52-53-54. MILES. VS. WEST & OTHERS.

1/65/7/15

No. 52, 53 & 54

Assignment.

Filed June 1st 1926

COURT OF APPEALS
ANNAPOLIS, MARYLAND

Baltimore, May 31st 1926

James A. Young, Esq.

Clerk of Court of Appeals

Annapolis

Dear Mr. Young,

Apparently I failed to give instructions as to the assignment for Tuesday, June 8th. Please give out to the Record that the assignment for that day will be:

52

No 52 Bayne v. The Evening News Company. No 53 T. Waller, et al vs. Graham Comptr. et al vs. Clay T. Joyce.

No 54 Clarence W. Miles vs Public Service Comm. vs United Rys.

I haven't the name of the second case here. It is a case involving the fixing of salaries for Baltimore School teachers. You will find the record there by this time I am sure. The last two cases are to be advanced from the October term.

Yours very truly,

Carroll T. Bond

Assignment for Tuesday May 8th 1926.

No. 54

April Term, 1916

Motion for Modification

Filed August 4th 1916

MILES

vs.

WEST AND OTHERS.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1926.

No. 54.

MOTION FOR MODIFICATION OF OPINION.

The appellee Company, by its counsel, respectfully calls attention to certain parts of the Opinion,—which the Court (we believe) would willingly modify. The fact is that the decision turned on a point which no one had any reason to anticipate; and failing such anticipation, the Record and argument were incomplete.

I:

The conclusion reached was (a) that the easements must be included in the rate base; but (b) that they cannot be valued (for such inclusion) by any measure that is based on present earnings,—because the fairness of these earnings is the thing to be proved. The first of these points was contested by the appellant; the second was conceded by both sides. As the Record shows, the Company's proof of sixteen to eighteen millions was based on land values and checked by a method in which earnings played no part. The case was remanded on the single ground (a) that the Com-

mission had based its valuation *solely* on the tax assessment; and (b) that this method was wrong because the assessment is itself based on earnings. The first objection is certainly supported by misleading language in the Commission's Opinion. The fact, however, is that the basic assessment figure (New Annex) was *adopted* as lower (and therefore more favorable to the public) than land values shown.

II:

The Court's second objection,—namely: that the tax assessment is necessarily based on earnings and "varies with the rates" is erroneous in fact; and it involves an error of law which is all the more disturbing because of the conspicuous force and clarity with which the Opinion is written. It is said (speaking of the first of the Gas cases—101 Md.):

> "In other words, this Court in effect said: 'Ascertain to what extent the use of this easement in the conduct of the corporation's business is responsible for its earnings, and then base the valuation for taxation purposes upon the earnings thus ascertained.' "

And later in the Opinion, this is spoken of as the law's "mandate" to the taxing authorities.

III:

We submit, however, that the easement tax assessment is not, in fact, based on earnings or varied with the rates; and that, without special legislation, this would be unlawful.

A:

In the first place (and incidentally) the suggested mandate to the tax assessor would be impossible of performance. You can no more allocate some specific part of earnings to the easement (as distinguished from the franchise and the other essential elements of a productive whole),—than you can apportion normal vitality between heart and lungs. In the second place, the mandate, if legal and practicable, would result in a cycle: increased taxes would require higher rates; these would, in turn, create more earnings attributable to the easements; and these increased earnings would in turn involve more taxes,—which (by hypothesis) vary with the rates.

B:

But: The case which the Court thus construes, antedates the advent of public utility regulation,—now sixteen years ago. The new law (as the Opinion holds) has extracted from the easement its former value based on the use or earning power. The easement is an interest in land; the tax in question is a direct property tax; and the real estate assessment may not be enhanced by attributing to the thing taxed an earning power which the valuation law denies it. The tax assessor cannot create values.

C:

But more than this: The easement tax assessment never was based on earnings. That it *logically* might be, is indeed a corollary of Judge McSherry's language in the case construed,—in which he said that the usable

value of the easement gave it a real (and therefore, taxable) value much in excess of the value (contended for by the Gas Company) measured by the adjacent fee. But both Court and counsel conceded that, without special tax legislation, earnings can only be reached through the shares; and that there was no way by which the assessor could segregate earnings assignable to easements. In the sequel (105 Md.) the Court (having rejected the two methods of the City, which implicitly involved earnings) suggested other methods (pp. 61-2) which were not, in any sense, based on earnings or variable with the rates.

D:

One of such methods was also adopted by the City when, later, it came to assess the railway easements (111 Md. 264). The Record (111 Md.) shows that the City's assessment on the private easements in the (now) Old Annex was based on the price per running foot paid under the (then recent) German Street Ordinance. The Record shows also the assertion of Mr. Leser (then of the Appeal Tax Court) that no question of taxing earnings was involved because (as the fact was) the grants were for substituted or connecting trackage and added nothing to gross receipts. After the decision (1909) these easements were *permanently* (126 Md. 56-7) assessed by agreement at one-half of the City's claim. This assessment has remained unchanged; and it was never consciously measured by or based on earnings. Easement taxes are imposed where operation is at a loss.

IV:

Further: the Court says: "In the valuation for rate-making purposes, property of a corporation, the value of which depends on the earnings of the corporation should not be included." But this (we suggest) is more than was meant. In any valuation scheme, you are precluded from using *actual* earnings as a measure of *fair* earning power. But this excluding principle is a necessity and not a fetish. To capitalize actual earnings is to assume the thing to be proved. To say that property in the rate base may not be valued by present earnings,—is correct; to lay down as a principle, that property must be excluded from the rate base if earnings are an element of its value,—would be confusion. All corporate property in public use must be *included;* and the value of most of it will depend on what the unified system earns. It is not the presence of earning power; but the use of *present* earnings as a measure of *fair* earning power,—that vitiates. To give only one illustration: the conventional allowance in the rate base for going-value (which depends on but is not measured by earning ability) would be wrong under such a principle as the Opinion announces.

V:

Summarizing: It is believed that the Commission's valuation would have been affirmed, but for a misapprehension of the Commission's method; and a misconception of the true nature of the easement tax assessment. The incomplete Record failed to show that the basic tax assessment (in the new annex) was

adopted after comparison with adjacent land values. This, however, is curable on remand. Whether the easement tax assessment ever was or lawfully could be based on earnings and vary as the rates (with the disturbing mandate to the tax assessor)—this question we believe deserves re-consideration.

Respectfully,

EDWIN G. BAETJER,
JOSEPH C. FRANCE,

For Company.

54 April Term 1926.

Motion overruled

Filed January 28, 1927.

MILES

vs.

WEST and OTHERS.

In the
COURT OF APPEALS
OF MARYLAND.

No. 54
April Term, 1926.

ORDERED by the Court of Appeals this 28th day of January, 1927, that the motion for modification of opinion filed in this case be overruled.

Carroll T. Bond

Chief Judge.

MILES

vs.

WEST AND OTHERS.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1926.

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