North Dakota Law Review

Volume 35 | Number 3 Article 12

1959

Special Assessments - Railroads-Right of Way Assessment Liability Depends on Present or Future Benefits

Robert K. Severson

Follow this and additional works at: https://commons.und.edu/ndlr

 Part of the Law Commons

Recommended Citation

Severson, Robert K. (1959) "Special Assessments - Railroads-Right of Way Assessment Liability Depends on Present or Future Benefits," *North Dakota Law Review*: Vol. 35 : No. 3 , Article 12.
Available at: https://commons.und.edu/ndlr/vol35/iss3/12

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

taining the intent of the parties, arrived at from a consideration of the conveying instrument's terms and attending circumstances.[15] However, when, as in the instant case, the parties use clear language such as: ". . . one-eighth of all the oil and gas which may be produced . . . ," it is submitted that such language should be held to result in the creation of a royalty interest. To hold otherwise is to ignore the usual operative effect given such language by the courts.

DAVID C. JOHNSON.

SPECIAL ASSESSMENTS — RAILROADS-RIGHT OF WAY ASSESSMENT LIABILITY DEPENDS ON PRESENT OR FUTURE BENEFITS. — Planitiff railroad's main line right of way ran adjacent and parallel to two portions of defendant's city street that was repaved. Plaintiff was assessed more than 50% of the total amount in the special assessment repaving district. The Michigan Supreme Court *held*, five justices dissenting, that the railroad failed to show that no benefits inured to the right of way at the present time or in the foreseeable future and was therefore liable for the paving assessment. *New York R.R. v. Detroit*, 93 N.W.2d 481 (Mich. 1959).

Most courts hold that property of a railroad may be made liable by assessment for local improvements.[1] The peculiar character of a railroad right of way gives rise to special problems in applying special assessments against it.[2] There is conflict of authority as to whether a special assessment may be enforced against a railroad right of way.[3]

Many courts hold that a railroad right of way is liable for assessment for local improvements only if it can be said to be benefited by the improvements.[4] This does not violate the Fourteenth Amendment.[5] But if the cost of paving is without any compensating advantage and if the statute requires as a basis for its operation the existence of benefits, then the assessment amounts to confiscation.[6] An assessment by proper authority being prima facie valid, the burden is on the railroad to show that it is not benefited.[7] There is a split of authority as to whether the court may say as a matter of law that a right of way does not receive a benefit.[8] Some states hold that a special assessment should be upon the basis of benefits to the property assessed from the improvements and not upon the number of square feet in the property, or

15. Dabney-Johnson Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935); Hickey v. Dirks, 156 Kan. 326, 133 P.2d 107 (1943); Pure Oil Co. v. Kindall, 116 Ohio St. 188, 156 N.E. 119 (1927).

1. *E. g.*, Carolina & N.W. R.R. v. Clover, 46 F.2d 395 (4th Cir. 1931) (Benefit not necessary); Cowart v. Union Paving Co., 216 Cal. 375, 14 P.2d 764 (1932).

2. *Cf.* Northern Pac. R.R. v. Seattle, 46 Wash. 674, 91 Pac. 244 (1907).

3. See, Town of Clayton v. Colorado & S. Ry., 51 F.2d 977 (10th Cir. 1931) (Solely a question of state policy).

4. See Northern Pac. R.R. v. Grand Forks, 73 N.W.2d 348, (N.D. 1955); Thomas v. Kansas City Southern Ry., 261 U.S. 481 (1923).

5. Northern Pac. R.R. v. Richland County, 28 N.D. 172, 148 N.W. 545 (1914); Louisville & N. Ry. v. Barber Asphalt Paving Co., 197 U.S. 430 (1905).

6. See Georgia R. & Electric Co. v. City of Decatur, 295 U.S. 165 (1934).

7. Chicago, R. I. & P. Ry. v. Wright County Drainage Dist., 175 Iowa 417, 154 N.W. 888 (1916).

8. See, *e. g.*, Long Island Ry. v. Hylan, 240 N.Y. 199, 148 N.E. 189 (1925) (no benefit declared as a matter of law); *Contra*, Grand Rapids v. Grand Trunk Ry. System, 214 Mich. 1, 182 N.W. 424 (1921) (Matter for the jury).

upon the street frontage.[9] Future benefits that will sustain an assessment may consist of gains from increases in traffic reasonably expected to result from the improvement, but they may not be based upon mere speculation or conjecture.[10] One state has expressly provided by statute that the right of way of a railroad shall be subject to special assessment for street improvements.[11]

In a great number of cases the liability of a railroad right of way for assessments has been denied on the ground that no benefit to the right of way has resulted, or will result from the improvement, although it is evident that had the improvement been beneficial, such property would have been held liable.[12] In some jurisdictions the power to assess a railroad right of way is denied on the ground that it is land appropriated to a public use.[13] Railroad right of ways are exempt from street improvement assessments only where use thereof is solely and permanently for railroad purposes.[14] The system and policy of each state enter largely into the question and give to it a local character.[15]

North Dakota would apparently follow the dissenting opinion. The law seems to be fairly well settled in North Dakota that a right of way is not subject to special assessments for the reason that no future benefits can be derived to a right of way committed to a definite use.[16]

ROBERT K. SEVERSON.

9. See Johnston City v. Chicago & E. I. Ry., 289 Ill. 407, 124 N.E. 568 (1919); Northern Pac. Ry. v. Grand Forks, 73 N.W.2d 348 (N.D. 1955) (In North Dakota special assessments must be apportioned according to benefits. The foot frontage method can be used only where benefits conferred upon the assessed property are equal and uniform.).

10. See Kansas City Southern Ry. v. Road Improv. Dist., 266 U.S. 379 (1924).

11. Iowa Code Annot. § 391.40 (1949).

12. See, *e. g.*, Long Island Ry. v. Hylan, 206 N.Y. Supp. 239 (1924); Minneapolis & St. L. Ry. v. Lindquist, 119 Iowa 144, 93 N.W. 103 (1903).

13. See, *e. g.*, Boston v. Boston & A. R.R., 170 Mass. 95, 49 N.E. 95 (1898).

14. See City of Barre v. Barre & Chelsa Ry., 97 Vt. 398, 123 Atl. 427 (1924).

15. Town of Clayton v. Colorado & S. Ry., 51 F.2d 977 (10th Cir. 1931); See Chicago, M. & St. P. Ry. v. Milwaukee, 89 Wis. 506, 62 N.W. 417 (1895).

16. See Northern Pac. Ry. v. Grand Forks, 73 N.W.2d 348, (N.D. 1955).