JUDICIAL APPEAL FROM GENERAL PROPERTY ASSESSMENTS IN MISSOURI

That the administration of the tax system in Missouri is unsatisfactory is admitted even by those administering it. What is the proper means of correcting and revising it is a matter of disagreement; but in this problem a most important phase is the intervention of the courts in the administrative process of levying and collecting taxes to correct errors and to protect the taxpayers' interests.

The most important tax in Missouri, as it is elsewhere, is the general property tax. According to the State Tax Commissions' report for 1931 about three fourths of the total tax collected for state and county purposes was from levies based on general property assessments. Touching as it does a large number of citizens it is natural that more controversies arise in its assessment than in the case of any other tax.

Briefly, the tax assessment process in Missouri is as follows:[1] the assessor fixes the value of the property and enters the same on the assessment book, which work must be completed by January 20th. He turns the books over to the county clerk who submits an abstract to the State Auditor and makes a copy of the assessment books and computes the amount of taxes, this copy to be known as the tax book. On the first Monday in April (except in large cities) the county board of equalization meets, goes over the assessment book, revises, corrects and hears the taxpayers' complaints. The State Board of Equalization passes on the values set and notifies the county clerk of changes to be made, which are made by the county board of equilization; if it has adjourned, then by the clerk himself. The tax book, after the corrections are made and the above work completed by the county clerk, is turned over to the tax collector. This is usually done about the first of September. Taxes become due on the first

[1] As to assessment, see R. S. Mo. (1929) secs. 9749 to 9810. As to duties of clerks: R. S. Mo. (1929) secs. 9876 to 9882 (compilation of the tax-books); sec. 9817 (making changes as ordered by the State Board of Equalization); sec. 9759 (has no power to make changes of his own accord). As to the county board of equalization: R. S. Mo. (1929) secs. 9811 to 9918; state tax commission: R. S. Mo. (1929) sec. 9854; State Board of Equalization; R. S. Mo. (1929) secs. 9861 to 9865.

The procedure is somewhat different in large cities. R. S. Mo. (1929) secs. 10155 to 10164 provide for the county assessor acting as city assessor in cities of 200,000 to 500,000 population and prescribe different time limits. Secs. 10146 to 10155 apply to cities from 200,000 to 700,000, setting out the powers of tax officials. In the City of St. Louis the assessor performs the duties of the county clerk in extending taxes on books. R. S. Mo. (1929) secs. 9806-7.

of October. It will be noted that the taxes due and payable on October first are based on the assessment made on June first of the previous year. In other words, taxes are always one year behind the assessment. The intervening time is utilized for assessing and for accomplishing the book work, such as copying of the tax books, figuring and extending the taxes, and the process of equalization, noted above.

I. THE NATURE AND EXTENT OF DEFECTS AND ERRORS IN ASSESSMENT WHICH ARE SUBJECT TO JUDICIAL REVIEW

1. *Defects and Errors in Putting a Valuation on Property.*

This class of errors deals with the assessors' action in placing the money value on the property assessed. The statutory guide imposed is, "its true value in money at the time of the assessment."[2] True value has been defined as the price which a willing seller would take and an able and willing buyer would give. Thus, contrary to popular belief, true value is not the price the property would bring at a forced sale, "under the hammer," but the value is fixed as the price obtainable by a sale without restraint or compulsion.

The disputes which arise in connection with this phase of assessment are those arising from alleged excessive, unequal, and fraudulent or dishonest assessments. The discretionary acts of the assessor or other tax officials will not be controlled or reviewed by the courts. Tax officials are free to use their judgment untrammeled by judicial supervision. Judges will not substitute their judgment for the assessors'. In this respect the courts have treated the assessors' decisions as they would judgments of other courts. This attitude was expressed in an early Missouri case as follows:[3] "The valuation of property for the purpose of taxation is confided to the skill and judgment of the assessor who acts in a judicial or quasi-judicial capacity. There is no provision for an appeal from his decisions to the courts, nor have the courts any supervisory control over his proceedings. However grossly the assessor may err his estimate is conclusive as the verdict of a jury and the tax based on the assessment like a judicial sentence can be attacked only for fraud or want of jurisdiction."

An excessive valuation is not subject to correction by any judicial body unless it was fraudulently or dishonestly placed by the assessor. A mere showing of overvaluation which might have resulted from error or mistake of judgment is not evidence

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[2] R. S. Mo. (1929) sec. 9792. For a definition of true and actual value see, State v. Woodward (1922) 208 Ala. 31, 93 So. 826; Underwood Typewriter Co. v. City of Hartford (1923) 99 Conn. 329, 122 Atl. 91.

[3] Hamilton v. Rosenblatt (1880) 8 Mo. App. 237.

sufficient to establish fraud.[4] It is not always necessary that fraud actually be shown but it may be constructively proved by a showing of sufficient grossness of assessment. Sufficient grossness of assessment has not been satisfactorily defined by the courts but is said to be, in a no more explanatory term, great excessiveness. No exact limits have been set, but upon an appeal from a raise ordered by the State Board of Equalization the Supreme Court said that a 120 percent valuation does not make out a prima facie right of recovery in the taxpayer.[5] In another case a valuation amounting to 114 percent was held not to be a constructively fraudulent assessment.[6]

Closely related to excessive valuations are discriminatory or unequal assessments. Similarly, there must be a showing of fraud to attack successfully the value assessed. A systematic and intentional assessment of one class of property higher or lower than another is fraud which enters into the very concoction of the assessment determination and is fatal to the determination when raised in court by the proper proceedings. Thus, if banks are assessed at 100 percent of their value and all other property at 50 percent, relief would be given the banks when the facts of discrimination are proved or are admitted by the tax officials.[7] It is essential to the plaintiff's case that he show that the discrimination was intentional on the part of the assessor. It is not fraud if the error occurred accidentally, that is, by honest mistake. A fraudulent omission of property from the assessment rolls is subject to the same review as a fraudulent assessment. Apart from a fraudulent system of assessment, in a recent case,[8] where the discrimination was not habitual and against a large class of individuals, but one individual was illegally, wrongfully, and fraudulently discriminated against, the court heard the complaint and gave the taxpayer relief. The holding in this case should form the basis for many suits not heretofore susceptible of judicial action, for relief previously had been granted only in cases of a wrongful system of assessment.

Any dishonest or fraudulent use of the assessors' powers would fall in this class of appealable errors. Purposely placing a man in the wrong taxing district, assessing an individual twice

[4] St. Louis Electric Bridge Co. v. Koeln (1929) 319 Mo. 445, 3 S. W. (2d) 1021.

[5] Columbia Terminals Co. v. Koeln (1929) 319 Mo. 445, 3 S. W. (2d) 1021.

[6] First Trust Co. of St. Joseph v. Wells (1930) 324 Mo. 306, 28 S. W. (2d) 108.

[7] Boonville National Bank v. Schlotzhauer (1927) 317 Mo. 1298, 298 S. W. 732.

[8] Jefferson City Bridge and Transit Co. v. Blaser (1927) 318 Mo. 373, 300 S. W. 778.

in the same year, delaying assessment to the extent that the taxpayer loses his right of appeal by the delay, are illustrative of transgressions in addition to high valuations amounting to fraud. The same errors occurring by honest mistake would not admit of judicial correction.

2. *Lack of Jurisdiction in the Tax Officials*

The above heading is a cover-all for a large number of defects and is of little use when applied to specific instances. It is sometimes used as synonomous with lack of authority. In other cases it may mean lack of physical jurisdiction, or it may mean failure to observe the proper procedure in assessing. The assessment of exempt property is reviewable because the assessor had no authority and hence no jurisdiction.[9] Failure to give notice of a raise in valuation or to leave an original notice prevents the making of a valid raise or assessment, and is usually categorized as a lack of jurisdiction. A person not resident within the state on the first day of June would not be within the jurisdiction of the authorities for tax purposes. Property situated in another state would be without the jurisdiction of Missouri tax officials although the person may be within the jurisdiction.

No adequate generalization is possible, but following out the analogy drawn from the same problem as to judgments of judicial bodies, the courts have said that a lack of jurisdiction in the taxing authorities renders a tax finding void. What is a lack of jurisdiction can be determined only by reference to cases similar to the one in hand.

3. *Failure to Observe Statutory Provisions as to the Manner of Making the Assessment and Listing Property and Similar Irregularities*

Statutory provisions as to assessment fall into two groups, those for the instruction and guidance of the assessing or reviewing officials, directory in character; and those for the protection of the taxpayer which are mandatory on the officials. Errors occurring in administering the second group of statutory provisions may be raised by the taxpayer by means of judicial review. Obviously, since the first group was not enacted for his benefit, the taxpayer cannot be heard to complain of a failure to follow them. Clerical errors do not invalidate the assessment nor do irregularities due to failure to observe the method prescribed for making up the tax books.[10] Errors of the assessor in

[9] National Metal Edge Box Co. v. Readsboro (1920) 94 Vt. 405, 111 Atl. 386. See also Const. Mo. Art. 10, Sec. 6.

[10] In the following cases the error was held not to invalidate the assessment. Clerical errors, statutory errors, and informalities in assessment are included. Thomas v. Chapin (1893) 116 Mo. 396, 22 S. W. 785 (tax books

making the original list are not fatal. Such errors are: listing the assessment in a lump sum instead of listing each item separately; failure to make a list after the taxpayer did not return one although the assessor made the assessment without a list of his own knowledge. That informality of assessment does not invalidate is provided by statute.[11] This adds little to the taxpayers' protection for it has been taken to mean that failure to follow methods of assessment prescribed by statute are not fatal unless they are provisions for the protection of the taxpayer (group two above).

In the second group the most important statutory provisions are the requirements for notice of the original assessment and of changes by boards of appeal and review, and for a hearing of the taxpayers' complaints. Due process requires a notice and hearing at some stage during the process of assessment. It does not have to come before the assessment leaves the assessor's hand or at any particular stage, but it is sufficient if the citizen knows the amount of his assessment and is given an opportunity to be heard at some time before the tax is made final.[12] The Missouri statutes require that notice of the original assessment on personal property be made by calling at the place of residence or office of the citizen, and, if he is not there, by leaving a list and notice, or by making the assessment and leaving a duplicate with a person over fourteen years of age.[13] These provisions must be strictly complied with. Where the assessor made the assessment and left verbal notice the assessment was held invalid and the tax based upon it was uncollectible.[14] The notice

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in two volumes instead of one as prescribed by statute); State ex rel. Brookfield v. Hurt (1892) 113 Mo. 90, 20 S. W. 879 (owner described as unknown although on record in the recorder's office); State ex rel. Wyatt v. Vaile (1894) 122 Mo. 33, 26 S. W. 672 (abbreviations in tax books held sufficient); Skillman v. Clardy (1914) 256 Mo. 279, 165 S. W. 1050 (abbreviations in land description not error); State ex rel. Rehle v. Stamm (1901) 165 Mo. 73, 65 S. W. 242 (separation of owner's property in listing); State ex rel Teare v. Dungan (1915) 265 Mo. 353, 177 S. W. 604 (alterations by the county clerk); State ex rel. Wennecker v. Cummings (1899) 151 Mo. 49, 52 S. W. 29 (failure to list separately classes of property assessed); State ex rel. Hudson v. Carr (1903) 178 Mo. 229, 77 S. W. 543 (failure to make a list when taxpayer made no return on his property); State ex rel. Teare v. Dungan, above (assessment copied from the books of previous year); State ex rel. Donnell v. Bank (Mo. 1924) 263 S. W. 205 (bank president failed to list bank shares in names of the owners); but note State ex rel. Flentge v. Burroughs (1903) 174 Mo. 700, 74 S. W. 610 (failure to describe correctly real estate fatal to collection of tax on it).

[11] R. S. Mo. (1929) sec. 9771.

[12] R. S. Mo. (1929) secs. 9756, 9757, and 9796.

[13] Cooley, THE LAW OF TAXATION (4th ed. 1924) sec. 1123.

[14] Cape Girardeau v. Bushman (1898) 148 Mo. 198, 49 S. W. 985.

must be written but need not be otherwise formal. The assessor may make a list himself only where the taxpayer fails to do so, after notice was left.[15] The return or list of the taxpayer is not binding on the assessor as to the values listed, but its purpose has been said to be to serve merely as memoranda for the assessor's use.[16] The question immediately suggests itself, if the assessor makes a change in the list returned must he give notice of the change to the taxpayer. That notice must be given has been held,[17] the court reasoning that if the assessor accepted the list without objection the taxpayer is entitled to presume his valuation will remain the same unless notified. In a later case the Supreme Court held binding an assessment made after a list was returned by the taxpayer and without notice.[18] It was suggested that since the assessment books remained in the office of the county clerk for some time after leaving the assessor's care the taxpayer had ample opportunity to determine the amount of his assessment before the board of equalization met and that he was not denied an opportunity to be heard. This holding may be distinguished from the previous one on the facts of the respective cases. In the first case an increase was made without notice; in the second case the assessor placed a valuation on building and loan shares which the taxpayer had omitted, and as to which he had verbally instructed the assessor to fill in the correct value. When a dispute arose as to the authority of the assessor to place a value the court sustained the action of the assessor. The question of a raise without notice was not directly involved nor was the earlier case expressly overruled, although it was mentioned by the court. The notice of the meetings of the boards of equalization is given constructively by the statute which specifies the date, and no further notice is necessary. However, if an individual's valuation is raised or other changes made in his tax, notice must be given either personally or by publication.[19] So, also, must the State Tax Commission give notice of a contemplated raise on an individual or corporation and give them an opportunity to be heard before the change

[15] State ex rel. Ziegenheim v. Spencer (1893) 114 Mo. 574, 21 S. W. 837.

[16] State ex rel. Rehle v. Stamm (1901) 165 Mo. 73, 65 S. W. 242.

[17] State ex rel. Ziegenheim v. Spencer, n. 14 above. But compare State ex rel. Hudson v. Carr (1903) 178 Mo. 229, 77 S. W. 543, where it was said that the values by the taxpayer are not binding on the assessor. The court also held that the assessment lists, whether made by the taxpayer or by the assessor, are only memoranda for the personal use of the assessor in making up the assessment books and are not evidence in a suit for the collection of the tax assessed.

[18] State ex rel Rehle v. Stamm (1901) n. 16 above.

[19] R. S. Mo. (1929) sec. 9813.

is made.[20] The State Board of Equalization has no power to raise individual assessments and can order only horizontal increases, that is, percentage raises on all property in a class and in one county, and no notice is necessary.[21] The protection given taxpayers in Missouri in this respect is ample and far more than merely satisfies due process.[22] At every step the taxpayer has notice and a right to be heard, and if the officials deny this right the courts will entertain the objections to the tax levied for the purpose of giving relief.

II. THE STAGES IN PROCEEDINGS FOR ASSESSMENT AND COLLECTION OF TAXES AT WHICH A JUDICIAL APPEAL WILL LIE AND THE TYPE OF REMEDIES AVAILABLE AT EACH STAGE

In approaching this problem it is necessary to bear in mind that the courts hold that assessors and boards of equalization act judicially or quasi-judicially, and that their determinations are to be treated like judgments, subject to the same rules which apply to judgments of regular courts.[23] In general, judgments may be attacked directly or collaterally. A judgment which is irregular admits of only a direct attack, but a judgment which is void is susceptible of either direct or collateral attack. In tax proceedings irregular judgments are those which are faulty by reason of an error or defect which is not fatal to the judgment when raised in a judicial proceeding, such as were indicated previously. When the error is one which renders the determination null, such as does fraud in its concoction or lack of jurisdiction, the judgment is said to be void. By direct attacks the courts usually mean all forms of questioning a judgment provided for by statute. Conversely, all attacks aside from the statutory ones in which proceedings the legality of the judgment is a material issue are called collateral. A collateral attack is considered available at any time whether a means of direct attack is yet open or not since it is based on the complete nullity of the judgment. If a party fails to question an irregular judgment by the procedure set up by statute, he is in no position to urge the defectiveness or erroneousness of the determination when the findings are used against him in a subsequent proceeding to collect the tax. Public policy requires that weight be given judgments as solemn records on which valuable rights rest and that they should not be lightly overthrown or disturbed. From the foregoing it will be seen that considerable importance attaches to whether the attack on the determination is direct

[20] R. S. Mo. (1929) sec. 9854.
[21] See Columbia Terminals Co. v. Koeln, n. 5 above.
[22] As to what is due process in tax suits see Cooley, *op. cit.* n. 13 above.
[23] *Ibid.*

or collateral in its nature.[24] In Missouri certiorari is a method of direct attack. Injunction, contrary to the general rule, has also been designated a direct attack.[25] In the *Jefferson City Bridge and Transit Company v. Blaser* case, the court defined a collateral attack as one which impeaches the judgment in a proceeding not instituted for the purpose of annulling it. Since an injunction suit to restrain collection of a tax is a proceeding directly questioning the judgment, and since its sole object is to deny and disprove the validity of the judgment it is justifiably classified as a direct attack.

Defenses in suits for the collection of a tax, suits to recover money paid under an assessment, suits to annul tax deeds, and any similar proceeding are included in a classification of collateral attacks.

In connection with direct court attacks on the determinations of tax officials it is important to note that all statutory remedies must be exhausted before the courts will entertain a suit to annul the tax. This fundamental principle, which has been termed "administrative impregnability by estoppel,"[26] is strictly adhered to by Missouri courts. The Missouri Supreme Court in *Trust Company v. Hill*[27] said, "To permit taxpayers through the state, who feel aggrieved through alleged discriminatory assessments of their property to stand silently by until after the taxes have become due and are pressed for collection and then resist by injunction would produce an intolerable condition. The collection of revenue would be so obstructed that both state and local government would be seriously crippled if nothing more." The Court then proceeded to deny the appeal because the Trust Company had not gone before the State Tax Commission with its complaint, and consequently had not exhausted its statutory appeals. It was said that the State Tax Commission should have been appealed to because it was given power to investigate and institute proceedings to correct irregular and fraudulent assessments.[28] In previous decisions no mention had been made of the necessity of appealing to the Commission and the courts had given relief without reference to such an appeal. By this decision a new addition was added to the administrative law of appeals in tax cases. In a subsequent appeal to the Federal courts, based on a claim of a deprivation of property without due process of law, the case was reversed because a new provision had been added to the previous statute of which change the Trust

[24] Freeman, JUDGMENTS (5th ed. 1925) secs. 304, 305, and 306.

[25] N. 8 above.

[26] See Statson, *Judicial Review of Tax Errors* (1930) 28 MICH. L. REV. 637.

[27] (1929) 323 Mo. 180, 19 S. W. (2d) 746.

[28] R. S. Mo. (1929) sec. 9854.

Company had no notice, and consequently no opportunity to conform with it. The rule laid down, however, was not disturbed and remains the law in Missouri. An exhausting of the statutory appeals necessary to obtain an appeal to a judicial body apparently would consist of appeals to the county board of equalization, to the State Tax Commission, and to the State Board of Equalization, if possible. (The State Board of Equalization has no power to make individual adjustments, but only such as involve a class of property.)

The type of remedy available for testing tax determinations in a judicial forum depends more upon the stage at which relief is sought than upon the substantive defect which is to be corrected. With few exceptions, to be noted later, the errors which are subject to judicial review are the same whatever type of proceeding is instituted. The main defects were discussed in the first part of this note. Consideration will now be given to the remedies available and best adaptable to proceedings in the various stages of assessing and collecting taxes.

1. *Appeal from the Decision of the Original Assessing Officer*

The original action of the assessor in placing the valuation is difficult to question by court action. The direct statutory appeal is open and in view of the principle laid down above it would be difficult to conceive of a factual situation that would permit immediate judicial action. Certiorari would review the acts of the assessor if it could be obtained since the assessor is said to act judicially. In view of the attitude of the courts toward the use of this writ, to be indicated later, it could be obtained and made use of in very few instances. Mandamus has been used to compel acts which the assessor was by law required to perform, but his discretion was not controlled. If the assessor refused to assess certain property, mandamus would be the correct writ to force him to make an assessment but he could not be forced to assign any certain value to it.[29] The possibility of a remedy in tort will be considered later.

2. *Appeal From Action of Boards of Equalization*

Certiorari will lie to question directly the findings of the boards of equalizations, whether county or state, since these boards are held to act judicially.[30] Since it examines only the record it is a very restricted writ when so used in tax cases. The records of the assessor and of the appeal boards are not as complete as those of regular courts since there is nothing to indicate the considerations entering into the making of the determination

[29] See Cooley, *op. cit.* sec. 1601, concerning mandamus against the assessor in the various jurisdictions.

[30] State ex rel. Harrison County Bank v. Springer (1896) 134 Mo. 212, 35 S. W. 589.

of the tax official. Thus, most of the prejudicial errors would not be indicated by the record. Certiorari is said to be the proper writ when an increase in assessment is made without jurisdiction, and its chief use has been to question the jurisdiction of the tax officials.[31] This is consistent with the use of the writ in regular court proceedings, where the Supreme Court noted, in considering a writ to a circuit court, that the chief purpose was to keep inferior courts within the bounds of their jurisdiction.[32] It is not, however, confined to matters of jurisdiction, and it may reach any other irregularity shown on the record.[33] An adequate remedy by appeal usually results in the writ being denied, but this is not to be construed as requiring an exhaustion of administrative appeals indicated previously.[34] Holding it is a writ of discretion and not of right, the courts feel that they should deny it if the complainant can have other satisfactory relief.[35]

Missouri courts have been wary in granting the writ to tax decisions. In *State ex rel. Gardner v. Hall*[36] the Court said, "Certiorari is not a writ of right. Its issuance is within the courts' discretion. That discretion should be warily exercised when as here, it is brought by a single taxpayer and its effect, if granted, will be to nullify the valuation for taxation of the real property of St. Louis. Under such a state of facts it is a question entitled to serious consideration whether the injury done by the granting of the writ will not far exceed the relief afforded. The presence of other remedies if the writ had been refused have resulted in no denial of justice." Consequently certiorari is not as widely used as injunction suits for the purpose of securing judicial review of tax decisions.

3. *Injunction Against the Collector of Revenue to Restrain Collection of the Tax*

This method of judicial appeal is the one most commonly used, and it is apparently the most effective means of questioning administrative decisions in tax cases. Since the Missouri courts have held it to be a direct attack on the assessment it is not subject to the limitations indicated as to collateral attack.[37] All of the substantive defects outlined in the previous section would

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[31] State ex rel. Cemetary Ass'n v. Casey (1908) 210 Mo. 235, 109 S. W. 1.

[32] Turner v. Penman (1926) 220 Mo. App. 306, 282 S. W. 780.

[33] State ex rel. Iba v. Mosman (1910) 231 Mo. 734, 133 S. W. 38.

[34] Cooley, *op. cit.* sec. 1634.

[35] State ex rel. Fairbanks-Morse and Co. v. Ayers (1906) 116 Mo. App. 90, 91 S. W. 306.

[36] (1910) 282 Mo. 425, 221 S. W. 708.

[37] Jefferson City Bridge and Transit Co. v. Blaser (1927) 318 Mo. 373, 300 S. W. 778.

be available as a basis for a decree restraining the collector from proceeding with collection of the tax. The Court would not be confined to a review of the record, as it would be in a writ of certiorari; extrinsic evidence is admissible in the injunction proceeding.

Here again it is essential that the statutory methods of appeal shall have been exhausted. Also, the taxpayer should tender the amount rightfully due before he brings suit. It is the practice to enjoin collection of the amount wrongfully sought to be collected and not the total tax.[38] "He who seeks equity must do equity" seems to be applied. To invoke equity jurisdiction some recognized ground of equity practice must be alleged, although the Missouri courts have not stressed this principle in recent tax cases; the tendency seems to be toward leniency, and to consider only the illegality involved and to take jurisdiction because of such illegality.[39] However, in the decided cases a ground of equitable relief has always been present although not expressly mentioned. The commonly recognized fundamental grounds of equitable relief are prevention of a cloud on title to realty,[40] irreparable injury to property or property rights,[41] inadequacy or lack of other remedies, and fraud in the compilation of the assessment.[42] Prevention of a multiplicity of suits is a sufficient ground to justify the intervention of equity when suit is brought by one taxpayer for the benefit of a large number, even though none of the other equitable grounds is present.[43]

In addition to its use as a device to attack an illegal assessment, injunction is the proper means to prevent collection of an illegal tax levy.[44] Thus, where officers who have no right to levy a tax or who levy a tax for an illegal purpose are without authority, their actions are void and equity will restrain the exercise of fraudulent and oppressive powers.

4. *Defenses in Suits to Collect Taxes*

Defenses in tax suits belong to the collateral forms of attack. Thus, only questions of jurisdiction and of fraud, which renders the entire judgment void, can be raised. Voidable judgments,

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[38] See n. 3 above.

[39] Cooley, *op. cit.* secs. 1641 *et seq.*

[40] Mechanic's National Bank v. Kansas City (1880) 73 Mo. 555; Fowler v. St. Joseph (1866) 37 Mo. 228; Lockwood v. St. Louis (1856) 24 Mo. 20.

[41] First National Bank v. Meredith (1869) 44 Mo. 500.

[42] Cooley, *op. cit.*

[43] See Carelton v. Newman (1885) 77 Me. 408, 1 Atl. 194.

[44] Overall v. Runzie (1878) 67 Mo. 203; Rannery v. Bader (1878) 67 Mo. 476; St. Louis I. M. & S. Ry. v. Epperson (1888) 97 Mo. 300, 10 S. W. 478.

that is, those which are only irregular and may be contested or may be treated as valid by the taxpayer at his option, cannot be attacked at this time, for reasons of public policy. The taxpayer must indicate his wish to avoid it by taking the proper steps to contest the tax before it is due and an effort is made to collect it, for otherwise the collection of taxes at a critical time might be seriously impaired. Thus we find the courts holding that where, by the correct procedure, the taxing authorities secured jurisdiction of the person or property of the defendant who had an opportunity to be heard, he was not denied due process and was held bound by the assessment, and the matter was res adjudicata in a subsequent suit to collect the tax; and the defendant was considered estopped from asserting that he was not properly assessed for that year.[45] In keeping with this holding, in a suit to collect a tax, where as a defense it was alleged that the State Board of Equalization acted discriminatorily in raising certain taxes, the defense was rejected because it was a collateral attack on the determination of the Board.[46] In view of these restrictions it is the better and safer course to bring an action before the effort is made to collect the tax, or the taxpayer may find himself estopped from asserting a just reason for nonpayment of the tax. Only when the nullity of the tax is certain by reason of the substantial defects set forth may the effort to escape the tax be delayed until proceedings to collect it have been started.

5. *Remedies Available After the Tax is Collected*

After the tax has been paid it is, as might be expected, a difficult matter to recover it. Actions for recovery which call into question the acts of the administrative tax officers are attacks on a tax deed to realty, suit for the recovery of the tax paid, replevin for the recovery of personal property taken by distraint, and tort actions for damages. They are all classed as collateral attacks and are subject to the restrictions incident to such attacks. Hence we do not find a large number of cases in Missouri using these methods of attack on tax determinations. Suits attacking tax titles are usually based on some matter of form, such as an irregularity in the tax bill, in the papers filed, or in the deed itself. Virtually the only question which could be raised as to administrative acts would be as to jurisdiction of the officials. If the land lay without the taxing district, or if a levy were made based on an unconstitutional statute, the resulting determination would be void at its inception and pro-

[45] State ex rel. Arnold v. McClune (Mo. 1923) 252 S. W. 657.

[46] State ex rel. Johnson v. Miners' and Merchants' Bank (1919) 279 Mo. 228, 213 S. W. 815.

ceedings based upon it would have no legal effect. Consequently the tax deed issued as a result of such proceedings would be void.

A suit to recover back the tax after it is paid may be based on precisely the same matters as can be raised by way of defense to a suit to collect the tax. Such a suit is maintainable only where the tax was paid under duress or compulsion; an amount paid voluntarily, no matter how invalid the original assessment, cannot be recovered.[47] A payment on the last day of grace to avoid a penalty would be a payment under duress. It is desirable that the administration of tax collection end with payment, and that alleged defects not be raised subsequently, for the same reasons of policy stated in connection with defenses to suits.

In an early case replevin was not allowed to recover personal property seized by distraint where it was sought thus to contest a high assessment, the court holding that this was not a proper function of a replevin suit.[48] The holding does not exclude the use of replevin for the purpose of attacking a tax determination in the proper case. There has been no subsequent decisions testing its use, although replevin is used in other states for this purpose.[49] The matters available under other collateral attacks on a tax should be available in a replevin suit.

In examining tort suits against the assessor or other tax officials, the analogy between a determination of a tax official and a regular court judgment is again found to be stressed; it is suggested that the tax official enjoys the immunity of the judge, and is not liable in tort for an erroneous or mistaken holding. This is not strictly true, for the assessor's immunity is not as absolute and complete as the immunity associated with the exercise of the judicial prerogative. It is the general American rule that the assessor is liable in tort if he acts fraudulently, maliciously, or negligently, and, probably, if he acts wholly without authority or in excess of authority.[50] It is necessary that he commit a recognized tort, that he intend to commit the wrongful act and that it did not occur through error or mistake. The justification for granting the assessor immunity for his mistakes is that it is to the public's interest that tax officials act without fear of incurring personal responsibility in order to secure a consistent and impartial enforcement of tax laws. The collection of taxes could be seriously impaired by a number of unfair and

[47] State ex rel. Rice v. Powell (1854) 44 Mo. 436; Kansas City ex rel. Elliott v. Holmes (1908) 127 Mo. App. 620, 106 S. W. 559.

[48] Hoskinson v. Helferstine (1883) 80 Mo. 23, *aff'd* (1883) 80 Mo. 140.

[49] See Boyce v. Cutter (1888) 70 Mich. 539, 38 N. W. 464.

[50] Cooley, *op. cit.* sec. 1621; see Miller v. Horton (1897) 152 Mass. 540, 26 N. E. 100.

unjustified damage suits; it is obvious that such suit would cause officials to act in an excess of caution not compatible with an adequate and speedy tax collection. In Missouri this means of redress against the assessor has been little used. In *Dobbins v. Reed*,[51] a suit on the assessor's bond for raising the assessment on the plaintiff's property without notice, the Court said that if the assessor acted, as alleged, wholly without authority of law, he was liable for any loss caused by his ursurpation of authority. No cases were cited as authority, the decision being a perfunctory one. Despite the paucity of such suits, the case seems sufficient authority to predicate a right in tort. In any event it would be hazardous to permit irregular proceedings to pass by with the intention of holding the assessor personally liable in a later suit; such relief should be sought only after all other means of adjustment have failed.

III. SUMMARY AND CONCLUSIONS

No attempt has been made to enumerate all the errors and defects possible in the assessing and collection of taxes, for they are limited only by the human capacity to err. It is inevitable that in the application of laws which apply to such a large number of persons, whose judgments and opinions must vary as affected by the circumstances brought to bear on each individual, the net result will be considerable disagreement.

Summarizing: mere irregularities consisting of mechanical or clerical errors in listing property, or failure to follow statutory provisions which are designed to direct the assessor or other officials, honest mistake of judgment or misuse of discretion are not sufficient to secure a judicial review of the determination of a tax official. They must be appealed to the statutory boards of appeal, such as the county board of equalization. Lack of jurisdiction, failure to follow statutory provisions designed to protect the taxpayer, or dishonest irregularities and fraud in the concoction of the assessment will permit a judicial appeal and the invalidation of the assessment.

The remedies available are: possibly, mandamus against the assessor, certiorari to assessors and boards of equalization, injunction against the collection of the tax, defenses in suits to collect the tax, attacks on the validity of a tax deed, suits for the recovery of the tax paid, and tort actions against the offending officials.

After examining the working of judicial appeal in tax cases it is evident that the chief improvement must come through correction of the administrative machinery. For practical purposes judicial review has worked out rather well in Missouri,

[51] (1900) 159 Mo. 77, 60 S. W. 70.

although in a number of individual cases the wrong complained of has not been redressed. In general greater protection has been given to the State than to the taxpayer, and justifiably so, since taxation is for the purpose of securing the money necessary for the maintenance of the government; and the methods used must be speedy and in their nature summary, for delay and vacillation would cripple governmental agencies and injure every citizen far out of proportion to the individual wrong sought to be corrected. The Missouri courts have recognized the danger and have granted injunctions with great consideration, and have consistently exercised their discretion strictly in allowing certiorari. In *Trust Company v. Hill*[52] the Court, in speaking of an injunction suit by a large number of taxpayers arising out of the omission to assess suckling animals and poultry, said, "We must rechart our course" in relation to tax cases. It was not indicated what should be done to rechart the course of judicial review, for the case went off on other grounds, but the Court indicated an awareness of the danger of judicial interference with tax officials.

A clarifying and crystallization of the rules governing judicial appeal by legislative enactment would prove beneficial. The proper methods of appeal should be set forth, along with the matters which would be considered so that the taxpayer would know his rights. One commentator[53] has argued that unequal taxation is unjust taxation, and that there is no reason why courts should not be open to remedy this as well as any other wrong. He points out all that is needed is a statute regulating and enlarging the jurisdiction of the courts in writs of certiorari, as is true in New York and some other states, in order that they may consider the correctness of the valuation when the case is brought before them. The obvious danger, of course, is that such a provision would open the courts to a huge number of suits, for the cry of excessive valuation is a common complaint. Tax officials are generally more capable of deciding disputes as to valuation than are the courts, which deal in such matters only incidentally. Tax officials are presumed to be experts and, if not actually so, they have the benefit of experience through dealing constantly with such matters.

It is not within the scope of this note to enumerate the changes needed in the administrative process. In a sense, tax administration is but one division of the greater field of administrative law, which is in need of further rationalization, but it is further complicated and differentiated from other branches by its peculiar public significance. The summary procedure and practises

[52] N. 27 above.

[53] Judson, TAXATION IN MISSOURI (1904) 311.

typical in tax administration, and which ought not exist in other fields of administrative law, are justified by the paramount demands of government. It must suffice here to say changes are inevitable, for it is inconceivable that many of the present antiquated and ineffective practices can be continued.[54] The Legislature in 1931 made some changes, chiefly in tax levies, but it failed to touch the real problems which make the taxation scheme a cumbersome one.

VICTOR P. KEAY, '33.

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[54] For a compilation of statistics which present a picture of the Missouri tax situation see National Industrial Board, Inc., THE FISCAL PROBLEM IN MISSOURI (1930).

The general property tax is generally condemned by students of taxation. Prof. Seligman in his ESSAYS IN TAXATION (9th ed. 1921) says, "The whole system is unsound . . . the tax as actually administered is . . . one of the worst taxes known in the civilized world." In the Missouri tax system the following defects seem of paramount importance:

(1) A lack of centralization in the administrative machinery and a consequent lack of uniformity in tax methods over the State.

(2) The duplication of the powers and functions of the State Tax Commission and the State Board of Equalization. The State Board of Equalization seems a superfluous body.

(3) The failure to secure an adequate assessment of such intangibles as notes, mortgages, bonds, and bank deposits.

(4) The unfortunate philosophy which has grown up among citizens in regard to tax affairs, characterized by the apathy with which citizens look upon perjury and dishonesty in returning property for assessment.

(5) Inability to cope with the problem of valuing large and complex properties, such as public utilities.