1881

Remedies of Illegal Taxation

Thomas M. Cooley
University of Michigan Law School

THE

AMERICAN LAW REGISTER.

JANUARY 1881.

REMEDIES OF ILLEGAL TAXATION.

TAXATION is to a nation what the circulation of the blood is to he individual; absolutely essential to life. In ordinary times it is the chief burden which government imposes upon the people, and is likely, therefore, to be the greatest source of discontent. This renders it of the utmost importance that taxation should as nearly as possible be just, and also that it should appear to those who pay it to be just. Absolute justice, however, is unattainable.

The primary purpose of all taxation is to produce revenue for the various needs of government, but indirect benefits may also be accomplished by the levies. A consideration of these often determines what taxes shall be laid. One state taxes all land according to market value, another deducts the value of improvements in order to encourage the making of improvements, another taxes only the property from which an income is derived, another taxes the income itself, and so on. Indirect taxes have almost always some ulterior purpose: manufactured articles when imported are taxed that the domestic manufacturer may to that extent have an advantage over the foreign, and some kinds of business are taxed heavily in order to discourage them because of the attendant evils: *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Youngblood* v. *Sexton*, 32 Mich. 406. The field of legislative discretion here is unlimited, and in the selection of subjects for taxation the law-making power may be altogether arbitrary. All that can be required is that a rule of apportionment shall be prescribed which, as between those subjects, shall make its demands with equality.

Whatever rule is prescribed, however, must be committed to local agents for execution, and it is found that not only are these agents many times careless and ignorant, but there are often local or class reasons why they are not likely to administer the statutory rules fairly. Thus, if property is taxed upon a valuation, and the local values are assessed by local officers, and the state burdens apportioned according to these, each assessor may seek to commend himself to his constituency by making his assessments as low as possible, thereby reducing their relative proportion of the general burden. So if the homestead of the laborer and the bonds of the capitalist are to be taxed at the same rate, the officer, more careful of his popularity than of his official oath, may seek by unfair relative assessments to please the stronger party, and thereby perpetuate his hold on public life. The prejudices of assessors against classes of men or particular accumulations of property are often as efficient in producing inequalities in taxation as the desire for political favor; and wherever there is opportunity for it—as there is in abundance in the levy and collection of imposts and excises—corruption in various forms must be looked for and guarded against. In the last-mentioned cases the government itself is the party cheated, but in other cases the wrong in general is a wrong to taxpayers.

Where the evil which the taxpayer feels is in the law itself, in that it selects the subjects of taxation unfairly, the only remedy available is the political remedy: *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *State* v. *Newark*, 26 N. J. 519; *Kirby* v. *Shaw*, 19 Penn. St. 258; *Williams* v. *Cammack*, 27 Miss. 209, 219; *Coite* v. *Society for Savings*, 32 Conn. 173; *Watson* v. *Princeton*, 4 Met. 599, 602. The legislature has its sphere of action, which includes this whole subject, and the judiciary cannot enter it. But important restraints may be and sometimes are placed upon the legislature by the constitution, and when this is found to be the case, the judiciary may be called upon to see that they are observed. For example, the constitution may require the legislature to make laws for the taxation of all property by value; and then no exemptions can be made: *Iowa Homestead Co.* v. *Webster County*, 21 Iowa 221; *Fletcher* v. *Oliver*, 25 Ark. 289; *People* v. *McCreery*, 34 Cal. 432; *Hunsaker* v. *Wright*, 30 Ill. 146; *Primm* v. *Belleville*, 59 Ill. 142; *Sanborn* v. *Rice*, 9 Minn. 273; *Bank of Columbus* v. *Hines*, 3 Ohio N. S. 1; *Louisville, &c., Railroad Co.* v. *State*, 8 Heisk. 664. Or it may exempt property used for specified

purposes, such as schools, public worship, &c., and thereby remove it altogether from the reach of the taxing power so long as the constitution remains unchanged; and by implication of law all property selected, owned and used by either state or federal government as a necessary or convenient means to the exercise of its functions is exempted from the taxing power of the other (*McCulloch* v. *Maryland*, 4 Wheat. 316; *The Collector* v. *Day*, 11 Wall. 113; *United States* v. *Railroad Co.*, 17 Id. 322), as are also the public loans, and other means whereby the government is enabled to perform its constitutional duties and perpetuate its powers unimpaired: *Weston* v. *Charleston*, 2 Pet. 449; *Crandall* v. *Nevada*, 6 Wall. 35.

Any tax is illegal which is levied for a purpose the burden of which cannot lawfully be thrown upon the public: *Loan Association* v. *Topeka*, 20 Wall. 655. So if the statute undertakes to provide for the levy of a tax which the constitution forbids, the tax is illegal, for the constitution is the law for the case and overrules any conflicting law: *People* v. *Weaver*, 100 U. S. Rep. 539. A tax may also be illegal merely because in its assessment or levy the forms of law have failed of observance through the ignorance or inadvertence of officers, or because of intentional disobedience to the law. Where the only ground for contesting the enforcement of the tax is that irregularities have occurred, the defects ought to be such as injuriously affect the interest of the taxpayer, or the tax should be sustained. It is so difficult to insure absolute correctness in tax proceedings, that a failure to follow closely the merely directory requirements of the statute may well be overlooked when nobody is injured by the errors: *Picket* v. *Allen*, 10 Conn. 145; *Alvord* v. *Collin*, 20 Pick. 418; *Goodwin* v. *Perkins*. 39 Vt. 598; *Wall* v. *Trumbull*, 16 Mich. 228; *State* v. *Commissioners*, 29 Md. 516; *Harrison County Commissioners* v. *McCarty*, 27 Ind. 475.

But it is a familiar fact in the law, that there are some forms and formal proceedings which can never be dispensed with, because they are of the very essence of taxation, and without them the tax would be only an arbitrary exaction, measured by the discretion of the revenue officers. One of these is, an apportionment between the subjects of taxation within the taxing district with a view to uniformity. The rate of apportionment must be prescribed by law, and every taxpayer has a right to require that it be followed. If he be taxed at one rate, and his neighbor at another and a less

rate, the tax as to him is void: *Tide Water Co.* v. *Coster*, 18 N. J. Eq. 518; *O'Kane* v. *Treat*, 25 Ill. 557; *Lexington* v. *McQuillan*, 9 Dana 513. So if the law provides for an opportunity to the taxpayer to be heard in respect to his assessment, and for notice of the time and place, the failure to give the notice is not a mere irregularity, but is fatal: *In Matter of Smith*, 52 N. Y. 526; *Moulton* v. *Blaisdell*, 24 Me. 283; *Lagroue* v. *Rains*, 48 Mo. 536; *Dool* v. *Cassopolis*, 4 N. W. Rep. 265. The same is true of the failure to give notice and an opportunity to be heard in any appellate tribunal, after an appeal from the assessment has been taken: *Darling* v. *Gunn*, 50 Ill. 424; *Railroad Co.* v. *Washington Co.*, 3 Neb. 30; *Stewart* v. *Trevor*, 56 Penn. St. 374; *Nixon* v. *Ruple*, 30 N. J. 58. But if the party taxed applies for relief in equity, and does not show or allege that he is unfairly taxed, relief will be denied; *Albany & Boston Mining Co.* v. *Auditor-General*, 37 Mich. 391.

But it is not our purpose at this time to discuss the general subject of illegal taxation, and the remedies that are appropriate to correct its evils. The space now at our command would not admit of this; and, besides, it may be assumed that the general rules are familiar. We shall only call attention to two or three points to which recent facts have given prominence, and which present unusual difficulties. These arise in the case of assessment of property for taxation by value, which, in state taxation, is the method by which the revenue is mostly raised.

The valuation of property implies an inquiry into the elements of value, and the application to these of the judgment of the party making it. The value, however, is not to be a speculative value, and the judgment should not be based upon excellencies or defects, real or fancied, which the assessor perceives but which are not open to the observation of others. It should, on the other hand, be a value which the community recognises, and which would determine its sale if put upon the market. In other words, the assessment should be according to the market value. But the market value may be one thing or another according to the circumstances and terms of sale. It is one thing, at a forced sale, where the property must go for what shall then by any one be bid for it; it is another, when time can be taken and the opportunity for a good sale awaited; it is one thing when immediate payment must be made in full, and another when the circle of purchasers can be

enlarged by allowing those to bid who must have credit for the larger part of their purchase. What standard is chosen is not very important so long as it is uniformly maintained, but to preclude evasions it is sometimes provided that the cash value shall be deemed to be, the value at sales as commonly made, and not what the property would bring at a forced sale.

The value being based upon judgment, it has been generally held that the assessor should be considered a judicial officer, and therefore within the general rule that exempts this class of officers from personal responsibility for erroneous judgments: *Weaver* v. *Devendorf*, 3 Denio 117; *Williams* v. *Weaver*, 75 N. Y. 30, and cases cited; *Dillingham* v. *Snow*, 5 Mass. 559; *Pentland* v. *Stewart*, 4 Dev. & Bat. 386; *Macklot* v. *Davenport*, 17 Iowa 379; *Walker* v. *Hallock*, 32 Ind. 239; *Steam Navigation Co.* v. *Wasco Co.*, 2 Or. 209; *Stickney* v. *Bangor*, 30 Me. 404; *Huggins* v. *Hinson*, 1 Phil. (N. C.) 126. It may be doubtful if the rule of exemption, as applied to their case, is not broader than it should be. It seems to be assumed in New Hampshire that assessors are only protected when their good faith is not successfully impeached (*Tyler* v. *Flanders*, 57 N. H. 618), and this would bring them within the rule of responsibility which has often been applied to other inferior officers who are charged with duties of a similar *quasi* judicial character, such as directors of schools, judges of elections and the like: *State* v. *McDonald*, 4 Harr. (Del.) 555; *Goetchens* v. *Matthewson*, 61 N. Y. 420; *Carter* v. *Harrison*, 5 Blackf. 138; *Wheeler* v. *Patterson*, 1 N. H. 88; *Weckerly* v. *Geyer*, 11 S. & R. 35; *Burton* v. *Fulton*, 49 Penn. St. 151; *Ferriter* v. *Tyler*, 48 Vt. 444; *Hoggatt* v. *Bigley*, 6 Humph. 236; *Donahoe* v. *Richards*, 38 Me. 379; *Walker* v. *Hallock*, 32 Ind. 239; *Gordon* v. *Farrar*, 2 Doug. (Mich.) 411; *Bevard* v. *Hoffman*, 18 Md. 479; *Pike* v. *Megoun*, 44 Mo. 492; *Caulfield* v. *Bullock*, 18 B. Mon. 495; *Patterson* v. *D'Auterive*, 6 La. Ann. 467; *Fausler* v. *Parsons*, 6 W. Va. 486. Complete exemption invites and encourages fraud; while on the other hand there is very little danger that an assessor under any rule would be made responsible for errors in an honest judgment. But we must take the rule as it stands upon the authorities; and upon these it is undeniable that the judgment of the assessor is not to be questioned, for either error or fraud, in an action against him personally.

If, therefore, the assessor value the property of any taxpayer rela-

tively too high, and this is the only complaint made of the assessment, the party assessed must look for his remedy elsewhere than to a suit against the assessor. The assessment-roll will not disclose the inequality on its face, but will apparently be in compliance with the law, and therefore apparently just and lawful. The assessor will certify that he has made the assessment according to his judgment of values, and in his favor the law must conclusively presume that he has done so. Even where he has erroneously charged the taxpayer with property not liable to taxation, the presumption must be the same: *Barhyte* v. *Shepherd*, 35 N. Y. 238; *Huggins* v. *Hinson*, 1 Phil. (N. C.) 126; *Williams* v. *Weaver*, 100 U. S. Rep. 547. And so it must be if he has omitted to assess property of others that should be taxed; thereby increasing contrary to the intent of the law the burdens of those who are assessed: *Dillingham* v. *Snow*, 5 Mass. 559.

But though in favor of a judge it must in civil cases be presumed that his official action is the result of his honest opinion, it does not always follow that the judgment must be paid. In equity relief may be had even against the judgments of courts of record, when, by reason of fraud, accident, or mistake in one or more of the parties it is unjust, and not such a judgment as but for that circumstance it must be presumed the court would have made it: Freeman on Judgments, c. xxii.; *United States* v. *Throckmorton*, 98 U. S. 61. It is true that such a proceeding does not assail the personal integrity or good faith of the judge; but this may be done in a direct prosecution by impeachment; and in the case of an officer who is only *quasi* judge, and not subject to such a prosecution, there is no reason why the direct proceeding to set aside his action on the ground that it was dictated by malice or fraud, should not be permitted.

It has accordingly been held that where, instead of valuing all property by the same standard, the assessor had purposely and fraudulently made an individual assessment relatively higher than that of others, it was within the ordinary powers of a court of equity to give relief against the fraud by restraining the collection of the tax so far as it should be equitable to do so: *Chicago* v. *Burtice*, 24 Ill. 489; *Pacific Hotel Co.* v. *Lieb*, 83 Id. 602; *Merrill* v. *Humphrey*, 24 Mich. 170; *Lefferts* v. *Calumet*, 21 Wis. 688; *Frazer* v. *Siebern*, 16 Ohio (N. S.) 614.[1] It is not often

[1] For the general principles on which the collection of unequal assessments will

that such a fraud can be established by the declarations of the party himself who is chargeable with it, but it may be made out on circumstances as in other cases. Very properly the courts impose the condition to relief that the complainant shall do equity; and equity in the case of an excessive assessment would consist in paying what the party assessed would have paid had the assessment been relatively just and fair.[1] A like rule to this is applied when equity sets aside a fraudulent or otherwise unjust judgment: Freeman on Judgments, sect. 516. This principle, which is a perfectly equitable one, has perhaps not been applied as often as it should have been, especially in the case of corporations which are taxed excessively, either by reason of errors in the statutes or of mistakes of judgment in assessors. National banks, for example, under the laws of Congress, can only be taxed by the states according to standards which Congress presents, and it has sometimes been found that the state laws either prescribed a different standard, or failed to make any provision under which taxation by the congressional standard was practicable. Any assessment whatever under such circumstances must be void, since lawful taxation must be based upon positive law prescribing its conditions and methods: *Van Allen* v. *Assessors*, 3 Wall. 573; *Bradley* v. *People*, 4 Id. 459. But when a state law merely taxes the banks excessively, by reason of some discrimination which it makes against them, there is no good reason why they should not pay such taxes as are equitably and lawfully assessable: *Merchants' National Bank* v. *Cumming*, 17 Alb. Law Jour. 345 (U. S. Circuit, Ohio); *National Bank of Paducah* v. *Paducah*, 5 Cent. Law Jour. 347 (U. S. Circuit, Ky.).

Perhaps in the majority of cases an excessive assessment affects not single individuals but whole classes; as for example, when non-residents are unequally assessed upon unseated or unimproved lands. If this is done fraudulently and upon system, so that each item of property is over-assessed the same percentage, perhaps all

---

be enjoined, see *State Railroad Tax Cases*, 92 U. S. Rep. 575; *Du Page* v. *Jenks*, 65 Ill. 275; *Albany & Boston Mining Co.* v. *Auditor-General*, 37 Mich. 391; *Cedar Rapids, &c., Railroad Co.* v. *Carroll Co.*, 41 Iowa 153; *Milwaukee Iron Co.* v. *Hubbard* 29 Wis. 51; *Parmley* v. *Railroad Co.*, 3 Dill. 25.

[1] See cases cited in last note. Also, *Ottawa Glass Co.* v. *McCaleb*, 81 Ill. 556; *Harrison* v. *Haas*, 25 Ind. 281; *Morrison* v. *Hershire*, 32 Iowa 271; *Twombly* v. *Kimbrough*, 24 Ark. 459; *Adams* v. *Castle*, 30 Conn. 404; *Lawrence* v. *Killam*, 11 Kans. 499; *Mason* v. *Lancaster*, 4 Bush 406.

parties concerned might unite in a bill in equity to restrain the collection of the excessive tax;[1] but this is at least questionable. There must necessarily be an inquiry into the excess in each case; and the fact that the illegal intent was the same as to all could not be evidence that all had been equally wronged. The law may well presume that an officer has performed his duty; but when his purpose is to depart from rectitude, and abandon the rule of law for one arbitrarily fixed by himself, there can be no intendment that he has been true to his dishonest purpose. It would seem therefore, that every man's case would stand upon its own merits, and the question would be, not how great was the wrong intended, but how great was the wrong accomplished.

But the taxpayer may have the same right to complain of the fraudulent undervaluation of others that he has to find fault with the excessive valuation of his own property, for the effect in increasing his tax is the same in each case. It has often been held that a legal wrong is committed when property is exempted from assessment without authority of law; but the remedy may be different in different cases according to the circumstances. If the exemptions are so large as sensibly to affect the amount of the tax levied upon each individual person or item of property, perhaps the whole roll ought to be declared void. See *Henry* v. *Chester*, 15 Vt. 460; *Weeks* v. *Milwaukee*, 10 Wis. 242; *State* v. *Branin*, 23 N. J. 484; *Crosby* v. *Lyon*, 37 Cal. 242; *Page v. St. Louis*, 20 Mo. 136; *Alexander* v. *Baltimore*, 5 Gill 383. But to annul a tax roll for the year is a severe remedy, and is so liable to breed confusion in public affairs that it ought never to be granted on the complaint of individuals, and as a means of righting individual wrongs, unless justice is otherwise likely to fail. The better remedy would seem to be, to allow the individual assessments to be abated in equity, or to permit the parties paying taxes to recover back at law what they pay in excess of their just proportion. See *Watson* v. *Princeton*, 4 Met. 599; *Muscatine* v. *Railroad Co.*, 1 Dillon 536; *Primm* v. *Belleville*, 59 Ill. 142; *Ottawa* v. *Barney*, 10 Kans. 270; *Tobey* v. *Wareham*, 2 Allen 594. But still better would be proper statutory provisions under which not only would the tax roll be sustained, but also the individual assessments, and

[1] That the general rule permits this when all are affected alike and equally, see Cooley on Taxation 546; High on Injunction § 748.

the property unlawfully exempted would be specially taxed on a separate roll, or be taxed for two years on the roll for the following year.

Questions even more troublesome arise when the assessors, in defiance of law, either overvalue or undervalue all the property of the taxing district, for some purpose which cannot be avowed and which is a fraud upon the law. Instances of over-valuation have not often occurred, for the reason that the inducements to evasion of law more often lead the officers in the opposite direction. There have, however, been some cases where, in order to evade statutory or constitutional provisions limiting the authority of municipal bodies in raising money for local purposes to a low percentage on the total assessments, the local officers have purposely made the assessment largely above the real value of property. This is a case of fraud upon the municipality, and if there be a prompt resort to legal proceedings before the rights of third parties intervene, there should be no difficulty in enjoining the contracting of debts or the payment of money for local improvements, based upon and measured by the excessive and fraudulent roll. But such things are done, when done at all, under the pressure of a temporary and unreasoning excitement, and the time for questioning them commonly passes by before the sober second thought of the people opens their eyes to the crime of their officers and their own folly.

Wherever there are systematic under-valuations, it generally appears, on examination, that the assessors have deliberately fixed upon a percentage of the true value as that which, in making their roll, they will adopt as the true value for their purposes. For example, when the law requires them to assess as the true cash value, and they make oath that they will perform their duty under the law, they nevertheless decide in their own minds that they will assess at one-third the value only. One curious feature about these assessments is, that though there can be no reason whatever for adopting an illegal standard except to prevent the respective municipalities obtaining the advantage of each other in the apportionment of state or county taxes, yet it is sometimes the case that, by common consent, they agree with each other what shall be the rate of assessment, and exactly how far they will depart from the law; in that case accomplishing nothing whatever by their disregard of solemn oaths, since an honest estimate would have placed them all relatively in the same position. But in some

states such a purpose to disobey the law has been deliberately acted upon for years without any very earnest attempt to restrain it, except by some statutory changes to which little or no attention has been paid. The chief reason for the toleration has been that no one could say that he was personally injured by the official dishonesty, and it is always an ungracious task for a private citizen to take upon himself the redress of public wrongs. Indeed the general public has scarcely felt the wrong, for very few ever appreciate or reflect upon the corrupting and demoralizing effect of an habitual disregard of law by officers sworn to obey it. Nor is redress easy; for, as the law is violated in the supposed interest of the local community, it is natural to expect a local sentiment that will go far to shield them in case of prosecution.

In Wisconsin, where the statute requires the assessors to assess lands "from actual view, at the full value which could ordinarily be obtained therefor at private sale, and which the assessor shall believe that the owner, if he desires to sell, would accept in full payment," it has been held that an assessment of all the cultivated lands of a county at one uniform rate, all the timbered land from which the timber had been removed at another uniform rate, all the pine lands on first-class driving streams within two miles' hauling at another uniform rate, and so on, was invalid, and any person assessed might maintain a bill to enjoin the collection of a tax based thereon: *Hersey* v. *Supervisors of Barron*, 37 Wis. 75. (See *Thomas* v. *Gain*, 35 Mich. 155.) So, where a statute required the assessment for a local improvement to be made in proportion to the actual benefits, estimated by the officers on actual view, and instead of that it was made by them in proportion to the cost of the improvement irrespective of the benefits, it was held that any contract based upon such assessment was unwarranted and illegal: *Johnson* v. *Milwaukee*, 40 Wis. 315. But a more important and far-reaching decision was that which declared that equity would interfere and restrain the collection of a tax based upon a uniform and intentional assessment of property in the taxing district, when the statute required it to be at the full value which could ordinarily be obtained for the property at private sale: *Schettler* v. *Fort Howard*, 43 Wis. 49. We say far-reaching, because it is notorious that assessments in Wisconsin for many years have been made in like disregard of the law, until it had come to be understood that the official oath was a mere form, to be taken that it might be

broken. But it is an unquestionable truth that was uttered by Mr. Justice COLE in that case, "There is really no security to the taxpayer except in requiring assessors to perform their duty and make assessments in substantial compliance with the law." And as was said by the chief justice, "The question, I think, resolves itself into this: whether statutory officers can, in the execution of their office, wilfully disregard the safeguards of the statute which creates their office; whether it is for the legislature to provide a general and constitutional rule of assessment, and for assessors to set the statute at defiance, and to establish, each for himself, several and unconstitutional rules. * * It is very easy for assessors to be honest in the discharge of their duties; and if honest, their errors of judgment can operate little to impair the uniform rule of the constitution. If they should be suffered to substitute a rule of their own for the rule of the statute, and yet to uphold their assessments by an oath that they have followed the statutory rule, it appears to me not extravagant to say that taxation in this state would rest less upon a uniform rule of assessment than upon a uniform rule of fraud and perjury. I am quite sure that no argument of inconvenience will ever induce this court to lend its sanction to such deliberate fraud, perpetrated in the name and by the authority of the state, in a proceeding which purports to be a just and uniform exercise of a sovereign power."[1]

In Michigan similar questions have been raised, but under different circumstances.

The statute requires property to be assessed at its true cash value; and that the assessor's certificate shall show the fact; and it has always been held that the certificate will be void unless it shows strict compliance: *Clark* v. *Crane*, 5 Mich. 151; *Hogelskamp* v. *Weeks*, 37 Mich. 422; *Wattles* v. *Lapeer*, 40 Mich. 624. But this is a mere showing in words, while the fact is commonly otherwise. In one adjudged case a city which by its charter was restricted in the tax it might levy in any one year to one and one-fourth per centum of the valuation, was found to have laid a tax considerable more than two per centum of the assessment roll. One of the taxpayers refused to make payment, and when suit was brought against him it incidentally appeared that the valuation of

[1] This case was followed in *Salscheider* v. *Fort Howard*, 45 Wis. 519. And see *Tierney* v. *Union Lumbering Co.*, 2 N. W. Rep. 289.

property for the year had been arbitrarily fixed by the assessors at one-fourth the cash value. It thus appeared that had a legal basis for assessment been taken, the tax would have been far within bounds; but the assessment had been made by the statute the measure of the power to tax, and the assessors had made their record and the city must abide by it. It followed that the tax was void. *Wattles* v. *Lapeer*, 40 Mich. 624. (See *Connors* v. *Detroit*, 41 Mich. 128.)

In another case, in which the validity of a sale for taxes was the subject of contention, it appeared that the certificate of the assessor was in due form, and showed, if true, a legal valuation. But it was proposed to show in opposition to that, that the certificate was false, and the actual valuation was far below the cash value. The court held that the evidence could not be received to defeat the tax title. Referring to the Wisconsin cases, which were relied upon, GRAVES, J., says: "They have been examined and are found not to sustain the position now taken. Expressions are noticed in some of them which, if wrested from the context, might possibly afford some countenance to the claim here. But when they are considered in connection with the issue presented, and the bias of the discussion, they cannot afford any aid. In every instance the contention was between the proprietary and the public authorities, and the action or suit, or whatever it should be called, was instituted or maintained or carried on to annul or enjoin the alleged tax, for some kind of illegality of the public agents, and the issue was directly upon the validity of the proceedings, and where consequently the matter of the proceedings could not be set up to prove validity. Moreover the question was not only between the property holder and the public authorities who were seeking to fasten a burden upon him, but it was raised seasonably and without laches, and before the attaching of any right of third persons. It belonged to the very object of the inquiry to see whether what purported to be a lawful record was in truth one having the property of verity, or whether it was invalid and not entitled to credence. There is a striking analogy between such a proceeding and one by writ of error or bill of review, and the distinction is well marked between the right to impeach proceedings when so assailed and when attacked collaterally and after the transaction has been closed and time has run upon it and new rights have grown up on the faith of its rectitude. Every system of jurisprudence has recognised the princi

ple, and it pervades the whole policy of our laws. Our revenue code has always been shaped with reference to it. The case before the court stands on entirely different ground. After the lapse of more than twenty years from the sale, and after the deed had been on record nearly that period, and after the holder of the tax title had gone into possession and held for some time, the holder of the original title began this action of ejectment, and he asserts therein the right to do away with the sworn official certificate of the supervisor by his present recollection as a witness. There is no general rule of law which will permit this to be done. On the contrary the course of decision is opposed to it." *Blanchard* v. *Powers*, 4 N. W. Rep. 542.

Such are the decisions in these two states. In Wisconsin the vigorous judicial denunciation of official dishonesty has no doubt had good results, and changes have been made in the statutes to facilitate the making of a re-assessment when the tax proves illegal: (See *Single* v. *Stettin*, 6 N. W. Rep. 312.) In Michigan it is highly probable that litigation in respect to these fraudulent assessments has only just begun. (See *Hogelskamp* v. *Weeks*, 37 Mich. 422; *Attorney-General* v. *Supervisors of Sanilac*, 3 N. W. Rep. 260.)

The sytematic under-valuation of property at a certain percentage is not always applied to personalty, and indeed as to that we find other evasions of law that sometimes operate one way and sometimes another. If the statute undertakes to assess personal property, including bonds, mortgages, corporate shares and other monied capital, in gross, upon the judgment of the assessor, the widest possible field is afforded for discretionary valuations, and for fraudulent assessments; and the assessor's evasion of law may take the form of an exemption of personalty, or of an excessive valuation, according to the local desire. If the law undertakes to tax all or nearly all personal property, it may be popular to overlook much of it, since few persons would be without something to be taxed for, and the ordinary furnishing of the house of a man of moderate means would constitute, when valued fairly, a very considerable item. If, on the other hand, the law exempts household furniture, tools of trade, &c., from assessment, the personal property to be taxed would consist largely in monied capital, and the local feeling might run strongly in favor of assessing this as highly as possible. Any careful examination of the tax statistics

of different states must satisfy any one that in some a very large proportion of the personal property which the statute intends shall be taxed escapes assessment altogether, while in others it is probably assessed far beyond its fair proportion. This last is especially true of such items of personal property as have a known and definite market value—such as corporate stocks and public securities.

The statutory methods which have been provided for protecting personal property against excessive taxation have generally been one or more of the following: 1. An appeal to some statutory board which is clothed with power to hear complaints and make abatements: *Walker* v. *Cochran*, 8 N. H. 166; *State* v. *Parker*, 34 N. J. 49; *Otis Co.* v. *Ware*, 8 Gray 509; *State* v. *Ormsby Co.*, 7 Nev. 392, and whose decision will be final: *Rhoads* v. *Cushman*, 45 Ind. 85. 2. Allowing the taxpayer to furnish his list of property and to verify it by his oath, and making this conclusive, except as the assessor shall be satisfied on investigation that it is untrue. 3. Permitting the person assessed to reduce the assessment after it has been made, by making oath that the whole amount does not exceed a certain smaller sum which he names. But neither of these is any protection as against the inequality which is caused by a systematic under-valuation of real estate. If a man actually owns $100,000 of personal estate, he cannot honestly return it at $30,000, though he may know that real estate is assessed at three-tenths its value only; neither if he is assessed for $100,000 can he "swear it down" to $30,000, or satisfy an appellate board that it amounts to that sum only. He is in fact remediless in any of the methods which the tax laws provide, and he must submit in silence or resort to equity for relief. Possibly, under the statutes of some states, there may be a remedy by suit to recover any excess after the tax has been paid, but we speak here of general principles only, and it is not perceived that in equity the case instanced differs from that of the landowner who is discriminated against by an assessment which is excessive as compared with the lands of others. The ground for granting him equitable relief is, that the assessment is fraudulent; that it does not undertake to apportion the burden as the law commands, and that as a consequence he is prejudiced by being compelled to pay more than his legal and just proportion of the public taxes.

But when no such relative inequality can be shown, the question may be asked, why may not the assessor, nevertheless, be

liable to civil actions by taxpayers for his systematic violation of law and disregard of his official oath in his under-valuations? The difficulty in the way of such an action must lie in the fact that the individual taxpayer can show no damage to his own interests. If the relative valuations are all equally low, each will pay no more than his just proportion of the tax. An actionable wrong implies both an injury and a resulting damage; and here apparently there is no damage whatever. And is there an individual injury? If there is, an action may be sustained; for the law implies some damage from every distinct invasion of individual right: *Ashby* v. *White*, 2 Ld. Raym. 938; *Embrey* v. *Owen*, 6 Exch. 353; *Webb* v. *Portland Co.*, 3 Sumn. 189; *Dixon* v. *Clow*, 24 Wend. 191; *Tillotson* v. *Smith*, 32 N. H. 90; *Tuthill* v. *Scott*, 43 Vt. 525; *Tootle* v. *Clifton*, 22 Ohio N. S. 247. But when we say there is an invasion of individual right, it is implied that the individual had a legal right which was personal to himself to insist upon some course of conduct different from that which has been pursued, and that some duty owing to him as an individual has been violated. Now, the general duty to obey the laws, to observe official oaths and not to injure the community by a public example of immorality is beyond all question a public duty. A wrong done by a breach of it is a public wrong, and ought to be redressed in a public prosecution. The fact that such a prosecution is likely to be ineffectual, by reason of the general disposition to wink at and even favor the breach of duty, cannot change its nature, or give new remedies. If a court can see its way clear to holding the whole tax roll void for the fraud, thereby compelling a re-assessment, as has been done in Wisconsin, that may solve the difficulty; otherwise it would seem that the fraudulent under-valuations may go on indefinitely, unless some appellate board, selected from the state at large or from some large district, shall be given authority adequate for a complete revision of the work of the local officers. That there is abundant occasion for prompt and decisive legislative interference would seem to be unquestionable.

In what has above been said respecting a remedy in equity, it is assumed that no statute prohibits it. It is conceded that the statute may prohibit injunction suits in tax cases: *Pullan* v. *Kinsinger*, 2 Abb. U. S. 94; *Howland* v. *Soule*, Deady 413; *Collector* v. *Hubbard*, 12 Wall. 1; *Lennon* v. *New York*, 56 N. Y. 361; or may attach conditions to their being brought: *Braun*

v. *Sauerwein*, 10 Wall. 218; *Erskine* v. *Hohnbach*, 14 Id. 613; *Cheatham* v. *United States*, 92 U. S. Rep. 85; *Macklot* v. *Davenport*, 17 Iowa 383; *Dean* v. *Todd*, 20 Mo. 92; *Hughes* v. *Kline*, 30 Penn. St. 227; but it cannot take away all remedy without providing a new one, and whatever is provided it is conceived must recognise the same equitable principles which governed before: *Hubbard* v. *Brainard*, 35 Conn. 563; *Wilson* v. *McKenna*, 52 Ill. 44; *Bryan* v. *Walker*, 64 N. C. 146; *Hart* v. *Henderson*, 17 Mich. 218; *Dean* v. *Borchsenins*, 30 Wis. 236; *Penrose* v. *Erie Canal Co.*, 56 Penn. St. 46.[1]

T. M. COOLEY.

[1] Since the foregoing was written, it has been decided in Michigan—*Moss* v. *Cummins*, 6 N. W. Rep. 843—that money paid to a tax collector, under compulsion of process valid on its face, cannot be recovered back as an illegal exaction, upon the ground that the supervisor, in making the assessment, in violation of his oath, deliberately assessed all the property of the township at a rate much below its actual value.