95 Md. 419, 52 A. 937

Court of Appeals of Maryland.
GITTINGS
v.
MAYOR, ETC., OF CITY OF BALTIMORE.
June 18, 1902.

Appeal from circuit court No. 2 of Baltimore city; Pere L. Wickes, Judge.

Suit by John S. Gittings against the mayor and city council of city of Baltimore. Bill dismissed. Plaintiff appeals. Affirmed.

West Headnotes

Appeal and Error 30 ⚿714(4)
30k714(4) Most Cited Cases
The bill to enjoin collection of a tax not alleging that notice of assessment was not given, and such fact not appearing in the record dismissing the bill, cannot be reversed on the ground that such notice was not given, because appellant's counsel stated in oral argument that it was not given, and this was not denied by appellee's counsel.

Judgment 228 ⚿714(3)
228k714(3) Most Cited Cases
A decree that an assessment for a certain year is illegal is not res judicata as to legality of assessment for another year, though all the circumstances are the same.

Municipal Corporations 268 ⚿974(2)
268k974(2) Most Cited Cases
Baltimore City Charter, § 170, Laws 1898, c. 123, provides that a person aggrieved by an assessment made by the appeal tax court, or because of its failure to reduce or abate an assessment, may by petition appeal to the city court to review the assessment, the petition setting forth that the assessment is illegal, or is erroneous for over-valuation, or is unequal, and that petitioner is injured by such illegal, unequal, or erroneous assessment, and the city court shall ascertain or decide on the proper assessment, which decision or ascertainment shall be final and conclusive, unless appeal be taken to the court of appeals. Held, that the remedy by appeal to the city court is exclusive, unless the appeal tax court gives no notice of its action, though there was but a pretended assessment, and though it is claimed that the illegality of the assessment is res judicata.

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

Julian I. Alexander, for appellant.
Wm. Pinkney Whyte and Olin Bryan, for appellee.

PEARCE, J.
This is an appeal from a decree of circuit court No. 2 of Baltimore city dismissing a bill filed to restrain the collection of certain taxes for the year 1901, alleged to be demanded without any legal assessment of the property against which said taxes are charged. This property consists of a tract of land situated in that part of the city known as the “Belt,” which was annexed to the city by the act of 1888, c. 98, under the terms of which the rate of taxation for city purposes upon all landed property so annexed could at no time, until the year 1900, exceed the tax rate for Baltimore county for the year 1887, which was 60 cents in the $100; nor could there be until the year 1900, for the purpose of city taxation, any increase in the assessment of such property as then assessed. In Sindall's Case, 93 Md. 526, 49 Atl. 645, this provision of the annexation act was construed, and it was held that such property was not liable either to any increased assessment, or to taxation at the current city rate, until after the year 1900. That case was decided June 12, 1901. Before that time, however, in October, 1900, this plaintiff had filed a bill in equity against this defendant, alleging his ownership of these lands, and that they were, prior to the year 1900, assessed at

$82,510, but that defendant pretended another assessment of said property had been made at the value of $2l7,650, on which assessment taxes were demanded from plaintiff at the rate of 60 cents per $100, amounting to $1,306.56, which he refused to pay, but tendered $495.36, being the true amount of taxes at said rate upon the former assessment, which the tax collector refused to receive, and plaintiff prayed an injunction to restrain the levying and collection of taxes upon said pretended assessment, and the refusal to receive the amount of taxes so tendered. Upon this bill a decree pro confesso was obtained, defendant having neglected to answer in time, and in January, 1901, a final decree was passed granting the injunction prayed. In April, 1901, a petition for a rehearing was filed; but in October, 1901, this petition was dismissed, the decision in the Sindall Case, in the meantime, having set at rest the question then at issue between plaintiff and defendant. In November, 1901, the present bill was filed, reciting at length the proceedings in the former case, and asserting that it was conclusively determined by the decree therein that the said pretended assessment of said land was null and void, and that defendant could not under existing laws levy any taxes for city purposes on said lands upon any other than the previous assessment of $82,510, nor at a higher rate than 60 cents on the $100. The bill further alleged that defendant had delivered plaintiff a tax bill for 1901 on said lands for city purposes, upon said assessment of $217,650, amounting to $1,306.56, which he had refused to pay, but had tendered the proper sum of $495.36, which the tax collector refused to receive, and was about to distrain for the amount unlawfully demanded. The bill further alleged that no new legislation had authorized any new or other mode of assessment of said lands than that which existed when the former bill was filed and the former decree was passed, "and that defendant has not in fact made, nor pretended to make, any new or other assessment of said property than that mentioned in the former bill," and the plaintiff prayed an injunction as in the former bill. There was a decree pro confesso which was subsequently stricken out, and a demurrer was filed, the ground of demurrer being that under section 170 of the city charter (Laws 1898, c. 123) the plaintiff had an ample remedy in a court of law which has sole and exclusive jurisdiction for the purpose of review of said assessment and valuation, and that, having failed to avail himself of that remedy, he must abide by the action of the appeal tax court in reference to said assessment. The circuit court No. 2 sustained the demurrer and dismissed the bill.

Section 170 of the city charter, which the defendant relies on to sustain its demurrer, provides that "any person aggrieved because of any assessment made by the appeal tax court, or because of its failure to reduce or abate any existing assessment, may by petition appeal to the Baltimore city court to ***939** review the assessment. *** The petition in such appeal shall forth that the assessment is illegal, specifying the grounds of the alleged illegality, or is erroneous by reason of overvaluation, or is unequal, *** and that the petitioner is, or will be, injured by such alleged illegality, unequal or erroneous assessment. *** All such appeals shall be taken within thirty days after an assessment has been made as aforesaid, or after refusal to reduce or abate an existing assessment, and shall be heard not less than five, nor more than thirty days, after the expiration of the thirty days limit for taking appeals as aforesaid. *** The person appealing to the said Baltimore city court shall have a trial before the court without the intervention of a jury, and the court sitting without a jury shall ascertain or decide on the proper assessment," which decision or ascertainment is required to be certified by the Baltimore city court to the judges of the appeal tax court, and is made by said section 170 "final and conclusive in every respect, unless an appeal be taken to the court of appeals." In Stoddert v. Ward, 31 Md. 563, 100 Am.Dec.

83, where an injunction was sought to restrain the collection of taxes, this court said: "In the execution of the revenue laws, the constitution and the acts of assembly have provided for the selection of certain public officers charged with the duty of assessing and collecting the public taxes; if any errors, omissions, or irregularities occur in the discharge of their duties, such errors may be corrected by the means which the tax laws provide;" and the injunction was accordingly refused. In Commissioners of Alleghany Co. v. Union Min. Co., 61 Md. 545, the mining company claimed that a portion of the tax levied upon its property was illegal and void, and asked that the county commissioners and the tax collector be restrained from selling the property. The circuit court for Alleghany county granted the injunction, but on appeal the decree was reversed, the court saying: "It is only when the tax itself is clearly illegal, or the tribunal imposing it has clearly exceeded its powers, or the rights of the taxpayers have been violated, that the interposition of the special remedy by injunction can be invoked, and only then when no appellate tribunal has been created with power to remedy the wrong." In Friedenwald v. Shipley, 74 Md. 220, 21 Atl. 790, 24 Atl. 156, it was held that, where the law authorized an appeal to the circuit court for the county by any person dissatisfied with the award for damages or assessment of benefits in the matter of opening a street, that court on such appeal has exclusive and final jurisdiction to correct any errors in these respects, saying: "It is too well settled to admit of further discussion that a court of equity cannot undertake the decision of questions which the law has confided to another tribunal specially designated to adjudicate them."

The appellant contends, however, that this ground wholly fails because the bill states, and the demurrer admits, that no new or other assessment of the property in question has been made since the decree in the former case, and that consequently there was no assessment against which the appellant could have appealed to the city court; but we cannot adopt this view. Section 170 of the city charter in express terms embraces an "illegal" assessment as cause of an appeal to the city court. "A pretended assessment," such as the bill in this case charges, is an illegal assessment, and the city court has the same power under this section to strike down a pretended or illegal assessment, and to restore the actual or true assessment, that it has to reduce or abate an erroneous or unequal assessment. The plain object of this section of the charter was to provide a prompt, efficient, and ample remedy for the correction of all errors, either of omission or commission, in the assessment and collection of taxes in the city of Baltimore; and in construing a similar provision in 61 Md., supra, this court said that even where the tax itself is illegal, or the tribunal imposing it has clearly exceeded its powers, the remedy by injunction cannot even then be invoked, if an appellate tribunal has been created with power to remedy the wrong. The case of Holland v. Mayor, etc., 11 Md. 186, 69 Am.Dec. 195, was not designed to establish a different doctrine. That case, and the case of Mayor, etc., v. Porter, 18 Md. 301, 79 Am.Dec. 686, were considered in Page v. Mayor, etc., 34 Md. 564, 565, and it was there shown that these and other cases mentioned were applicable where it was sought to enforce the provisions of a void ordinance, but that where an appeal is given to the parties to be affected by the proceedings any irregularities therein are open upon appeal, and the appellate tribunal is the proper one to review and correct them.

Nor do we think that the former decree can be regarded as conclusively determining the illegality of the assessment now in question. The subject of consideration in the former case was the assessment for the year 1900, while in the present case it is the assessment for the year 1901. The res in the one case is not the same as in the other, though all the circumstances of the two cases may

be the same, and we can discover nothing in the cases of New Orleans v. Citizens' Bank of Louisiana, 167 U.S. 371, 17 Sup.Ct. 905, 42 L.Ed. 202, and Bank v. Hubbard, 45 C.C.A. 66, 105 Fed. 817, cited by appellant, to require a different conclusion. But, even if the former decree were held to make a case of res adjudicata, that plea would have been properly made in the city court on appeal, and would have been as effective there for the protection of the appellant as in a proceeding in equity.

***940** Appellant's counsel, in his closing oral argument, asserted that no notice whatever had been given by the appeal tax court of its purpose to change the plaintiff's assessment for the year 1901, and this statement was not met by any denial from the appellee's counsel, but this alleged defect was not alluded to in the plaintiff's bill nor in his printed brief.

Section 164a of the city charter (Laws 1900, c. 347) gives the appeal tax court power at any time to revise all valuations and assessments of real or personal property in said city, and to lower or increase the same, and provides that whenever said court shall purpose to alter or change any assessment, or make any new assessment, they shall, before such assessment is made, give at least five days' notice thereof, in writing, to the owner of the property to be assessed or reassessed. If, therefore, the prescribed notice of such purpose was not in fact given, such alteration and increase was illegal, and if the failure to give such notice had been alleged in the bill of complaint it cannot be questioned that the injunction should have been granted. It was held in Monticello Distilling Co. v. Mayor, etc., of City of Baltimore, 90 Md. 416, 45 Atl. 210, that "notice and an opportunity to be heard are essential to the validity of every assessment for taxation; that it is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights, and that this fundamental principle is applicable in its full force to the method by which each individual's property is valued to fix the basis of his liability for the payment of taxes." The assessment in that case had reference to distilled spirits under the special provisions of chapter 704 of 1892, which act nowhere provided for notice or hearing before any tribunal or official on the question of valuation; and for that reason the act was held unconstitutional, and the tax sued for could not be recovered. Here the law is free from this infirmity, but it is of no avail that the law requires notice to be given of the purpose to alter or change an assessment, if no notice in fact be given, and it cannot be said that a taxpayer is in default for failure to appeal from an increase of his assessment, if he has neither knowledge nor means of knowledge of the purpose to make such increase. But it is apparent from the views we have expressed upon the other objections urged that the failure to give the prescribed notice is the only fact, if it be assumed to be a fact, which would give jurisdiction to the circuit court, and that fact is not alleged in the bill, and nowhere appears in the record. It is manifest that the bill was based wholly upon the alleged effect of the former decree, and it is hardly to be supposed that so experienced and skillful a lawyer as plaintiff's counsel would have omitted to allege want of notice had this been known to him when he prepared and filed the bill, or at any time before the ruling upon the demurrer. Every reasonable intendment should be made in support of the regularity of proceedings which are sought to be enjoined in equity, and this principle requires a presumption that the appeal tax court did not disregard its duty to give the prescribed notice before increasing this assessment. The demurrer denies the jurisdiction of the court upon the distinct ground alone that there was a remedy at law by appeal, which could not be said if plaintiff had no notice of the proposed increase of

assessment, and the court evidently sustained the demurrer upon that ground. It has been repeatedly held in equity pleadings to be essential that that which gives jurisdiction to the court should be distinctly and substantially alleged (Grove v. Rentch, 26 Md. 367, and cases there cited), and we therefore think that justice to the appellees and to the circuit court requires us to hold that, if this want of notice existed, it should have been alleged in the bill to warrant us in reversing the decree. We had occasion to say in Triesler v. Wilson, 89 Md. 178, 42 Atl. 926, that we must consider and decide cases as they are presented by the record, and not as regarded by counsel in their briefs and arguments, when these add to or subtract from the record, and the application of this rule in the present case will not permit us to do otherwise than affirm this decree dismissing the bill.

Decree affirmed, with costs above and below.

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