TAX LITIGATION IN ILLINOIS

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THE past five years in Illinois have been a period of very unusual interest in the field of tax litigation. It would be difficult to find another instance in which so many important cases, involving questions of such vital consequence from a legal and fiscal point of view, have found their way to the court of last resort of the state and to the federal courts within an equal period of time. Included in the series of cases were several involving the validity under the present state constitution of forms of taxation which, though familiar elsewhere, were novel in Illinois experience.[1] The enactment of these new tax laws was a result of substantially the same forces and conditions which operated to clog the courts with suits in which the legality of administrative acts and procedures incident to the enforcement of the general property tax was subjected to vigorous and bitter attack by thousands of embittered property owners. They were in response to the need for more revenue and a wider distribution of the tax burden. For many years the burden of taxation on real property has been steadily increasing. Attempts which have been made on several occasions to amend the antiquated revenue article of the state constitution[2] in such a manner as to empower the legislature to establish a modern revenue system based upon the principle of an equitable distribution of the tax burden have foundered upon the shoals of jealousy and suspicion between the people of the urban and rural areas

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[1] In Bachrach v. Nelson, 349 Ill. 579, 182 N.E. 909 (1932) the court held unconstitutional a state income tax law upon the ground that income was "property" within the meaning of Article 9, Sections 1 and 2, of the Illinois Constitution, and that the graduated feature of the tax violated the requirement that taxes on property be based upon value and be uniform. See Hughes, The Constitutionality of the Income Tax Law of 1932, 1 Univ. Chi. L. Rev. 124 (1933).

In Winter v. Barrett, 352 Ill. 441, 186 N.E. 113 (1933), the 1933 retail sales tax was held unconstitutional because it was found to involve discriminatory exemptions and contained a clause involving double appropriation of funds.

In Reif et al. v. Barrett, 188 N.E. 889 (Ill. 1933) The Retailers' Occupation Tax Act of 1933, imposing on persons engaged in selling tangible personal property at retail a tax measured by gross receipts was sustained.

[2] Article 9, Section 1: "The General Assembly shall provide such revenue as may be needed by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; . . . . "

of the state and the indifference of a large part of the voting population to the issues involved.

In the meantime there has been a steady growth in the variety and quantum of governmental activities, and a concomitant increase in the demands for revenue. The normal solution, viz., recourse to new sources of revenue by new types of taxation, has encountered the obstacle of an obsolete constitution.[3] Year by year the property tax rate has continued to increase, until at the present time in Chicago the average rate as applied to thirty-seven per cent of the full value theoretically determined by the assessment is close to eight per cent.

As long as the post-war prosperity continued, the mounting burden of taxation on real estate, while it gave rise to a considerable volume of grumbling in the press and elsewhere by individuals and small groups, did not become so unendurable as to produce an organized revolt of large proportions. It was not until 1928 that the dissatisfaction with conditions of assessment in Cook County became so general and articulate as to produce decisive action by the State Tax Commission in the form of an order of reassessment of all real estate in Cook County. It is possible that, if the reassessment had been carried through to completion in the conditions of 1925 or 1926, the organized tax strike and the resulting litigation which for a considerable period well nigh paralyzed the collection of taxes would not have occurred. But by the time taxes were again extended on the basis of the new assessment roll the collapse of 1929 had passed into history and economic paralysis was spreading over the country.

The coincidence of high 1928 valuations, the two years' interruption of tax extension, shrinking incomes from property ownership and business, high interest rates on mortgages floated in boom times upon the basis of inflated valuations, and a greatly reduced economic capacity on the part of the body of taxpayers combined to create an impossible situation when, after two years, the reassessment was finally completed and extension and collection of taxes was resumed. The percentage of taxes in default steadily increased to unprecedentedly high levels; the diminishing stream of tax payments which continued to flow in was for the most part already hypothecated by the issuance of tax warrants at increased rates of interest by desperate government officials. The situation was greatly complicated by a tax strike of formidable proportions, fomented by an association composed of thousands of protesting real estate owners, including many whose holdings of real estate were large. The leaders of this

[3] *Supra* note 2. The revenue article does, it is true, include power to levy a variety of excise and occupation taxes, but despite this it is one of the most narrow in its grants of power to be found in state constitutions.

organization carried on an active propaganda by radio and other means to secure adherents. Its members paid a small percentage of the amount of taxes assessed upon their properties into the treasury of the association. The large fund thus raised was used to finance propaganda, to pay substantial salaries to the permanent officials, and to cover the heavy legal costs of initiating and prosecuting to the finish litigation which it was confidently predicted would bring to the overburdened owners of real estate substantial relief.[4]

The leaders of the movement boldly advised and urged owners of real estate to withhold payment of all taxes until the suits attacking the validity of the Cook County assessment rolls for 1928 and 1929 had been decided. This counsel, as will later appear, proved in the final outcome to be bad, but it was the more effective at the time because of the existence in Illinois of an unjust rule which makes any real property tax payment a voluntary one virtually as a matter of law.[5] Full advantage was taken of this fact in the tax strike propaganda. It was iterated and reiterated that property owners who paid any portion of their taxes ran the risk of paying more than the courts might decide to be lawfully due, and that to the extent of such overpayment such taxpayers would be without legal recourse. Had the Illinois law permitted complaining taxpayers to preserve their legal position by payment of their taxes under specific written protest,[6] it seems probable that the volume of tax payments might have been substantially increased.

This reluctance to pay *any* taxes was accentuated by an apparently formidable but completely abortive movement to secure the issuance of a huge amount of long-term bonds to fund the unpaid taxes for a period of from one to three years, the burden of which would have tended to fall quite disproportionately upon those taxpayers who had already paid. In the meantime, the load of those who had defaulted their tax payments became steadily greater with the accumulation of tax penalties, even though the penalty dates were extended several times by emergency legislation in the hope of breaking the strike. Under the pressure of necessity, considerable reductions in the budgets of tax-spending bodies were being

[4] The character of the activities of this organization and the nature of the relationship between it and its members are quite fully set forth in the opinion of Mr. Justice Farthing in the case of People ex rel. Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933).

[5] See School of Domestic Arts v. Harding, 331 Ill. 330, 163 N.E. 15 (1928), and notes on the case in 29 Col. L. Rev. 227 (1929) and 23 Ill. L. Rev. 821 (1929). Cf. Lefevre v. Lee County, 353 Ill. 30, 186 N.E. 536 (1933).

[6] Albro v. Kittelle, 42 R.I. 270, 107 Atl. 198 (1919) was decided in a state where substantially this rule is in effect.

made, but these economies were offset to a substantial degree by the heavy interest charges on borrowing which the stoppage of tax revenues necessitated. Soon the tragic spectacle was presented of payrolls of public school teachers and other public employees many months in arrears, a condition which unfortunately still continues. After five years tax litigation or its aftermath still exerts its paralyzing influence upon the collection of taxes.[7]

It is the writer's purpose to examine, in the light of this historical background and the present situation, certain aspects at least of this litigation. What are the basic legal issues which the litigation has involved? To what extent have these issues been faced and solved by the courts and to what extent evaded? Are we warranted in concluding that the evils and weaknesses of our fiscal system are soluble in some measure by recourse to the courts or is this a situation in which judicial intervention means simply confusion worse confounded? These are questions which must be faced if government is to chart a course for the future intelligently.

While it was only one of several important cases, the case of *People ex rel. McDonough v. Cesar*[8] was the spearhead of the tax strikers' attack upon the assessment roll, as it was also the case which received the greatest publicity. Inasmuch as the case involved most of the important issues and was the one in which the revolting taxpayers came nearest to success, it affords a good point of departure and demands careful consideration.

The case arose out of an application by the county collector filed in the county court for judgment and order of sale against all the lots and lands upon which taxes and special assessments for the year 1928 remained due and unpaid as described in a delinquent list filed, as provided by law. An order was entered by the court that all persons interested in the lands and lots described and desiring to make objections to the judgment and order of sale should file such objections by a specified date. In due course an objection was filed upon behalf of various parties, including Mrs. Cesar.[9] A similar procedure was followed in the case of lands and lots on which 1929 taxes were delinquent, and again objections were filed upon behalf of a group of property owners including Mrs. Cesar. In both years the court entered an order for judgment and sale of the properties described, excepting those for which objections had been entered in accordance with

[7] According to figures published in the Chicago Tribune, March 27, 1934, announced by County Treasurer Joseph B. McDonough, $765,000,000 in taxes have been paid for the years 1928–1931, with $268,000,000 still in default.

[8] 349 Ill. 372, 182 N.E. 448 (1932), certiorari denied 288 U.S. 603, 53 Sup. Ct. 386 (1933). Accord: People ex rel. McDonough v. Reinecke, 188 N.E. 455 (Ill. 1933).

[9] It is stated by C. J. Heard that the abstract does not show that Mrs. Cesar was one of the parties who filed the objection, but she was treated by the county court, and in the briefs of both appellants and appellees, as if she were. 182 N.E. 448, 449.

the rules of the court. Later, the City of Chicago was permitted to intervene and to file written briefs and arguments. Also the objections for the two years were consolidated and adjudicated in a single proceeding. Upon completion of the hearing, the county court, Edmund K. Jarecki, Judge, sustained Mrs. Cesar's objections and refused judgment and order of sale for the general taxes for 1928 and 1929. In his judgment Judge Jarecki incorporated the finding that the entire tax levied for the two years was invalid.

At the time the cause came on for hearing, counsel for the objector was permitted to file an amendment to the objections entered for both 1928 and 1929 taxes which was of great importance in the subsequent history of the case.[10] This amendment contains the gravamen of the complaint which formed the ostensible basis, at least, of the tax strike. It charged that the board of assessors (of Cook County), for the years 1920 to and including 1929

> . . . , have willfully, knowingly, and intentionally failed, refused and neglected to value and assess vast amounts of personal property in Cook County, Illinois, subject to taxation and not exempt under the laws of Illinois; that the said board of review (of Cook County) has during the same period willfully, knowingly and intentionally failed, refused and neglected to assess all such personal property subject to assessment which is not assessed by the said board of assessors; that for upwards of ten years last past, including the years 1928 and 1929, said board of assessors have deliberately, systematically, and willfully omitted to value and assess for taxation vast amounts of personal property in Cook County subject to taxation and not exempt under the laws of Illinois; that during the same period of time the said board of review deliberately, systematically and willfully failed to correct the assessment as made by the board of assessors, and also failed to assess vast amounts of personal property subject to taxation and not exempt under the laws of Illinois and which was not assessed by the board of assessors.

In his statement counsel for the objector left no room for doubt as to the radical character of this objection. On the contrary he stated that it was his purpose "to raise the question of the illegality of the entire assessment in so far as the assessment constitutes a violation of both the statutes and the constitutions, State and Federal." He asserted that the issues raised in the case would be limited to two, viz., denial of due process of law under both constitutions and denial of equal protection of the laws under both constitutions.[11] Any question which might have been raised as to fraudulent discrimination in the valuation of the objector's real estate as compared with other real estate disappeared from the case.

Upon appeal to the Supreme Court of the state, the judgment of the county court was sweepingly reversed by unanimous decision and the case

[10] 182 N.E. 448, 449. [11] *Ibid.*

remanded with instructions to enter judgment in favor of the collector, with interest and costs.[12] The Court, speaking through Mr. Chief Justice Heard, asserted that the only question presented was the right of the county collector to have judgment against the objector's real property for delinquent taxes. It vigorously declared that the county court was without jurisdiction to make a finding that the entire taxes against all real estate in Cook County for the years 1928 and 1929 were invalid. It furthermore held that the finding was based largely upon a mass of incompetent evidence admitted by the county court over the objections of the counsel for the appellants which tended to show that vast amounts of personal property of various sorts were not being entered upon the assessment rolls and that no real effort was made by the assessing officials to find such property and place it there upon a uniform standard of valuation with real property. But the opinion does admit that there was sufficient evidence to show that considerable amounts of personal property were not assessed for these years, and that it was uniform practice in the assessor's office to place on the roll no returns of personal property of a value under $200.[13] It was conceded that testimony of the members of the board of assessors themselves showed that there was much personal property not assessed which could have been found and assessed if adequate appropriation for staff for this purpose had been made and the same diligence shown as in the case of assessment of realty. This failure was attributed by them to deficiency in appropriation and staff, difficulty of procuring schedules from citizens, and the short time allowed by law for making an assessment.

The court found that the objector was precluded from relying upon this apparent lack of uniformity between assessment of real property and assessment of personal property. As to her assertion that she was deprived of due process of law because of the failure of the board of review to grant her a hearing upon her complaints of improper valuation, it was held that she was not in position to take advantage of the objection for several reasons. First, her complaint was fatally defective in that it did not comply with the lawful rules and regulations of the board because it gave no information regarding her property but was limited to a state-

[12] *Supra* note 8.

[13] It is suggested that the recent decision in People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 405 (Ill. 1933) may give unintended encouragement to this practice. Herein the court held the county collector's practice of making no effort to collect small personal property tax claims of $20 or less on ground that costs of collection exceed the amount recovered unlawful as violating the constitutional guaranty of equal taxation, and that the amount not collected for this reason cannot be included in a subsequent levy to cover loss of and cost of collection of taxes.

ment that the property was overassessed. She could not claim lack of uniformity as to her personal property assessment since the record did not show that she had made any return of personal property whatever or that she had been assessed therefor. It may be noted in passing that the practice of making no personal property return or at the most a return of only a small fraction of total personal property holdings was so general among Chicago taxpayers that few owners of real property could have come into court with clean hands to complain of such underassessment of personal property.

The principal ground relied on, however, for denying the objector relief was her failure to bring a mandamus proceeding in a court of law in order to compel the board of review to grant her a hearing upon her complaint. The court also noted that the objector had failed to invoke any of the penalties provided by law for refusal or willful neglect of any assessor or any member of a board of review to perform his duty in the matter of assessing taxable property,[14] or to attempt to compel by mandamus the assessment of the omitted personal property.[15] It then goes on to say:[16]

> While the law has provided penalties for the refusal or willful neglect of any assessor or member of the board of review to perform his duty in the matter of making the assessment of taxable property, the invalidity of the whole assessment has never been held to be one of the results of such refusal or neglect. If the whole real estate assessment of Cook County were to be held invalid in this case for lack of uniformity, it would necessarily follow as an inevitable conclusion that the entire personal property tax as well would be invalid, and that the entire state tax for the years 1928 and 1929 in all the other counties would be invalid as well. Such a result would be not only a grave injustice to the many thousands of persons against whose property the same county court of Cook County rendered judgment of sale for delinquent taxes based on the same assessments of 1928 and 1929, as well as to the hundreds of thousands of persons who voluntarily paid their taxes. Such a holding would render it possible for an unscrupulous assessor to prevent government, both local and state, from functioning.

The court makes the further point that the evidence of the objector fails to show that she had suffered injury by reason of the discrimination in favor of personal property which is the basis of the complaint, in that it does not appear that the taxes upon her real property would have been decreased if the personal property claimed to have been omitted from the assessment roll had been assessed, because no evidence was offered to show the amount of the appropriations made by the numerous taxing bodies in Cook County in 1928 and 1929 nor that they were operating upon balanced budgets during those years. It might have added that, in the absence of proof as to the amount of personal property owned by the

[14] 182 N.E. 448, 454. [15] *Ibid.* [16] *Ibid.*

objector and the portion thereof assessed for taxation, it might well be that no net saving would have accrued to her if real property and personal property had been assessed upon the uniform basis which the constitution and statutes require.[17]

One of the cases chiefly relied upon as authority in the *Cesar* case was *Bistor et al. v. McDonough*,[18] decided just a few weeks before. The plaintiff and appellant, Bistor, along with more than five thousand other owners of real estate, had filed a bill praying for an injunction restraining the county collector from seeking recovery of judgment for the general taxes levied on their properties for the year 1929 and from offering to sell, or making sale of such properties to satisfy the tax demands. A demurrer to the bill was sustained and the bill was dismissed for want of equity by the circuit court. The bill alleged deliberate, fraudulent, and illegal omission to assess and underassessment of personal property, and a resulting discrimination against real property in violation of the uniformity requirement of Section 1, Article 9, of the state constitution. It further alleged with considerable detail the omission or the underassessment of various types of personal property which it was later attempted to establish by the evidence at the trial in the county court in the *Cesar* case and the failure and refusal of the board of review to hear more than a small fraction of the many thousand complaints filed with the board; that the Illinois tax commission was petitioned to grant relief to the complainants and other real estate taxpayers but that the commission refused to order a reassessment of all property in Cook County in accordance with the constitutional requirements of uniformity; that the complainants knew that any appeal to the board of assessors, board of review, or the state tax commission to correct their assessments would be futile.

In affirming the decree below dismissing the bill, the Supreme Court, speaking through Mr. Justice De Young, pointed out that the power to impose tax burdens is a legislative power, that the Illinois constitution vests the power of assessment exclusively in the persons elected or appointed for that purpose, and that, unless fraud be shown, the courts are without power to review valuations of property made by the proper authorities. It follows that, in the absence of fraud, the only remedy for excessive assessment is by application for abatement made to the agencies created by statute for the purpose of hearing complaints. Even if the basis of the complaint is fraud, the property owner must exhaust his legal

[17] Baker v. Druesdow, 263 U.S. 137, 142, 44 Sup. Ct. 40 (1923); West Virginia Hotel Corporation v. W. C. Foster, 132 So. 842, 847 (Fla. 1931).

[18] 348 Ill. 624, 181 N.E. 417 (1932). Accord: Koester v. McDonough, 351 Ill. 492, 184 N.E. 826 (1933).

remedies before seeking equitable relief by way of injunction. This the appellants have failed to do because they have not sought by mandamus to compel the board of review to review their assessments. The plaintiffs thus came to grief upon the same shoal which wrecked the objector in the *Cesar* case.

The court was not content, however, to stop at this point. It went on to add to the woes of the striking real estate taxpayers by unequivocally affirming the position previously taken in a long line of cases[19] that the contention that the assessments on parcels of real estate are void because there is discrimination in favor of personal property is untenable.[20] It further declared that the burden was upon landowners asserting that real estate had been assessed without uniformity to allege facts from which the court could determine whether the personal property omitted from the assessment roll was taxable, and that a general allegation to that effect was a mere legal conclusion and insufficient to show unjust discrimination.[21]

But the determined taxpayers had not yet exhausted their resources. If the state courts were not productive of the relief sought, it was inevitable that resort should be had to the federal courts. In *American Mutual Liability Insurance Co. v. McDonough*[22] the plaintiff, a Massachusetts corporation, which owned a leasehold estate for a long term of years in certain Cook County real estate, filed a bill in equity in the District Court for the Northern District of Illinois, alleging the invalidity of general taxes assessed upon its property for the years 1928 and 1929 and praying for a decree declaring said taxes to be null and void and that the defendant, the county collector, be enjoined from selling said real estate for taxes delinquent for those years. The bill not only alleged violation of the plaintiff's rights under the Fourteenth Amendment and the constitution and statutes of the state of Illinois through discrimination against real property by means of fraudulent and deliberate administrative omis-

[19] 181 N.E. 417, 421.

[20] Chicago, Burlington & Quincy R. Co. v. Frary, 22 Ill. 34 (1859); Schofield v. Watkins, 22 Ill. 66 (1859); Merritt v. Farris, 22 Ill. 303 (1859); Metz v. Anderson, 23 Ill. 463, 76 Am. Dec. 704 (1860); Dunham v. City of Chicago, 55 Ill. 357 (1870); People v. Lots in Ashley, 122 Ill. 297, 13 N.E. 556 (1887); First Nat. Bank of Urbana v. Holmes, 246 Ill. 362, 92 N.E. 893 (1910). Would not the logic of the objector's theory in the Cesar case lead to the conclusion that Illinois has never had a valid assessment roll since the legislature has never provided for taxation of income recognized as *property* in Bachrach v. Nelson *supra* note 1, which Article 9 Section 1 of the Illinois Constitution makes it the duty of the legislature to tax by the rule of uniformity?

[21] 181 N.E. 417, 421.

[22] 1 F. Supp. 888 (1931); affd. by C.C.A. 7th. 61 F. (2d) 558 (1932); certiorari denied 288 U.S. 603, 53 Sup. Ct. 386 (1933).

sion and underassessment of personal property, but arbitrary and fraudulent discrimination in that plaintiff's real estate was assessed at a very much higher percentage of actual value than other real estate in the same district. It will be noted that no claim of this latter type of discrimination was involved in the *Cesar* and *Bistor* cases. In this case, moreover, plaintiff offered to pay the amount of tax found to be due.

Again the taxpayer ran into a stone wall. The bill was dismissed for want of equity and this decree was affirmed by the Circuit Court of Appeals.[23] Relief was denied on the authority of *Keokuk & Hamilton Bridge Co. v. Salm.*[24] The plaintiff had failed to state a case sufficient to constitute a valid cause of action in equity, despite the allegation of refusal by the board of review to hear and pass upon its objections, because it had failed to exhaust the remedies provided by the Illinois statutes in that no objection had been raised in the county court to entry of judgment on the ground of deliberate and fraudulent discrimination in the assessment.[25] Until the entry of such judgment and order of sale in the county court, no lien could attach to the plaintiff's property and no cloud on title be created. The federal court could not presume that taxing officers of Illinois would be permitted by its courts to violate the statutes of the state. One can scarcely wonder if an owner of real property, reading the opinion in the above case and comparing it with that of the Illinois Supreme Court in the *Cesar* case should feel like a ball in a game of battledore and shuttlecock.[26]

One more chapter in the story of the attempt to gain advantage from

[23] *Ibid.* [24] 258 U.S. 122, 66 L.Ed. 496, 42 Sup. Ct. 207 (1922).

[25] The court discusses and distinguishes three cases: (1) Cummings v. Merchants' Nat. Bank of Toledo, 101 U.S. 153, 25 L.Ed. 903 (1879), on ground that that case related to taxation of bank stock, which had been greatly overvalued in proportion to other property, real and personal, and was subject to immediate warrant and distraint if the tax not paid; not as a result of judgment after hearing in state court as in Illinois; (2) Raymond v. Chicago Union Traction Co. 207 U.S. 20, 52 L.Ed. 78, 28 Sup. Ct. 7 (1907); on ground that corporate property was there assessed originally by state board of equalization under a system which clearly denied due process and equal protection of law, and that there was no appeal from its decision on valuation under the state law; (3) Greene, Auditor et al. v. Louisville & Interurban R.R. Co., 244 U.S. 499, 61 L.Ed. 1280, 37 Sup. Ct. 673 (1917), on ground that there the discrimination resulted from the divergent action of differing assessing boards whose assessments were not subject to any process of equalization under the state law, the diverse results being due to intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body. It may further be noted that in all these cases there was discrimination between property falling in the same class. See Stason, Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies, 28 Mich. L. Rev. 637 (1930).

[26] At the time this case was decided, a decision in the Cesar case had been handed down, being cited at 61 F. (2d) 565, but it was noted parenthetically that a petition for rehearing was pending. This petition was, of course, denied later by the Illinois Supreme Court.

the discrimination in favor of personal property remains to be considered. It will have been noted that in the *Cesar* case the Supreme Court observed that no attempt had been made by the objector to compel the assessing authorities to bring the large amount of omitted or underassessed personal property alleged to exist onto the assessment roll by mandamus proceedings.[27] A case was soon presented to the court in which the plaintiff tried to do that very thing.[28] The petitioner sought a writ of mandamus in the superior court of Cook County to direct the members of the board of review[29] to add to the assessment roll a vast amount of personal property which it was alleged was taxable but was not being assessed.

The petition was an elaborate one. After describing the organization of the board, its practices, and duties, and alleging facts tending to show that enormous amounts of personal property were not being assessed by reason of the deliberate failure and neglect of the defendants, in violation of the uniformity requirements of the constitution and laws of the state, the petition described in a long series of paragraphs classes and types of personal property alleged to be omitted or substantially underassessed and alleged a minimum total valuation for each of such classes. Among them were estates held in trust by banks and trust companies, funds on deposit in banks, estates under administration in the probate court,[30] aeroplanes and water craft, automobiles,[31] refrigerator cars and other railroad rolling stock, memberships in the Chicago Board of Trade and the Chicago Stock Exchange, obligations secured by mortgages and trust deeds on property in the county and recorded in the county recorder's office, property in storage warehouses, and merchants' and manufacturers' inventories. Demurrers to the petition were overruled and an order was entered directing a writ to issue in accordance with the prayer of the petition. The Supreme Court, this time with two of its members dissenting, reversed the

[27] 182 N.E. 448, 454 (1932).

[28] People ex rel. Koester v. Board of Review of Cook County et al., 351 Ill. 301, 184 N.E. 325 (1933).

[29] The new board of appeals was later substituted for the board of review as party appellant.

[30] It was alleged with reference to these estates that their values and descriptions and the names of the owners were set out in full in the inventories and appraisements on file and available to the board of review in the county treasurer's office and in the inheritance tax department of the Attorney General's office. See 184 N.E. 325, 327, paragraph 10.

[31] It was alleged with reference to automobiles and motor vehicles that more than 500,000 were owned by residents of Cook County, with a fair cash value in excess of 120 million; that less than 20,000 were assessed by the board of review for the said year; and that the names, descriptions, and data relative to the automobiles were easily available to the board of review from the printed public records of the Secretary of State of Illinois. See 184 N.E. 325, 327, paragraph 13.

court below and directed that the demurrers, general and special, be sustained.

A perusal of this opinion supplies ample evidence, if evidence were needed, of the illusory character of mandamus as a remedy for a widespread lack of uniformity in the assessment of property. While the court declares that upon a sufficient petition and proper showing, the board of appeals could be compelled by mandamus to assess omitted property or increase the assessment upon undervalued property,[32] the requirements for such a showing which are laid down are so severe that no taxpayer or group of taxpayers could satisfy them. The requirements amount in substance to this: the petitioner must be prepared to allege and prove the name and residence of the owners of the omitted or underassessed property, the situs and character of the property, and whatever facts are necessary to show that the property was subject to taxation. In the absence of such a showing, the court will not presume that the board violated any duty in failing to assess it. In other words, the petitioner must have satisfactory proof of all the facts necessary to the preparation of an assessment roll. What the assessing authorities with their staffs and sources of information have not done either through unwillingness or inability, the petitioner must do if he is to state a good case for relief by mandamus.[33]

No implication of criticism of the Supreme Court's general position,

[32] A note, 46 Harv. L. Rev. 1000 (1933) contains an excellent discussion of the topic, Remedies for Unequal Property Tax Assessments, and an extensive collection of authorities. The baneful effect with regard to uniformity of the very general practice of assessing property below its true value in order to minimize the number of complaints from property owners and to obviate the necessity for readjustment in event of a decline in values is pointed out. The writer of the note also points out the availability and convenience of the remedy of mandamus to compel an increase in low assessments where only a few parcels of property have been undervalued, citing inter alia Board of Equalization v. People ex rel. Goggin, 191 Ill. 528, 61 N.E. 339 (1901). See also People ex rel. Webb v. Jones et al., 256 Ill. 364, 100 N.E. 224 (1912) where a writ was granted to compel board of review to assess certain omitted personal property described in the petition, the owners thereof being named therein.

[33] The illusory character and complete inadequacy of mandamus as a remedy for the disfavored taxpayer in the case of widespread undervaluation was recognized by the United States Supreme Court in the case of Sioux City Bridge Company v. Dakota County, 260 U.S. 441, 67 L.Ed. 340, 43 Sup. Ct. 190 (1923). It was there held that the complaining taxpayer was entitled to have its assessment reduced to the prevailing level, despite the statute of Nebraska providing that all property should be assessed at one hundred per cent and the fact that complainant's property was not assessed in excess of that figure. The doctrine established by the Nebraska Supreme Court limiting the taxpayer in such cases to a suit for mandamus to compel the increase of all other assessments to the same level was held to violate due process of law. But it should be noted that in the above case a federal right was involved, inasmuch as the taxpayer complained of intentional discrimination as between its real estate and other real estate in the district.

however, is intended, for the fatal defects of mandamus as a remedy for discriminatory assessment, at least where lack of uniformity is extensive, are inherent in the remedy itself. In order for the writ to be effective, it must be possible for the court issuing the writ to determine whether it is being complied with in order that a contempt citation may issue in the event noncompliance is found. Tested by this standard, the sweeping writ of mandamus issued by the lower court in the principal case was an absurdity, unless the court was prepared itself to undertake what would in effect amount to a reassessment of personal property in Cook County or else to treat as incontestable fact the allegations of Mr. Koester's petition and to jail the members of the board of appeals for contempt unless they succeeded in producing an assessment roll substantially conforming thereto. He would be a brave man who would accept appointment to or remain a member of the board with such a threat hanging over him. Surely only a super-optimist can believe that any mind not equipped with omniscience could locate and assess fifteen additional billions of personal property or any large fraction thereof in Cook County, possessed of the limited powers of inspection and search which Illinois assessors are given by statute.

Yet there is some reason to agree with the dissenting judges in their contention that the requirements laid down by the majority, at least when applied to so large a city as Chicago, virtually deny property owners any relief. Moreover, if the majority really take seriously the dogma of uniformity, to which allegiance is rendered in so many Illinois opinions dealing with assessment, it would seem that the court might safely have sustained the writ as to certain of the categories of personal property described in the petition. Particularly is this true, as the dissent points out, of trust estates, airplanes and water craft, automobiles the ownership of which is largely a matter of public record, and memberships in the Board of Trade and the Stock Exchange, the names and addresses of the owners of which were listed in the petition. Even a modicum of effort on the part of the assessors should suffice to place substantially more than five per cent of automobiles owned by residents of Cook County upon the assessment roll.

It is difficult to escape the conclusion that the judges realized the hopelessness of enforcing even an approach to uniformity in the assessment of personal property, and that they were reluctant to single out certain limited classes, which for one reason or another are easier to locate and assess, and to take effective action to secure their inclusion on the roll of taxable property. The full assessment of securities in trusts and estates

in the probate court or held by corporate trustees, for instance, while securities in general are escaping taxation almost altogether, is not calculated to appeal to the sense of justice.

The principal objective of all this litigation was to secure an amelioration of the tax burden of real property by transferring a large portion thereof to the pocketbooks of the owners of personal property, tangible and intangible. Leaders of the tax strikers in their utterances expressed the hope of reducing taxes on real estate from one-half to two-thirds. Whereas personal property assessments made up about eighteen per cent of the total assessments for 1927, a truly uniform assessment of all property, it was said, would increase that percentage to about sixty per cent. This was indeed a stake worth playing for, but as might have been expected it was a stake which the tax strikers failed to win. Their goal would have been beyond their reach even if the decision of the county court in the *Cesar* case had been sustained by the Supreme Court of Illinois or the Supreme Court of the United States. Such a decision would have compelled a general reassessment of all property in Cook County, though it is well to note that the courts in Illinois could not themselves have ordered it.[34] It would have greatly aggravated the already chaotic condition of the public finances and its consequences upon the existence and functioning of local government in the area affected would have been difficult to foresee. If such judicial intervention could possibly have led to a solution of the tax problem which would have been in general fair and equitable, the agony and travail which might have been its immediate result would have been worthwhile. But to attribute to a court order holding an assessment roll invalid the power to cure or even measurably ameliorate the fiscal ills of Cook County and the state of Illinois is to credit the judicial process with supernatural powers.

At least two fatal weaknesses in the position and tactics of the striking taxpayers were apparent to the dispassionate observer from the very outset of the movement. The first was ethical in character and served to impeach the moral integrity of the strike. It consisted in the rather general

[34] In Wisconsin the courts are given power by statute to order a reassessment directly. Wisconsin Stat. of 1931, § 75.54. The power has been exercised in a number of instances but, as pointed out in 46 Harv. L. Rev. 1000, 1004, the results have not been altogether happy. Illinois courts possess no such statutory power. Hence, if our courts took it upon themselves to declare an entire assessment roll void, it would be necessary for the State Tax Commission to order a reassessment as a condition precedent to further property tax extensions. In a few cases courts have taken such extreme action. Harjim, Inc. v. Owens, 52 F. (2d) 530 (D. Fla. 1931); Roberts v. American Nat. Bank of Pensacola, 94 Fla. 427, 115 So. 261 (1927); Auditor Gen. v. Hughitt, 132 Mich. 311, 93 N.W. 621 (1903); Peninsular Power Co. v. Wisconsin Tax Comm., 195 Wis. 231, 218 N.W. 371 (1928).

refusal or failure of the strikers to pay any part of the taxes assessed on their properties, even such portion as according to their own showing would still be due if a uniform assessment were to be made.[35] On this ground alone the courts might, upon established principles, have refused equitable relief.[36] *He who seeks equity must do equity.*

The second error was a failure to analyze and diagnose correctly their problem. Whether this failure was due to ignorance or duplicity upon the part of the leaders of the strike we are unable to say, but the fact remains that the propaganda of the strike attributed the ills of real estate owners to the inefficiency, neglect, and corruption of administrative officials charged with the duty of preparing the assessment roll. It would be foolish to deny that the charges of breach of official duty were true. Even in the assessment of real property, where a reasonable approach to uniformity is possible,[37] given the two essentials of an orderly and scientific meth-

[35] On page 2 of his printed opinion and judgment in the Cesar case, Judge Jarecki made the following statement:

"I do not, however, agree with the attitude taken by some of these organizations in recommending the non-payment of taxes.

"It must be realized [quoting Republic Inc. Co. v. Pollak, 75 Ill. 292–296] 'that governments are created to protect men in their natural rights, and with incidental protection to their civil or political rights. No means has been devised, by which government can be maintained without the use of revenue, and that revenue must be directly or indirectly drawn from the governed.'

"Without revenue governments cannot function, and when a government ceases to function all protection ceases, schools close, etc.

"In cases where taxpayers feel themselves aggrieved by exorbitant taxes they should tender that portion of their taxes which they themselves feel or believe are due and afterwards file objections to the disputed balance in order that the government may continue to function for their own protection and that of the community."

It cannot be truthfully asserted, unfortunately, that this judicial admonishment was markedly effective in stimulating tax payments.

[36] State Railroad Tax Cases, 92 U.S. 575, 23 L.Ed. 663 (1875); Raymond v. Chicago Traction Co., 207 U.S. 20, 38, 52 L.Ed. 78, 28 Sup. Ct. 7 (1907); Taylor v. Louisville & Nashville R. Co., 88 Fed. 350 (C.C.A. 6th 1898); Keokuk & Hamilton Co. v. Salm, 258 U.S. 122, 125, 66 L.Ed. 496, 42 Sup. Ct. 207 (1922); Ottawa Glass Co. v. McCaleb, 81 Ill. 556 (1876); Johnson v. Roberts, 102 Ill. 655 (1882). It should also be noted that in the much discussed case of Aldrich v. Harding, 340 Ill. 354, 172 N.E. 772 (1930), the case most strongly relied upon by counsel for the objector in the Cesar case but distinguished therein (see 182 N.E. 448, 454), the record reveals the important fact not stated in the opinion in the case that the complainant had paid that part of the taxes upon his property which was justly due, according to the allegations of his bill and offered to pay whatever additional amount the court might find to be due.

[37] One of the hopeful and constructive results flowing from the recent litigation is the apparent approval which the Supreme Court has given to the principle and general procedure of the modern system of real property assessment introduced in the 1928 reassessment in Cook County, based upon Rules 14 and 15 promulgated by the State Tax Commission. See the opinion in the Cesar case, 182 N.E. 448, 450, for a description of the methods used in the

od and a competent and non-political personnel, the 1927 quadrennial assessment had manifested a well nigh complete collapse of intelligence and integrity in assessment in the Chicago area.[38] Subsequent developments have shown the possibility of increasing within moderate limits the gross amount and the relative proportion of personalty on the assessment roll.[39] But to regard administrative dereliction of duty as the prime or even a substantial responsible cause of lack of uniformity in assessment of personal property is to close one's eyes willfully to the lessons of experience wherever the general property tax has been tried.

The conditions existing in Cook County in 1928 were of no recent development. From the beginning of its history the general property tax has been the nucleus of the Illinois fiscal system. It was adopted at a time when land formed the huge proportion of the wealth of the state, and

assessment of Mrs. Cesar's property. The best hope for uniformity in valuation of real property is found in the perfection by experience and the skillful application of this general type of technique. It must, of course, be applied with judgment and due allowance must be made for special conditions and peculiarities in individual cases to produce the most satisfactory results. But it is certainly a great improvement over the old hit-and-miss methods which were largely responsible for the enormous inequalities contained in the 1927 quadrennial assessment. Compare the hostile attitude toward a similar procedure of the Supreme Court of Pennsylvania in Harleigh Realty Company's Case, 299 Pa. 385, 149 Atl. 653 (1930), and Lehigh & Wilkesbarre Coal Company's Assessment, 298 Pa. 294, 300, 148 Atl. 301 (1929).

[38] Professor Simpson's informative study, Tax Racket and Tax Reform in Chicago (1930) contains a striking picture of the low levels to which real estate assessment had fallen prior to the 1928 reassessment. His data indicate that the 1928 assessment, while far from perfect, was nevertheless a striking improvement and reduced by approximately half the deviation from uniformity. See chart on p. 160.

[39] The following data were made available to the writer through the kindness of Mr. O. L. Altman of the County Assessor's office. Column I represents total assessment for Cook County for the respective years; Column II the total personal property assessment; Column III the ratio between I and II in terms of percentage of total represented by personalty.

	I	II	III
1927	4,377,078,055	790,228,597	18.1%
1928	4,043,929,819	689,867,120	17.1
1929	4,128,152,797	675,692,335	16.4
1930	4,516,485,826	769,842,262	17.0
1931	3,756,778,446	922,272,890	24.5
1932	3,057,380,991	930,714,468	30.4

The figures given for 1932 are before revision by the board of appeals and subject to considerable modification. Column I includes real estate, capital stock, personal property, and railroad assessments for Cook County as made by local assessment officers and the State Tax Commission. Column II represents total assessments for Cook County on personal property, including capital stock assessment as made by the local assessor, but excluding railroads. The average for railroads for many years has been between four and five per cent of the total. It will be noted that, while there has been a substantial increase in personal property assessment totals since the low water mark in 1929, the major portion of the relief to property owners has come through the striking reductions in real property valuations.

when tangible personalty consisted largely of livestock, vehicles, and similar chattels not easy to conceal. Intangibles were relatively unimportant, for the vast structure of corporate securities and public and private obligations characteristic of modern capitalism was still in the future. The basic assumption underlying the general property tax, viz., that ownership of property is a fair index of taxpaying capacity, was under such simple conditions within speaking distance of reality. Moreover, the idea of uniformity and the phrase itself had a curious appeal to a simple pioneer democracy. But such idyllic conditions were of short duration, if indeed they ever existed. The researches of a nationally known scholar in the field of public finance have proved beyond question that the general property tax in Illinois tended as time went on to become, in actual operation as it has everywhere else, a tax upon real estate.[40] The practice of not listing intangibles soon became so universal as to take on the force of a custom, despite vigorous attempts by legislatures and administrative officials to force such property onto the rolls.

While the assessing machinery of Cook County was for many years subjected to political control and prostituted to political ends to a degree perhaps unprecedented in the United States and this fact gave rise to certain peculiarly anti-social abuses,[41] there can be little doubt that the lack of vigor shown in the assessment of personal property, particularly intangibles, met with the tacit approval of the dominant public opinion. Whereas in other states, a tolerable solution has been found in the form of laws providing for orderly classification of property for tax purposes or, in some, a substitution of income tax or other forms of taxation for the personal property tax, Illinois has continued, partly because of inertia and partly due to inability to agree upon a constitutional amendment acceptable to all portions of the state, to adhere to an obsolete and impossible theory. Loose and unsystematic classification by extra-legal processes has been the inevitable result.[42]

Upon few questions of public finance will expert opinion be found in such a unanimity of agreement as upon the proposition that the taxation of all forms of property upon a uniform basis is impossible of achievement.[43] Such a uniformity, if realized, would prove a sterile and arbitrary

[40] Haig, History of the General Property Tax in Illinois (1914). See also Constitutional Convention Bulletins, Illinois (1920).

[41] Simpson, *supra* note 38.

[42] Seligman, Essays in Taxation (1928); Jensen, Property Taxation in the United States (1931); Leland, The Classified Property Tax in the United States (1928).

[43] *Supra* note 42, and references cited. Professor Leland's book, pp. 14–39, contains an enlightening summary of the reasons for the breakdown of the general property tax.

thing. Intolerable discrimination may result from an insistence upon treating alike things which are inherently different. Common sense and simple arithmetic will demonstrate that a rate of taxation which is at least tolerable in the case of real estate is, when applied to interest-bearing securities, ruinous and confiscatory. Capital will not tolerate such treatment. It will find its way into tax-exempt forms of investment or will quietly migrate to a jurisdiction where a sensible and realistic policy prevails. If it were possible really to enforce the uniform assessment of personal property in Illinois, it is no alarmist prediction that the consequences would be catastrophic for all, not the least for the owners of real property in the state.

It is profoundly significant in this connection that the Supreme Court of the United States refused even to review the decisions of the Illinois court in the *Bistor* and *Cesar* cases and that of the Circuit Court of Appeals in *American Mutual Liability Insurance Company v. McDonough.*[44] That court has generally recognized the necessity of allowing a wide latitude for the exercise of legislative discretion in selecting the subjects of taxation.[45] It has wisely refused to identify the scope of the equal protection clause of the Fourteenth Amendment with that of the rigid type of uniformity clause found in a few state constitutions, such as that of Illinois,[46] and has sustained classification of property for tax purposes where the basis of classification was not manifestly arbitrary in character.[47] It follows that, so far as the federal Constitution is concerned, the Illinois legislature would be free to classify personal property and provide for its taxation at rates varying within the different classes and different from the rate with respect to real estate. It follows also that it

[44] *Supra* note 22.

[45] Bell's Gap R. R. Co. v. Pennsylvania, 134 U.S. 232, 237, 33 L.Ed. 892, 10 Sup. Ct. 533 (1890); Heisler v. Thomas Colliery Co., 260 U.S. 245, 67 L.Ed. 237, 43 Sup. Ct. 83 (1922); State Board of Tax Com'rs. of Indiana et al. v. Jackson, 283 U.S. 527, 75 L.Ed. 1248, 51 Sup. Ct. 540 (1931) graduated license tax on chain stores sustained; Ohio Oil Co. v. Conway, 281 U.S. 146, 159, 74 L.Ed. 775, 50 Sup. Ct. 310 (1930). See Powell, Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922–25, 12 Va. L. Rev. 441 (1926).

[46] In First National Bank of Urbana v. Holmes, 246 Ill. 362, 92 N.E. 983 (1910) at 895 the court said: "It is not within the power of the Legislature to provide that different classes of property shall be valued differently, and, if moneys, mortgages, bonds, or securities are valued at a different proportion of their full value or on a different basis than other property, the Constitution and law are both violated." This has been the consistent position of the Illinois Supreme Court with regard to the effect of Article IX. It would be difficult to reach a different result under the strict provisions of Section 1. Of course the same result would follow if classification were attempted by applying a different rate as between classes to a uniform valuation.

[47] *Supra* note 45.

might exempt forms of personal property, such as intangibles, from taxation altogether.[48]

It is submitted that classification by administrative action or omission likewise does not of itself violate any substantive right protected by the Fourteenth Amendment. The mere fact that such administrative action or omission is a violation of the state law is not material.[49] Such violation will and ought to be left to the remedial processes of state law. It is beyond the proper function of the federal Supreme Court to undertake the correction of such dereliction of official duty by state officers where no federal right is involved. On the other hand, that Court has not hesitated to interfere to protect members of a class from intentional and arbitrary discrimination as compared with others within the class, nor to recognize the inadequacy of the remedies available under local law for the correction of such discrimination.[50]

The one inescapable fact emerging from the recent welter of tax litigation in Illinois is that the courts were besought to attempt the enforcement of the constitutional requirement of uniformity in the taxation of all property and that they refused to do so. According to all the tests of human experience this antiquated constitutional provision commands the impossible. While a court may assert that it is "the duty to follow the law, however serious and far-reaching the consequences [of its decision] may be upon the processes of taxation and the continuance of public functions and services,"[51] one may well question the soundness of the position taken if it is clear that the ensuing demoralization of public finance and services will be in vain and that the net result will be to leave the ideal of uniformity as far from realization as ever.

Are the courts of necessity constrained to pursue this will of the wisp?

[48] Bell's Gap R. R. Co. v. Pennsylvania, *supra* note 45. For a recent study of the progress of classification in the United States, see Leland, The Classified Property Tax in the United States (1928).

[49] It is difficult to find case authorities squarely in point. Pointing strongly in this direction, see Missouri v. Dockery, 191 U.S. 165, 24 Sup. Ct. 53 (1903); Coulter v. Louisville & Nashville R. R. Co., 196 U.S. 599, 25 Sup. Ct. 342 (1905), where Mr. Justice Holmes, speaking for the court, found nothing objectionable under the federal Constitution in a discrimination which was forbidden by the constitution of the state; Swiss Oil Co. v. Shanks, 273 U.S. 407, 413, 71 L.Ed. 709, 47 Sup. Ct. 393 (1927); Klein v. Board of Supervisors, 282 U.S. 19, 24, 75 L.Ed. 140, 51 Sup. Ct. 15 (1930); Cf. Barney v. City of New York, 193 U.S. 430, 48 L.Ed. 737, 24 Sup. Ct. 502 (1904); Raymond v. Chicago Traction Co., 207 U.S. 20, 38, 52 L.Ed. 78, 28 Sup. Ct. 7 (1907).

[50] Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 67 L.Ed. 340, 43 Sup. Ct. 190 (1923), and cases therein cited.

[51] Opinion and judgment of Judge Jarecki of the County Court of Cook County in the *Cesar* case, bottom page 3.

Would it not be better frankly to recognize that this is one of the class of constitutional guarantees which it is beyond the power of the courts to enforce?

There are ample analogies to support such a position.[52] It is a mistake to assume that because a particular policy is commanded by the constitution ipso facto it is a part of the judicial function to enforce it. This may be true even if private rights are involved.[53] There is no rule of thumb or a priori principle by which to determine whether or not a particular constitutional guarantee is of this type. The question must be determined largely by practical considerations, among which are such desiderata as the consequences of judicial intervention and its probable practical efficacy.[54] It is not fatal to the above suggestion that courts have undertaken to enforce uniformity clauses to the extent of holding unconstitutional acts of the legislature attempting to legalize classification.[55] It does not follow by remorseless logic from the fact that a given constitutional mandate is

[52] Luther v. Borden, 7 How. (U.S.) 1, 12 L.Ed. 581 (1849), holding enforcement of the constitutional guarantee of a republican form of government not a judicial function; Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 119, 32 Sup. Ct. 224 (1911), to same effect; Fergus v. Marks, 321 Ill. 511, 152 N.E. 557 (1926), refusing mandamus to compel members of legislature to perform their constitutional duty of reapportioning the state (Article IV, Section 6) flagrantly disregarded for more than three decades; Fergus v. Kinney, 333 Ill. 437, 164 N.E. 665 (1929), certiorari denied 49 Sup. Ct. 349 (1928), refusing injunction against state treasurer to restrain payment of expenses of 56th General Assembly and salaries of its members, theory of bill being that they were holding office in violation of the constitution; People ex rel. Fergus v. Blackwell, 342 Ill. 223, 173 N.E. 750 (1930), refusing to entertain *quo warranto* proceedings against the members of the 56th General Assembly to test their title to their offices. Cf. Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 67 L.Ed. 1078, 43 Sup. Ct. 597 (1923), where the Supreme Court refused to entertain jurisdiction of two suits, one brought by the State of Massachusetts, the other by a citizen thereof, to enjoin the expenditure of funds appropriated under the Shepherd-Towner Maternity Act, it being contended that the purpose for which the funds were to be expended was not national but fell within the domain of state power. It would be difficult to contend that the constitutional infraction arising from failure to enforce an obsolete and impossible uniformity requirement is as serious in its consequences as the stubborn and defiant disregard of the reapportionment mandate. Taxation without adequate representation is one of the possible results of the latter.

[53] Such was the fact in several of the cases cited in note 52 *supra*.

[54] See particularly People ex rel. Fergus v. Blackwell, *supra* note 52, at pp. 225–226 where Mr. Justice Orr, speaking for the court, points out the disastrous consequences which might flow from granting the relief prayed for. By denying such relief, the court did not, of course, thereby approve the unconstitutional conduct of the members of the legislature. On the other hand it vigorously condemned it in several of the above cases. One cannot escape the fact that there are cases where the *cure* of judicial intervention may be worse than the *disease* against which relief is sought.

[55] Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395 (1897); First Nat. Bank of Urbana v. Holmes, *supra* note 46, semble. But see on the question of the meaning of uniformity Reed v. Bjornson et al., 253 N.W. 102 (Minn. 1934).

judicially enforceable for one purpose or in one aspect it must likewise be so in all.[56]

It is believed that a frank adoption of such a position by the courts would have a healthy and clarifying effect upon the whole tax situation. The problem of proper distribution of the tax burden is essentially a political and legislative one. Until the Illinois constitution is amended so as to give the legislature a larger measure of discretion or even complete freedom in this respect, the present confused conditions will continue to exist, and the courts are helpless to do anything effective about it. But the manner in which some of these tax cases have been decided is not likely to increase the public confidence in the administration of justice in this state.

The public could be made to understand the reasons and justification for a hands-off attitude on the part of the courts such as is advocated above. It is useless to expect laymen to understand a decision which compels every owner of property to resort to the courts for a writ of mandamus where a venal or an overworked board of review refuses him the hearing to which he is legally and constitutionally entitled. The costs of such a proceeding make the remedy unavailable to the great majority of taxpayers. Moreover, in some years as many as one hundred thousand complaints have been filed, and only a small fraction of the complainants have been granted actual hearings by the board of review.

What would the consequence be if all these property owners filed petitions for mandamus? What would the board be able to do about it if in the majority of cases writs were granted? Under the quadrennial system of assessment, with annual revisions, the assessing officials have only a few months in which to complete their job if the extension of taxes and the collection of the revenues upon which existence of government depends are not to be indefinitely delayed. When the complaining taxpayers try another tack and attempt by mandamus to compel the officials to perform their duty of making a uniform assessment, they quickly find that it is necessary for them virtually to make a complete assessment themselves before the court will grant the writ.[57] Can they be blamed for regarding

[56] People ex rel. Mooney v. Hutchinson, 172 Ill. 486, 50 N.E. 599 (1898) where the Supreme Court held unconstitutional a legislative act reapportioning senatorial districts as in violation of Article IV, Section 6 of the state constitution and awarded a writ of mandamus to the relator, directed to the county clerk of Will County, compelling him to receive and file relator's certificate of nomination for the office of state senator under the provisions of the act of 1893.

[57] Cf. Sioux Bridge Co. v. Dakota County, 260 U.S. 441, 67 L.Ed. 340, 43 Sup. Ct. 190, 192 (1923) where Mr. Chief Justice Taft points out the complete inadequacy of relief by mandamus where the basis of the taxpayer's complaint is widespread and systematic undervaluation of property.

such decisions as mockeries upon justice? However sound or necessary the policy upon which the decisions are based may be, its existence is effectively concealed under the (to the layman) mystifying legal jargon of the opinions.

Even if taxpayers who have been refused a hearing by the board of review, either singly or joining in a group as they have been allowed to do,[58] secure a writ of mandamus compelling the board of review to grant them a hearing, what have they accomplished? The writ does not purport to tell the board how it shall exercise its judgment.[58a] Suppose the board grants a hearing pursuant to the writ and after hearing sustains the complainant's assessment, as it would normally do where the gravamen of the complaint is not excessive valuation of his real property as compared with other real property, but the failure of the assessors or the board to assess personal property uniformly with real estate. Under the doctrine of the *Bistor* case and the *Cesar* case the validity of the real estate assessment as such is not affected. Could the taxpayer now secure equitable relief on the ground of fraud? The most that can be said is that the outlook is not promising. The difficulties in proving fraud in tax cases are in any case very great.[59] But in this particular situation it would appear that

[58] People ex rel. Ahlschlager et al. v. Board of Review of Cook County, 352 Ill. 157, 185 N.E. 248 (1933).

[58a] People ex rel. Webb v. Jones et al., 256 Ill. 364, 100 N.E. 224 (1912).

[59] Occasionally a taxpayer is able to assemble evidence strong enough to support a charge of fraud where he is put to the proof. Sometimes the overvaluation may be so excessive as to warrant, if not necessitate, an inference of fraud. For cases in which the complainant succeeded, see People's Gaslight & Coke Co. v. Stuckart, 286 Ill. 164, 121 N.E. 629 (1919); People ex rel. Carr v. Stewart, 315 Ill. 25, 145 N.E. 600 (1924). An important fact here was the arbitrary refusal of the board of assessors to consider data relating to sales of property in the vicinity of the objector's property on the question of valuation. But the court is careful to point out emphatically in both cases that the area within which estimates of value may vary and yet result from honest exercise of judgment is wide.

Many of the cases in which taxpayers have succeeded on a charge of fraud have been decided upon demurrer, where the tax officials have appealed from judgment against them on demurrer instead of putting the taxpayer to the proof of his charge. For a case of this sort see Aldrich v. Harding, 340 Ill. 354, 172 N.E. 772 (1930). In People v. Keokuk & Hamilton Bridge Co., 287 Ill. 246, 122 N.E. 467 (1919) the Supreme Court reversed a judgment and order of sale of the county court on the ground that the court erred in striking from the files objections which charged arbitrary and fraudulent overassessment of objector's property. The case was remanded for hearing on the merits, and the taxpayer was unable to make a sufficient showing of fraud. People ex rel. McCallister v. Keokuk & Hamilton Bridge Co. 295 Ill. 176, 129 N.E. 87 (1920).

In other cases where a taxpayer has succeeded in proving constructive fraud, it has been by reason of the admitted use of some short-cut method or formula of assessment which the court has regarded as arbitrary and calculated to produce a substantial overassessment. For cases of this type see Weyerhaeuser Timber Co. v. Pierce County, 97 Wash. 534, 167 Pac. 35 (1917); but cf. Sunday Lake & Iron Co. v. Wakefield, 186 Mich. 626, 153 N.W. 14 (1915), affd. 247

the taxpayer is confronted with the same virtually insuperable obstacles that baffled the relator in the *Koester* mandamus case. He would have the burden of proving clearly and definitely that personal property is being intentionally and systematically omitted from the assessment roll or underassessed by the assessing officials.[60] Should a plaintiff ever succeed in satisfying this impossible burden, then the courts might find it difficult to refuse him relief by quashing or reducing his assessment without frankly admitting the judicial unenforceability of the constitutional mandate of uniformity.

As a matter of fact, a numerous and powerful group such as the owners of real estate does not require court aid to protect its interests. Their situation is fundamentally different from that of the plaintiff in *Aldrich v. Harding*,[61] the gravamen of whose complaint was fraudulent discrimination as between owners of real estate. The owners of real estate have at last come to appreciate the realities of the situation and to see along what lines salvation for themselves must be sought. The state property tax has been abolished because of the enactment of a sales tax. The pressure for a deflation of municipal budgets and for a reduction of assessed valuations to conform more closely to real values has been inexorable and to a considerable degree successful. The movement looking to the imposition of a limitation on real property tax rates by legislative action or, if necessary, by constitutional amendment is taking on formidable proportions.[62] It is

U.S. 350, 38 Sup. Ct. 405 (1918); Union Tank Line Co. v. Wright, 249 U.S. 275, 63 L.Ed. 602, 39 Sup. Ct. 276 (1919).

For a recent case in which the objector failed to prove legal fraud and which illustrates very strikingly the difficulties of doing so, see People ex rel. McDonough v. Goldberg, 188 N.E. 428 (Ill. 1933).

[60] Bistor v. McDonough, 348 Ill. 624, 181 N.E. 417, 421 (1932). See particularly the last paragraph of Mr. Justice De Young's opinion, and the cases there cited.

[61] *Supra* note 59. The opinion of the Supreme Court in this case caused uncertainty and confusion because of its approving quotation of the language of Mr. Justice Taft in Taylor v. Louisville & Nashville R. Co., 88 Fed. 350, 374 (1898), to the effect that an assessment roll is to be considered as one judgment, that fraud therein vitiates the roll, and anyone injuriously affected thereby has a right to complain. The exact meaning of this language has never been stated by the court, since the court went on to say (at p. 362) that "the only thing litigated is the validity of the assessment on appellee's property, and a decision of that question cannot operate as res adjudicata as to any other taxpayer or any other property." In other words, such fraud does not ipso facto render the assessment roll null and void. What then does it do? A possible view would be that proof of such fraud would destroy or weaken the strong presumption in favor of the validity of administrative action, which ordinarily it is so difficult for the taxpayer to overcome. Of course the administrative authorities charged with collection of taxes would find their task immensely complicated if deprived of the benefit of such presumption.

[62] It is not intended to imply an opinion that any or all of these movements and measures

to be hoped such property owners as a class will vigorously support such an amendment of the constitution as will enable Illinois to enjoy a truly up-to-date revenue system, for only in this does a permanent and satisfactory solution lie. A revenue system suitable to the days of the covered wagon cannot function much longer in an age of high-speed transportation and communication. There is cause for regret that the vast energy and large sums of money poured into the sinkhole of futile litigation could not have been mobilized behind some constructive program which had a reasonable prospect of success.

If the difficulties in the way of making an adequate assessment of personal property were not already well nigh insuperable, a very recent decision of the Illinois Supreme Court has done much to make them so. In the case of *People v. Pullman Car & Mfg. Corporation*[63] the court held that an assessment entered by the assessor in the column on the schedule entitled "all other personal property required to be listed" is constructively fraudulent against the taxpayer and is a nullity to the extent that it includes items such as machinery, credits, bank stock, or money in bank which were required by the statute to be listed in separate columns.[64] An action of debt was brought against the corporation to recover the unpaid balance of a tax levied upon $5,200,000 of personal property. The corporation returned an unsworn schedule bearing only its signature and the figures 5,000,000, preceded by the dollar mark. These figures were not placed opposite any of the forty classified items on the schedule but were written at the bottom of column 2, entitled "Full Fair Cash Value." The board of assessors did not require the corporation to make a statement of its taxable property in accordance with the provisions of the statutes,[65] but made an assessment of $5,200,000 in the column entitled "All Other Personal Property Required to be Listed." The equalizing factor of thirty-seven per cent applied to assessed valuations of real estate in Cook County was ignored by the assessors and the board of review, and this apparently was the principal basis for the corporation's refusal to pay the entire tax demanded, since it did pay $125,000 which was approximately the tax due on an assessment of five million dollars equalized to thirty-seven per cent. The objection of the assessor's failure to itemize the as-

are sound from the point of view of the general public interest. We merely wish to point out that this organized group has turned from the courts to the normal political procedures and processes of democratic government to secure protection for and consideration of its common interests.

[63] 189 N.E. 278 (Ill. 1934).

[64] Cahill's Rev. St. 1933, c. 120, par. 107, Smith-Hurd Rev. Stat. 1933, c. 120, § 339.

[65] Cahill's Rev. Stat. 1933, c. 120, par. 337; Smith-Hurd Rev. Stat. 1933, c. 120, § 295.

sessment was raised apparently for the first time as a defense to the action to recover the balance of the tax. Since more than ninety-nine per cent of the corporation's personal property was found capable of classification under the thirty-nine specific items listed on the schedule and to this extent the assessment was held to be void, it seems that the Pullman Corporation voluntarily paid many times more than the amount of tax that was legally due.

The significance of this decision may not be immediately apparent to any one not conversant with the administrative difficulties of making a personal property assessment. The court states that it is the duty of the assessor to make the assessment; that the taxpayer is only required to give a full and accurate inventory of his property. The latter need not fix the value of such property. The difficulty with all this is that the assessor has no way under the law to compel the taxpayer to supply the necessary information. He is given no power to enter a home or factory to view and appraise property or to gain access to private books and records.[66] It would seem that this decision not only compels the assessor to estimate the total value of all the personalty of a given taxpayer, in itself a task of no small proportions, but to guess at a proper distribution of this total value among the various items on the schedule.[67] In the court's view substantial justice to the taxpayer requires that this distribution be made. Failure to do so is not a mere irregularity, even though as in the principal case the total assessment is by the corporation's own admission not excessive, save for the failure to equalize.[68] Ironically enough, if the assessor does make such a distributed estimate and puts down figures for each

[66] The Cook County assessor requested the legislature several years ago to amend the statutes in such a way as to vest in him more adequate powers to obtain information needed in assessing personal property, such as bank deposit records, inventories of goods in storage warehouses, etc. No action was taken, however.

[67] The validity of personal property assessments apparently depends, far more than formerly, if this decision stands, upon the powers of good guessing possessed by the assessor.

The State Tax Commission may mitigate the problem of the assessor somewhat by further simplification of the personal property return, having already reduced the number of specific classes from thirty-nine to fifteen. Suppose the Commission should see fit, because of this decision, to change the form so as to include all personal property in one class. In People v. Calumet Steel Co., 351 Ill. 451, 185 N.E. 586 (1933), the court held that the board of review was without power under the statutes to make a "lump sum" assessment, but it did not suggest that the legislature was without power to authorize it. See Town of Albertville v. Hooper, 196 Ala. 642, 72 So. 258 (1916) indicating that, without some listing or description of property, there would be no assessment at all. There are probably limits here which cannot be transgressed without encountering the objection of due process. Query, however, whether the due process objection would lie if the taxpayer has been given an opportunity to furnish an accurate inventory of his property and has failed to do so. Cf. Central of Georgia Ry. Co. v. Wright, 207 U.S. 127, 52 L.Ed. 134, 28 Sup. Ct. 47 (1907).

[68] 189 N.E. 278, 280.

class which are in fact higher than true value but not to such a degree as to be constructively fraudulent, the taxpayer is without relief under the Illinois decisions.[69] But if instead the assessor puts down the total of his estimates in a single figure in one column the taxpayer can secure a judgment that the entire assessment is void.

Could there be better evidence that the Supreme Court has confused form with substance and has construed as mandatory a statute which without danger to any substantial interest could safely have been interpreted as directory? The taxpayer knows better than anyone else what property he owns. He can, if he wishes, obey the theoretical requirement of the statute and give the assessor an inventory of his property. If he does not do so, why should he complain if the assessor's undistributed estimate is substantially fair to him? A comparison of this decision with the *Cesar* and *Bistor* cases reveals a paradox in that an overburdened owner of real estate can secure no effective relief where an assessor fails for any reason to assess personal property as the law requires; yet a person whose personalty is not overassessed as regards amount but is not properly entered upon the roll, can escape payment of the tax altogether. Is not this a case of straining at a legal gnat and swallowing a camel?

There remains one other important chapter in the Cook County tax litigation to be considered, viz., that which began with the so-called "fifteen per cent" order issued by the board of appeals of that county on March 22, 1933, which order was subsequently sustained after a hearing before the State Tax Commission by a two to one vote of the members of that body. The order was issued upon the basis of a verified complaint filled by one Thomas Harvatt, as owner of a small bungalow, alleging that the assessment thereon was excessive, and that there was a general lack of uniformity in the assessment for the year 1931 on income-producing and commercial property on the one hand and residence and small apartment buildings on the other, in that the base price used by the assessor in making the assessment on the latter classes was relatively too high. It was further alleged that for this reason a revision of the entire assessment of all real estate in Cook County was necessary. Without a hearing on the complaint and without notice to the assessor[70] an order was entered by the

[69] *Supra* note 59 and cases therein cited. One may well conclude, if the legislature does nothing to strengthen the powers of the assessor in the assessment of personal property and makes no effort to nullify the holding in the Pullman case, *supra* note 63, by amendment of the statute, that the legislature is quite in accord with the tacit public approval in past years of lax enforcement of the personal property tax.

[70] The procedure of the board of appeals was, to say the least, rather precipitate and was beyond question in violation of the explicit provision of the statute which provides: "No hearing upon any complaint shall be held until the person or corporation affected and the assessor who certified the assessment have each been notified and given an opportunity to be heard

board directing the assessor to revise the assessment on all cottages, bungalows, residences, homes, and two-flat and three-flat buildings by reducing the base price on which all such assessments were made by fifteen per cent. Since the order did not purport to affect land valuations, it was estimated that it would result in a net saving of between seven and eight per cent on tax bills to the owners of the enumerated classes of property.

Shortly thereafter, one Thomas, a resident and taxpayer of Cook County, filed in the Supreme Court as relator a petition for a writ of mandamus commanding the members of the board of appeals to convene and vacate and expunge the order. By virtue of a stipulation the issue to be determined was limited solely to the power and jurisdiction of the board to enter the order. In *People ex rel. Thomas v. Nixon* et al.,[71] the Supreme Court, with Justices De Young and Stone dissenting, sustained the attack upon the order and awarded the writ prayed for. It was admitted by the parties and the court that the old board of review possessed the lawful power to issue such an order. The court divided as to the effect of the amendments to the revenue act, popularly known as the Kelly Bill,[72] which revamped the tax-assessing machinery of Cook County, substituting a single assessor for the old board of assessors of five, and a board of appeals consisting of two members for the old board of review of three. The new officials were made appointive till the 1934 election; thereafter elective. The majority of the court concluded that the amendments withheld from the board of appeals certain powers theretofore possessed by the board of review, and that the functions and powers of the new board were limited to those of a reviewing body, empowered only to revise the assessment on particular property described in a complaint filed by some taxpayer. Any general revision of assessment of whole classes of property such as was attempted by the order of the board was thereby excluded.

Mr. Justice De Young in an able dissenting opinion[73] disagreed with the interpretation of the amended statutes upon which the above decision was based and argued that such an interpretation vested a dangerous power in a single assessing official. He asserted that "judicial decision should permit only the clearest statutory language to withhold from a reviewing body the power of revision. Experience has demonstrated that this power is vitally necessary even to approximate equality and uniformity in taxation."[74]

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thereon." Cahill's Rev. Stat. 1933, c. 120, par. 346 (2). By virtue of the stipulation referred to in the text, however, this question did not come before the Supreme Court in the Nixon case.

[71] 187 N.E. 650 (1933).

[72] Laws of 1931–32, Special Sess. p. 65.

[73] 187 N.E. 650, 653.

[74] *Supra* note 73, at p. 656.

It is difficult to accept the argument for either of the two conflicting interpretations of the statute as conclusive. The amendments were poorly drafted and replete with unfortunate ambiguities. They were enacted only after a long and bitter struggle in the legislature and were the result of a compromise. There can be little doubt that the interpretation favored by the majority was in accord with the public understanding of the purposes of the Kelly bill. The movement for an overhauling of tax machinery in Cook County was the result of general dissatisfaction with a system which superimposed upon the assessing authority a board of review which was to all intents and purposes a second assessing body. This situation had led to constant bickering between the two assessing authorities, as well as to division and evasion of responsibility. It had lent itself so well to sinister political manipulation and the secret activities of professional tax fixers that public confidence in the whole machinery of assessment had been destroyed. It was a type of organization which had been abandoned generally throughout the country as unsatisfactory.[75]

In the light of the experience of Cook County and other jurisdictions, it is impossible to agree that the extract from the dissenting opinion quoted above[76] is supported by the facts. In any event, whatever doubt there may have been as to the proper interpretation of the legislative intent expressed in these amendments was removed by a further amendment[77] which makes it perfectly clear that the powers of the board of appeals are limited to the revision of assessments of particular properties.

Very recently the county court of Cook County has undertaken to do in effect what the Supreme Court held the board of appeals was without power to do. Following the above decision, an organized movement was initiated with the support of certain powerful newspapers and real estate organizations to secure relief in some other way from the asserted discrimination against owners of homes and small flats. Several hundred thousand taxpayers who had not yet paid the second installment of 1931 taxes, due in September, 1933, were permitted to file objections in the county court based upon this alleged discrimination, forms for the purpose being printed in or supplied by these newspapers. Property owners who had already paid their taxes in full were unable to take advantage of the

[75] Simpson, Tax Racket and Tax Reform in Chicago (1930), 204–215.

[76] *Supra* note 74.

[77] "The board of appeals shall hear complaints and revise assessments of any particular parcel of real estate or the assessment of personal property of any person or corporation mentioned or described in a complaint filed with the board and conforming to the requirements of sec. 35b of this Act and shall make revisions in no other cases." L. 1933, p. 868, filed July 13. Now found in Cahill's Rev. Stat. 1933, c. 120, par. 146(1).

proceeding and must look to special legislation to give them the benefit by way of rebate or credit on future taxes of the order entered a few days ago by the court.

After a hearing lasting many weeks in which a large mass of testimony was introduced in support of and attacking the assessment roll, including much expert opinion, Judge Jarecki held that the charges of discrimination had been sustained and granted relief by ordering a reduction of fifteen per cent in the base prices used in assessing the above classes of property. The order does not affect unimproved property nor does it apply to outhouses and like subsidiary structures. It is uncertain at the time of this writing whether or not the order will be given effect by the assessor for the remaining years of the quadrennial period. It is equally uncertain how many taxpayers will be able to qualify for reduction of assessment under the terms of the order and how large a net saving will be realized by them, in view of statutory penalties accumulating since last September. The two certainties are that newspaper propaganda greatly exaggerated the possible benefits of such a reduction to small property owners and that the delay incident to revision of the assessments on hundreds of thousands of parcels of property will tend further to demoralize the disorganized public finances and credit by hampering collection of taxes.

It would be improper without a careful study of the record and the evidence in the proceeding to express an opinion as to whether the court was warranted in finding discrimination between classes of such character as to amount to constructive fraud justifying judicial intervention under the precedents established by the decisions of the Illinois Supreme Court. So far as one may rely upon the summaries of testimony appearing in the columns of the press, it would appear that there was much difference of opinion between competent experts as to the fairness and accuracy of the basic rates used by the assessor in making the assessment. If, as this difference of opinion might tend to suggest, the assessor did not exceed the broad limits of reasonable discretion and judgment which he possesses under a constitution and statute which vests in administrative authority to the exclusion of the courts the function of assessment,[78] the order of the court would appear to be open to attack upon an appeal as exceeding the bounds of judicial jurisdiction.[79] It is submitted that the public interest

[78] It would be a work of supererogation to cite the numerous opinions of the Supreme Court of Illinois which iterate and reiterate this proposition. See for instance the cases cited in note 59, *supra*.

[79] There is a marked tendency observable for courts to disregard this settled doctrine as to their proper place in tax administration and enforcement. Particularly in the case of suits brought to collect unpaid personal property taxes does the procedure in court have the appearance of an administrative review of the assessment.

from the long view demands that such an appeal be taken, despite the further regrettable delays in tax collection which such appeal would involve. The order of the court, if unfounded in law, establishes a dangerous precedent and opens the door to political manipulation of assessment in the future.[80]

The great and important powers which the assessor possesses in Cook County, and which an assessor must possess under any system of assessment which seeks to avoid the intolerable evils resulting from conflict and overlapping of authority, are susceptible of abuse and of prostitution to political ends by an incompetent, corrupt, or politically minded official. The litigation of the past five years demonstrates the futility of reliance upon judicial remedies as a corrective of the evils inherent in a system based upon the general property tax. The established jurisdiction to correct fraudulent discrimination against individual taxpayers loses much of its practical value because of the great difficulties involved in proving fraud. The remedy of mandamus to compel a proper performance of his official duty by the assessor is, as we have seen, of very limited value. No assessor, however high minded and competent, can produce more than partially satisfactory results when chained to such an obsolete and impossible tax system as that of Illinois. Fundamental constitutional changes are a condition precedent to real reform. But under any fiscal system which involves the processes of valuation and the exercise of judgment in its administration, there can be no substitute for integrity, technical competence, and freedom from political entanglements and influence in the administrative authority.[81]

[80] The Chicago Daily Tribune for Wednesday, April 18, 1934, p. 11 reveals that Chicago bankers have manifested reluctance to purchase tax warrants of municipal corporations in Cook County, since the decision of Judge Jarecki was announced and since official decision not to appeal the order has become apparent. The fear is expressed that the court has arrogated to itself the function of revision of assessment and that a stable legal assessment roll upon which the security of tax warrants depends is made more difficult of realization. The fears expressed appear to have some justification.

[81] In the early part of 1933 the Legislature enacted a law which goes under the name of the Skarda Act. See Smith-Hurd Ill. Rev. Stat. 1933, c. 120, §§ 238a–238c. The purpose of this measure was to bring extraordinary pressure to bear upon large property owners to pay taxes in default. It did this by vesting in certain courts the power to appoint the county collector receiver of properties taxes upon which should be more than six months in default, with power to manage and administer the same and apply income therefrom to payment of taxes. Receivers were appointed in a number of cases by the county court, and the threat of such receiverships has undoubtedly been effective in some cases to induce payment of taxes where the capacity to pay is present. The constitutionality of this statute and the validity of the proceedings thereunder are now being questioned in the courts. In the background is the question of the power of the county court to appoint such a receiver without the authority of statute. The varied legal issues which this legislation presents fall beyond the purview of the present article.