RAILROAD TAXATION IN COURT

Arguments of Counsel on the Issues Raised in the Mandamus Case Before Nebraska Supreme Court--*Part VII.*

Argument by B. T. White, as amicus curiae for the respondents:

If your honors please, it is fortunate for us that in the division of government we have a tribunal which above the din and turmoil may retire for the consideration of important questions that may be submitted to it for determination. It is fortunate, also, that we have constituting such tribunals those who are learned in the law, so that when the final conclusion shall have been made it will not have resulted from extraordinary appeals, but from cold analysis and calm logic. This is a serious question, and will grow more serious as time goes on.

So far as I am concerned, it has been somewhat of an enigma to me as to just where our friends stand—our friends who represent the relators. I understood at the inception of this controversy before the State Board of Equalization that it was the contention then and there that the franchises of the class of corporations within sections 39 and 40 should be separately valued, but when I perusc the alternative writ which is the pleading upon which the relators stand in this court I am somewhat annoyed—I find it somewhat difficult to say just where they stand upon this proposition. For, while they claimed to have been entitled to an assessment of the franchises separate and apart from the physical property before the State Board of Equalization the writ in its conclusion seems to point to the thought that there should be one assessment of all of the railroad property of the respective companies. But when I look at the brief of the relators I am inclined to believe that they insist on a proposition for which I will contend today, which is, that when the assessment of this property is made to the railroad companies in the terms which are set out in section 39 it comprehends all of the valuation of railroad property; that when you take into consideration the main track, the side track and the rolling stock denominated as such in that section, then that the board should, and it is contemplated by law that they should take into consideration everything which enters into the value of that property.

But today I am not exactly clear in the confusion which has resulted from the different positions which it seems to me they have taken, whether it is claimed that these franchises should be assessed separately or whether they should be simply considered and the assessment made on the aggregate value of all of the property. Perhaps the statement of my brother Harrington would indicate that they intend to stand on both propositions. But before we come to this there are some things which we must consider with reference to the situation and the duties of the State Board of Equalization.

As I read the law, the board is organized and constituted for certain purposes and for the performance of certain duties. The statute defines those duties. Under sections 39 and 40 it is to value the railroad property, and is not the mere instrumentality which may be guided hither and thither by every branch of the government, but it is to be controlled by the law which defines its duties. The law reposes in that board a certain discretion. It is clothed with a quasi-judicial function, and when it enters upon the consideration of the duty entrusted to it—when it undertakes to make an assessment of railroad property under the law it has undertaken to exercise that discretion as it is imposed upon it by law, and its decision upon that subject, after it is rendered—after it has entered upon the exercise of its discretion and has exercised the functions which are imposed upon it by law is as inviolable as that of any court upon any subject. If there is fraud in its deliberations, it may be true that the courts may take cognizance of it and may compel the board to act again.

It may be that if there is fraud in its conduct or fraud inheres in the determination, then the courts may call it back to perform its duty; but that right even then depends, in my judgment, upon whether or not there is another remedy for the person who seeks to invoke the power of this court for the purpose of directing the State Board of Equalization as to the method of exercising its judgment. If the law has provided a way for a review of the action of that board, then, if there is fraud in that action, and that fraud was known, or if the circumstances indicating it were known at the time when the judgment was rendered, I take it that under the law the remedy which is pointed out by statute must be pursued by the person who has appeared before that board and sought by evidence to influence its action. That applies to county boards of equalization, and why shouldn't it apply to the State Board of Equalization? The statute is broad enough to comprehend both. It seems to provide and comprehend the idea that a judgment of the State Board of Equalization may be reviewed upon error by the district court. Section 580 of the Code is as follows:

A judgment rendered or final order made by a probate court, justice of the peace or any other tribunal, board or officer, exercising judicial functions and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court.

Then it is further provided under the statute with reference to settlement of a bill of exceptions, being the latter part of section 311, which was enacted by the legislature of 1895, that:

Any person or officer or the presiding officer of any board or tribunal before whom any proceeding may be had shall, on the request of any party thereto, settle, assign and allow a bill of exceptions of all the evidence offered or given on the hearing of such a proceeding.

Now, then, as I said before, all of the circumstances entering into the making of the assessment of this property was as well known on the day when the judgment was rendered by this board as it is now, or as it was on the day when application was made to this court for the alternative writ of mandamus. Knowing these facts, they could have taken that record into the district court, and if there was any error on the part of this board they could have had it remedied there; if there were any set of facts or circumstances which they sought to get in evidence which were excluded by the board (I understand it is the claim of these parties here that they did offer evidence and that they were notified that that evidence would not be considered) then it was their duty to have applied for a bill of exceptions from the presiding officer of that board, as provided in section 311, had that settled and allowed and taken it to the district court and in that court had the matter reviewed. They have not seen fit to do that. This court has determined time and time again—you have iterated and reiterated the fact that a writ of mandamus is an extraordinary writ, and should only be resorted to at the last moment, at the time when all other remedies have been exhausted and when there is no other remedy of which the party can avail himself.

Chief Justice Sullivan—Does it appear that this corporation, the Bee company, has any matter appearing before the board?

Mr. White—I understand that that was the institution that appeared before the board.

Chief Justice Sullivan—I don't know.

Mr. White—That is a fact, isn't it?

Mr. Simeral—It filed a protest there.

Mr. White—They filed their protest and asked that the franchises be assessed, and they say in the alternative writ that the members of this board said they had no right to consider the franchise and that they did not consider it. Now, I say they knew that, and they could have had all of those facts and circumstances put into a bill of exceptions, taken it to the district court and there had the matter reviewed. So I say there are two things to consider here as preliminary. First, if there was no fraud in the action of this state board this court cannot send forth the extraordinary writ of mandamus and cause these people to reconvene and reassess railroad property. They have already done what is required of them under the law. They did meet. They did move. They have exercised their discretion. They have performed their judicial function in determining the value and assessment of this railroad property. But second, even if there is fraud here, then we say it was just as apparent to these men on the day when that judgment was entered as it is now, and they ought to have taken the proceedings provided in the statute for reviewing it in the district court. They have not done that.

But suppose we eliminate those questions in the further progress of the argument. Suppose we enter upon the consideration of fraud here. Let us see then where we stand. Fraud is not to be lightly presumed. This board is composed of honorable men, who have been regarded as standing well in the communities in which they have resided. This court, then I say, will not lightly presume that fraud has been attendant upon their action or that they have had any other intention than that of fairly and honestly performing their duties, and the mere fact that in the valuation of this property the board has placed it lower than this court would have placed it should not influence this court in determining that these men—that this board was guilty of fraud. I have referred to a number of cases in my breif here which I will not undertake to read, but which are quite pertinent to this line of argument, and in which it is held that even were the assessed valuations considerably lower, or were they considerably greater than the court would have assessed if it had been considering valuations, yet, so long as they appear to be the expression of an honest exercise of judgment of the board, the valuations cannot be interfered with.

I desire now to refer more particularly to the Elkhorn company for the purpose of showing that there is no fraud so far as it is concerned. Under the evidence that has been introduced here, I have tabulated the earnings of that road for eight years. I find that the total net earnings of that road for those years as shown by Poor's Manual, 1901, page 207, aggregate about $10,062,592, making the average for a year $1,257,824, making the average per year per mile—our mileage being 1,363 miles—$922.83. Now mind you, that is for the whole system and we take into consideration South Dakota, Wyoming and Nebraska. I think it would be in the neighborhood of $950 or $1,000, if we confined it simply to Nebraska. Now, then, adopting the method used by relator, and you might capitalize that at 4 per cent and it would make $23,000 per mile in round numbers. One-sixth of $23,000 per mile would be something like $3,845. Now mind you that is at 4 per cent. If it was one-seventh it would be $3,296 a mile.

But 4 per cent is not fair, because the Elkhorn company has outstanding about $21,000,000 worth of bonds, of which almost $2,000,000 bear 6 per cent interest, maturing in 1933. There are about $18,000,000 worth of bonds which bear 6 per cent, maturing some time in the future, upon which only 4 per cent interest is paid by reason of this. These bonds are guaranteed by the Northwestern Railway company. The latter places its own bonds at 4 per cent, secured by the Elkhorn bonds above mentioned as collateral. The Northwestern simply requires of the Elkhorn bond the payment of 4 per cent interest thereon, hence there is only about $1,900,000 upon which the Elkhorn pays 6 per cent interest. On the balance of the $21,000,000 worth of bonds it pays only 4 per cent, but this is not a fair rate of interest to the Elkhorn company. I simply refer to the 4 per cent because that is the extremely low rate which the relators claim railroad property is entitled to earn. Capitalizing at 5 per cent the value per mile would be about $18,457, one-sixth of which for the purposes of assessment would make the value $3,076. The assessment of the Elkhorn company is $3,600 per mile. One-seventh of the valuation, and the board say they assessed railroad property between one-sixth and one-seventh, it should have been assessed at $2,637. If $950 or $1,000 is capitalized at 6 per cent the valuation would be measurably less per mile. Even at the low rate of interest contended for by the relators the assessment of the Elkhorn company shows upon its face that there was no fraud upon the part of the board.

Another thing to take into consideration is that the members of the board say they had evidence before them showing that this road could be reproduced for between $19,000 and $20,000 per mile. One-sixth of $19,000 would be about $3,100 per mile, and at $20,000 per mile it would be a little more. The Elkhorn assessment is $3,600 per mile and is one-seventh of $25,200. It is true that the road has probably cost more, but the greater portion of that road was built years ago, when it could not be built as cheaply as now. It can now be reproduced for about $20,000 per mile.

So, I say that anyway you figure it it shows that there is no reason for charging fraud upon the board in the assessment of the Elkhorn property. Page 130 in the last auditor's report shows the mileage of the Elkhorn road, and it shows the assessed value, and it shows the net earnings per mile. I am not going to stop to figure that out to your honors, but I say it appears to be an average of $948 per mile taken for ten years. The figures upon which I have based the estimate just given to your honors is taken from Poore's Manual, which has been introduced by the relators. Now, if you estimate the earnings per mile according to the figures which appear on page 130 of the auditor's report practically the same result will be reached. So far as the contention of these gentlemen is concerned, if anything were to be done, the Elkhorn company ought to have a decrease in its valuation. Why, in one year, in 1895, we had a deficit of $337,000—more than it ever has put to surplus in any one year before or since. So much for fraud, as it may be considered with reference to the Elkhorn road.

Now, let us go into this question of franchise a little further, for the purpose of seeing whether or not there is any fraud with reference to the valuation of franchises. That involves the consideration of what a franchise is, whether or not it possesses this great value—this incalculable value which these gentlemen have attached to it. What is a franchise? First, there is a franchise to exist. Second, there is a franchise to do business as a corporation. Third, there may be a franchise which carries with it peculiar privileges which cannot be enjoyed by any other person or by any other corporation. Those are the three classes of franchises we will say.

The first, the right to exist as a corporation, is of no value separate and apart by itself. It could not be sold upon the market. It could not be sold upon adverse process, nor can the right to do business as a corporation be sold upon the market. It cannot transfer it. Separate and apart from the tangible property it is not worth a dollar, and it is so held in the Detroit street railway case, 125 Mich., page 673, which goes over similar facts.

With reference to the third franchise, it is said that these railroad companies have a great franchise, in that they are permitted to charge rates and fares for hauling passengers and freight. They say it is also a great franchise to be permitted to condemn real estate—to exercise the right of eminent domain. How valuable? We must remember that the people have their compensation for these franchises and for these rights. We cannot take a foot of land but we have to respond in damages for the taking of it and often times to pay more than the land would bring for any other purpose, and not only that, but are compelled to respond in damages for every dollar of damages that accrues to abutting property. Railroad companies must respond in damages for that even though the advent of the railroad in that community may increase the value of such property. So I say that the public has its compensation with reference to this privilege. The right of eminent domain in and of itself has no great value. It has no tangible value in and of itself. It must be considered with the exercise of the right and with the building of the road. And you might say this, too, that this right exists simply by virtue of the will of the legislature. It might be enjoyed by an individual who is engaged in a public enterprise and for the public benefit if the legislature felt inclined to grant it to him. The only reason that it may not be granted to a private person is because in the organization and operation of these great corporations it has been found that no single individual has ever undertaken to control or own one. There has been no necessity to appear before the legislature to get such a right in favor of an individual for carrying on a public enterprise.

With reference to the right to charge rates and fares, the public has its compensation. Legislative invasion may hold rates and fares down to a point where the return upon the investment will be reasonable and the line may be paralleled at any time, so that no exclusive right is given. It cannot go beyond what is reasonable. So we do not get any great right there. But the man who operates a private business—who runs a great newspaper, if you please—or any private corporation, has the liberty of making as much money as he or it may, limited only by the liberality of their more aggressive competitors. So that this franchise is not so very valuable in and of itself except as it is considered with reference to the tangible property. What gives to the tangible property its value as railroad property? Would there be any value to the Union Pacific Railway company, to the Burlington Railway company, to the Elkhorn Railway company if they allowed the rails to accumulate rust, and if they allowed the ties to rot in the ground, if they operated no trains? Would there be anything of value in railroad stock if trains did not move? Then what is it that gives life and vitality to this property? What makes it of value? Why is it that this board did not assess it as mere dead material? Why, because they have the right to operate the railroad, because they have the right to exercise the rights and privileges given to them under the constitution and laws of the state of Nebraska. That is what imparts value to railroad property, and it is not this intangible thing that has such great value separate and apart by itself. But it is the live and operated plant. If you do not have a live and operated plant your franchises have no value.

This is illustrated very forcibly to one's mind by the case on which these gentlemen seem to depend with so much vigor. The case in the 154 United States, of Backus against Railroad Companies. That was a case based upon a law which was passed by the legislature of Indiana in 1891, a general revenue law. That general revenue law repealed all former laws, and it provided for an assessment of property generally, minutely and specifically; it provided for the assessment of stocks and bonds; it provided for the assessment of railroad property; it provided specifically for reports which were to be made by railroad companies to the auditor, and it provided among other things that there should be listed with the auditor a list of stocks and bonds, differing from our statute. It provided directly that those stocks and bonds should be listed with the auditor for the purpose of being considered by the board in the assessment of railroad property. Section 137 of the Indiana law provided that the board should assess railroad property as railroad track and rolling stock. It was assessed as such in this particular case. An action was brought by the railroad companies to have the law declared unconstitutional, and also for the purpose of wiping out the assessment made because it was inequitable. Among other things, it was claimed that it allowed the State Board of Equalization to go over into Ohio and Illinois and take the values there and commingle them with the value of property in Indiana and make an assessment upon such valuation. They also claimed it was a tax or burden upon interstate commerce. These contentions were found not correct, and were not considered by the court as valid. In passing upon the Indiana law Justice Brewer uses this language:

Counsel sought in argument to narrow the meaning of the words "railroad track" and "rolling stock" as though the two did not include the entire railroad property; but evidently the supreme court of the state construed, and as we think properly, the two terms as embracing all which goes to make up what is strictly railroad property. By section 3 of the act it is provided that all property in the state shall be subject to taxation unless expressly exempted. By section 4, that when the property of a corporation is taxed to the corporation the shares held by individuals shall not be subject to taxation. There is in terms no exemption of any railroad property nor any part thereof; and there is no provision of the tax law reaching that which is strictly railroad property, except as embraced within the two terms "railroad track" and "rolling stock." Obviously it was assumed by that court, though the matter is not discussed in the opinion, that by these two descriptive terms the legislature, carrying out the declared purpose of subjecting all property within the state to taxation, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called "railroad property." And when the statute provides that such property shall be assessed at its "true cash value" it means to require that it shall be assessed at the value which it has, as used, and by reason of its use.

Nothing is said about the assessment of franchises. Why? Because within the two terms "railroad track" and "rolling stock" was comprehended everything of value of railroad property. That suggestion finds force from a subsequent case in the same volume, commencing at page 439, in which the contention was more vigorously made that it was a tax upon interstate commerce, in which the direct question was put to one of the state officials on his examination as a witness, if he assessed anything for the franchise of a certain road, and he answered he did not. Justice Brewer comments upon that in his opinion and says or notices distinctly that the franchise was not assessed. And, by the way, we might say here that of course franchises are property, and the fact that a franchise is named in the constitution does not give it any additional force. By way of parenthesis we might say here it might just as well have been left out. Justice Brewer says in that opinion, at page 445:

The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes nor for the privilege of using the property, but rests solely upon the value. But the value of the property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put.

So we say that this decision contemplates, when the board assessed the railroad property under the designation "railroad track" and "rolling stock," they included everything of value in railroad property. Now this is borne out by another case which I did not cite in my brief. It is the case of Detroit Citizens' Street Railway Company against Common Council of City of Detroit, 85 N. W. 96. I will not attempt to read any great portion of that case, but here is the gist of it. It is found in the fourth paragraph of the syllabi:

If property may be assessed as a unit there is no obligation to value its separate elements.

Now that would naturally dispose of all this cross-firing at these men who were put upon the stand and asked if they separately valued the franchises of these corporations, because under the statutes of the state of Nebraska they are not obligated to assess the franchises of the corporations separately.

In this Kentucky case read here it is proper to say that they have a distinct statute requiring that the franchises shall be assessed separate and apart from the tangible property. Section 4077 of the laws of that state provides as follows:

Every railway company or corporation and every incorporated bank, trust company, guaranty or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company ,telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised.

It is a legislative enactment and entirely different from ours. Your Montana law is the same. They simply have the value of the use of the property valued by itself and then the value of the tangible property valued by itself, and then aggregated. In other words, they are separated; here we combine them and assess them together. I want to call your attention to this section 32 just for a moment. I do not understand that section 32 contemplates the aggregation of stocks and bonds for the purpose of finding the value of the property of corporations under the construction this court has placed upon it. It does not say anything about adding the value of stocks and bonds. The fifth and sixth items deduct the debts and value of real and personal property. The method these gentlemen contend for is not found in that statute. Of course that statute is not applicable here because, if I am correct in my premises that the value of the property as a used, going concern is to be valued, then it could not be legally assessed under section 32 for many reasons. You would get the franchise twice, and it was never intended. And again, the very fact that the law was passed in 1879 and section 32 being the part referring to stocks, and sections 39 and 40 referring railroad property, were all passed at one time and at the same session. Upon the face of these respective statutes it appears that the unit idea was in the minds of the legislators; they wanted to assess the railroad property as a unit by one tribunal, with a view of avoiding the annoyance and inconvenience involved in assessing railroad property and the many incongruous results produced by local assessments, and I say, if you construe section 32 with sections 39 and 40, it wholly destroys the unit idea, because, under section 32, is assessed the value of the franchise by the local assessor, or State Board of Equalization, without the latter being named in the statute. The local assessor makes one assessment under section 32, and the state board another under sections 39 and 40. This was not contemplated, and it is not the law. Sections 12, 25 and 137 of the Indiana law, and sections 32, 39 and 40 of the Nebraska law are parallel statutes. It was no more contemplated that there should be a separate valuation of the franchises under the Nebraska law than under the Indiana law. I say this is borne out by the Backus case, which I have mentioned. If that is true, then these men were justified in saying "We assessed this property with reference to its use. We assessed it as a live going property. We assessed it with reference to its earnings."

I want to call your attention to Mr. Stuefer's testimony. He said he found the earnings of the Union Pacific main line to be $6,000 or $7,000 per mile You will find on page 130 of the auditor's report where he got those figures. So these intangible things, these franchises, are not to be valued separate and apart. Let us go a step farther. Our friend says, "Your franchises are worth $200,000,000; your tangible property is worth $200,000,000. Your whole property is worth $400,000,000." This appears from the alternative writ. Eight per cent of 400,000,000 is $32,000,000 and 6 per cent is $24,0000,000. The railroad companies of Nebraska have never earned 5 per cent of $40,000,000, which would be $20,000,000. The railroads of the state of Nebraska have never netted $20,000,000. Four per cent of $400,000,000 would be $16,000,000 and the railroads of Nebraska have never netted $16,000,000. Three per cent of $400,0000,000 would be $12,000,000. The railroad companies of Nebraska have never netted $12,000,000 over and above operating expenses. Two and one-half per cent of $400,000,000 would be $10,000,000; $10,000,000 as shown on page 13 of the auditor's report is the utmost that has ever been earned by all the railroads. Out of this was paid fixed charges, taxes and interest. Then, my friend Harrington has a proposition. He is going to reduce rates 15 per cent. Now, then, I say this uncovers a little of this moonshine on the shovel. It is interesting to find gentlemen who have time to engage in such abstruse questions—interesting to listen to this new school of philosophers, whose time has heretofore been limited to tracing the distinction between a "living hero" and a dead "jackass"—dilate upon the question of valuation of railroad properties.

Another point I want to make here is this. The rule of taxation in this state provided by the constitution is upon the valuation of property. It is upon nothing else. It is not upon brains, neither is it upon the value of labor nor the value of anything intellectual, nor the value of energy, but upon the value of property. The constitution determines that taxes shall be raised upon the value of property and nothing else. We have no business to levy taxes upon any other basis. The constitution of this state by section 1 of article ix, provides for the raising of revenue by taxation upon the value of property. It does not provide for the assessment and taxation upon the value of mental or physical labor employed in the use of property.

The different enterprises of the present day, with reference to the production of pecuniary returns, may be classified about as follows:

1. Enterprises which depend more upon the capacity for management and the application of mental and physical labor than upon the use of tangible property.

2. Enterprise in which profits accrue more largely through the use of property than of labor employed.

3. Enterprises in which profits are returned through the employment of property and labor in about equal parts.

In the operation of railroads it is fair to say that from 65 to 70 per cent of the gross income thereof is expended in the cost of operation. The compensation of employes of railways represents from 55 to 60 per cent of the operating expenses of the road, and 39 per cent of their gross earnings, as is stated in the fifteenth annual report of the Interstate Commerce commission for 1901, page 54, distributed among trackmen, brakemen, conductors, firemen, engineers, shopmen, machinists and operating and managing officials.

When one considers the army of employes in the service of the Burlington, Union Pacific and Elkhorn companies, the truth of this statement will hardly be disputed. Therefore, to the extent that interest payments are made upon bonds, dividends declared upon stocks, or net earnings are derived from the operation of railroad property, it must be remembered that about one-half thereof is contributed by labor, and only one-half by the property used. Hence, if assessments of value are to be placed upon the aggregate worth of securities, or net earnings are to be capitalized, it is clear that only about one-half of the result thus obtained can be truly traced to the value of the property used. The balance of the result is due to the labor employed. When values thus ascertained are used for the purpose of assessment and taxation, the companies are thereby compelled to pay taxes not only upon property used in their business, but upon earnings resulting far more largely from the employment of labor than the value of property, thus doing violence to the constitutional requirement that taxes shall be derived from a property valuation.

In illustration of the three classes above referred to, I will present one under the first class. We will suppose that a party organizes a district messenger service. The only property used in the business consists of desks, chairs and books for the purpose of keeping memoranda and accounts. This would be a business in which there was little or no tangible property, and in which the dependence for results must be placed upon the good management of the proprietor, and the faithful service and intelligence of the boys employed as messengers. In the first instance the business is conducted by one man, who hires the boys and takes all of the proceeds and enjoys the profits. He may hire twenty boys from whom he makes 20 cents apiece, which would be $4 a day. It is apparent from this that the profits accrue from the physical and intellectual labors of the manager or owner of the business and those whom he employs.

Now, will it be contended for a moment that in order to ascertain the value of the man's property invested in the business it is to be ascertained by capitalizing his net earnings for the year at 6 or 8 per cent? If this could be done it would be an instance in which the entire taxable value is that which results from the employment of labor and not from the property itself.

After conducting the business in this way for awhile he finds it advisable to incorporate. Thereupon the required number form a corporation, and the services thereafter are rendered by a greater number of boys employed by the new company—an increase of mental and physical labor. Relatively no greater amount of tangible property is used in the transaction of the business than before the formation of the new company. But the net profits may be double what they were before, all resulting from the increase in labor, mental and physical, employed in the transaction of the business. There is no more reason now, since the institution has become a corporation, for capitalizing the business on the net profits and using the sum thus ascertained for the purpose of valuing the property of the corporation for the purposes of taxation, than when it was conducted in the name of a private party, nor is the constitutional objection obviated that the tax is not made upon property because of the business being conducted by a corporation.

If capital stock is authorized, issued and dividends declared, the dividends simply measure the right of the holder of the stock to participate in the earnings of the company through the dividends. It in no manner measures the value of the property used by the corporation, because such value is no greater relatively now than it was when carried on in the name of one individual.

I will take another illustration. Suppose a person is occupying a house, in which he lives with his family. If the property be occupied simply as a family residence, no earnings are made upon the property. If, on the other hand, the same house is used for an excellent and successful boarding house, in which a score of servants may be employed under skillful and competent management for the conduct of the boarding house business therein, large earnings may result; but they come not nearly so much from the property as from the labor of the manager and employes of the business conducted on the property. Can it be said for a moment that these earnings from the business afford a basis for ascertaining the value of the premises? Certainly not. The premises are the same, whether used for a dwelling or a boarding house business. The landlord's rent in the case of the property being used as a residence, truly measures the earning power of the property itself, but the profits of the boarding house keeper, in the other case, measure, beside the mere value of the passive use of the property, the larger and more important factor of the returns for the large amount of work done on the premises. This latter factor is as much a return for labor as are the wages of any working man, whether he drives a dray, or is a carpenter, or railroad engineer, or a switchman.

Suppose, further, that the boarding house business is conducted by a stock company. What will be the market price of the stock in this company, which we will suppose to be conducting the same successful and profitable business? The price will be determined by the value of the stockholders' right to participate, through dividends, in the profits of the boarding house business, and those profits we have seen to be the outcome only in part of what may truly be regarded as rent, and much more the outcome of earnings through labor, skilled and unskilled. This market price of the stock in the boarding house, if its business be successful, will be much higher than would be the price of the stock of a company merely owning the premises and renting them as a residence; for in the latter case the stockholders would merely participate in the rent, while in the case of the boarding house, the stockholder participates in the additional earnings from the business conducted on the premises.

A real estate agency conducted by a person or corporation is also within this class. He, or it may be in the business of buying or selling real estate, employing a number of clerks and solicitors, and yet, not at any time be the owner of any property except the office furniture used in the conduct of the business. Profits from a well conducted business of this character may be considerable, yet their value could not be assessed and taxed.

Railroads come within the second class. We may use one as an illustration. Let us suppose that the lines of the Burlington company in Nebraska (we refer to the Burlington company for the reason that it has a greater mileage within the state of Nebraska than any other company) should come to be owned by a company not likewise owning the Burlington system of railroads in other states. The Burlington property in Nebraska would remain the same as it is today, but the business conducted thereon by the new owner would undoubtedly be very much less than the business which the Burlington company now does upon that property, for the reason that the new owner would not have the advantage of all the traffic which the Burlington company is able to procure for its Nebraska lines through its control of other railroad property in adjacent states. As respects earnings, the result would be that the new owner would earn very much less on its Nebraska railroad than the Burlington company does today.

The market price of stock in the new company owning this Nebraska road would be much less than the market price of the Burlington company's stock. Would that difference in the market price of the two stocks be due, except in a relatively small degree, to the difference in the value of the railroad in Nebraska, being the same railroad in all its features, whether owned by the Burlington company or by the new purchaser? Surely not. The difference would be due, rather, to the difference of earnings of the two companies through the reduction of business thereon in the hands of the new company. That is to say, the Burlington company runs two and perhaps three times as many trains, carries two or three times as much freight, considerably more passengers and employs 50 per cent more men than the new company would with its diminished volume of business. The difference in earnings, therefore, chiefly amounts from the different amount of labor done on the property and this element, while it is all important as respects the profits of the business and the consequent market price of the stock, is not in any way a measure or test of the value of the property on which the business is conducted. That property is the same whether owned by the Burlington company or the supposed new purchaser and its fitness for use in business is the same in the two cases, but the difference as respects earnings and, consequently, as respects market price of the company's stock lies in the fact that in one case a very much larger business is done through the possession of extraneous advantages and opportunities for obtaining business and a very much larger amount of labor is consequently expended than in the other case.

As an illustration of the third class we might take a large department store, owned and conducted either by an individual or by a corporation. In either event we will assume the individual or corporation to be the owner of the building and a large stock and variety of goods such as are usually found in the department stores of great cities. The building is of great value. The stock is constantly being depleted and supplied, turned over two or three times a year. There may be the usual number of department managers and clerks, but the profits, if made, will result to a greater extent from the property used and sold than from the labor employed, although the latter may be of considerable value and form quite a factor in the production of earnings.

It is no more lawful to find the value of railroad property by aggregating the market value of stock and bonds or capitalizing the net earnings than it is to find the value of the property of the engineer, the firemen, the clerk or day laborer by capitalizing their earnings. In either case it is an income tax. Under the constitution the assessment and collection of taxes must be upon a property valuation and not upon the value of the labor which proceeds from an effort of the brain or the application of the hands and the feet, or all combined.

The truth is that stock and bond prices do not measure the value of a railroad property for the purpose, either of taxation or of rate making. Such prices do not indicate the value of railroad property at all; but rather the value of the right of a stock or bondholder to participate in the earnings through the company's dividends or the stipulated interest on bonds, and these earnings, the right to participate in which is the basis of stock and bond prices, proceed, as has been already indicated, far more largely and far more truly from the labor of thousands of men than from the mere use of the property. In other words, a railroad company's earnings in much the larger part, if it be prosperous, represents compensation for the labor of large numbers of men, rather than the mere rental value of the property by the partial help of which the work is done.

You cannot arrive at the fair value of railroad property in the aggregate by this method of combining the market value of stocks and bonds or by capitalizing net earnings. The result does not, as intimated, represent the franchise in the case of a corporation any more than in the case of an individual. A corporation may be in the exercise of all its rights and privileges—its franchises—all the time and yet its stocks and bonds be below par. It may have no net earnings, but it is in the exercise of its franchises. The truth is, its net earnings increase with the increase in the amount of labor employed. The value of the franchise is as of the value of the property and has no value separate and apart from the property. Labor may be valued by itself. There is much in this proposition for study. I do not think a valuation for the purposes of taxation which is based upon the aggregate market value of stocks and bonds, or one that is based upon net earnings capitalized, is a fair value either for the earning of revenue by the company or for the purposes of taxation. The valuation for the purpose of taxation ought to be the same as that for rate earning purposes. It would be considerable of a task to make our friends, Rosewater, Judge Howe, Harrington and Simeral believe that the railroad companies were entitled to earn rates upon $400,000,000, the amount which they name in the alternative writ as the value of railroad property in this state. No rate case which has ever been tried, that I know of, has considered the value of franchises separate and apart from the use of the tangible property. When the value of a railroad company is testified to in these rate cases it is reproduced at its value with reference to its physical construction, use and operation, which includes everything.

The stock and bond and net earning theory is no better for the purpose of fixing taxable values than it is for the purpose of fixing rates and it is just as proper for the purpose of fixing rates as it is for the purpose of taxation. But it is not proper in either case. In all the cases that have ever been tried, either with reference to rates or taxation, it has never been determined that the valuation of stocks and bonds or net earnings capitalized should be exclusive items of evidence upon which rates may be fixed or valuations for taxation determined.

A multitude of items are to be considered by a court in arriving at a conclusion as to the value of railroad property. It should not be confined to stocks and bonds alone nor earnings alone. Allowance must be made for the part which labor plays in fixing the value of stocks and bonds and in producing net earnings. You must consider the condition of the country through which the railroad passes, the physical condition of the railroad property and its connections. If the valuations for the purposes of taxation were fixed by the stock and bond or net earnings theory, then to be logical one should say when stocks and bonds are below par or there are no net earnings, that then the property ought not to be taxed, but these extreme advocates would never consent to this. If it is unfair to value it this way when the stocks and bonds are below par or there are no net earnings, it ought not to be recognized as the method when stocks and bonds are above par or there are net earnings. If it is the value of the physical property as used in case the property is operated at a loss it ought to be the value of that property which should control for the purpose of fixing the value for taxation when the property is operated at a profit. The truth is, you arrive at the value of railroad property as you do in the case of any other enterprise—the same as you would arrive at the value of a manufacturing plant that may employ 1,000 men and has invested millions of dollars. The property is valued as property for the purpose of taxation and that is the only way that the fair value can be arrived at.

If you simply take the one item of stocks and bonds or net earnings, you will arrive at an erroneous value of the property. You will adopt a method that is not recognized or authorized by the constitution. It may be that there are constitutions and statutes in some of the states in this union in which this method is recognized, however wrong it may be. Of this I do not know. But in this state the assessment for taxation must be made upon a property valuation. It cannot be upon the value of intellectual or physical labor.

This item of stocks and bonds and net earnings is about all that has been introduced here before this court for the purpose of proving that the members of this board acted fraudulently. How uncertain and deceptive it is must be plain. Courts have declared time and time again that it is only one item of evidence to be considered, and some have said that it is the most unsatisfactory and uncertain, as it is in fact.

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