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JUDICIAL DEVELOPMENTS IN THE TAXATION OF REAL PROPERTY SINCE THE ADOPTION OF THE ILLINOIS CONSTITUTION OF 1970

by SHELDON GARDNER*

INTRODUCTION

The problem of valuation and assessment of real property in Illinois came to a climax with the adoption of the Illinois Constitution of 1970.[1] Legal challenges to a system viewed as arbitrary and corrupt have changed the basic approach to assessment. Underlying much of the litigation in this area, including most of the major cases cited in this article, was a concept that the assessors functioned in an arbitrary fashion and, prior to the new constitution, had been sheltered from attack from the courts. Indeed, the assessor's office in Cook County had been under attack by the media for a number of years for alleged favoritism and corruption. Federal indictments and convictions emanated from the activities of the assessor's office. It is against this political and historical background that one must see the wave of litigation against the assessors and their valuations.

Since the adoption of the new constitution, the law of real property assessment has undergone both drastic changes and unforeseen stagnation. Although many of these changes were mandated by the Revenue Article,[2] greater change has come from subsequent court decisions which have interpreted the constitutional language. Although the changes have not completely resolved the chaotic system that had existed, they have better defined the rights of the property owner in Illinois. However, the process which has resulted in this heightened definition of rights has raised substantial questions which will require further clarification from either the legislature or the judiciary.

Although commentators had expressed great hopes for innovation by way of the new Revenue Article,[3] in several instances court decisions interpreting its sections have caused great disappointment. Expanded scope of judicial review in assessment

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1. ILL. CONST. (1970). All references to the "constitution" are to the Constitution of 1970 unless otherwise stated. The effective date of all relevant sections mentioned herein was July 31, 1971.

2. ILL. CONST. art. IX (1970).

3. For a delegates report on the Revenue Article, *see generally* Netsch, *Article IX—Revenue*, 52 CHICAGO BAR REC. 103 (1970).

proceedings was considered by some to be a certainty under the new provisions. However, in the first decision examining the issue, the Illinois Supreme Court found that the framers did not intend to expand judicial review. The status of available equitable relief of fraudulent assessments is currently in an uncertain state. Recent supreme court decisions have yielded little in determining the relationship between statutory forms of relief and the courts' power to enjoin collection of allegedly excessive taxes. While the court has stated that equity is available, it has outlined uncertain guidelines as to when its application can be sought and granted. It will also be noted that the question of the availability of equitable relief and judicial review may well open a federal forum to the disgruntled taxpayer in the near future.

While the courts have been less than clear in elucidating the standards of review in these areas, they have acted decisively in validating the Cook County procedure of de facto classification of real property for assessment purposes. The constitutional convention had indicated that the new Revenue Article would in effect ratify this county procedure. However, questions regarding its enactment engendered several suits which challenged the entire assessment procedure within the county. The supreme court has answered the challenges in favor of the assessor, and has preserved the use of the de facto system.

JUDICIAL REVIEW OF PROPERTY ASSESSMENTS

To taxpayers and reformers alike the greatest obstacle in the assessment system was the inability of the taxpayer to effectively challenge the inaccuracy of the assessment. Since the review of the Assessor's initial evaluation[4] was limited to review by a Board of Appeals,[5] the taxpayer could not appeal the proceeding to the judicial system although he might under limited conditions challenge the valuation in court. The Illinois Supreme Court had interpreted Article IX of the Illinois Constitution of 1870[6] as prohibiting judicial review.[7] The court characterized the valuation of real property as a legislative process under the constitutional mandate that valuation be set by rules or laws enacted by the General Assembly in a uniform fashion. Thus,

4. ILL. REV. STAT. ch. 120, § 120 (1973). *See* First Lien Co. v. Markle, 31 Ill. 2d 431, 202 N.E.2d 26 (1964).

5. ILL. REV. STAT. ch. 120, §§ 593 *et seq.* (1973). On review of assessments by Boards of Review in counties with less than 500,000 inhabitants, *see* ILL. REV. STAT. ch. 120, § 588 (1973).

6. The relevant clause of the 1870 Constitution provided in part that "[t]he general assembly shall provide such revenue as may be needful by levying a tax by valuation. . . ." ILL. CONST. art. IX, § 1 (1870).

7. Bistor v. McDonough, 348 Ill. 624, 181 N.E. 417 (1932).

if local officials set valuations by uniform procedures, the valuation would not be subject to challenge. However, should the mandate for uniform treatment be violated by the local assessing official, a judicial challenge would lie.

The basis to the challenge of excessive valuation requires that the cause be not disagreement as to value, but rather due to fraud—either real or constructive.[8] Any excessive valuation caused by fraud would violate the 1870 constitutional requirement of uniform treatment. Under this interpretation, the Illinois Supreme Court achieved a two-fold objective. First, it prevented what the court felt could be a flood of cases dealing with differences of opinion as to valuation. Second, it allowed a method of judicial review for those cases that were of such a nature as to require taxpayer protection. Thus, the court established a system where only the most severely injured taxpayers had a legal remedy.

In *People ex rel. Nordlund v. S.B.A. Co.*,[9] a 1966 case, the supreme court set forth the problem concisely:

> We have consistently held that the taxation of property is a legislative function rather than a judicial function, and under Section 1 of Article IX of the Illinois Constitution, *the courts in the absense of fraud, have no power to review or determine the value of property fixed for purposes of taxation by the appropriate elected or appointed administrative officers. . . .*
>
> We know of no authority, and none has been cited to us, which suggests that it is a deprivation of due process to attribute

8. In People *ex rel.* Frantz v. M.D.B.K.W., Inc., 36 Ill. 2d 209, 211, 221 N.E.2d 650, 652 (1966), the Illinois Supreme Court stated the proof required to establish constructive fraud:

> It is only where the property has been grossly overvalued, the assessed valuation being reached under circumstances showing either lack of knowledge of known values or a deliberate fixing of values contrary to the known value, that fraud in law will be inferred. Before the conduct of taxing authorities will be considered constructive fraud, the evidence must clearly establish that the assessment was made in ignorance of the value of the property, or on a judgment not based upon readily ascertainable facts, or on a designedly excessive basis.

The grounds for constructive fraud have also been summarized as follows:

(a) Where there is evidence of actual fraud;
(b) Where the evidence indicates the assessment is so excessive that it could not have been honestly made;
(c) Where the evidence indicates that the assessment was made by mere will without the exercise of judgment;
(d) Where the evidence indicates the assessment was arbitrarily made in disregard of recognized elements of value;
(e) Where the evidence indicates the assessment was made in violation of the rules of the Assessor or the Board of Appeals; and
(f) Where there is evidence of intentional and systematic discrimination.

Forde, *The Litigation of Real Estate Tax Assessments in Cook County*, 1972 TRIAL LAWYERS GUIDE 209.

9. 34 Ill. 2d 373, 215 N.E.2d 233 (1966).

such finality to administration determination of assessments . . . .[10]

An analysis of the debates of the Constitutional Convention indicate that the framers of the new constitution were well aware of the problems faced by taxpayers wishing to challenge excessive valuation. The debates on the Revenue Article, though limited, indicate the concern of certain delegates.

> Mrs. Leahy: Does your sentence 'any such classification shall be reasonable and assessment shall be uniform with any class,' does that sentence provide the ability for challenges to assessments that do not exist today in Cook County?
>
> Mr. Karns: I would say that it well might, Mrs. Leahy. As I understand the courts have picked on the expression determined by some person I believe, as 'the General Assembly shall direct and not otherwise' as the — one of the reasons for denying judicial review. That type of provision, you will notice, is not in here.
>
> Mrs. Leahy: . . . [S]o you would see this sentence as providing some type of protection from arbitrary and capricious assessments, if such should exist?
>
> Mr. Karns: Yes.
>
> . . . .
>
> Mr. Gertz: Now, earlier you suggested that judicial review might be possible. Would you be amenable to inserting some phrase or clause which would make judicial review more likely in certain circumstances?
>
> Mr. Karns: I would not, personally, because I do not personally see the need for expanded judicial review. This is my own opinion in this matter.
>
> Mr. Gertz: Wouldn't judicial review be limited to fraud, and there might be other circumstances including unreasonable classification.
>
> Mr. Karns: Well, certainly fraud and unreasonable classification and perhaps other circumstances.[11]

These are the only references to the question of judicial review of real property assessments in the legislative history of subsections 4(a) and 4(b) of Article IX of the 1970 Constitution. Thus, when the new revenue provision emerged in the constitution, its broad language gave hope of a new approach to the problem of over-assessment.[12]

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10. *Id.* at 376, 215 N.E.2d at 235 (emphasis added).

11. RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, *Verbatim Transcripts*, vol. III at 2023. [hereinafter cited as *Verbatim Transcripts*].

12. The portions of the Revenue Article pertinent to this discussion are ILL. CONST. art. IX, § 4(a)-(c):

> (a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.
>
> (b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than

Both the drafters of the constitution and legal scholars had great expectations for change. One commentator, Dr. Richard Wattling, developed a case for change. His thesis was:

> The Revenue Article of the 1970 Illinois Constitution has worked, or more precisely will work, substantial changes in the taxation of real property in Cook County. . . . *It expands, substantially, the legal remedies available to real property owners aggrieved by the valuations placed upon their properties by the assessing authorities.*[13]

Based upon his analysis of the proceedings of the Constitutional Convention and of the changes in the Revenue Article in the 1970 Constitution, Wattling concluded that:

> [T]he 1970 Constitutional Convention *knowingly and deliberately eliminated from the 1970 Constitution any and all restrictions on judicial review of real property assessments.* . . . Accordingly, it would appear that, for the first time in 124 years, direct judicial review is now possible in Illinois from the valuation decisions of the assessing authorities. More specifically, no longer is it necessary in a separate proceeding to establish that the assessment in question was actually or constructively fraudulent. . . .[14]

Many of Wattling's expectations were shared by other real estate tax experts.[15] The pervading feeling was that judicial review indeed had been enhanced in scope.

The hopeful expectations of the commentators were never fulfilled. In *M.F.M. Corp. v. Cullerton*,[16] the Illinois Appellate Court utilized the "constructive fraud" doctrine in reviewing an assessment within Cook County. After citing older decisions as supportive, the court found that the facts did lead to a conclu-

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200,000 may classify or continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential property in that county.

(c) Any depreciation in value of real estate occasioned by a public easement may be deducted in assessing such property.

13. Wattling, *Taxation of Property in Cook County Under the Constitution of 1970*, 6 J. MAR. J. 87 (1972) [hereinafter cited as WATTLING].

14. *Id.* at 97 (emphasis added).

15. Wayne W. Whalen, a drafter of the 1970 Constitution, along with Robert A. Helmon, stated: "Nothing in Section 4 requires continuation of the doctrine developed by the courts under the 1870 Constitution that no judicial review is allowed with respect to individual assessments." ILL. CONST. art. IX, § 4(b), Commentary at 177 (Smith-Hurd 1973). Kevin M. Forde, one of the leading revenue attorneys in Illinois has also stated: "The restrictive language of Article IX, Section 1 (of the 1870 Constitution) has been removed in the Constitution of 1970, perhaps broadening the opportunities for judicial review." Forde, *The Litigation of Real Estate Tax Assessments in Cook County*, 1972 TRIAL LAWYERS GUIDE 209, 223.

16. 16 Ill. App. 3d 681, 306 N.E.2d 505 (1973).

sion of fraud.[17] As fraud was factually indicated by the record, there was perhaps no need to review other proposed standards for judicial review made possible by the new Revenue Article. The court made no effort to inspect floor proceedings of the convention or the legislative history of the article. However, the use of the constructive fraud standard was soon to be put to a more genuine challenge.

In *LaSalle National Bank v. County of Cook*,[18] the Illinois Supreme Court rejected arguments for a change of the standard for judicial review of assessment proceedings. Several corporate land trustees[19] filed individual and class actions seeking injunctive relief and a refund of taxes allegedly based upon excessive valuations within Cook County.[20] The court discussed the applicability of the equitable and declaratory relief sought,[21] and found that the case involved facts not warranting either form of relief at this stage of the litigation.

Of greater impact was the court's holding that the new constitution did not change the necessity of a finding of constructive fraud as a requisite for judicial review of property tax assessments. After setting out the relevant provisions of both the old and the new constitutions,[22] the court found that "[t]he difference in the language used in the 1970 Constitution from that used in the 1870 Constitution . . . has not altered the scope of judicial review of real estate tax assessments."[23] The

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17. *Id.* Plaintiff's property had been assessed at a figure approximately three times that of the previous year's figure. The record indicated no improvements which would justify the inflated figure placed upon the property by the assessor.

18. 57 Ill. 2d 318, 312 N.E.2d 252 (1974).

19. The defendants questioned the ability of the land trustees to bring the actions. The court found it unnecessary to discuss this contention since the dismissal was upheld on other grounds.

20. Cook County is specifically authorized to divide the territory of the county into four parts. Each quadrant is reassessed every four years. ILL. REV. STAT. ch. 120, § 524 (1973). The validity of this enabling statute was upheld in Apex Motor Fuel v. Barrett, 20 Ill. 2d 395, 169 N.E.2d 769 (1960).

21. For a discussion of these remedies as they relate to the contestation of real estate assessments, *see* text accompanying notes 26-40 *infra*.

22. The court's comparison of the wording of each constitution stated:

> Section 1 of article IX of the Constitution of 1870 provided:
> 'The general assembly shall provide such revenue as may be needful 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*; * * * ' (Emphasis added.)
> Section 4(a) of article IX of the Constitution of 1970 provides:
> 'Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly *by valuation ascertained as the General Assembly shall provide by law*.' (Emphasis added.)

57 Ill. 2d at 329, 312 N.E.2d at 258.

23. *Id.* at 329-30, 312 N.E.2d at 258.

statements made on the convention floor[24] which Wattling firmly believed established a new standard of judicial review, were cited by the court as being in direct support of the *LaSalle Bank* decision:

> The constitutional debates contain only slight reference to the subject of judicial review of assessments. Delegate Karns, who had submitted the proposed amendment, was asked if he would be amenable to the insertion of some phrase or clause in his amendment which would make judicial review more likely. Delegate Karns indicated he would not.[25]

Thus, in view of the uncertainty of the framers of the constitution and despite the predictions of the legal scholars, the court reaffirmed its earlier reliance upon the theory of real and constructive fraud as the only remedy for over-evaluation. The hopes for expanded judicial review of administrative assessment procedures were shattered by the holding of the *LaSalle Bank* decision.

The Right to Equitable Relief

In the 1930's, the Illinois legislature enacted the predecessors to what are now sections 675 and 716 of the revenue chapter.[26] These sections require that in order to contest any tax assessment, the taxpayer is required to pay the entire tax to the appropriate collector, and then file timely objections with the circuit court for review and possible refund.[27] The shortcomings and potential hardship involved with this form of assessment protest are readily apparent. Illinois courts have consistently held that, in all but the most extreme cases, these statutes provide the taxpayer with an adequate remedy at law in contesting the actions of the assessor.[28] Thus, the courts have found this method to provide adequate legal relief, and as a result the taxpayer is severely limited in invoking the jurisdiction of equity.

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24. *See* text accompanying note 11 *supra*.
25. 57 Ill. 2d at 329, 312 N.E.2d at 258.
26. Ill. Rev. Stat. ch. 120, §§ 675, 716 (1973).
27. In pertinent part, section 675 provides:
> If any person desires to object . . . to all or any of a real property tax for any year, for any reason other than that the real estate is not subject to taxation, he shall first pay all of the tax installment due. . . .

The validity of the statute was upheld in Lakefront Realty Corp. v. Lorenz, 19 Ill. 2d 415, 167 N.E.2d 236 (1960). For a discussion of the use and procedures of the payment under protest provisions, *see* Parham, *Procedures for Obtaining Relief with Respect to Property Tax Assessments and Rates*, 61 Ill. B.J. 306 (1973); and Mathias, *Paid Under Protest*, 58 Ill. B.J. 466 (1970).

28. Lakefront Realty v. Lorenz, 19 Ill. 2d 415, 167 N.E.2d 236 (1960); Lackey v. Pulaski Drainage Dist., 4 Ill. 2d 72, 122 N.E.2d 257 (1954); Goodyear Tire and Rubber Co. v. Tierney, 411 Ill. 421, 104 N.E.2d 222 (1952); Ames v. Schlaeger, 386 Ill. 160, 53 N.E.2d 937 (1944).

The obvious limitations of these remedies at law created pressure on the legal community to seek an alternative form of relief in real estate litigation. Although somewhat limited, equity did provide some relief in specific types of cases.

> A taxpayer need not look to the remedy at law but may seek relief by way of injunction where the tax is unauthorized by law or where it is levied upon property exempt from taxation. These two situations constitute independent ground for equitable relief and in such cases it is not necessary that the remedy at law be inadequate.[29]

The reason that equitable relief, as well as statutory legal relief, is available in cases of unauthorized taxes and exempt properties is because no question exists as to valuation. If the property is exempt or if the tax assessed is illegal, nothing is due to the county, and the property should not be exposed to loss at a tax sale.[30]

Historically, the chancery courts had granted injunctions where the prior statute had made no provisions for refunds on excessive valuations.[31] When the General Assembly enacted the payment under protest statutes and provided for court-enforced refunds for excessive valuation, the principal argument for injunctive relief disappeared. The injunctive procedure had acted only to slow the collection of revenue. Dicta in recent cases had hinted that equitable relief might be invoked in cases where the valuation was so excessive as to connote constructive fraud.[32] However, in the case of *Clarendon Associates v. Korzen*,[33] the Illinois Supreme Court held that excessive valuation, in itself, would not be sufficient to invoke equitable jurisdiction. The plaintiffs in *Clarendon* asserted that the assessments of their properties were so excessive as to be fraudulent, and sought declaratory and injunctive relief. Without setting out the facts of the case, the court found that the parties had an adequate remedy at law through the procedures of payment under protest.

The *Clarendon* court expressed concern that a serious crisis in the collection of revenue could occur should injunctive relief

29. Clarendon Associates v. Korzen, 56 Ill. 2d 101, 105, 306 N.E.2d 299, 301 (1973).

30. Lackey v. Pulaski Drainage Dist., 4 Ill. 2d 72, 122 N.E.2d 257 (1954); Owens-Illinois Glass Co. v. McKibben, 385 Ill. 245, 52 N.E.2d 177 (1943); Moline Water Power Co. v. Cox, 252 Ill. 248, 96 N.E. 1044 (1911). The taxpayer may elect to pursue either a legal or an equitable remedy in these two specific instances. Sanitary Dist. v. Young, 285 Ill. 351, 120 N.E. 818 (1918).

31. Ames v. Schlaeger, 386 Ill. 160, 53 N.E.2d 937 (1944); Peoples Gas Light and Coke Co. v. Stuckart, 286 Ill. 164, 121 N.E. 629 (1918); Pacific Hotel Co. v. Lieb, 83 Ill. 602 (1876).

32. *See, e.g.*, American College of Surgeons v. Korzen, 36 Ill. 2d 340, 224 N.E.2d 7 (1967).

33. 56 Ill. 2d 101, 306 N.E.2d 299 (1973).

be freely available.[34] Perhaps the court was sagacious in that it foresaw today's depressed economic condition where litigation might be used to forestall payment of contested taxes. Such a situation could paralyze local governments with their heavy dependence upon the revenue of real property taxes.

The court then defined the question even more concisely. If the taxpayer is able to pay the assessed tax and subsequently sue to obtain a refund, such relief would be equivalent to that granted by equity. The plaintiffs had paid the tax in full, and thus established the adequacy of their remedy at law. The court thus eliminated equity as a *concurrent* remedy for excessive valuations. If the taxpayer is able to pay under protest, he must meet an extremely heavy burden in order to have recourse to equity. In effect the court has stated that equity is not totally precluded as a remedy. However, plaintiffs will be forced to make a special showing of extrinsic evidence in order to be entitled to equitable relief. The door to equity has not been completely closed, as the court stated:

> Although there may have been justification for granting injunctive relief in constructively fraudulent assessment cases prior to [the enactment of the payment under protest statutes], we do not think this should continue to be considered as an independent ground for equitable relief.
>
> . . . .
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> There will be cases of fraudulently excessive assessments where the remedy at law will not be adequate and injunctive relief should then be available.[35]

Hoyne Savings & Loan Association v. Hare[36] indicates what the court regards as a proper case for equity, thereby lessening the uncertainty of *Clarendon* to some extent. The plaintiff savings and loan subdivided a tract of land and made minor improvements. The defendant assessor raised the 1970 valuation of the property from $9,500 to $246,810, with a correlative increase in the tax computation. Hoyne was not aware of this change until it received the new tax bill, although the assessor had published the new assessment rolls. Defendant assessor sought to bar Hoyne's right to equitable relief, contending that the plaintiff had an adequate remedy at law. Hoyne, unaware of the changed assessment figure, failed to appeal to the Board of Review. This failure to exhaust its administrative remedy barred recourse at

34. The court cited People *ex rel.* Sweitzer v. Orrington Co., 360 Ill. 289, 195 N.E. 642 (1935) to emphasize this factor. That court found that taxpayers of a depression era were filing needless and groundless objections to tax assessments, thereby severely impairing the functions of local governments.

35. 56 Ill. 2d at 107-08, 306 N.E.2d at 302-03.

36. 60 Ill. 2d 84, 322 N.E.2d 833 (1974).

law.[37] Pursuant to a lower court order, plaintiff paid the tax due under the assessment into court pending a hearing.

Clarendon fairly implied that where a taxpayer was able to pay the assessment under protest, equitable relief was not available. However, *Hoyne* was found to fit into that small category of cases wherein the *Clarendon* court had hinted that the possibility of injunctive relief was not precluded.

> [I]n *Clarendon*, we also stated: 'There will be cases of fraudulently excessive assessments where the remedy at law will not be adequate and injunctive relief should then be available.' . . . We consider this case . . . to fall within this exception to the general rule announced in *Clarendon*.[38]

The court looked into a number of factors concerning the assessment process and its propriety in relation to this case. Among the most important of these included:

1) An increased valuation of approximately 2500% on property without significant improvement.

2) An assessment based upon the best possible use of the land, when at the time of the assessment, such a use was prohibited by the local zoning ordinance.

3) Consideration of all lots in the sub-division as improved, although fewer than 10% actually were so improved.

4) The fact that plaintiff's taxes for subsequent years had been significantly reduced, which the court construed as acknowledgment that the contested taxes were grossly excessive.

5) A figure from a private appraiser of only 10% of the county's assessed valuation.

While the court found no single factor sufficient to warrant equitable relief, these many unwarranted factors in the aggregate prompted a finding that:

> Under these circumstances it would be extremely unfair and unjust for this court to adhere to a rigid formula which would require that all relief from fraudulently excessive assessments be sought through the legal remedy provided by statute. This is a proceeding in equity, and a court of equity is not bound by strict formulas . . . but may shape its remedy to meet the demands of justice in every case, however peculiar.[39]

The *Clarendon* and *Hoyne* decisions imply that the possibility of equitable relief will be decided on a case by case basis. While *Clarendon* has stated that excessive assessments alone will not

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37. Payment under protest must be accompanied by timely filed objections. Where the taxpayer fails to file proper written objections within the statutory period, he waives his right to protest. ILL. REV. STAT. ch. 120, § 716 (1973).

38. 60 Ill. 2d at 89, 322 N.E.2d at 836.

39. *Id.* at 90-91, 322 N.E.2d at 837 (citation omitted).

be sufficient to invoke equity, *Hoyne* appears to hold that an assessment which is admittedly "grossly excessive," accompanied by various other factors, will enable an equitable remedy.[40] A critical factor in both cases is the ability of the plaintiffs to pay the contested sum into court pursuant to the statutory remedy. As of yet, no Illinois court has decided the adequacy of the legal remedy where the contestant makes a showing of inability to pay as mandated by the statutes.[41] However, it will become readily apparent that the issue must be resolved within a reasonably short time.

Federal Review of Property Tax Assessments

Long before the enactment of applicable statutes, the federal courts expressed extreme reluctance in affording state taxpayers equitable relief on federal grounds where state procedures provided an adequate remedy wherein the taxpayer could assert deficiencies in federal constitutional standards.[42] The rationale for such a judicial attitude was founded upon a feeling that enjoining the collection of state taxes constituted an unwarranted interference with a state's internal economic and administrative procedures.[43] This concept of judicial restraint was granted congressional approval and sanction with the enactment of the predecessors of 28 U.S.C. § 1341.[44] In 1948, § 1341 was enacted into law in the same form in which it exists today:

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40. The *Hoyne* court noted:

> Although not intending to establish a line of demarcation as to when an assessment will be so excessive as to render the relief at law inadequate, we consider this grossly excessive assessment significant though not necessarily by itself controlling.
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> . . . .
>
> Additional circumstances which assist us in the formation of the total picture requiring equitable intervention are the extremely late date on which the assessor completed the assessments . . ., the publication date, which was several months later than ordinarily expected, the late mailing of the tax bills, and the fact that the first actual notice which the plaintiff had of the increased assessment was after the Board of Review had closed its books for the 1971 taxes.
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> . . . .
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> Of substantial significance is the revelation made to this court . . . [that] it appears that the assessing officials of McHenry County have acknowledged that the assessment on which the plaintiff's taxes for 1971 was based was grossly excessive.

Id. at 89-90, 322 N.E.2d at 836.

41. *See* the discussion of Exchange National Bank v. Cullerton, 17 Ill. App. 3d 392, 308 N.E.2d 284 (1974), at note 53 *infra.*

42. Matthews v. Rogers, 284 U.S. 521 (1932); Stratton v. St. Louis S.W. Ry. Co., 284 U.S. 530 (1932).

43. *See* Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943).

44. An Act of August 21, 1937, ch. 726, § 1, 50 Stat. 738. The original statute essentially provided that federal relief was not available to a state taxpayer where the state could demonstrate the existence of an adequate remedy at law. The language has been adopted for the most part in the current statute, 28 U.S.C. § 1341.

> The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such state.

With the enactment of this statute, Congress placed the burden upon the taxpayer to follow the required state procedures before resort to the federal courts will be permitted.[45] State procedures must be followed even though there may be substantial federal issues raised by the taxpayer.[46]

Court interpretation of this section has shown that the phrase "plain, speedy, and efficient" will generally receive a liberal interpretation. The standard involved has been held to connote that the state remedy need not be the "plainest, speediest, or most efficient remedy."[47] Similarly, federal declaratory relief has been held to be unavailable until state remedies have been exhausted.[48] As so interpreted, the statute has created a heavy burden upon the state taxpayer in contesting a state tax in federal courts. Where state law provides for an appellate process of some form, it will be unlikely that the taxpayer will be entitled to federal redress of a matter related to state taxation.[49]

The recent case of *28 East Jackson Enterprises, Inc. v. Cullerton*[50] tested the availability of the federal courts as an alternative forum for contesting the valuation of real property in Illinois. Plaintiff-taxpayer failed to pay the tax levied on its property following an allegedly fraudulent assessment.[51] The taxpayer sought no state remedy, but filed a civil rights suit against the assessor pursuant to 42 U.S.C. § 1983.[52] Petitioner's

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45. Geo. F. Alger Co. v. Peck, 74 S. Ct. 605 (1954) (Reed, J., as Circuit Justice).

46. *See* Mandel v. Hutchinson, 494 F.2d 364 (9th Cir. 1974); *cf.* Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969).

47. Mandel v. Hutchinson, 494 F.2d 364 (9th Cir. 1974); Ford Motor Credit Co. v. Louisiana Tax Comm'n, 321 F. Supp. 1365 (E.D. La. 1971).

48. . . . [W]e are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.

Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 299 (1943). *See also* Hickmann v. Wujick, 488 F.2d 875 (2d Cir. 1973); City of Houston v. Standard-Triumph Motor Co., 347 F.2d 194 (5th Cir. 1965).

49. *See, e.g.*, McCaw v. Fase, 216 F.2d 700 (9th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).

50. Dock. #74-1179 (7th Cir., Aug. 8, 1975).

51. Plaintiff alleged that its property was assessed at 70% of its fair market value, while Cook County generally assessed its property at 25% of its fair market value. *Id.* at 2.

52. Section 1983 reads, in its totality:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

substantive argument was that the disparity of the assessment of its property in comparison with that of neighboring property was so great as to cause a denial of due process and equal protection.

The jurisdictional allegation essentially stated that, due to plaintiff's inability to pay the tax under protest as mandated by the Illinois statutes, there was no adequate remedy at law in the state courts. The allegation was necessary to preserve jurisdiction in the face of § 1341. The district court granted the preliminary injunctive relief after finding that plaintiff's inability to pay under protest denied it a remedy which was "plain, speedy, and efficient."

On appeal to the Seventh Circuit, Cullerton, the Cook County Assessor, argued that payment under protest was a remedy sufficient to preclude federal jurisdiction over the dispute. The Court of Appeals answered this response by ruling that, since the district court had expressly found that plaintiffs were unable to pay the tax under protest, such a remedy was not available to the taxpayer. Defendant-assessor then claimed that the taxpayer could, under the circumstances, seek equitable relief in the Illinois courts. The taxpayer's response to this was that such a remedy had been foreclosed by the *Clarendon* decision, and that there was no remedy under the state plan which would provide relief for the taxpayer's constructively fraudulent assessment.

The majority opinion reversed the district court and dissolved the injunction. Essential to the decision was the court's reliance on the *Clarendon* language to the effect that while constructive fraud alone would not suffice to invoke equitable relief, other factors could enter which might permit a state court to invoke its equity jurisdiction.[53] The court stated that the policy of freely allowing equitable relief would "impair the collection of state revenues and undermine the purpose of the statutory remedy."[54] However, the court found that the plaintiff in this

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to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

53. The Seventh Circuit favorably cited both *Hoyne* and *LaSalle Bank* as authority for this hypothesis. The court also cited Exchange National Bank v. Cullerton, 17 Ill. App. 3d 392, 308 N.E.2d 284 (1974). In this case, the dicta of the Illinois Appellate Court implied that, had plaintiff been able to satisfactorily establish inability to make the payment under protest, equitable relief may have been granted. However, such a showing had not been attempted by the plaintiff. Taxpayer had attacked the payment under protest statutes as a violation of constitutional due process. The dismissal by the lower court of plaintiff's action was upheld by the appellate court.

54. 28 *East Jackson* at 4. The court found that this factor was a valid policy for the limitation placed on equitable remedies by the state courts, but that the strength of the policy could not be used to totally preclude any resort to equity.

case did not seek equity to delay payment, but sought its relief only because no other was available to it. In effect, the Seventh Circuit expressed its faith that the state courts would construe both *Clarendon* and *Hoyne* as allowing equitable relief in the plaintiffs situation.

> Since the legal remedy considered adequate in *Clarendon* was the statutory remedy of payment under protest, it follows that when that remedy is unavailable, as in the present case, an action for injunction will lie. . . . [W]e believe that it is reasonably certain that Illinois courts would entertain a suit for injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest. Under such circumstances, the principles of comity and restraint embodied in section 1341 require that plaintiff first seek equitable relief in the Illinois court.[55]

A dissenting opinion felt that the likelihood of equitable relief in the state courts was not so certain as to deprive the federal courts of jurisdiction. Section 1341 will not apply when the existence or adequacy of the state remedy is uncertain.[56] The dissent argued that, as the majority's reliance on *Clarendon* and *Hoyne* was mere prediction, the requisite "certainty" was not so imminent as to deprive the plaintiff of a federal forum under § 1341. While agreeing with the majority that the injunction should have been dissolved, the dissent recommended that the district court be allowed to retain jurisdiction of the case pending the state court's disposition of the taxpayer's suit.

The implication left by the Seventh Circuit was unmistakable. The failure of the state courts to permit equitable relief would permit the taxpayer to return and plead his case in the federal courts. The federal judiciary has sent a subtle message to the state courts: should the *Clarendon* doctrine fail to allow sufficient exceptions to fulfill the federal standards, federal review of the state's assessment procedures may well follow. Nonetheless, the federal court denied access to this taxpayer until state remedies were exhausted, perhaps giving the state courts a further push to reassess the *Clarendon* exceptions and produce additional guidelines. It must be noted that, pending resolution of any potential state-federal conflict, a taxpayer's election to proceed in federal court without exhausting both state legal and equitable remedies could well be an expensive one.

Classification of Real Property for Purposes of Taxation

Prior to the adoption of the new constitution, the Cook County Assessor had long followed a system of taxation based

55. *Id.* at 4-5.
56. Hillsborough v. Cromwell, 326 U.S. 620 (1946).

upon classifying different types and uses of real estate at varying percentages of market value. As the 1870 Constitution required uniform valuation of all real property for tax purposes, the assessor's actions were directly in contravention of the constitution. The assessor had never been successfully challenged on this procedure. However, legal scholars and convention delegates alike acknowledged the existence of the practice.[57] The term "de facto classification" has been attached to this practice.[58]

Against this background, it was to be expected that the constitutional convention would treat the problem of classification as well as the de facto actions of the assessor. An early proposal of the Committee on Revenue and Finance recommended the abolition of mandatory uniform assessments for the following reasons:

> The basic provisions of the present revenue article . . . were intended to insure that a uniform . . . property tax would be the principal form of taxation. . . . Most property was . . . easily located and easily valued.
>
> Today, conditions are far different. Property ownership interests are complex. Much property is intangible, some property is highly mobile and some is very difficult to value. . . . In response to these factors, the property tax has become something far different from the ideal set forth in the 1870 Constitution.[59]

The doctrine of classification was eventually granted constitutional legitimacy.[60] The phrase "may classify or continue to classify" was inserted to bridge the gap between the old and new constitutions, and to retroactively legitimize the past classification of the Cook County Assessor. However, debates ensued as to whether the language of the article was self-enacting or required enabling legislation.

Wattling had feared that under the new constitution the continuing de facto classification by the assessor without the

57. *See* Wattling, *Taxation of Real Property in Illinois—The "Railroad Cases" and the Future of De Facto Classification*, 1 J. MAR. J. 213 (1968). *See also* the discussion of the delegates to the convention concerning the de facto classification in Cook County. *Verbatim Transcripts*, vol. III at 1989-97 (1970). The discussion generally portrays a large conflict of ideals among the delegates, ranging from veritable outrage (remarks of Delegate Friedrich at 1991), to suspicion (remarks of Delegate Garrison at 1994), to justification (remarks of Delegate Lyons at 1991-92).

58. A student author has succinctly defined such classification as "a means of applying different tax rates to different types of property." Comment, *Real Property Taxation In Illinois*, 1974 U. ILL. L. FOR. 480, 490.

59. *Proceedings of the Illinois Constitutional Convention*, RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, *Comm. Proposals*, vol. VII at 2113-14 (1970).

60. ILL. CONST. art. IX, § 4(b). For the complete text of the section *see* note 12 *supra*.

passage of the appropriate ordinance by the County Board would lead to a legal challenge to the entire system of real estate taxation. This challenge could, in turn, result in the collapse of real estate taxation in Cook County:

> It would appear . . . that the Cook County Board, having failed to exercise the options granted to it under subsection 4(b) of the Revenue Article . . . would be governed by the general provisions of subsection 4(d) prohibiting the classification of real property for purposes of taxation. It would further appear that the changes in the classification system made by the County Assessor in 1972 were made without legal authority and are therefore void.[61]

Two separate lawsuits embraced the legal theories of Wattling and attacked the system of real estate taxation in Cook County. Fortunately for the revenue and citizens of the county, the Illinois Supreme Court rejected these challenges to the now allegedly *de jure* classification. In both *LaSalle National Bank v. County of Cook*[62] and *People ex rel. Kutner v. Cullerton*,[63] the court ruled in favor of the classifications as they were then being applied.

The *LaSalle* case was a consolidation of a number of lawsuits and served as a massive attack on the entire revenue system of Cook County. As to classification, the plaintiff contended that the system invoked by the assessor was without the requisite authorization of the County Board, thus rendering all assessments void. This contention confirmed the fears of Wattling by attacking the system in its entirety.

Upon an in depth review of the convention proceedings, the court concluded that the framers of the Revenue Article specifically sought to allow the Cook County Assessor to continue classification until either the General Assembly or the County Board had acted.[64] The court noted that several amendments to the Revenue Article, which would have required prior action by the County Board, had been defeated,[65] and construed this in conjunction with the actual language of the constitution as an intention on the part of the framers to allow the classification to continue without further legislative enactments. The holding thus found the challenge to be without a constitutional basis. Classification by the Cook County Assessor was therefore legitimized.

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61. WATTLING at 117.
62. 57 Ill. 2d 318, 312 N.E.2d 252 (1974). For a review of the effect and holding of the *LaSalle* case on the availability of judicial review in assessment cases, *see* text accompanying notes 18-25 *supra*.
63. 58 Ill. 2d 266, 319 N.E.2d 55 (1974).
64. *Verbatim Transcripts*, vol. III at 1991-97 (1969).
65. *Id.* at 1995-98.

The court responded to a second challenge to classification in the *Kutner* case several months after the *LaSalle* holding. Plaintiff sued a number of county officials alleging that they had failed to perform their duties to assess and equalize real property at a uniform percentage of cash value.[66] The argument stated that not only did the assessor lack the authority to classify property without legislative enablement, but also that all past assessments were illegal, as the constitution was not intended to be retroactive. Plaintiff's first contention, that the assessor needed enabling legislation to classify property, was found to have been resolved in the *LaSalle* case, and the court quickly dismissed it.

In finding that the phrase "continue to classify" was intended to apply retroactively, the court cited the language of several delegates upon the convention floor:

> MR. GERTZ: . . . I'd like to ask you what would be the effect if the proposed section 4.1 were adopted? Would that, in your opinion, fully legalize retroactively what Cook County has done?
>
> MR. McCRACKEN: Yes, it would in my opinion.[67]

Thus, the court held that the new provision was meant to have a retroactive effect and, as such, was able to cure the allegedly illegal practice that preceeded the new constitution. A practice which had been clearly unconstitutional became legitimized by the new constitutional provision.

The court then quickly disposed of plaintiff's contention that classification violated the equal protection clause of both the Illinois and United States Constitutions. The court noted the United States Supreme Court had granted the states "a very wide discretion in the laying of their taxes,"[68] and that "[t]he presumption of constitutionality which accompanies a State's scheme of taxation may be overcome only by a clear showing that it is arbitrary and unsupportable by any set of facts."[69] The court concluded that plaintiff had not met this burden in his allegations.

After many years of pursuing an illegal method of valuational assessment, the Assessor of Cook County, and all other counties having 200,000 or more inhabitants, are free to classify

66. The cause of action was brought under ILL. REV. STAT. ch. 120, § 804 (1973), which allows a civil action for damages caused by the neglect or evasion of duty by a county clerk, assessor, or other official as described in the statute. Plaintiff alleged that the failure to assess real property at an equalized valuation had caused damages to the amount of $420,000,000. As the statute authorized double recovery, the suit was brought for $840,000,000.

67. *Verbatim Transcripts*, vol. III at 1995.

68. Allied Stores v. Bowers, 358 U.S. 522, 526-27 (1959).

69. 58 Ill. 2d at 273, 319 N.E.2d at 59. *See* Madden v. Kentucky, 309 U.S. 83 (1940).

property for such assessments. The holdings of both *LaSalle* and *Kutner* clearly establish the legality of a reasonable and uniformly applied system of categorizing property for tax purposes. The issue seems closed, as the Illinois General Assembly has passed enabling legislation, as has the Cook County Board of Commissioners.[70]

Conclusion

Providing fair and equitable treatment for taxpayers in a modern and urban society is extremely complex. It is filled with conflicts between real estate investors and individual homeowners. The power of industrial taxpayers conflicts with efforts to accommodate the needs of single family taxpayers. The economic power of wealthy urban developers conflicts with government programs to provide adequate housing.

These conflicting interests and the increasing revenue needs of local governments place a great strain on the revenue system of a state or municipality. The pressure becomes even greater when, despite the heavy dependence upon real estate taxes, there exists an increasing inability to collect these taxes in areas of decline. The system is further distorted by an assessment mechanism which has been admittedly political and criticized as arbitrary and corrupt. The judiciary, faced with these conflicts and administrative deficiencies, appears to be unwilling to be dragged into the morass of direct review of specific assessments.

The cases decided since the adoption of the Constitution of 1970 indicate that the state courts will exercise restraint in any efforts to widen their appellate jurisdiction of the assessment process. Under a clearly legal doctrine, the judiciary has committed itself to support governmental operations by means of a continued and uninterrupted flow of revenue. Although the Illinois Supreme Court, as well as the applicable federal courts, may be criticized for its unwillingness to enter this "thicket," it is apparent that the court has begun to outline a path which clarifies the availability of taxpayer relief. It may be argued that the court has not followed, with great acumen, the implicit mandates of the new constitutional provisions. It may be additionally argued that the court has not reached a fully fair and equitable system from the taxpayers' standpoint. Nevertheless, the aggrieved taxpayer is now more fully aware of what rights are available to him should he seek relief from the courts. Although much remains to be resolved, the court appears to have made an adequate start in defining the procedures available to the property owner.

70. *See* Ill. Rev. Stat. ch. 120, § 501 (Supp. 1975).