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Article 6

Constitutional Law: Due Process

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did decrease in value that alone will not justify the injunction. 46 C. J. 682.

The plaintiff has been fortunate in that he has been able to enjoy his country estate for so long a time, he must now yield to the change and progress of the times.

In regard to the property rights of a land owner in the air over his land, it is clear that in all legislation pertaining to such, that both Congress and the States proceed upon the treory that a land owner has no exclusive property in the higher air spaces. Both the Constitution of the United States and of Ohio protect in broad terms the rights of property, but neither contains any classification or definition of property, any more than they reveal the contents of the word liberty. 94 U. S. 113.

What the owners property rights are, so far as air space above is concerned, has not been declared by legislation, nor have such rights been fixed by the courts as yet. The plaintiff relies upon the old common law maxim of "Cujus est solum ejus est usque ad coelum." The court cited a long list of English and U. S. cases in which reference was made to the ancient maxim, but there were no cases which involved an adjudication of property rights in the air space which would be normally used by airplanes. It is true that the maxim has been used as the basis for some decisions, but it is the points actually decided, not the maxims, which establish the law. A maxim, said Sir Frederick Pollock, "is a symbol or vehicle of the law so far as it goes; it is not the law itself, still less the whole of the law, even on its own ground."

What was the "coelum" or originally intended by the early Latin writers? When used, it commonly referred to the lower air spaces, or that space in which the birds fly and the clouds drift. Another writer spoke of it as the space lying only a little above the highest treetop. 62 Amer. Law Rev. 894.

Thus, it appears that the maxim has never been applied in cases which fixed rights in the space traveled by airplanes, and since there are no previous decisions which establish rules as to such, any reasonable regulatory legislation would be constitutional, but so far no legislative provisions have established any exclusive proprietary rights in the land owner to the adjoining air spaces normally travelled by the airplanes.

LYMAN B. GILLET.

Constitutional Law: Due Process.

"What is due process of law must be determined by the circumstances * * * ", said Justice McKenna in *Reeves v. Ainsworth,* 219 U. S. 296. In relation to taxation it has been agreed that due process

in reference to the XIV Amendment of the U. S. Constitution requires three things in order that there has been a valid assessment on property: notice to the person being taxed, a hearing before the taxing body, and a method of appeal before some court.*

In September 1930 the Northwestern Lumber Company appealed to the Supreme Court of Wisconsin contending that a reassessment of their property had been invalid because they had proceeded without due process. The plaintiff corporation was engaged in the number business since Jan. 1, 1911, and had acquired large tracts of timber to engage in this business, part of this property being obtained before and part after Jan. 1, 1911. They had filed an income tax return every year in accordance with the Income Tax Law and had paid their taxes according to their assessments. In 1926 it appeared that the property and income of the corporation had been under-assessed, and the defendant commission reassessed property acquired by the plaintiffs partly before and partly after Jan. 1, 1916. The proceeding was authorized by section 71.10, Wis. Stats., 1925, which provided for a reassessment on the property and income of the corporation where it has been later found that there has been an under-assessment on the property and income of the corporation where it has been later found that there has been an under-assessment of such property and income. The statutory limitation made it permissible to reassess only the incomes following Jan. 1, 1916. The company objected to the reassessment of its holdings previous to Jan. 1, 1916 in a hearing before the defendant tax commission, but the commission would deduct merely the assessment on unused property in accordance with *Oconto Co.* v. *Tax Commission,* 193 Wis., 488.

The plaintiff company brought the case up for appeal in the Supreme Court contending among other things that its rights under the Constitution of the United States and the Constitution of the State of Wisconsin were being violated in that the method of the Wisconsin Tax Commission in this case in going back of the statutory limitation set by section 71.10 deprives the plaintiff of property without due process of law. 231 N. W. 865.

The Supreme Court discounted all of these contentions involving constitutional rights and maintained that this question did not even enter into the case. They held that the method of the commission in taking into account the property acquired before Jan. 1, 1916, the statutory limit for reassessing under-taxed incomes was not a deprivation of property without due process because such an assessment was necessary to effectively ascertain the true income of the company during th years of 1916 to 1824 inclusive.

*210 U. S. 373; 159 U. S. 526; 189 U. S. 285; 207 U. S. 127.

The Tax commission was backed and moved by virtue of the statutes 71.10 which provided for a ten day notice to the corporation before proceeding with the reassessment, and section 71.155 which provides for a hearing of the plaintiff corporation before the tax commission in the Circuit Court of Dane County, and sub-division 5 of the same section provides for an appeal on the judgment within 20 days of its recording before the Supreme Court of Wisconsin.

And, although the case was reversed in part as to other contentions, it is a good illustration of the futility of attacking the methods of a taxing body, because in its practice it seems to be violating the due process clauses of the state and federal constitutions, if such body moves by authority of a statute which provides in some way for a notice to the assessed party, a hearing before the assessing body, and some method for appealing the assessment to a court for final adjudication.

FRANCIS ACKERMAN

Insurance.

Behnke v. *Standard Acc. Inc. Co. of Detroit,* 41 Fed. 696, is an appeal by the plaintiff from the judgment of the District Court of the United States for the Eastern District of Wisconsin. The action is based upon a complaint purporting to state two causes of action, the first upon an alleged express contract by the appellee to insure appellants against liability under the Wisconsin Workmens Compensation Act, and the second upon an alleged tort, in that appellee negligently failed to enter into, or to notify the appellants within a reasonable time that it refused to enter into the contract of insurance.

The facts are as follows: the appellants, engaged in operating a portable sawmill and logging in Forest County, Wisconsin, whose compensation insurance had been handled by Ross Richardson prior to October, 1925, were advised by him in September, 1925, that their present policy procured by him with the London Guaranty and Accident Company would expire October 1, 1925. They were also advised that they would have to seek insurance elsewhere because that company refused to renew the policy. Richardson, who was an agent of the Fidelity Deposit Company of Maryland, thereupon wrote Wolff, the general manager of the Milwaukee district for the same company stating that he had the application for the insurance, outlining it as best he could, and asking whether Wolff could secure the compensation insurance from some company. Neither Wolff nor Richardson was an agent of the appellee company nor of the George H. Russell Company, its Milwaukee agent.

Wolff answered on stationery bearing the letterhead of the Fidelity and Deposit Company, saying that he believed that he could procure the policy and asking for the details regarding the risk. This letter