A", "B", "C" and "D"

EXHIBIT "A"

GARKANE POWER ASSOCIATION
NET OPERATING MARGINS — PROFIT OR LOSS

| | Current Year | Previous Year |
|-----------------|--------------|---------------|
| 12/31/48 | \$ 9,199.40 | \$ 83,379.99 |
| " / " /49 | 35,360.95 | 118,740.94 |
| " / " /50 | 472.24 | 118,269.70 |
| " / " /51 | 14,736.89 | 133,006.59 |
| " / " /52 | 27,611.35 | 160,617.94 |
| " / " /53 | 16,284.86 | 176,902.80 |
| " / " /54 | 4,620.79 | 172,282.01 |
| " / " /55 | 4,101.98 | 176,383.99 |
| " / " /56 | 8,781.13 | 167,602.86 |
| " / " /57 | 13,499.79 | 154,103.07 |
| " / " /58 | 13,577.51 | 140,525.56 |

EXHIBIT "B"

UINTAH BASIN TELEPHONE ASSOCIATION, INC.
INCOME STATEMENT

Year Ending December 31, 1957

| | |
|--|-------------|
| Operating Revenues: | |
| Local Service Revenue | \$42,823.76 |
| Toll Service Revenues | 15,763.69 |
| Miscellaneous Operating Revenues | 4,706.53 |
| Gross Revenues | \$63,293.98 |
| Less: Uncollectible operating revenue..... | 540.66 |
| Total Operating Revenues..... | \$62,753.32 |
| Operating revenue deductions: | |
| Maintenance labor | \$ 6,684.96 |
| Maintenance Materials & Supplies..... | 2,255.85 |
| Other maintenance expenses | 4,602.91 |

| | |
|---------------------------------|----------|
| Other traffic expense | 1,317.51 |
| Salaries | 6,017.25 |
| Other operating expenses: | |
| Adv. | 31.01 |
| Directors Fees and expense..... | 1,165.95 |
| Directory Expense | 1,246.54 |
| Area Survey | 161.32 |
| Insurance | 1,058.51 |
| Legal | 178.85 |
| Office Supplies & expense | 383.74 |
| General expense | 940.44 |
| Audit | 952.32 |
| Postage | 369.11 |
| Rent for general office | 600.00 |
| Stationery & printing | 1,106.23 |
| Travel and incidental | 1,215.58 |

| | |
|--|-----------|
| Depreciation | 18,648.59 |
| Amortization of plant adjustments..... | 699.95 |
| Operating taxes | 5,404.83 |
| Rental for lease of telephone plant..... | 2,499.45 |
| General service and license | 1,722.06 |
| Miscellaneous taxes | 56.20 |

\$60,156.62

| | |
|---------------------------------------|----------|
| Net operating income | 2,596.70 |
| Other income: | |
| Miscellaneous physical property..... | 106.50 |
| Rental of poles & central office..... | 1,233.59 |
| | <hr/> |
| | 3,936.79 |
| Interest on long term debt | 9,404.46 |

Net (Loss) (\$5,467.67)
 Less \$56.80 tax J/E entry

EXHIBIT "D"

Gaskane 1957 (Utah 6)

Miles of line—608
 No. of consumers—2,042
 Operating loss—\$140,525.56 (1949 to 1958 incl.)
 Revenue per mile—29.04 in 1957

Moon Lake 1957 (Utah 8)

Miles of line—1,113
 No. of consumers—2,907
 Operating loss—\$19,787.00
 Revenue per mile—\$61.75

Escalante Valley (Utah 10)

Miles of line—110
 No. of consumers—259
 Revenue per mile—\$18.50

Howell Elec. (Utah 11)

Miles of line—98
 No. of consumers—162
 Revenue per mile—\$23.74

Dixie Rural (Utah 14 K)

No. of miles—35

No. of consumers—53

Average Revenue per mile of 4 in. Utah, 3 in. Vermont, 10 in. Virginia, 9 in. Idaho, 10 in. Wyoming is:

| Utah | Vermont | Virginia | Idaho | Wyo. |
|----------------|---------|----------|-------------|-----------|
| 29.04 | 32.52 | 26.49 | 32.80 | 26.81 |
| 61.75 | 28.55 | 37.15 | 24.80 | 29.57 |
| 18.50 | 25.74 | 32.21 | 36.38 | 33.21 |
| 23.74 | | 28.07 | 22.60 | 32.53 |
| | | 27.80 | 19.08 | 19.58 |
| | | 78.85 | 25.19 | 49.46 |
| | | 31.99 | 45.43 | 28.89 |
| | | 31.16 | 9.50 | 33.78 |
| | | 28.49 | 29.06 | 22.20 |
| | | 19.83 | | 67.93 |
| Utah | \$33.26 | — 4 | Idaho | 27.20 — 9 |
| Vermont | 28.94 | — 3 | Wyo. | 34.396—10 |
| Virginia | 29.20 | —10 | | |

Average number of consumers served nationally, 1957

| | |
|--|-------|
| Residential service. Farm and non-farm | 91.4% |
| Commercial & industrial | 7.7% |
| Other electric service | 0.9% |

Kilowatt-hour Sales:

| | |
|---|-------|
| Residential service—farm & non-farm | 71.3% |
| Commercial & industrial | 23.0% |
| Other electric service | 4.1% |
| To others for re-sale | 1.6% |

Revenues:

| | |
|---|-------|
| Residential service — Farm & non-farm | 77.4% |
| Commercial & industrial | 17.6% |
| Other electric service | 3.0% |
| To others for re-sale | 0.6% |

The average monthly kilowatt-hours sold per residential consumer during 1957 was 283, the average monthly bill was \$7.85, and the average revenue per kilowatt-hour was 2.77 cents. For commercial and industrial users, including schools, churches, etc., the average monthly usage during 1957 was 1,089 KWH, the average monthly bill was \$21.22, and the average revenue per KWH was 1.95 cents. The average monthly energy use by residential consumers has more than doubled since 1949 while the average revenue per KWH has decreased by over one fourth during the same period.

EXHIBIT "C"

SOUTH CENTRAL UTAH TELEPHONE ASSOCIATION, INC.
STATEMENT OF PROFIT & LOSS
AS OF
SEPTEMBER 30, 1958

| Revenues | Month of September | Year to Date |
|---|-----------------------|-----------------|
| Local Service Revenue—Orderville Exchange.... | \$ 546.30 | \$ 4,552.45 |
| " " " Beryl Exchange | 380.64 | 3,249.04 |
| " " " Koosharem Exchange.. | 338.63 | 3,066.02 |
| " " " Escalante Exchange.... | 197.67 | 2,360.99 |
| " " " Tropic Exchange | 157.05 | 1,528.37 |
| " " " Boulder Exchange | 127.50 | 1,036.96 |
| Total | \$1,747.79 | \$15,793.83 |

| | | |
|--|------------|-------------|
| Toll Service Revenue—Beryl Exchange..... | 421.36 | 2,922.15 |
| " " " Escalante Exchange..... | 286.25 | 2,834.47 |
| " " " Orderville Exchange..... | 437.32 | 2,773.85 |
| " " " Tropic Exchange..... | 194.50 | 1,456.92 |
| " " " Koosharem Exchange.. | 191.64 | 1,448.40 |
| " " " Boulder Exchange..... | 62.80 | 373.31 |
| Total | \$1,593.87 | \$11,809.10 |
| Miscellaneous Operating Revenue..... | \$ 151.54 | \$ 2,190.03 |
| Total Operating Revenues | \$3,493.20 | \$29,792.96 |

EXPENSES

| | | |
|--|------------|-------------|
| Depreciation | \$1,174.93 | \$10,579.53 |
| Maintenance Labor | 556.73 | 4,649.69 |
| Interest to REA | 535.67 | 4,531.15 |
| Office Salaries | 414.48 | 3,578.84 |
| Maintenance Deductions from Income | 138.79 | 1,249.11 |
| Maintenance Truck Expense | 165.57 | 1,101.40 |
| Power | 127.52 | 1,037.17 |
| Other General Expenses | 187.29 | 819.00 |
| Legal | -0- | 480.00 |
| Insurance | 61.45 | 472.73 |
| Taxes — State, County and Local..... | 83.38 | 462.12 |
| Other Maintenance Expenses | 15.51 | 333.65 |
| Maintenance Materials & Supplies | 47.41 | 321.68 |
| Travel | 77.46 | 289.92 |
| Supply Expense Clearing | -0- | 268.70 |
| Taxes — Federal | 89.08 | 253.99 |
| Office Supplies & Expense | 8.68 | 237.93 |
| Postage & Envelopes | -0- | 220.26 |
| Rent | 20.00 | 180.00 |
| Relief & Pensions | (6.44) | 177.53 |
| Other Traffic Expenses | 19.65 | 152.90 |
| Directors Fees | -0- | 135.00 |
| Stationery & Printing | -0- | 79.58 |
| Total Operating Expenses | \$3,717.16 | \$31,612.36 |
| Net Loss for the Period | \$ 223.96 | \$ 1,819.40 |

SOUTH CENTRAL UTAH TELEPHONE ASSOCIATION, INC.
STATEMENT OF PROFIT & LOSS
AS OF FEBRUARY 28, 1959

| Revenue | Month of February | Year to Date |
|--|----------------------|-----------------|
| Local Service Revenue—Orderville Exchange... | \$ 557.71 | \$ 1,164.99 |
| " " " Beryl Exchange | 381.80 | 793.62 |
| " " " Koosharem Exchange... | 340.55 | 683.34 |
| " " " Escalante Exchange... | 318.23 | 609.86 |
| " " " Tropic Exchange | 204.72 | 420.01 |
| " " " Boulder Exchange | 127.50 | 258.90 |
| | \$1,930.51 | \$ 3,930.72 |
| Toll Service Revenue—Orderville Exchange... | \$ 264.07 | \$ 659.29 |
| " " " Beryl Exchange | 252.73 | 652.54 |

| | | | | | |
|---|---|---|------------------------|------------------|-------------------|
| " | " | " | Escalante Exchange.... | 172.75 | 437.65 |
| " | " | " | Tropic Exchange | 111.84 | 258.87 |
| " | " | " | Koosharem Exchange.. | 113.35 | 228.71 |
| " | " | " | Boulder Exchange | 27.13 | 107.64 |
| | | | | <hr/> | <hr/> |
| | | | | \$ 941.87 | \$ 2,344.70 |
| Miscellaneous Operating Revenues | | | | \$ 248.05 | \$ 295.80 |
| Total Revenues | | | | <hr/> \$3,120.88 | <hr/> \$ 6,571.22 |
| EXPENSES | | | | | |
| Depreciation | | | | \$1,270.03 | \$ 2,510.85 |
| Office Salaries | | | | 359.61 | 1,072.87 |
| Interest | | | | 479.10 | 1,047.06 |
| Maintenance Labor | | | | 461.93 | 709.74 |
| Taxes — State, County and Local | | | | 300.00 | 600.00 |
| Relief & Pensions | | | | (12.88) | 283.36 |
| Other Miscellaneous Deductions from Income.... | | | | 139.13 | 278.26 |
| Outside Services - Engineering, Auditing, etc.... | | | | 72.00 | 213.55 |
| Other Traffic Expense | | | | 155.17 | 162.42 |
| Insurance Expense | | | | 57.88 | 115.76 |
| Meals, Traveling & Incidental Expense | | | | 28.50 | 109.55 |
| Telephone Service | | | | 25.21 | 67.01 |
| Office Supplies & Expense | | | | 34.30 | 57.13 |
| Vehicle Clearing Account | | | | 50.20 | 55.62 |
| Maintenance Materials & Supplies | | | | 43.44 | 47.59 |
| Rent | | | | 20.00 | 44.35 |
| Membership Fees in Trade Associations | | | | 42.30 | 42.30 |
| Directors Fees | | | | —0— | 36.00 |
| Station Removals & Changes | | | | 1.87 | 32.02 |
| Stationery & Printing | | | | 14.85 | 14.85 |
| | | | | <hr/> | <hr/> |
| Total Expenses | | | | \$3,560.64 | \$ 7,500.29 |
| Net Loss for the Period | | | | <hr/> \$ 439.76 | <hr/> \$ 929.07 |

Sutherland Statutory Construction 3rd Ed. Vol 2—
Sec. 2102 to 2115:

"At common law the only statutes of which the Courts would take notice were public acts, and these were called general laws. Obviously, the constitutional provisions concerning general laws and laws of a general nature used the term in a different and more limited sense. Although some courts followed the common law definition this was erroneous because a public act can be special or local as well as general. If the subject of the statute may apply to and affect the people of every politi-

cal subdivision of the State, it is a law of general nature and must have uniform operation. . . A general law may operate only in a particular County, and only affect a small group of persons at the time of its enactment if the classification of the group is reasonable and if the statute will apply equally to all in a similar situation coming within its scope a law is general not because it operates on every person in the State, but because every person brought within the relations and circumstances provided for by the act is affected. See *Martin v. Superior Court of Sacramento*, 194 Cal. 93, 227 P. 762 (1924) : In re Livingstone, 76 P. 2nd. 1192 (1938)

The court in *Martin v. Superior Court of Sacramento County* 227 P. P. 763—was confronted with the question of the constitutionality of a statute passed in 1923 which provided “In counties and cities and counties having a population of 100,000 inhabitants or over, such selection (of trial jurors) shall be made by a majority of the judges of the superior courts.” By this enactment the basis of classification for the purpose of selecting jurors was changed. The court in this cause said: “It is conceded, as indeed it must be, that where a classification of persons of things is distinctive and such distinction is based upon some constitutional or natural, or intrinsic distinction, laws may be applicable to such class alone, *providing the act is uniform as to all persons or things within such class.*—The amendment under consideration is not, in our opinion, a special law. It is a general law having a uniform operation upon a class of persons or things readily naturally differentiated from another class

of persons or things by reason of the necessities peculiar to the subject matter of the legislation. A law is not special legislation merely because it does not apply to all persons. It is a settled principle of constitutional law that the legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people. If the law is to bear equally upon all persons, the legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation. In other words, different persons, different localities, and different governmental organizations and agencies may justly be found by the legislature to stand in different relations to the law, and if the same law were, in such a situation, to be applied to all alike, it would not bear equally upon each of them. *Darcy v. Mayor, etc. of the City of San Jose*, 104 Cal. 462, 38 P. 500; *In re Sumida*, 177 Cal 388, 170 P. 823.

The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law, but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within

the class to which it is addressed. (*Pasadena v. Stimson* 91 Cal. 238, 27 P. 604; *McDonald v. Conniff*, 99 Cal. 386, 34 P. 71; Title, etc., *Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356, 8 L.R.A. 682.

The power to thus classify necessarily carries with it a wide descretion in the exercise thereof. The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the legislature, in the first instance, to whom has been given the power to legislate and not to the Courts, and the decision of the legislature in that behalf is ordinarily conclusive upon the Courts. Every presumption is in favor of validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason. (In the matter of a proceeding to validate the Sutter-Butte by-Pass assessment No. 6 of the Sacramento and San Joaquin Drainage District (Cal. Sup.) 218 P. 27. It follows that in any given case if the existence of a state of facts of which the court may take judicial notice seems to have been made the basis of a particular piece of legislation, and if it may be reasonably said that such facts afford good ground for the making of a particular classification; the legislative enactment will be upheld, although the reason therefor does not appear *prima facie* in the law itself. *Stevenson v. Colgan* 91 Cal. 649, 27 P. 1089; *Grumbach v. Leland*, 154 Cal. 679, 98 P. 1059; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. ct. 289, 51 L. Ed. 499.

In determining the need and propriety of classified legislation, where the same does not appear on the face of the legislative enactment, the Court may resort to its judicial knowledge of the contemporaneous conditions and situation of the people, the existing economic, sociologic and civic policy of the State, and all other matters of common knowledge — In other words, “where the discretion so to classify is vested in the legislature, the selection of a limit is a legislative power which will be judicially reviewed only in a plain case of abuse.”

In *Bacon v. Walker* reported in 204 U. S. P. 311, the factual situation involved a law of Idaho which provided a civil damage of \$100 for sheep trespassing within 2 miles of a dwelling house. The action was brought in the Justice’s Court, appealed to the District Court and finally affirmed by the Supreme Court of Idaho. In error to the Supreme Court of Idaho the case was heard by the U. S. Supreme Court.

The Idaho Act provided: “Sec. 1210. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within 2 miles of the dwelling house of the owner or owners of said possessory claim.” The act then provides the penalty for damages. The plaintiff in error alleges, among other things that the Idaho law makes a discrimination that is arbitrary. The U. S. Supreme Court held: “The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil—*The selection of some limit is a legis-*

lative power, and it is only against the abuse of that power if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance (2 miles) expressed shows nothing. The Court concludes that such a statute is a vindication from the accusation of being an arbitrary and unreasonable discrimination against the sheep industry. The statute was sustained as a constitutional exercise of the power of the state on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners.

Returning to Sutherland Statutory Construction the author says: "The form of enactment is not conclusive. The courts will consider the entire act along with the surrounding circumstances, the reasons for passage, and the purposes to be accomplished. An act general in form but special in fact will be treated judicially, as a special act, but this does not mean that the act is unconstitutional — The uniformity that is required is to prevent the granting to any person, or class of persons, the privileges or immunities which upon the same terms do not belong to all persons — When an act is assailed as class or special legislation, the attack is usually based on the claim that there are persons or things similarly situated to those embraced in the act, and which by the terms of the act are excluded from its operation. The question then is whether the persons or things embraced by the act form by themselves a proper and legitimate class with reference to the purposes of the act. Constitutions do not forbid a reason-

able and proper classification of the objects of legislation. The question is, what is reasonable and proper — Most litigation concerns the reasonableness of the limits imposed on the operation of the contested act — The standards used by the Courts have been stated in many different ways. Some Courts have held a general act applies alike to all of a certain class and operates uniformly on all persons in a similar category; that is to say, when a class is determined by the legislature, in order to sustain the act, all in the class must receive uniform treatment. The author, at this point, cites the case of *Clear Lake Coop Livestock Shippers Ass'n v. Weir*, reported in 206 N. W. at page 279, the facts being these: The 39th general assembly of the State of Iowa, authorized by law the creation of agricultural marketing agencies for the sole purpose of marketing farm products. Each association created thereunder, adopted by-laws, which required the membership to sell all its livestock through this agency. The appellant, being a member of the appellee, was charged with selling certain of his livestock outside this marketing agency. On appeal to the Supreme Court of Iowa it was contended that the act violated Section 6 of Article I, of the Constitution which reads: "all laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." It was contended that the power conferred upon associations organized under this chapter is withheld from individual or voluntary, co-operative, unincor-

incorporated associations engaged in the same line of industry, and therefore its provisions are discriminatory and arbitrary and not based upon an obvious or natural classification or industry. In answer to this contention the Supreme Court said: "The contention overlooks the purpose of the act. Its design was to secure unity and cooperation among all producers of livestock in order that greater efficiency might be secured in selling livestock on foreign markets — The right of the legislature to enact legislation for the incorporation of non-profit sharing, cooperative associations is not questioned. Perhaps the legislature taking cognizance of altered conditions in farming and other industries, believed a change of public policy should be adopted." The author of this text continues: "Others say if the basis of classification is valid it is wholly immaterial how many or how few there are in the class." The author continues "authorities are divided on the propriety of judicial review of legislative classifications. Most authorities agree, however, that it is not necessary that every city or county be included, but none can be excluded in such a manner that they can never come within the legislative classification. Thus, classification must be prospective and not permit the future entrance into the class when its qualification and standards have been met. The restriction may place either wide or narrow limits on the class, but the nearer a classification comes to total generality the more susceptible it is to attack. A valid classification must include all who "naturally" belong to the class, all who possess a common disability, attribute or classification, and there

must be some natural and substantial differentiation between those included in the class and those it leaves untouched — Classifications also have been sustained on the ground of necessity. An actual basis for differing treatment must be established on the basis of differences in the situation and subject matter included and excluded from the class. Using these tests, if it is determined that there is no reason for the classification, the rule that the legislative determination of fact is binding will not be applied, and the act will be declared unconstitutional, but generally the courts will exercise every presumption in favor of the validity of the legislative determination. In *Williams v. Mayor and City Council of Baltimore*, Justice Cordozo said, "Time with its tides brings new condtions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute may be as narrow as the mischief. The constitution does not prohibit special laws inflexibly and always. It permits them where there are special evils with which the general laws are incompetent to cope. The special public purpose will sustain the special form — The problem in the last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in the case of plain abuse will there be revision by the courts. — If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. — If special circumstances have developed of such a nature as to call for a new rule, the special act will stand."

In the case of *Broadbent et al v. Gibson et al*, 105 U. 53, this Court was concerned with classification of property as affected by the Sunday closing law. In discussing this question of classification this court said: "In determining whether or not this classification is unconstitutional, it must be remembered that discrimination is the very essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable. (Citing *State v. Mason*, 94 U. 501, 78 P. 2nd 920; *State v. Lormis*, 75 Mont 88, 242 P. 344.) The legislature has a wide discretion in determining what shall come within the class of permitted activities and what shall be excluded. (Citing *Koman v. St. Louis*, 316 Mo. 9; 289 S.W. 838; *Stewart Motor Co. v. City of Omaha*, 120 Neb. 776, 235 N.W. 332; *State v. Diamond* 56 N.D. 854, 219 N.W. 831; *State v. Dolan*, 13 Idaho 693, 92 P. 995.)

"A court is not concerned with the wisdom or policy of the law and cannot substitute its judgment for that of the legislative body. If reasonable minds differ as to the reasonableness of the regulation, the law must be upheld." *Justesen's Food Stores v. City of Tulore*, 43 Cal. App. 2nd 616, 111 P. 2nd 424, 427.

In *State v. Mason* 94 U. 501 — This court considered the constitutionality of Chapter 4, Laws of Utah 1935, insofar as it requires a license to be obtained by persons other than commission merchants, who for the purpose of resale obtain from farmers possession or control of farm products without paying cash for the same at the time of obtaining such control or possession. The defend-

ant was convicted of this offense and appealed urging, among other things, that it is a denial of equal protection clause of the constitution by creating unreasonable discriminations. The court held: "To be unconstitutional as discriminatory, the discrimination of a statute must be unreasonable or arbitrary and a classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation and if the differentiation bears a reasonable relation to the purposes to be accomplished by the Statute.

The objects and purposes of a statute present a standard for determining propriety of classifications as respects question whether statute is unconstitutionally discriminatory.

The Supreme Court in *State v. Loomis*, 75 Mont. 88, 242 P. 344 (1925) considered a Sunday closing law of the State of Montana which provided that dance halls must close on Sunday. The dance hall closing provision permitted theater, playhouses and other forms of entertainment to remain open, and further provided that this act would not apply to dance halls and pavilions as are maintained or conducted in public parks or playgrounds where no admission is charged. The appellant was convicted of keeping open a dance hall on Sunday. The Supreme Court held: "It is conceded, as it must be, that it is competent for the lawmakers to classify subjects of legislation and to deal differently with the different classes created, if the classification is reasonable and not a mere artificial

arrangement or subterfuge to avoid the inhibition of the 14th amendment to the federal constitution. Whether the classification made by the amended Act is reasonable was a matter for legislative determination in the first instance, and every reasonable presumption will be indulged in favor of the validity of the act; in other words, it will be presumed that the classification is reasonable, and the defendant must assume the burden of showing that there is not any admissable hypothesis upon which it can be justified."

The Court in this case concluded that classification of subjects for the purpose of legislation does not depend upon scientific or marked differences in things or persons or in their relations, it being sufficient to withstand the charge of discrimination — the very essence of classification — and not objectionable unless founded on distinctions unreasonable or purely fictitious. *Am. Sugar Ref. Co. v. Louisiana* U. S. Reports 179-89.

A license tax upon those not excepted — P. alleges tax does not impose equally such tax on all who refine sugar and molasses. The U. S. Supreme Court held: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid, of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religions, opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a

denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their production upon the market. So, too, this court has had repeated occasion to sustain discriminations founded upon reasons much more obscure than this. Thus in *Railroad Co. v. Richmond* 96 U. S. 521, a Municipal ordinance was sustained declaring that no car or vehicle of any kind "belonging to or used by the Richmond, Fredericksburg & Potomac Railroad Co. shall be drawn or propelled by steam" upon a certain street, although no other company was named in the ordinance, the Court held that no other corporation had the right to run locomotives in that street, no other corporation could be in a like situation, and that the ordinance, while apparently limited in its operation, was general in its effect, as it applied to all who could do what was prohibited." "All laws should be general in their operation, and all places within the same city do not necessarily require the same local regulation. While locomotives may with great propriety be excluded from one street, it would be unreasonable to exclude them from all." In *Missouri Railroad Co. v. Mackey*, 127 U. S. 205, it was said: "and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the

same conditions." To the same effect is *Walston v. Nevin*, 128 U. S. 578.

In *Bell's Gap Railroad Co. v. Pennsylvania* 134 U. S. 232 the Court said: "All such regulations so long as they proceed within reasonable limits and general usage, are within the discretion of the legislature or the people of the State in framing their constitution."

CONCLUSION

There remains but little that can be said in summation. The plaintiff in this cause is convinced that the duty imposed upon the taxing authority is not an easy one. To determine "a uniform and equal rate of assessment and taxation on all tangible property in the State according to its value in money," requires both wisdom and patience.

Despite the effort in this behalf, this court which must ultimately decide and determine these controversies, is probably more keenly aware of the many disparities in our taxing effort, than is any other agency or instrumentality of government. To reach a plateau of greater equality, may require a new base upon which the tax is levied and laid. Until then, the inequalities that spring from this system, must be tolerated by a patient citizenry until a rule or formula emerges with judicial sanction.

The plaintiff earnestly urges that the legislative formula provided in Section 16-6-16 and 16-6-17 provides a yardstick or method of determining value which secures for assessment purposes a valuation fair and equitable in comparison with and commensurate with the valuation

of other kinds of property. When the valuation thus secured is such that if the uniform and equal rate of taxation is applied, the property is taxed in the same proportion to its value as is all other tangible property, the method of arriving at the assessed valuation is not subject to constitutional objections as violation of Article 13. The selection of some limit (\$50 times the number of miles of primary distribution or transmission lines — \$10 times the number of circuit miles) is a legislative power, and it is only against the abuse of that power if at all, that the courts may interpose. But the abuse must be shown.

All such regulations so long as they proceed within reasonable limits and general usage, are within the discretion of the legislative or the people of the State in framing their constitutions.

To be unconstitutional as discriminatory, the discrimination of the statute must be unreasonable or arbitrary, and a classification is never unreasonable or arbitrary in its inclusion or exclusion features, so long as there is some basis for the differentiation between classes or subject matters. If reasonable minds differ as to the reasonableness of the classification, the law must be upheld.

Assaying the instant matter new before this Court, we very respectfully submit that Sections 16-6-16 and 16-6-17 do not contravene Article 13 or Article 6 of the Constitution of the State of Utah.

Respectfully submitted,

George E. Stewart

Ferdinand Erickson

Attorneys for Plaintiff