STANDING OF THE UNDERVALUED PROPERTY OWNER

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Recent Arizona decisions recognize the standing of an undervalued property owner to sue for equitable relief without having to first allege overvaluation or overpayment of taxes. His remedies are the common law remedies that have been modified and implemented by statute and case law, and to some extent limited by the financial structure of the taxing unit and public policy.

Arizona Statutes

Our statutes are plain, clear and unambiguous. They require property to be assessed by proper authorities at "full cash value"[1] and define the term;[2] that as condition precedent to an appeal from the taxing authorities to the courts the taxpayer pay the full amount of the taxes levied under protest;[3] and for an allegation in his complaint that he deems his assessment unjust and why he thinks so.[4] There are also procedural requirements of notice to the board whose judgment is being appealed.[5] Another statute, more often relied on by the taxing authorities than by the taxpayer, prohibits the issuance of an injunction to prevent or enjoin the collection of taxes already imposed or levied.[6] However, such writs are not prohibited if intended to prevent future actions, enjoin further levies or stay taxes based on illegal statutes or assessments,[7] and if there is no adequate

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[1] ARIZ. REV. STAT. ANN. §§ 42-227 & 42-238 (1956). See also State v. International Smelting Co., 20 Ariz. 516, 181 Pac. 951 (1919), and Territory v. Delinquent Tax List, 3 Ariz. 117, 21 Pac. 768 (1889) in which the courts were specifically denied jurisdiction over the amount of an assessment.

[2] ARIZ. REV. STAT. ANN. § 42-201 (1956).

[3] ARIZ. REV. STAT. ANN. § 42-245B (1956). In Nelssen v. Electrical Dist. No. 4, 60 Ariz. 175, 133 P.2d 1013, *modifying on rehearing* 60 Ariz. 145, 132 P.2d 632 (1942), the court made clear that plaintiff did not have to pay the tax as condition precedent to test the legality of the tax when there was no semblance of authority for its imposition.

[4] ARIZ. REV. STAT. ANN. § 42-245B (1956).

[5] ARIZ. REV. STAT. ANN. § 42-245C (1956).

[6] ARIZ. REV. STAT. ANN. § 42-204 (1956).

[7] A writ of injunction was granted as taxpayer's remedy in McCluskey v. Sparks, 80 Ariz. 15, 291 P.2d 791 (1955); Crane Co. v. Arizona State Tax Comm'n, 63 Ariz. 426, 163 P.2d 656 (1945) in which the dissent indicated that widespread use

remedy at law. Of course, taxes must be imposed uniformly,[8] and in order to meet constitutional requirements the taxpayer must be given notice of the taxes due from him before he may be penalized.[9]

Judicial Construction of Arizona Statutes

Our statutes have remained basically the same since territorial days[10] but compliance with the statute requiring assessment of property at "full cash value" has been somewhat less consistent. The recent case of *Southern Pac. Co. v. Cochise County*[11] reflected how far our taxing authorities and assessing officers have departed from the full cash value requirement. Here, the plaintiff alleged its property was valued at 89% of full cash value while other property in the area was valued at an average of 20% of full cash value. The taxpayer sought two kinds of relief: an injunction to keep the state officials from continuing to value the property disproportionately, and a refund of the taxes paid under protest on the basis of the alleged disproportionate valuation. The court took judicial notice of the fact that despite the statute, all property is undervalued for tax purposes. It therefore reversed the trial court's order dismissing the complaint, holding that the taxpayer was entitled to injunctive relief if its allegations of disproportionate valuation were true. At the same time, it upheld the trial court in denying the taxpayer the right to sue for a

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of the injunction to test the legality of a levy could lead to financial embarrassment of the government; Nelssen v. Electrical Dist. No. 4, 60 Ariz. 145, 132 P.2d 632, *modified on rehearing*, 60 Ariz. 175, 133 P.2d 1013 (1942); Maricopa County v. Fox Riverside Theatre Corp., 57 Ariz. 407, 114 P.2d 245 (1941); and State v. Cull, 32 Ariz. 532, 260 Pac. 1023 (1927) which granted an injunction, *inter alia*, to avoid multiplicity of suits. Injunction was denied as a remedy in Smotkin v. Peterson, 73 Ariz. 1, 236 P.2d 743 (1951); State v. Superior Court, 72 Ariz. 388, 236 P.2d 461 (1951) in which the court refused to follow Crane Co. v. Arizona State Tax Comm'n, *supra*, and refused to grant an injunction to avoid multiplicity of suits, suggesting that the taxpayer rely on his remedy at law; Morgan v. Board of Supervisors, 67 Ariz. 133, 192 P.2d 236 (1948) (dismissed on the merits); Santa Fe Trail Transp. Co. v. Bowles, 62 Ariz. 177, 156 P.2d 722 (1945) (because there was an adequate remedy at law); Campbell v. Bashford, 2 Ariz. 344, 16 Pac. 269 (1888). See also Bank of Ariz. v. Howe, 293 Fed. 600 (D. Ariz. 1923) and Standard Oil Co. v. Howe, 257 Fed. 481 (9th Cir. 1919). In both cases injunctive relief was granted to the taxpayer protesting assessment on Arizona property.

Writs of mandamus and certiorari have also been issued when there was no other appropriate remedy. See Christmas Copper Corp. v. Kennedy, 58 Ariz. 216, 118 P.2d 1110 (1941); State Tax Comm'n v. Board of Supervisors, 43 Ariz. 156, 29 P.2d 733 (1934); State v. Superior Court, 30 Ariz. 620, 249 Pac. 768 (1926); State v. Board of Supervisors, 14 Ariz. 222, 127 Pac. 727 (1912); Copper Queen Mining Co. v. Board of Equalization, 7 Ariz. 364, 65 Pac. 149 (1901).

[8] ARIZ. CONST. art. 9, § 1.

[9] See Yuma County v. Arizona Edison, 65 Ariz. 332, 180 P.2d 268 (1947) in which the taxpayer was given relief for lack of adequate notice; State Tax Comm'n v. Shattuck, 44 Ariz. 379, 38 P.2d 631 (1934) in which a law was declared unconstitutional for lack of provision for adequate notice.

[10] Until 1901, there were no statutory remedies of appeal, and only equitable relief was afforded if an assessment was alleged to be illegal or fraudulent. REVISED STATUTES, §§ 3831, 3835, 3849 & 3877 (1901) provided the earliest statutory relief.

[11] 377 P.2d 770 (Ariz. 1963).

refund. The discriminatory valuation, although grossly inequitable, was so widespread that to permit the wronged taxpayer to sue for a refund would rock the financial stability of the taxing unit.[12]

Just when the assessments began to depart from uniform valuation is hard to ascertain; whether all property was ever valued at uniform full cash value is equally hard to determine. In the early territorial case of *Maish v. Arizona,*[13] an aggrieved taxpayer thought that Southern Pacific's property was undervalued for tax purposes and not bearing a fair share of the tax burden. The taxpayer offered to prove his contention, but his offer was rejected and his complaint was dismissed. In 1903 a taxpayer contended that other property similar to his own was undervalued and sought relief.[14] The court recognized that inequities existed in the assessments, but said it felt that the remedy was one for the "politicians," and that it would be impractical for the court to require assessing officers to do their duty and assess all property at its full cash value. Thus the court shifted to the legislature the burden of creating machinery to force authorities to assess at full cash value in compliance with the statute. This is probably the earliest case in which the court took notice of the fact that some property was undervalued for tax purposes but it refrained from offering a really constructive remedy to the taxpayer.

It was not until 1955, in *McCluskey v. Sparks,*[15] that our court for the first time took judicial notice of the state-wide undervaluation of property and granted equitable relief (injunction) to a small group of taxpayers whose property had been singled out and assessed by a different means of valuation than other taxpayers. The court there admitted that to deny common law or equitable relief would be to deny any remedy at all to a taxpayer whose property is required to bear an unfair share of the tax burden. The court relied to some extent on the fact that such taxing practices are unconstitutional.

In *McCluskey* and in the recent *Southern Pacific* case, the taxpayer alleged lack of uniformity rather than overvaluation. Before then the taxpayer had to allege overvaluation before he was afforded relief in court and entitled to a refund or a reduction in assessment. As early as 1890, our court took cognizance of the fact that property was to be "properly assessed for its full value. . . ."[16]

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[12] So much so that in the language of the court, "the refund which appellant seeks . . . threatens the financial solvency of the taxing unit." *Id.* at 778.

[13] Maish v. Arizona, 164 U.S. 599 (1896).

[14] County of Cochise v. Copper Queen Consol. Mining Co., 8 Ariz. 221, 71 Pac. 946 (1903).

[15] 80 Ariz. 15, 291 P.2d 791 (1955). See also Sparks v. McCluskey, 84 Ariz. 283, 327 P.2d 295 (1958).

[16] Territory v. Delinquent Tax List, 3 Ariz. 179, 180, 24 Pac. 182 (1890). This case was not actually predicated on valuation but on whether the taxpayer could deduct a mortgage owed on real property.

Our courts also presumed valuation was based on valid evidence in the absence of proof to the contrary.[17] It later defined "full cash value" as the "amount at which the property would be taken in payment of a just debt due from a solvent debtor."[18] Still later the court went further, and reviewed the evidence considered by the trial court and its mode of determination in arriving at an appraisal of "full cash value."[19] The court then relied on what is still the statutory definition — "the price at which property would sell if voluntarily offered for sale . . . and not the price which might be realized if the property were sold at forced sale."[20] As recently as 1945, a taxpayer seeking a refund had to allege and prove that his property was overvalued on the basis of this statutory definition in order to get relief after he had fully exhausted his statutory remedies.[21]

Thus until some time between 1945 and 1955, while the court literally construed the statute requiring assessments at full cash value, and required allegation of overvaluation as a prerequisite to relief, the taxpayer whose property was valued proportionately higher than his neighbor's but below full cash value was for all purposes without a statutory remedy. The taxpayer was forced to rely on the limited relief offered by equity and the common law if he could prove fraud, overvaluation or unconstitutionality of the taxing statute, much as he had to do before the adoption of statutory remedies for the taxpayer.[22] It remained for the recent *Southern Pacific* case to really jar the courts, our legislature and administrative boards into a full realization of how far the present-day assessments vary from the statutory requirements of full cash value.

Judicial Solutions of Assessment Problems in Other Jurisdictions

Certainly the problem of inequitable assessments and valuation is not unique to Arizona. Valuation seems to be one of the most difficult problems confronting the taxing authorities. While the classification of property is a valid legislative prerogative, neither the legislature nor its appointed or administrative officials may single out any individual taxpayer or group of taxpayers and cast upon him or them a disproportionate share of the tax burden. Once property is classified, then a uniform rate of taxation must be applicable to all

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[17] Hampson v. Dysart, 6 Ariz. 98, 53 Pac. 581 (1898).

[18] County of Cochise v. Copper Queen Consol. Mining Co., 8 Ariz. 221, 234, 71 Pac. 946, 950 (1903).

[19] State Tax Comm'n v. Magma Copper Co., 41 Ariz. 97, 15 P.2d 961 (1932); State Tax Comm'n v. United Verde Extension Mining Co., 39 Ariz. 136, 4 P.2d 395 (1939); Steinfeld v. State, 37 Ariz. 389, 294 Pac. 834 (1930).

[20] ARIZ. REV. STAT. ANN. § 42-201(1) (1956).

[21] State Tax Comm'n v. Phelps Dodge Corp., 62 Ariz. 320, 157 P.2d 693 (1945). See also Union Pac. R.R. v. Hoefke, 376 P.2d 80 (Ore. 1962).

[22] See note 10 *supra*.

property falling within this classification.[23]

In the New Jersey case of *Switz v. Township of Middletown*,[24] a taxpayer, taking a cue from an earlier New Jersey dissenting opinion by Judge Vanderbilt,[25] brought a suit to compel the local taxing authorities to assess all property at full and fair market value and require equalization of all assessments in the county so as to comply with the statutory requirements. The court issued the writ of mandamus. On appeal, this order was modified extending time for making these equalized assessments in order to avoid the chaos that might ensue if the attempt to equalize valuations was made too hastily. The New Jersey legislature acted immediately, and changed the law so that each county assessment board may determine at what percent of full cash value it wants its county property assessed.[26] The rate though is to be uniform throughout the county, and the basic valuation must be at fair market value.

The persistent Mrs. Switz did not stop there, and in 1961 again brought suit against the taxing authorities.[27] In the trial court (the matter is still before the New Jersey appellate court) the plaintiff was upheld and the court found that a part of the newly enacted law was invalid — it provided that "in the assessment of acreage which is actively devoted to agricultural use, such value shall not be deemed to include prospective value for sub-division or non-agricultural use."[28] It also held invalid that portion of the new law[29] which prescribed that the taxable value of farm machinery and farm livestock shall be fixed at percentage levels of fair value different and lower than those applicable to machinery and equipment used in business. There is an appeal pending this decision as well, but the writer would concur with the trial court and find invalid legislation that would tax property owners at a different rate for the identical kind of property.

In a similar case arising in Iowa, *Pierce v. Green*,[30] the court held

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[23] See Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946) for a Supreme Court enunciation of the constitutional rights of the taxpayer in a district in which the assessments are not based on uniform valuations.

[24] Switz v. Township of Middletown, 23 N.J. 580, 130 A.2d 15 (1957), followed by Village of Ridgefield Park v. Bergen County Bd. of Taxation, 31 N.J. 420, 157 A.2d 829 (1960).

[25] Baldwin Constr. Co. v. Essex County Bd. of Taxation, 16 N.J. 329, 108 A.2d 598, 607 (1954) (dissent).

[26] New Jersey Public Laws of 1960, Chapter 51. This was implemented by Rules and Regulations, Local Property Tax Procedures (1961). Copies of the Public Law and the implementing regulations can be obtained from the New Jersey Division of Taxation.

[27] Switz v. Kingsley, 69 N.J. Super. 27 (Law Div. 1961), contesting N.J. REV. STAT. 54:4-1 (1960) and Regulations 16:12-1.130 & 16:12-1.280.

[28] N.J. REV. STAT. 54:4-1 (1960).

[29] Switz v. Kingsley, 69 N.J. Super. 27 (Law Div. 1961), in which N.J. REV. STAT. 54:4-11 (1960) was contested which would modify or invalidate Regulations 16:12-2:250 & 16:12-2.260.

[30] 229 Iowa 22, 294 N.W. 237 (1940).

that mandamus was a proper remedy to compel the taxing authorities to assess at full cash value if the statute requires assessment at full cash value. This case has received less publicity and notoriety than the *Switz* cases, but the basic complaint and the remedy were similar.

In the 1948 Maryland case of *Board of County Comm'rs v. Buch*,[31] the taxpayer did not allege overvaluation; he merely complained that he thought another taxpayer's property was undervalued for tax purposes. The local taxing authority felt that he had no standing to be heard and denied him the right to a hearing. The taxpayer petitioned the court for a writ of mandamus. The writ was issued compelling the county board to hear the taxpayer's complaint. Nineteen other jurisdictions also permit the taxpayer to be heard when he wants to complain about the underassessment or non-assessment of the property of another taxpayer, but Arizona is not yet listed among these.[32]

Other jurisdictions have completely denied relief to a taxpayer who could not allege that his own property was overvalued. In *Carr v. Assessors of Springfield*,[33] and later in *Stone v. City of Springfield*,[34] the Massachusetts court denied relief although it tacitly admitted that there was a lack of uniformity. The court felt that the complainant had not satisfactorily proven that the lack of uniformity was based on intentional discrimination.

In *Stembler & Ford, Inc. v. Mayor of Capitol Heights*,[35] the Maryland court held that if the statute required uniformity, there was no discrimination. In a leading textbook in this field, Professor Hellerstein finds this case an "extraordinary example of judicial tolerance of discriminatory administration of a taxing statute"[36] because the court would not even give weight to evidence that the statute was not uniformly exercised.

Thus while the *Switz* decision in New Jersey compelling taxing authorities to comply with statutes gave impetus to the general area of reappraisal and encouraged the enactment of appropriate legislation to implement this reappraisal, the courts have been somewhat less than unanimous in following this case. The Arizona decisions taking judicial notice of the undervaluation of most property in this state certainly do not go so far either. Perhaps if they had, much of the legislative hassle concerning property reevaluation and reappraisal might have been mitigated or completely avoided.

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[31] 190 Md. 394, 58 A.2d 672 (1948).

[32] See Annot., 5 A.L.R.2d 576 (1949) for a complete discussion of the standing of a taxpayer who alleges the property of another taxpayer is undervalued, without having first to allege that his own property is overvalued or even unfairly valued.

[33] 339 Mass. 89, 157 N.E.2d 880 (1959).

[34] 341 Mass. 246, 168 N.E.2d 76 (1960).

[35] 221 Md. 113, 156 A.2d 430 (1959).

[36] HELLERSTEIN, STATE AND LOCAL TAXATION 105 (1961).

Valuation and Assessment Problems

Our courts in taking judicial notice of the undervaluation of almost all property in this state lagged somewhat behind the administrative tribunals. An informal inquiry at the Pima County Tax Assessor's office[37] elicited the information that real property is assessed at 15% for the value of the land and 25% for the value of the improvements thereon, and that this has been the common practice for some time.

To assist the assessor in making this "undervalued valuation" the state publishes the *Arizona Assessor's Rate Manual.*[38] This is a rather detailed breakdown of values to be given to various building and construction materials from stucco to Quonset huts, and to the various improvements to buildings and property from fireplaces and swimming pools to pergolas and arbors. Even with this elaborate assistance and data the problems of the assessor are manifold in areas that are building and developing as rapidly as the urban areas of Arizona. This is reflected in the wide divergence of valuations one sees on identical tract homes to which improvements were added at varying times.[39]

The difficulties of maintaining assessments at current full market value are also shared with other jurisdictions. In Washington, for instance, the state constitution provides that all property be assessed at 50% of its true and fair value. In practice, however, the statewide average assessment ratio is approximately 20% of its true and fair value.[40] In Illinois, the constitution requires that assessment be at

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[37] The writer went to the local assessor's office and made casual inquiry. Books, records and ledgers are open to the public, and even a cursory glance would reveal that not even these percentages are accurate or consistent.

[38] ARIZONA ASSESSOR'S RATE MANUAL (1951). The preface explains that 1939 levels are used. No dates are given for the changes. There is an annual depreciation allowance noted. This is still in effect in spite of a rising market over the last twenty-five years.

[39] The writer is most familiar with the houses in the tract in which she resides (Indian Ridge, Tucson, Arizona) and could best compare valuations there. There seemed to be some glaring inconsistencies in the assessments of almost identical homes, and in the real estate valuation for the land. Many improvements were not noted or taxed, probably in some cases because the assessor was unaware of them. A house valued at $6524 is almost identical to one valued at $5016. The former has a pool and the latter has very extensive and elaborate landscaping and patio wall. The tax difference is tremendous. Another house valued at $4580 is identical to its neighbor valued at $4333 except that the latter has added two rooms and a bath, has more extensive landscaping, and still enjoys a considerably lower valuation. Both have pools. A third house, also identical, but with little or no landscaping, and no pool is also valued at $4346. By identical, I mean the house is built of the same material, and has the same floor plan, and was built by the same builder at about the same time.

[40] Letter from the research division of the Washington Tax Commission, March 18, 1963.

full value, but most counties make assessment at 55% of the full fair market value.[41] Iowa law requires assessment at 60% of the actual fair market value, but in actual practice the values are established at 25-30% of the fair market value.[42] Missouri statutes require true value in money to be the basis of assessed valuation, but there too, in actual practice, the assessments are only a third of the amount.[43] This practice is not to be confused with that of some states in which the statute itself provides that for assessment purposes only a per cent of the actual valuation is to be used.[44]

Standing of the Taxpayer to Sue

In the former group of states, as in Arizona, it would be extremely difficult for a taxpayer to seek relief if he had to allege overvaluation in order to gain standing to sue. In this sense then, the *McCluskey* and *Southern Pacific* cases may have paved the way for other aggrieved taxpayers. Without alleging overvaluation, but basing their claims for relief on the lack of uniformity, they gained standing to sue, and in some limited measure, equitable relief.

The statutory requirement of payment of taxes under protest as a condition precedent to bringing suit for a refund is also worthy of some comment.[45] In some jurisdictions, the courts have found that when one pays a tax under duress for fear that non-payment may result in high penalties or interest or even a possible forfeiture, such payment is not voluntary in the legal sense, even though the taxpayer may not have formally protested at the time the tax payment

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[41] Letter from the Department of Revenue, Springfield, Illinois (unsigned), March 18, 1963.

[42] Letter signed by Robert E. Bucklew, Statistician for the Research Division of the Iowa State Tax Commission, March 18, 1963.

[43] Letter from John A. Williams of the Missouri State Tax Commission.

[44] In Montgomery County, Alabama, property is assessed at 25% of fair market value; Connecticut permits the percentage of fair market value to be determined locally; Idaho assesses at 20% of today's price on labor and material; Indiana assesses at 33⅓% of "true cash value"; Minnesota at approximately a third of market value; Nebraska at 35% of actual value; Nevada at 35% of actual value; North Carolina permits county to adopt an assessment ratio to full cash value; Oregon (except for one county) uses an assessment of 25% of true cash value; South Dakota uses a 60% taxable value but assessed at full and true value; Wyoming uses 25% of present-day value except for oil and gas production property which is valued at 100% for tax purposes; Vermont permits municipalities to list at a ratio of fair market value. This information was furnished by the individual state tax commissions.

[45] County of Maricopa v. Hodgin, 46 Ariz. 247, 50 P.2d 15 (1935) in which taxpayer could recover taxes paid under protest; Sears Roebuck v. Maricopa County, 41 Ariz. 304, 17 P.2d 1096 (1933); Arizona E.R.R. v. Graham County, 20 Ariz. 257, 179 Pac. 959 (1919) in which our court said that not only must payment be made under protest, but it must be made clear that it was paid for the express purpose of contesting the tax; Gibson Abstract Co. v. Cochise County, 12 Ariz. 158, 100 Pac. 453 (1909) in which the court said that when taxes are not paid under protest, the taxpayer has no right of action.

was made.[46]

There also appears to be some difference of opinion in the various jurisdictions as to what constitutes a fraudulent assessment and what remedies are available to rectify the situation. In *Pierce v. Green*,[47] the Iowa court viewed unequal assessments as void and said, "by a fraudulent assessment is meant an assessment that is purposely made too high, with a view of casting an undue proportion of the public burden on a certain taxpayer . . . . inequality in valuation fixed by design . . . [should] render the assessment void."[48] It operates as a constructive fraud on the taxpayer. This would give the taxpayer who has been unequally assessed latitude in the relief he may seek; equity always tries to remedy the defrauded person. As has been pointed out, the court in *Pierce* found fraud and issued a writ of mandamus compelling the local taxing authorities to equalize the assessments and bring them up to full valuation.

In *Guaranty Trust Co. v. State*,[49] a New York case, the court distinguished between a tax illegally imposed which it held to be void ab initio from a tax erroneously collected. In the former, the court felt that the common law remedy of a refund for money had and received is always available along with any remedy that the statutes may offer. When taxes are erroneously collected, the court there would limit the remedy to that provided by statute.

The Arizona court relied on some tenuous reasoning in denying recovery of the refund in the *Southern Pacific* case. It notes that taxes voluntarily paid could not be recovered,[50] but the first sentence of the court opinion states that the taxes were paid under protest.[51] Then our court goes on to say "[o]vervaluation of property is not a ground for action at law for the excess of taxes beyond what should have been a just valuation"[52] and cites an 1887 Supreme Court case.[53] That case clearly stated, however, that where an assessment is set aside as invalid,

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[46] City of Franklin v. Coleman Bros., 152 F.2d 527 (1st Cir. 1945); State *ex rel.* Kresge Co. v. Howard, 357 Mo. 302, 208 S.W.2d 247 (1948).

Note that our court in Nelssen v. Electrical Dist. No. 4, 60 Ariz. 175, 133 P.2d 1013, *modifying on rehearing* 60 Ariz. 145, 132 P.2d 632 (1942) held that payment of tax under protest was not a condition precedent to test the legality of a tax imposed without a semblance of authority.

[47] 229 Iowa 22, 294 N.W. 237 (1940). See also Switz v. Township of Middletown, 23 N.J. 580, 130 A.2d 15 (1957) which resulted in legislation to correct the situation.

[48] Pierce v. Green, 229 Iowa 22, 294 N.W. 237, 255 (1940).

[49] 186 Misc. 676, 62 N.Y.S.2d 309 (Ct. Cl. 1946).

[50] See note 45 *supra*.

[51] Note that in City of Franklin v. Coleman Bros., 152 F.2d 527 (1st Cir. 1945), and State *ex rel.* Kresge Co. v. Howard, 357 Mo. 302, 208 S.W.2d 247 (1948) courts of other jurisdictions have extended the concept of payment under protest to include payment made under duress or fear of high penalties or forfeiture of property and held that such payments are not voluntary in a legal sense even though not formally protested at time of payment.

[52] Southern Pac. Co. v. Cochise County, 377 P.2d 770, 778 (Ariz. 1963).

[53] Stanley v. Board of Supervisors, 121 U.S. 535 (1887).

an action at law does lie.[54] The Court there said that the taxpayer must render an amount due on a just evaluation before resorting to equity to enjoin collection of the excess. However, in the *Southern Pacific* case the taxpayer was forced by statute, and paid under protest, not the amount due on a just valuation, but the amount due on what the court itself felt may be an excessive, discriminatory valuation.[55]

Our court cites the dicta in *State ex rel. Kresge v. Howard*[56] for the proposition that public policy discourages suits for the refund of taxes, even where the taxes are illegally imposed and collected; but even in *Kresge* the Missouri court clearly limited this to taxes paid voluntarily and without compulsion, and where there was no remedy provided by statute. As a matter of fact, in *Kresge* the taxpayer was granted a refund, even though he had not paid under protest, because the court felt that compulsion could be implied when a taxpayer has to pay a tax in order to avoid a forfeiture or a stiff penalty.

The final case cited by our court in supporting the refusal of a refund is *State v. Airesearch*,[57] which our court relies on for the proposition that the refund of taxes is paid by governmental grace rather than by any legal right. The *Airesearch* opinion also limits itself to taxes voluntarily paid, and notes that even under such circumstances, under the laws of our state, it felt that the legislature had intended refund claimants to have the right to a hearing and an appeal to determine the merits of their claims.[58]

Conclusion

It would seem then that if the *Southern Pacific* assessment was a legal fraud on the taxpayer, some more adequate relief should have been afforded, even though the writer is fully aware of the stunning impact this would have on the local economy. However, should the court have determined that a refund was due, all the court could

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[54] Our own court has said that the fact that a county board of supervisors violated the statutes for many years in levying taxes does not add to the validity of the practice. Maricopa County v. Southern Pac. Co., 63 Ariz. 342, 162 P.2d 619 (1945). There seems to be no ground for claiming that payment of the disputed tax was a valid tax levy.

[55] In Simms v. Los Angeles County, 35 Cal. 2d 303, 217 P.2d 936 (1950) the court granted recovery of taxes paid under protest on misclassified property and allowed full recovery for the difference between the tax actually paid and that which properly should have been exacted.

[56] 357 Mo. 302, 208 S.W.2d 247 (1948).

[57] 68 Ariz. 342, 206 P.2d 562 (1949).

[58] Our court has recognized the right of a taxpayer to a refund in State Tax Comm'n v. Miami Copper Co., 74 Ariz. 234, 246 P.2d 871 (1952) for taxes paid under protest; and in Maricopa County v. Leppla, 89 Ariz. 220, 360 P.2d 227 (1961) for taxes paid voluntarily under mistake of fact. An Attorney General opinion of March 25, 1958, said that since there was no statutory provision for refunding an erroneous payment of taxes, the county treasurer needs judicial sanction to make a refund.

do is enter judgment.[59] It could not direct the county treasurer to pay it since the law will not permit a levy on property to satisfy such a judgment.[60] The taxpayer is merely a creditor, to be repaid in due course of time as are other creditors, and the county may budget the judgment as it does any other county expense, and levy the appropriate taxes to pay it.

The cases cited for the proposition that the judgment could have prospective force only[61] had to do with reliance on prior judgments or opinions that the court was presently reversing or overruling. The court felt that those who relied on the prior judgment or opinion should not be penalized and so ordered the cited judgments to have prospective force only.

The problem henceforth is one for the legislature. It alone may classify property; it is not in the province of the Board of Supervisors or Board of Equalization to assign classification or differing tax rates in the absence of further legislation.[62] The present legislature has embarked on the project of surveying the state's property properly and bringing all property up to a full cash value assessment as demanded by statute.[63]

Recognizing judicially that all property is undervalued in the state may afford some limited relief to the taxpayer whose assessment is as far out of line as Southern Pacific's was, but it does not in any measure alleviate the many less glaring, but perhaps equally unfair inequities. And it still leaves the state courts in the unenviable position of admitting that a gross wrong has been done, that a taxpayer has borne an unfair share of the tax burden, and then being unable to offer a fully adequate remedy.

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[59] In Bank of Ariz. v. Howe, 293 Fed. 600 (D. Ariz. 1923) the court said it is a fraud on the taxpayer to systematically assess some property by a different method than that which is used in assessing other property, when such method results in excessive tax.

[60] County of Maricopa v. Hodgin, 46 Ariz. 247, 50 P.2d 15 (1935). See also City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 164 P.2d 598 (1945); O'Malley v. Sims, 51 Ariz. 155, 75 P.2d 50 (1938).

[61] Arizona State Tax Comm'n v. Ensign, 75 Ariz. 376, 257 P.2d 392 (1953); Duhame v. State Tax Comm'n, 65 Ariz. 268, 179 P.2d 252 (1947).

[62] See Smotkin v. Peterson, 73 Ariz. 1, 236 P.2d 743 (1951) which held that the tax commission has jurisdiction to determine whether a taxpayer falls into a particular classification; Brophy v. Powell, 58 Ariz. 543, 121 P.2d 647 (1942) in which classification is considered a legislative prerogative; People's Finance & Thrift Co. v. Pima County, 44 Ariz. 440, 38 P.2d 643 (1934) where classification is forbidden if unfair or specious; Yuma County v. Arizona & Swansea R.R., 30 Ariz. 27, 243 Pac. 907 (1926) and Copper Queen Consol. Mining Co. v. Territorial Bd., 9 Ariz. 383, 84 Pac. 511 (1906) which early recognized the right of the legislature to classify property for tax purposes.

[63] Money has been allocated by the present legislature to undertake a statewide reappraisal of property valuations.