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101 Md. 541, 61 A. 532, 109 Am.St.Rep. 584, 1 L.R.A.N.S. 263

Court of Appeals of Maryland.
CONSOLIDATED GAS CO. OF BALTIMORE
v.
MAYOR, ETC., OF BALTIMORE et al.
June 22, 1905.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Proceeding by the appeal tax court of Baltimore city for the assessment of street easements, etc., used by the Consolidated Gas Company of Baltimore. From an order of the Baltimore city court sustaining the assessment, the gas company appeals. Reversed.

West Headnotes

Taxation 371 ⚿2240
371k2240 Most Cited Cases
(Formerly 371k124)
Code Pub.Gen.Laws 1904, art. 81, § 2 , declares that all bonds and certificates of indebtedness bearing interest, issued by any corporation, belonging to residents, "shall be assessed to the owners thereof"; and article 81, § 92 , declares that it shall be the duty of the appeal tax court of Baltimore city to assess all such bonds or certificates to the "owners thereof" resident in the city; and by article 81, § 210, the rate of assessment, except for state taxes, is restricted to 30 cents on each $100 of assessed value. Held that, in assessing the value of easements in a street belonging to a gas company, it was error for the appeal tax court to charge to the corporation over $10,000,000 of the company's own outstanding obligations.

Taxation 371 ⚿2248
371k2248 Most Cited Cases
(Formerly 371k157)
The actual occupancy of the streets of a city by a gas company for its mains constitutes an easement, and not a mere franchise, and is therefore taxable to the corporation as real estate.

Taxation 371 ⚿2540
371k2540 Most Cited Cases
(Formerly 371k376(1))
Where a gas company was notified to appear before the Baltimore appeal tax court and show cause why its street easements should not be assessed for taxation at $6,000,000, which amount had been previously arbitrarily fixed, and, after hearing, the court found that the valuation reached by the process followed produced a sum, as the value of the easements and of the franchises, nearly $1,000,000 in excess of the total par value of the corporation's capital stock, whereupon it proceeded to arbitrarily reduce the same by deducting an inflated and erroneous valuation of the corporation's personal property, and then dividing the residuum by 2, the assessment was void.

Taxation 371 ⚿2723
371k2723 Most Cited Cases
(Formerly 371k493.7(4), 371k493(7))
Where, in a contest over an alleged assessment of certain street easements belonging to a corporation, it appeared that there was no assessment, there could be no presumption in favor of its accuracy, and hence it was error for the court to declare that the burden was on the corporation to show by a preponderance of the testimony that the assessment was erroneous.

Argued before McSHERRY, C.J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

W. Calvin Chestnut and Edgar H. Gans, for appellant.
Sylvan H. Lauchheimer and W. Cabell Bruce, for appellees.

McSHERRY, C.J.

The Consolidated Gas Company of Baltimore is a corporation duly formed under the laws of Maryland. In the year 1904 it was assessed by the appeal tax court of Baltimore city, for the purposes of taxation, with sundry parcels of real estate, valued at $2,697,791; with 79,000 services, at $158; and with 455 1/2 miles of gas mains, at $1,131,640; making a total of $3,987,431. This total was increased for 1905 to $4,026,997. On September 23, 1904, the following notice was sent to the company by the appeal tax court: "This is to notify you that it is the purpose of the appeal tax court to increase the assessment on your mains, pipes, and other construction located in, on, under, or over the public highways of Baltimore city, so as to include the value of the easement enjoyed by you in said highways, and that on Thursday, September 29, 1904, at 12 o'clock, you will be given an opportunity to make such statements and present such proofs as you may desire, to show why an additional assessment of $6,000,000 should not be placed on said real property. Thereafter the court may enter an increased assessment thereof, according to its best judgment and information in the premises." The company appeared by its counsel. No evidence was adduced by either side, but the company's counsel insisted that the contemplated or projected assessment of $6,000,000 could not be legally made in the form or by the method proposed. On the day following the appeal tax court entered its conclusions in these words: "Additional assessment on mains, pipes, and other construction located in, on, or over public highways of Baltimore city, so as to include the valuation of the easements enjoyed by said company in said highways, $6,000,000." From that action or determination the gas company appealed to the Baltimore city court. Upon the trial of that appeal, evidence was offered with respect to the method pursued by the appeal tax court in arriving at the sum of $6,000,000 as "the valuation of the easements enjoyed by said company in said highways"; and propositions of law, embodied in prayers, were presented, with a view of raising the question as to the right and authority of the city to tax the particular easement involved, and the further question as to the regularity of the mode adopted by the appeal tax court in reaching the result to which it came. The Baltimore city court rejected all the prayers of the gas company, but granted four out of the eight prayers presented by the city. The court, sitting without a jury, passed an order sustaining the action of the appeal tax court, and from that order this appeal was taken.

There are two questions in the case: First, had the city the power to increase the prior assessment on the mains, etc., by the addition of $6,000,000, so as to include by that addition the taxable value of what the appeal tax court describes as the easements enjoyed by the company in the highways? and, secondly, if it did have that power, has it properly and lawfully exerted it?

It is not denied by the appellant that the Legislature could make provision for an independent assessment of the intangible, incorporeal right called by the company a "franchise," but claimed by the city, in view of the facts, to be an easement-the right to occupy a certain space beneath the surface of the streets with gas mains and service pipes; but it is maintained on behalf of the appellant that the General Assembly did not intend, by existing enactments, to allow the appeal tax court to assess as real property the right, privilege, or franchise to occupy the streets with gas mains, because that right, by whatever name you call it, like the franchise to carry on business, forms part of the value of the company's capital, and is taxable only through its shares of stock. It is obvious, when these two contentions are brought into juxtaposition, that, in order to determine the first inquiry with which we have to deal, the exact nature of the right in question, under existing

conditions, must be definitely ascertained. It must be ascertained, however, not as a mere abstraction, nor purely from a philosophical standpoint, but especially and specifically with reference to and in the light of previous adjudications by this court, as applied to the actual facts in evidence. It is a question of taxation which is before us. "An easement is a liberty, privilege, or advantage, without profit, which the owner of one parcel of land may have in the lands of another. *** An easement, ***534** although only an incorporeal right, and appurtenant to another (the dominant) tenement, is yet properly denominated an interest in land which constitutes the servient tenement; and the expression 'estate or interest in lands,' when used in a statute is broad enough to include such rights, for an easement must be an interest in or over the soil." 14 Cyc. 1139. In every instance of a private easement (that is, an easement not enjoyed by the public), there exists the characteristic feature of two distinct tenements-one dominant, and the other servient. On the other hand, a franchise is a special privilege conferred by government on individuals, which does not belong to the citizens of the country generally by common right. 2 Wash.Real Prop. 303. A franchise does not involve an interest in land. It is not real estate, but a privilege which may be owned without the acquisition of real property at all. The use of a franchise may require the occupancy, or even the ownership, of land, but that circumstance does not make the franchise itself an interest in land. To define the nature of a thing by the accidents which are employed in its use is to confound the thing itself with the agencies applied in its adaptation. Because land may be required in putting a franchise into effective operation, it does not follow that the franchise is land, or an interest in land. But an easement is quite a different thing. It is essentially and inherently an interest in land. It is an estate-a dominant estate imposed upon a servient tenement. To which of these two distinct and dissimilar classes does the right of the gas company to occupy with its mains the subsurface of the streets belong, in the contemplation of the revenue and tax laws of Maryland?

It will be found upon examining some of the cases that there is occasionally, in the arguments of counsel, a want of exactness in the use of terms, and now and then the right to do a particular thing, which is the franchise, is confused with the results achieved in the exercise of the right, and those results are inaccurately spoken of as the franchise. The right to occupy the streets with gas mains is a franchise. The actual occupation of them in that way, pursuant to the franchise, is the acquisition of an easement. You must distinguish between the right to do the thing, and the interest acquired in the soil by the exercise of that right. The right of a railroad company to be and to build a road is a franchise from the state. The roadbed acquired by purchase or condemnation is an easement altogether distinct therefrom, though obtained as a result of the exercise of that pre-existing franchise. It is strictly accurate to say, "The right of a gas company to lay its pipes, and to use the streets of a city for the purposes of laying pipes to convey gas, is a franchise, and can only be conferred upon a corporation by the Legislature." State of Ohio v. Cinn. Gas Co., 18 Ohio St. 262. It is equally correct to declare, "The right to use the public streets of a city for the purpose of laying gas pipes therein is, in my opinion, a franchise which alone the state can confer." Jersey City Gas Co. v. Dwight, 29 N.J.Eq. 242. In each of these cases, and in many more that might be cited, the right to do the thing spoken of is the franchise. And so in Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh (Va.) 78, 36 Am.Dec. 374, it was said: "Now, I take a franchise to be (1) an incorporeal hereditament; and (2) a privilege or authority vested in certain persons by grant of the sovereign (with us, by special statute) to exercise powers or to do and perform acts which without such grant they could not do or perform. Thus it is a

franchise to be a corporation, with power to sue and be sued, and to hold property as a corporate body. So it is a franchise to be empowered to build a bridge or keep a ferry over a public stream, with a right to demand tolls or ferriage, or to build a mill upon a public river, and receive tolls for grinding, etc. But the franchise consists in the incorporeal right. The property acquired is not the franchise. A bank has a right to purchase a banking house. When purchased, is the house a franchise? Surely not, for it is corporeal, whereas a franchise is incorporeal." In Bridgeport v. N.Y., etc., R. Co., 36 Conn. 266, 4 Am.Rep. 63, it was held that a franchise does not include property gained by the exercise thereof.

The distinction is clear between a franchise, as such, and the property acquired for the use of the franchise. The naked, unused, slumbering franchise is property; but it is property concerning the assessment of which in that condition for purposes of taxation the statutes do not make provision otherwise than by including it as an element which enhances the value of the shares of the capital stock. But when the franchise is brought into activity, and is availed of to accomplish the ends it was designed to effect, the property acquired under it becomes amenable to the tax laws, apart from the tax on the stock, and its value as an easement, if an easement it be, may be largely augmented by the use to which the franchise enables that property or easement to be put. Said the Court of Appeals of New York in People v. Tax Com'rs, 174 N.Y. 441, 67 N.E. 74: "They [tangible chattels in the public highway] have no assessable value, worthy of notice, except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both, and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment, in valuing a wagon, and especially in estimating its earning capacity, does not pass upon the body, wheels, top, and tongue separately. We regard the tangible property as ***535** an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which, as a going concern, can neither be assessed nor sold to advantage except as one thing, single and entire." We cite this to show, if precedent be needed to support such a self-evident proposition, that the use to which a franchise permits an easement to be put is an essential element to be considered in placing a valuation on that easement for purposes of taxation.

What, then, is the thing assessed and taxed in this case? Is it the mere right to occupy the streets below the surface with mains and pipes, which is the franchise, or, is it the easement acquired, through the franchise, by the actual occupancy of the highways in that manner? Ostensibly it is the latter, and the right to include the value of that easement as an element in fixing an assessment on the tangible property employed in availing of that easement is, we think, no longer an open question in this state, since the decision in The Appeal Tax Court v. The Union R. Co., 50 Md. 274. In that case it appeared that the tracks of the Union Railroad Company within the city of Baltimore were, to a considerable extent, constructed in a tunnel under the bed of Hoffman street, a public highway of the city, and another portion of the road within the city, not in a tunnel, was also, to a considerable extent, within the limits of public highways. The company asked that the assessments of the roadbed in the tunnels be stricken from the property valued to it. The court below granted the relief asked, and the appeal tax court appealed. The specific contention was made in the argument here as to the tracks located in the tunnel and on the streets that the railroad company did not own the property (that is, the roadbed), and ought not to be assessed for it as though it was seised of it; it had only the right to make use of the streets and the soil beneath the streets, and to receive the tolls authorized by its charter. But

in disposing of that contention our predecessors said: "We do not concur in the position of the appellee that it should only be assessed with the superstructures on the bed of the road, irrespective of the roadbed itself, or any right or interest therein, because the road occupies a tunnel under a public street, or runs along the highways of the city. The appellee has an easement in the way occupied by its road, and, whether that easement be under or over the public street, it is an element of value to the road, and, as such, should be included in the valuation of the road itself. But few of the railroad companies of the country have anything more than a mere easement in the ways occupied by their roads, and we are not aware that it has ever been held that, because the company did not own the freehold estate in the bed of the road, nothing but the mere superstructures thereon could be assessed to the company. The rule would seem to be clearly otherwise, and that an easement enjoyed in the bed of a public street may be assessed and taxed as real estate. People v. Cassity, 46 N.Y. 49; Appeal of N.B. & M.R. Co., 32 Cal. 499; Providence Gas Co. v. Thurber, 2 R.I. 21, 55 Am.Dec. 621." The last-cited case (Providence Gas Co. v. Thurber, 2 R.I. 21, 55 Am.Dec. 621) is peculiarly apposite. The Supreme Court of Rhode Island there said: "What, then, is the nature of the right which the plaintiffs, the gas company, take under their charter? We think, when exercised, it is an easement-an incorporeal hereditament-like the right of a railroad company to build and occupy their road, or a canal company their canal, under the provisions in their charter which grant the power to take the land upon rendering compensation to the owners." Here is a specific decision that the right conferred by the charter-the franchise-becomes. "when exercised," an easement. But it is not necessary to go beyond Maryland in search of adjudged cases to support the proposition that the easement possessed by a corporation in a public thoroughfare may be assessed and taxed as real estate owned by the corporation. The Appeal Tax Court v. Union R. Co., supra, expressly so rules, as already indicated; and that case, though referred to as supporting various propositions, in eight subsequent decisions, has never been doubted, questioned, or even distinguished in any particular. Swan v. Kemp, 97 Md. 692, 55 Atl. 441; Dundalk, etc., Ry. Co. v. Gov. Smith, 97 Md. 181, 54 Atl. 628; United Ry. Co. v. Balto., 93 Md. 633, 49 Atl. 655, 52 L.R.A. 772; State v. N.C.Ry. Co., 90 Md. 473, 45 Atl. 465; Smith v. School Com., 81 Md. 516, 32 Atl. 193; State v. Falkenham, 73 Md. 467, 21 Atl. 370; State v. Yewell, 63 Md. 121; P.W. & B.R. Co. v. Appeal Tax Court, 50 Md. 409. It is true that in only one of the above eight cases was the inquiry with which we are now concerned under discussion, but the frequent reaffirmance of the judgment in Appeal Tax Court v. Union R. Co., as to other propositions covered by it, so thoroughly ingrafts it, in its entirety, on the Maryland system of taxation, that nothing short of a legislative enactment can now disturb or qualify it.

Can any one doubt that if the Consolidated Gas Company, by purchase or condemnation, had secured the right to lay its mains through private property, instead of under the streets, lanes, and alleys of the city, it would have acquired an easement-an interest or estate in land-with which it could have been properly assessed as an owner of real estate? Surely no one would seriously contend that such a right of way through private property was a mere franchise, to be considered, in fixing the company's taxable basis, as included in the value of its capital stock. In what respect, looking alone to its legal attributes, would an easement of ***536** the kind just supposed differ from the one actually enjoyed by the company? The fact that the pipes are laid in the bed of the street without compensation having been paid for the use of the ground occupied can, not change the nature of the estate held by the company, nor convert the thing done, which is an easement, into

a mere right to do the thing, which is the franchise.

From the views thus far expressed it follows, we think, that the property or estate which the gas company has in the highways of Baltimore is an easement which may be properly assessed to the company as real estate; and hence there was no error committed by the city court in rejecting the appellant's first prayer, nor in granting the appellee's first and second instructions.

We come next to the second inquiry, namely, did the appeal tax court properly and lawfully exert the power which we hold that it possessed to tax the easement in question? Before that question can be intelligently answered, the method actually pursued must be closely and critically examined. Now, what did the appeal tax court do? First, as will be remembered, the appeal tax court sent the notice of September 23, 1904, giving the company an opportunity "to show why an additional assessment of $6,000,000 should not be placed" on its real property. So, in advance of any hearing, the appeal tax court apparently fixed upon a sum to be added to the company's assessment unless the company could show that such an increase would be wrong. The amount of $6,000,000 was arrived at by the following process: The appeal tax court acted on the theory that the entire assets and property of the company, and its securities, capital stock, and obligations on which it was able to earn a dividend and to pay interest, respectively, constituted the value of its total holdings. The stock was then selling at $80 a share-the par being $100-but in the calculation it was put at $70. There are 107,000 shares. At $70 a share, the appeal tax court carried out the aggregate as $7,500,000. In addition, the company owed several millions of dollars, represented by outstanding bonds, which were valued at $7,700,000. Then the company owed $1,500,000 in certificates, which were put down at $1,350,000. Still another item was $1,000,000 of 4 1/2 per cent. general mortgage bonds, which were included at par. The aggregate of all these items footed up $17,550,000, of which $10,050,000 represented debts due by the company on bonds and certificates held by creditors of the company. Then from this total aggregate the appeal tax court deducted the assessed value of the company's real estate, namely, $4,300,000, and there remained the sum of $13,250,000. The company was assessed with $150,000 of personal property, but, in deducting that personal property from the above mentioned sum total, the appeal tax court increased the valuation of the same personalty to $1,500,000, from which they at once subtracted $250,000, and took the remainder-$1,250,000-from the $13,250,000, leaving exactly $12,000,000, which sum, it is insisted, represents the value of the company's franchises derived from the state, and also the increased value of its mains by reason of the enjoyment of the easements in the streets. This result was then divided by 2, and $6,000,000 were added to the assessed value of the mains and pipes, to include the value of the easement enjoyed by the company in the highways. Was that process a lawful method, under existing statutes, to reach a valuation of the street easements for taxation purposes? The city contends that it is, and relies in support of that contention on the case of Simpson v. Hopkins, 82 Md. 478, 33 Atl. 714.

It must be borne in mind that there are two distinct elements which enter into the question as to whether the method pursued by the appeal tax court in making the assessment now under review was lawful; and they are, first, the right of the assessors, under the Maryland statutes, to measure the value of a corporation's property, for the purposes of taxation, by adding thereto and including therein and charging against the company the bonded indebtedness due by the corporation; and, secondly, the peculiar and apparently arbitrary, as distinguished from

juridical, ascertainment of the values apportioned amongst the component factors reckoned and comprised in the sum total of the assessment. The case of Simpson v. Hopkins, supra, does not deal with or pass upon either of these two elements, because neither of them was then before the court for decision. These are the facts: Hopkins, the collector of state and city taxes, sued Mrs. Simpson and her husband to recover the amount of taxes levied for the years 1891, 1892, and 1893 upon 12 bonds of the Consolidated Gas Company owned by Mrs. Simpson. Three grounds of defense were relied on, namely: First, that section 88 of article 81 of the Code (Code Pub.Gen.Laws 1888), as then in force, and under which the tax was levied, was in conflict with article 15, Declaration of Rights , and unconstitutional, because it subjected to taxation, in the hands of the holders, all bonds of a corporation, even though the bonds were secured by a mortgage on real property wholly within the state, whilst section 4 of the same article of the Code exempted from taxation similar mortgages and mortgage debts due by individuals; secondly, that, by reason of the facts just stated, section 88 of article 81 was void, under the fourteenth amendment to the federal Constitution; and, third, that, by the above-named section, 88 bonds of the description held by Mrs. Simpson were declared to be liable to assessment and taxation to the owners thereof in the same manner as like bonds secured by a mortgage on land partly in this state and partly beyond it, and ***537** that, as there was no provision for assessment of the last-named class of bonds, there could be no taxation on those owned by Mrs. Simpson. There was no question raised as to whether the gas company should have been assessed with the bonds. Dealing with the first and second of the three defenses, and with a view of showing that there was no unreasonable discrimination made between the bonds issued by a corporation and the mortgage debt created by an individual, this court said: “An individual's true worth for the purposes of taxation consists of his real and personal property; but, in the case of a corporation, its franchise, its borrowing power, its earning capacity, its real worth, are not represented merely by its visible property and shares of stock. The taxable value of a corporation is its bonded indebtedness, together with its stock. In support of this, Justice Miller, in State Tax Cases, 92 U.S. 605, 23 L.Ed. 663, said: ‘It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have, by the action of those who, above all others, can best estimate it, ascertained the true value of the road, all its capital stock, and its franchises, for those are all represented by the value of its bonded debt and the shares of its capital stock.’ ” We then added: “It is quite apparent, then, that this exemption of the mortgage debt of an individual and taxation of the mortgage bonds of a corporation in the hands of the respective creditors is not an arbitrary and unreasonable discrimination between the same classes of property.” Whilst we thus quoted from the State Tax Cases, supra, which concerned and interpreted the Illinois system of taxation, that differs from ours, the citation was made, not as referring to our tax system in its application to corporations, but to show that there was no unreasonable or arbitrary discrimination involved in the exemption of individual mortgage debts, under section 4, art. 81, Code Pub.Gen.Laws 1888, and the taxation of corporate bonds, under section 88, in the hands of the owners thereof; but we did not say or imply that under the Maryland statutes the indebtedness of a corporation formed an assessable part of its taxable value, or could be included in the assessment of its property. That question was not involved. It may not be amiss to note, in passing, the view entertained of the Illinois system by Judge Cooley, though the Supreme Court reached a different conclusion. In a note to page 136, Cooley on Taxation, evidently written before the State Tax Cases were decided by the Supreme Court, Judge Cooley said: “A

franchise may have a distinct value by itself, irrespective of any debts that may be owing by the corporation or persons possessing it, as a farm may have irrespective of the mortgage upon it; but there is certainly some difficulty in understanding how the capital stock of a corporation can be valued without taking into account its indebtedness, or how, if the corporation owes so much that its capital stock is absolutely worth nothing and could be sold for nothing, it could have for any legal purposes a fair cash value given it by taking as the measure of its value that which renders it valueless. It may be that if, by enforcing the debt, the capital stock should become the property of the creditors, it would then have a value equal to the previous value of the debt, but this would be by the substitution of one thing for another. Before that time, certainly, the debt is no part of the capital stock." However this may be, it is perfectly apparent that Simpson v. Hopkins did not hold that the bonded indebtedness of a corporation might be added to the market value of its stock in order to ascertain by that process the corporation's actual worth for the purposes of taxation, under the then existing laws of Maryland. The opinion does say, "The taxable value of a corporation is its bonded indebtedness, together with its stock," but it does not say the corporation may be taxed on account of that indebtedness. Doubtless the General Assembly could prescribe such a rule. The question is not, can it validly do so? but, has it done so?

The answer to that question must be sought in the provisions of the Code relating to assessments and taxation, and to those provisions we now turn. Naturally the first inquiry which suggests itself in this connection is, what are the statutory requirements with regard to the valuation of bonds which constitute the indebtedness of a corporation, and to whom, by the declared will of the Legislature, are such bonds directed to be assessed for the purposes of taxation? To the corporation, to the bondholder, or to both? Let us see. Section 2 of article 81, Code Pub.Gen.Laws of 1904, among other things, provides: "All bonds made or issued *** by any corporation whatsoever belonging to the residents of this state *** shall be valued and assessed for state, county and municipal taxation to the owners thereof in the county or city in which such owners may respectively reside." Further on the same section also declares: "All bonds and certificates of indebtedness bearing interest, issued by any railroad or other corporation of this state secured by mortgage of property wholly within this state, belonging to residents of this state, shall be subject to valuation, assessment and taxation to the owner or owners thereof, in the same manner as like bonds or certificates of indebtedness bearing interest and secured by mortgage of property partly in this state and partly in some other state or states are now subject to valuation and assessment under the laws of this state. ***" Section 92 of article 81 is in almost the same language as the above quotation, but it concludes with these words: "And it shall be the duty of the county commissioners***538** of the several counties and the appeal tax court of Baltimore city to assess all such bonds or certificates of debt to the owner or owners thereof resident of the several counties, or in the city of Baltimore, respectively." The plain and explicit terms of these sections of the Code make it the imperative duty of the county commissioners and the appeal tax court to assess to the holders thereof the bonds and certificates of indebtedness issued by the Consolidated Gas Company. The holders, therefore, are to be assessed with them. Now, section 210, art. 81, declares: "All bonds, certificates of indebtedness or evidence of debt in whatsoever form made or issued by any public or private corporation, owned by residents of Maryland, shall be subject to valuation and assessment to the owners thereof in the county or city in which such owners may respectively reside *** and upon such valuation the regular rate of taxation for state purposes shall be paid, and there

shall also be paid on such valuation thirty cents (and no more) on each one hundred dollars for county, city and municipal taxation in such county or city of this state in which the owner may reside." This section distinctly limits the amount which may be exacted on each $100 of the assessed value of such bonds. By the prior sections the bonds are to be assessed to the owners thereof, and by this section the rate is restricted, outside of the state tax, to 30 cents, "and no more," on each $100 of their assessed value. Primarily, therefore, the creditor, who owns the bonds, and not the debtor company, which issued them, pays the tax on them; and, unless there is some explicit and unequivocal provisions of law subjecting the same bonds to an additional imposition as part of the taxable value of the assets of the indebted corporation, the appeal tax court was without authority to charge the Consolidated Gas Company with $10,050,000 of the company's own outstanding obligations. Is there any such provision to be found upon the statute book? A diligent search has failed to discover it, and in the admirable and instructive arguments at the bar it was not even suggested that an enactment of that kind existed in Maryland. Very cogent reasons were assigned, and dwelt on with great force, to sustain such a scheme of assessment. Those reasons would doubtless have much weight with the legislative department of the state government, but we have no right or power to supply by judicial interpretation measures of administrative detail or systems of valuation which the Legislature has not yet seen fit to adopt. "A distinction must be noticed," said the Supreme Court, "between the state law and the power of a state." Adams Ex. Co. v. Ohio State Auditor, 166 U.S. 221, 17 Sup.Ct. 604, 41 L.Ed. 965. We are dealing now with the construction of our existing statutes, and not in any wise with the power of the state to enact in this particular a different scheme of taxation. In the case last cited the Supreme Court, after illustrating the inequality resulting from the imposition of a tax on only the tangible assets of a corporation, whilst its intangible and perhaps most valuable property was suffered to escape, observed: "Accumulated wealth will laugh at the credulity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation. *** But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market-the amount for which its stock can be bought and sold-is the real value. Business men do not pay cash for property in moonshine or dream-land. They buy and pay for that which is of value in its powers to produce income or for the purposes of sale." The power of the state to levy taxes on values thus computed is one thing. The question as to whether it has, by enactments now in force, done so, is another and a widely different thing. With the first we have no concern, because the method of taxation, and what shall be taken as the measure of the tax, are in the discretion of the Legislature. Cooley, Tax'n, 273. As to the second, we have reached the conclusion that no such legislation has yet been adopted. It follows, then, that the method pursued by the appeal tax court in this instance was without warrant of law, and that the assessment was irregular.

But there is, in addition, an equally serious objection to the validity of the assessment, though it rests on a different foundation. Whilst it is true this court cannot be required to sit as a board of review to revise the amount of the valuation placed by assessors or other tax officials upon property for purposes of taxation (Mayor, etc., v. Bonaparte, 93 Md. 159, 48 Atl. 735; State Tax Cases, 92 U.S. 610, 23 L.Ed. 663), yet, when the record shows that a valuation had been imposed

upon property in a capricious or whimsical or unwarrantable way, instead of by the exercise of judgment, then such a valuation would not be an assessment at all. "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them." Cooley, Tax'n, 258; New York v. Weaver, 100 U.S. 539, 25 L.Ed. 705; 3 Cyc. 1111. Taxes by valuation cannot be apportioned***539** an assessment. "Without an assessment, they have no support and are nullities." Thayer v. Stearns et al., 1 Pick. 482. It is shown by the evidence that the $6,000,000 figure was fixed tentatively in the notice sent to the company, and that it was arrived at by the method hereinbefore indicated. But inasmuch as the result actually reached by the process followed by the appeal tax court produced a sum, as the value of the easement in the streets and of the franchises, nearly $1,000,000 in excess of the total par value of the capital stock, the appeal tax court proceeded at once to cut the sum down, first by deducting an inflated and confessedly erroneous valuation of the personal property, and then by dividing the residuum by 2. The inflation of the value of the personal property purely for the purpose of augmenting the amount of the subtrahend in the calculation detailed by the witness-an inflation having not a pretense of fact nor a shadow of justification to rest on-necessarily diminished the remainder; but, as thus diminished, it was still too high to permit even the semblance of judgment in its ascertainment to be predicated of it, and it was summarily split in two. The arbitrary inflation of the value of the personal property-arbitrary because done without the suggestion of a valid reason-tainted the whole calculation. It will be remembered that the value of the personal property was fixed at $150,000; that this sum, without any suggestion that it was too low, and without any intimation that it was erroneous, was raised to $1,500,000. But when it appeared that the result obtained by deducting this last-named sum would not be represented in round numbers, $250,000 were subtracted from the $1,500,000, so as to make the remainder an even $12,000,000. In all this there is not an element of judgment as respects the value of the easement. Any other combination of figures might just as well have been employed, and, by subtracting here and adding there, $6,000,000-the sum named in advance in the notice-could have been as readily and precisely reached. That is not the kind of judgment which the law contemplates shall be exercised by an assessor. The method of valuation was wrong, and the appellant asked the court to so rule; but, by rejecting the company's fourth prayer, the trial court refused to grant that instruction. In this there was error.

There was also error in granting the appellees' sixth and eighth instructions. The sixth declares that the burden of proof was on the company to show by a preponderance of testimony that the assessment was erroneous. Presumptions are in favor of the correctness of assessments. 27 Am. & Ency.L. (2d Ed.) 728. But there must be an assessment before there can be a presumption in favor of its accuracy. In this case there was no assessment; hence no presumption can be invoked. The theory underlying the eighth prayer is that there had been a valid assessment of $6,000,000 on the easements. As that theory is unsupported, the prayer must fall.

This disposes of all the questions raised in the case, and it will be seen that, whilst we hold the easements in question to be taxable, we determine that the method followed in valuing them cannot obtain under the statutes now in force.

For the errors indicated, the order sustaining the action of the appeal tax court will be reversed, and the alleged assessment as to the $6,000,000 will

be, and hereby is, vacated.

Order reversed, with costs above and below.

Md. 1905.
Consolidated Gas Co. of Baltimore v. City of Baltimore
101 Md. 541, 61 A. 532, 109 Am.St.Rep. 584, 1 L.R.A.N.S. 263

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