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## Municipal Taxpayers and Standing to Sue

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rights of infants and incompetents are severed by the foreclosure sale; that a purchaser at a County sale acquires a title which is protected by *res judicata* from irregularities; that jurisdictional defects, generally, are not grounds for upsetting the purchasers' title if the deed is recorded and the two year statutory period has expired; but that the Soldiers' and Sailors' Civil Relief Act permits a returned serviceman to redeem his foreclosed property if he acts promptly.

Matthew X. Wagner, Sr.  
Robert C. Schaus

## MUNICIPAL TAXPAYERS AND STANDING TO SUE

### *Introduction*

It is in the area of public law that one encounters the popular impatience with a judicial attitude which requires, not only a defined controversy, but also a plaintiff legally interested in its outcome. It is proposed in this comment to examine one part of the general problem of standing to sue, a part in which this popular impatience has perhaps made itself felt, and the courts have relaxed their traditional standards.

The specific problem to be considered herein is, in an action against a municipal corporation or its agents, what standing to sue has a plaintiff solely by virtue of the fact that he is a taxpayer? This is the initial query in all taxpayers' suits, which have been defined as follows:

Taxpayers' suits are actions by one or more taxpayers acting not alone as individuals but as representatives of the other taxpayers, to prevent acts which will injure the taxpayers and which are *ultra vires* or unauthorized, i. e., suits to vindicate the public and common right to have the public funds and property preserved from spoliation by public officers and devoted only to public uses; and also suits on behalf of the municipal corporation.<sup>1</sup>

It is evident that a taxpayer's bill is a class bill, filed in the common interest of all taxpayers of the municipality,<sup>2</sup> so that plaintiff has no private interest entitling him to sue. If he possesses such a concern, it is not a taxpayer's action. Accordingly, if a

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1. 18 McQUILLIAN, MUNICIPAL CORPORATIONS (3rd ed. 1950), 3.

2. *Schlanger v. West Berwick Borough*, 261 Pa. 605, 104 Atl. 764 (1918).

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taxpayer's interest is found insufficient, no effort will be made in this paper to indicate in what additional capacities (whether as parent, creditor, etc.) a plaintiff might have standing to sue. Nor will there be any inquiry into the merits of the action, this essay being primarily concerned with municipal taxpayers' standing to sue.

### *Municipal Taxpayers' Actions*

Even the United States Supreme Court, of all tribunals habitually the most watchful for issues of standing to sue, has recognized that in a proper case a municipal taxpayer may have standing to complain of the conduct of the local government.<sup>3</sup> *Massachusetts v. Mellon*,<sup>4</sup> while it struck down a taxpayer's suit against the Federal Government, indicated that the interest of a taxpayer of a municipality in the application of its moneys is "direct and immediate." For that reason, a justiciable controversy is found. Such is the effect, however, only when it is a good faith pocketbook action, and a dollars-and-cents injury is complained of, a question which the Supreme Court apparently will determine for itself.<sup>5</sup> So where a taxpayer complained of Bible reading in the public schools, but failed to allege that this activity augmented the cost of conducting the schools or that his taxes might be increased, it was held that no justiciable controversy was presented.<sup>6</sup> Plaintiff sues as a taxpayer, and must show himself affected as such, although his injury obviously will not be unlike that suffered by a large portion of the general public.

The preceding suggests two important, distinct questions:

(1) Is it necessary for plaintiff to plead an injury personal to himself, one not sustained by people generally? This is equivalent to inquiring whether a taxpayer's action against a municipality will lie at all.

(2) Must plaintiff prove any injury to taxpayers as a class? It is this question which the federal courts answer in the affirmative.

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3. In *Crampton v. Zabriskie*, 101 U. S. 601 (1879), a unanimous court, per Field, J., stated at 609: "Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question."

4. 262 U. S. 447 (1923).

5. *Doremus v. Board of Education*, 342 U. S. 429 (1952); Frankfurter, J., dissenting in *Adler v. Board of Education*, 342 U. S. 485 (1952).

6. *Doremus v. Board of Education*, *supra* n. 5. Cf. *Everson v. Board of Education*, 330 U. S. 1 (1947), where there was a measurable disbursement of funds, occasioned solely by the activities objected to, and a justiciable controversy was found.

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These two questions should now be taken up in order. The New York Court of Appeals once assumed an influential role in the realm of municipal taxpayers' actions. The common law rule in New York was (and is) well-settled, that a taxpayer lacks standing to sue unless he suffers an injury different from that sustained by other taxpayers. The rule seems to have been first stated in 1856,<sup>7</sup> and was strongly reaffirmed in two opinions by Judge Denio.<sup>8</sup> Clearly, the early New York rule in effect precluded all taxpayers' suits, for if plaintiff could sue only when specially injured he could not sue on behalf of all other taxpayers, which is the gist of such suits. Thus if the state, through its attorney general, did not bring proceedings against its erring municipal agent, the taxpayer could only hope to find redress at the polls. He found the courts closed.

These New York cases at one time were elsewhere respected, and have been followed in a few, but decreasing number of jurisdictions<sup>9</sup> Various reasons for the rule against taxpayers' actions have been assigned by these courts. The chief fear finds expression in the old argument against "opening the door," flooding the courts with endless litigation over uncertain rights.<sup>10</sup> It is said that the interests of men in good government are joint and not several, so that no self-appointed private party, in whom the people have not vested any such supervisory power, can champion the public interests.<sup>11</sup> Instead, it is urged, for wrongs against the public, whether actually committed or only apprehended, the remedy (civil or criminal) is by a prosecution instituted by the attorney-general, representing the state's abused confidence, or by some local agency.<sup>12</sup> Some courts have relied on the usual

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7. *Davis v. Mayor of New York*, 14 N. Y. 506 (1856), holding that a suit to restrain construction of a railway does not lie in favor of a resident taxpayer who does not own real estate on the street where the railroad is proposed to be laid.

8. *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155 (1858); *Roosevelt v. Draper*, 23 N. Y. 318 (1861). In the latter case, it was stated that the same rule applies to actions against all types of municipal corporations.

9. *Jones v. City of Little Rock*, 25 Ark. 301 (1868); *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586 (1875); *Douglas v. City of Wichita*, 148 Kan. 619, 83 P. 2d 657 (1938); *Anderson v. Village of Rochester*, 263 Mich. 130, 248 N. W. 571 (1933); *Carlson v. Helena*, 43 Mont. 1, 114 Pac. 110 (1910); *Turner v. City of Reidsville*, 224 N. C. 42, 29 S. E. 2d 211 (1944).

10. *Craft v. Jackson County*, 5 Kan. 518 (1870); *Bryant v. Logan*, 56 W. Va. 141, 49 S. E. 21 (1904), where it was said, "(I)t is of high import that the action of constituted authority of government should not be hampered and delayed by assaillment by any and every individual from disappointment, whim or caprice. The door would be open wide to multitudinous suits filling the courts with litigation." 56 W. Va. at 142, 49 S. E. at 22.

11. *Miller v. Grandy*, 13 Mich. 540 (1865).

12. *Craft v. Jackson County*, *supra* n. 10; *Bryant v. Logan*, *supra* n. 10.

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rule governing actions to enjoin a public nuisance.<sup>13</sup> And there have been vague judicial murmurings about possible dangers of "fraud and collusion."<sup>14</sup>

Because of its total denial of the taxpayers' action, the common law rule of New York, while of continued importance to lawyers of that state, has elsewhere fallen into almost total judicial disfavor. It is now generally held sufficient that plaintiff taxpayer will be pecuniarily injured by the conduct complained of, notwithstanding that all other taxpayers will be injured in precisely the same way.<sup>15</sup> Thus, so far as his personal status is concerned, it serves for plaintiff to prove that he is a taxpayer. The minuteness of his interest probably will not be assigned as a reason for denying the action,<sup>16</sup> although it has been said that plaintiff's taxes must not be so infinitesimal as to be subject to the maxim *de minimis non curat lex*.<sup>17</sup> It seems that, if plaintiff has not paid his taxes, or even has paid illegal taxes voluntarily, he cannot initiate a taxpayer's action.<sup>18</sup> Although it appears that the great majority of taxpayers' suits have been instituted by residents of the municipality, the better view is that place of residence is immaterial: plaintiff's interest as a taxpayer is no less because he resides elsewhere.<sup>19</sup> Fortunately for taxpayers' suits, it is also held that the motive behind the litigation is irrelevant: plaintiff's motive may be distinctly personal, and not the avoidance of tax burdens, but the court will not inquire into that.<sup>20</sup> So much for the problem of personal status.

Although the courts have generally dispensed with a requirement that peculiar personal damage be shown, in lieu thereof they have uniformly insisted that plaintiff prove some kind of injury to

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13. *Ibid.* For the rule that one who would abate a public nuisance must plead and prove special damage not common to people generally, see *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264 (1887).

14. *Miller v. Grandy*, *supra* n. 11.

15. *Barry v. Goad*, 89 Cal. 215, 26 Pac. 785 (1891); *Poor v. Town of Duncombe*, 231 Iowa 907, 2 N. W. 2d 294 (1942); *Meyer v. Town of Boonville*, 162 Ind. 165, 70 N. E. 146 (1903); *Afton v. Gill*, 57 Okla. 36, 156 Pac. 658 (1916); *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325 (1911); *Hannon v. Lawton*, 25 Okla. 372, 107 Pac. 646 (1909); *Rancroft v. Building Commissioner of City of Boston*, 257 Mass. 82, 153 N. E. 319 (1926); *Lang v. City of Cavalier*, 59 N. D. 75, 228 N. W. 819 (1930); *Harris v. City of Philadelphia*, 299 Pa. 473, 149 Atl. 722 (1930).

16. *Brockman v. City of Creston*, 79 Iowa 587, 44 N. W. 822 (1890); *Bacon v. City of Detroit*, 282 Mich. 150, 275 N. W. 800 (1937).

17. *Fugate v. McManama*, 50 Mo. App. 39 (1892).

18. 52 AM. JUR., Taxpayers' Actions § 3.

19. *Brockman v. City of Creston*, *supra* n. 16; *Commonwealth use of Wiggins v. Scott*, 112 Ky. 252, 65 S. W. 596 (1901).

20. *Brockman v. City of Creston*, *supra* n. 16.

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taxpayers as a class. The character of this injury is difficult to describe, but the requirement conceivably could be held satisfied by proof of any of the following:

(1) That the municipal corporation has done, or proposes to do, an *ultra vires* or illegal act. This approach would allow a mere legal, not financial, injury to be shown, and would reduce the requirement to a matter of words. The law is contrary, and it is settled that mere illegality is not enough.<sup>21</sup>

(2) That the municipal corporation has done, or proposes to do, an *ultra vires* or illegal act which involves expenditure of public funds or property.

(3) That such act involves economic waste of such funds or property. If plaintiff offers proof of waste, of course that suffices, but need he go so far? For example, may he enjoin performance of an unauthorized municipal contract, which requires for its execution the expenditure of public funds, on a mere showing of the nature of the agreement and of its illegality? Although it is hardly possible to reconcile all of the authorities, probably the action could be maintained on a showing that the conduct to which exception is taken is illegal and requires public funds.<sup>22</sup> If the conduct is economically feasible, plaintiff might still be injured in a financial way. As a taxpayer, he has two interests. One is that future tax rates not be increased. The other is that existing municipal funds and property not be misused. These interests would appear to give a taxpayer standing in court to demand that tax funds be channelled into proper undertakings. Such funds were presumably taken for lawful purposes, and if they are diverted therefrom, there is some danger that new revenue will be needed to finance the legitimate goals of government. At any rate, because proof of probable increase in taxation would be so difficult and speculative, the courts have never demanded that plaintiff prove more than that the unlawful act is of a type which naturally tends in that direction.

It is wise, however, not to lay down any absolute rules. Instead, the courts will follow a common sense approach, keeping

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21. *Kasik v. Janssen*, 158 Wis. 606, 149 N. W. 398 (1914); *Shoemaker v. City of Des Moines*, 124 Iowa 244, 105 N. W. 520 (1906); *Kiernan v. City of Portland*, 57 Or. 454, 111 Pac. 379 (1910), writ of error dismissed, 223 U. S. 151 (1912); *Altgelt v. City of San Antonio*, 81 Tex. 436, 17 S. W. 75 (1890).

22. See, e. g., *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968 (1891), where the county board of supervisors contracted to purchase realty, without publishing a notice of intention, as required by statute. Held, taxpayer had standing to enjoin performance of the contract, without alleging that the value of the land was less than the price to be paid: such price was a claim against the county, and it is immaterial whether the latter would profit or lose by the transaction.

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constantly in mind the interests to be protected. Thus, where plaintiffs as taxpayers challenged the illegal removal of a public building, which unless removed would be destroyed, it was held that they lacked standing to sue: they could not possibly be injured by the expenditure of public money for the protection of public property.<sup>23</sup> It is also in supposed conformity with the underlying interest of the plaintiff as a taxpayer that a majority of courts deny him an injunction against the wrongful expenditure of funds not raised by taxation.<sup>24</sup> Such funds are usually regarded as including moneys received from another governmental unit.<sup>25</sup> Similarly, a general taxpayer can't restrain the awarding of a street improvement contract where the cost is to be met by special assessments upon benefited property; he lacks standing unless the government attempts to discharge the debt from general funds.<sup>26</sup> Nor may he complain of misuse of revenues derived from operation of a city-owned utility; a taxpayer's interest is said not to extend so far.<sup>27</sup>

The cases allowing taxpayers' actions have a strong practical appeal, for they provide a remedy with which the master can avoid being plundered at the hands of his servant. But they have not gone without theoretical justification. The principal rationale, advanced by Judge Dillon, is based on an analogy to a well known equity doctrine governing private corporations, whereby each stockholder has such an interest in the corporate property that he may interfere to protect the same from the illegal or fraudulent acts of its officers. There is a trust, with the directors and officers considered as trustees, the owners as *cestuis que trust*. This same trust theory has been employed to explain equity's protection of municipal taxpayers.<sup>28</sup>

Thus the rule permitting suits by taxpayers is harmonized with the principles governing equity's intervention in

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23. *Williams v. Mayor and City Council of Baltimore*, 128 Md. 140, 97 Atl. 140 (1916).

24. Anno., 131 A. L. R. 1230.

25. *Ibid.* But there is strong dissent as to this. See *Shipley v. Smith*, 45 N. M. 23, 107 P. 2d 1050 (1940), holding that a municipal corporation has no more right to waste a gift of money than to waste tax funds and that a taxpayer may enjoin either type of waste.

26. *Merritt v. City of Duluth*, 103 Minn. 236, 114 N. W. 758 (1908); *Patterson v. Barber Asphalt Paving Co.*, 96 Minn. 9, 104 N. W. 566 (1905).

27. *Andrews v. City of South Haven*, 187 Mich. 294, 153 N. W. 827 (1915). But the action will lie if plaintiff uses electric current purchased from a city-operated plant. *Freeland v. City of Sturgis*, 248 Mich. 190, 226 N. W. 897 (1929).

28. 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911), 2766. The same argument is sustained in 2 HIGH, INJUNCTIONS (4th ed. 1905), 1235-36.

cases of breach of trust. This theory of the action is supported by numerous cases,<sup>29</sup> and seems to have gained the respect of the Nation's highest tribunal.<sup>30</sup> Whether it adequately accounts for the present law in New York we shall next inquire. The answer is to be had by a look to the past: "Upon this point a page of history is worth a volume of logic."

*New York General Municipal Law §51*

In New York at common law, the principle applicable to public nuisances was adopted; private persons could champion their own interests, but could not assume to be champions of the community. This worked no very great inconvenience in the early history of the state, when cities were not so large nor corruption so prevailing. But the defect of the common law rule was visibly demonstrated by the activities of the worst plunderer in American history. William Marcy Tweed (1823-1878) was the most corrupt man of a most corrupt era. It is unnecessary to detail the story of his frauds. Suffice it to say that according to the *Dictionary of American Biography*, the amount which Tweed's "ring" filched from the City of New York has been variously estimated at from \$30,000,000 to \$200,000,000.

Although Tweed was ultimately convicted, his swindle proved the ineffectiveness of the common law rule, for law enforcement officers were themselves the guilty parties. The result was the enactment of a statutory remedy for taxpayers.<sup>31</sup> Indeed, such a statute was recommended by Governor Hoffman, himself a Tweed man, who in his annual message to the Legislature (1872), after referring to the "recent exposure of great wrongs in the administration of the local government of the City of New York,"<sup>32</sup> called for the creation of some "well-defined, summary and effectual remedy in the courts for taxpayers against abuses of trust by

29. *Cornell College v. Iowa County*, 32 Iowa 520 (1871); *Miller v. Town of Milford*, 224 Iowa 753, 276 N. W. 826 (1936). In *Sherburne v. Portsmouth*, 72 N. H. 539, 58 Atl. 38 (1904), the learned court stated: "The duty of city councils in administering the ordinary business affairs of the city does not differ from that of the directors of a private corporation in respect to its business. Such directors act as trustees for their stockholders when they are administering the affairs of the corporation. So city councils act in a trust capacity in administering the ordinary business affairs of the city," 72 N. H. at 542, 58 Atl. at 40.

30. *Massachusetts v. Mellon*, *supra* n. 4 (dictum).

31. That the Tweed frauds caused the statutory remedy, see *Schieffelin v. Craig*, 183 App. Div. 515, 170 N. Y. Supp. 603 (1st Dep't 1918); *Adamson v. Union Ry.*, 74 Hun 3, 26 N. Y. Supp. 136 (2nd Dep't 1893); *Ayers v. Lawrence*, 59 N. Y. 192 (1874); *Talcott v. City of Buffalo*, 125 N. Y. 280, 26 N. E. 263 (1891).

32. 6 MESSAGES FROM THE GOVERNORS (ed. Lincoln, 1909), 378.



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municipal officers . . .'<sup>33</sup> In response, the Legislature passed a bill declaring that local government officers should be "trustees" of the property and funds of such government, and that resident taxpayers should be *cestuis que trust* in respect to such property, with all the responsibilities and remedies of trustees and *cestuis*, respectively. This bill was vetoed by the Governor, who stated in a special message to the Senate that he feared it might operate to divest every municipal corporation of the legal title to its property, and vest such title in the public officers.<sup>34</sup> The Legislature then passed, and the Governor approved, "An Act for the protection of tax-payers against the frauds, embezzlements and wrongful acts of public officers and agents."<sup>35</sup> This act authorized a taxpayer's action against persons acting on behalf of any county, town, or municipal corporation, "to prevent waste or injury to any property, funds or estate" thereof. Ten years later, "An Act for the protection of tax payers"<sup>36</sup> was enacted, broadening the scope of taxpayers' actions. This statute contained the words, "to prevent any illegal official act on the part of any such officers," followed by the words of the 1872 enactment, "or to prevent waste or injury to any property, funds or estate of such county, town, village or municipal corporation . . ." Thus we have the 1872 statute, aimed at "waste or injury," and the act of 1881, covering "any illegal official act" in addition. Still later, a third bill became law,<sup>37</sup> which was for our purposes identical with GENERAL MUNICIPAL LAW §51. The remainder of this paper is concerned with §51, and its first sentence should be quoted verbatim:

All officers, agents, commissioners and other persons acting, or who have acted for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation by any person or corporation whose assessment, or by any number of persons or corporations, jointly, the sum of whose assessments shall amount to one thousand dollars, and who shall be liable to pay taxes on such assessment in the county, town, village or municipal

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33. *Id.* at 386.

34. *Id.* at 429-32.

35. L. 1872, c. 161.

36. L. 1881, c. 531.

37. L. 1892, c. 301.

corporation to prevent the waste or injury of whose property the action is brought, or who have been assessed or paid taxes therein upon any assessment of the above-named amount within one year previous to the commencement of any such action.

This statute is the basis of taxpayers' suits in New York today. The old equity action has not been abolished,<sup>38</sup> but one who would sue as a taxpayer only must find his right in §51.<sup>39</sup> If he is able to do so, peculiar personal injury is not essential to his standing to sue.<sup>40</sup>

In our discussion of taxpayers' suits in other jurisdictions, a requirement was noted that plaintiff show some kind of injury to taxpayers as a class. So far as §51 actions are based on the "waste or injury" clause, the same requirement obviously prevails.<sup>41</sup> But most of the litigation under §51 involves the meaning of the words "illegal official act." Is it sufficient to authorize the granting of relief that the act complained of is illegal and official, or must injury result to taxpayers? And if the latter, is not the statute of 1881 thereby rendered superfluous? Doubtless it was this consideration which induced the Court of Appeals initially to adopt a literal interpretation of "illegal official act."<sup>42</sup> This literal construction, however, encountered and failed the acid test in *Rogers v. O'Brien*,<sup>43</sup> wherein plaintiff was trespassing upon city land. Defendants, constituting a certain city board, were preparing to bring an action of ejectment against plaintiff, who sought an injunction against said action on the ground that defendants had no legal right to commence it. The Court of Appeals held that, on a mere showing of illegality, plaintiff lacked standing to sue. A non-restrictive interpretation of "illegal official act" would ignore the underlying theory of taxpayers' suits.

38. *Eagle Nest Corp. v. Carroll*, 179 Misc. 99, 37 N. Y. S. 2d 716 (Sup. Ct. 1942), reversed on other grounds, 265 App. Div. 385, 38 N. Y. S. 2d 599 (3rd Dep't 1942).

39. *Schieffelin v. Craig*, *supra* n. 31; *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216 (1916).

40. *Brill v. Miller*, 140 App. Div. 602, 125 N. Y. Supp. 865 (1st Dep't 1910); *Gerlach v. Brandreth*, 34 App. Div. 197, 54 N. Y. Supp. 479 (2nd Dep't 1898); *Rogers v. Board of Supervisors*, 77 App. Div. 501, 78 N. Y. Supp. 1081 (2nd Dep't 1902). It is immaterial that in bringing suit plaintiff is moved by some private grievance. *Gage v. City of New York*, 110 App. Div. 403, 97 N. Y. Supp. 157 (1st Dep't 1905).

41. It may be noted in passing that "waste or injury" has been construed to embrace only illegal or dishonest acts, and not to subject the official acts of boards and officers, acting within the limits of their power, to taxpayers' claims that such action was uneconomic, improvident, or unwise. *Talcott v. City of Buffalo*, *supra* n. 31.

42. *Warrin v. Baldwin*, 105 N. Y. 534, 537, 12 N. E. 49, 49-50 (1887).

43. 153 N. Y. 357, 47 N. E. 456 (1897).

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In addition to a showing that the act complained of is illegal, therefore, proof that it involves damage to taxpayers is required. As to the nature of this injury or damage there is no very precise answer. It is difficult to reconcile all the decisions. Consider the following four cases:

(1) A taxpayer sued to restrain the employment of a person ineligible under the CIVIL SERVICE LAW. It was held to be no defense that the compensation agreed to be paid was not extravagant.<sup>44</sup>

(2) A taxpayer sued to restrain payment of a judgment illegally confessed against a city. It was held unnecessary for plaintiff to show that the city was not justly indebted in the amount of the claim. Judge Haight stated:

The statute under which this action was brought authorizes a taxpayer to bring an action to prevent waste, and also to prevent an illegal official act. If the action was based upon the provision of the statute "to prevent waste," then it would be necessary to show that the city was not justly indebted in the amount stated in the judgment, for if it was there could be no waste. This action, however, was brought under the other provision of the statute, to prevent an illegal official act.<sup>45</sup>

(3) A taxpayer sued to restrain the expenditure of funds for the conducting of an election under an allegedly unconstitutional apportionment act, and to compel the election to be conducted in accordance with a prior apportionment. It was suggested by the Court of Appeals that there should have been an allegation that the elections would cost a greater sum under the new, than under the old apportionment.<sup>46</sup>

(4) The City of Buffalo illegally contracted to sell a large quantity of water. In the absence of a finding that the price was less than cost or that the sale impaired the city's ability adequately to supply its inhabitants with water, it was held that there was no "waste or injury". Nor was the arrangement an "illegal official act." Though illegal, it was innocuous, while the theory of a taxpayer's suit is that the illegal action is in some way injurious to

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44. *Peck v. Belknap*, 130 N. Y. 394, 29 N. E. 977 (1892); see also, *Ziegler v. Chapin*, 126 N. Y. 342, 27 N. E. 471 (1891).

45. *Bush v. O'Brien*, 164 N. Y. 205, 215, 58 N. E. 106, 109 (1900). For a similar case, and a reiteration of the point that there can be no "waste" if the city is justly indebted in the amount of the judgment, see *Bush v. Coler*, 60 App. Div. 56, 69 N. Y. Supp. 770 (1st Dep't 1901), *aff'd*, 170 N. Y. 587, 63 N. E. 1115 (1902).

46. *Matter of Reynolds*, 202 N. Y. 430, 96 N. E. 87 (1911).

municipal and public interests, and if permitted to continue will result in increased burdens upon and disadvantages to the municipality and its taxpayers.<sup>47</sup>

These cases sufficiently illustrate the factual problems which arise on this question. To them should be added the significant case of *Altschul v. Ludwig*,<sup>48</sup> which raised the issue whether a taxpayer may restrain the superintendent of buildings from approving plans for the erection of a non-fireproof theatre in New York City, on the ground that the plans do not comply with the BUILDING LAW. Sustaining the action, the Court of Appeals stated:

The mere illegality of the official act in and of itself does not justify injunctive relief at the request of the taxpayer. To be entitled to this relief, when waste or injury is not involved, it must appear that in addition to being an illegal official act the threatened act is such as to imperil the public interests or calculated to work public injury or produce some public mischief.<sup>49</sup>

And it was concluded that a crowded theatre, built in violation of those provisions of the building code which are designed to secure the public safety against fire, imperils the public interests and is calculated to produce public injury.

The Court of Appeals, in the past two decades, has added little by way of clarification of what constitutes "public injury or mischief." However, a few general considerations may be stated, and a few conclusions ventured. At one extreme, it is certain that a mere showing of an "illegal official act" will not do. At the other, it is clear that the illegal act need not involve waste or injury to municipal property. This leaves a penumbral zone in the middle. In deciding problem cases the courts will probably be influenced by a variety of factors. One is the statutory history of taxpayers' suits in New York, which has been one of steady extension. Another is the necessity of continuing to construe the act of 1881 so that, in view of the act of 1872, it will not be meaningless. On the other hand, the judiciary is aware that as a taxpayer plaintiff may seek protection for only a limited interest; and since everything, illegal or not, which a municipality does, requires the expenditure of money, the courts will and should require evidence

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47. *Western New York Water Co. v. City of Buffalo*, 242 N. Y. 202, 151 N. E. 207 (1926).

48. *Supra* n. 39.

49. 216 N. Y. at 467, 111 N. E. at 218. See also, *Brill v. Miller*, *supra* n. 40; but cf. *Breen v. Valentine*, 170 Misc. 590, 10 N. Y. S. 2d 821 (Sup. Ct. 1939), *aff'd* 256 App. Div. 1066, 12 N. Y. S. 2d 240 (1st Dep't 1939).

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that the objectionable expenditures are closely associated with the illegality complained of, and cannot be disposed of by the maxim *de minimis*. The judiciary is also cognizant of the fact that it is unwise to decide questions in the abstract, or to harass local government and its agents with a multiplicity of actions in which the public is not genuinely concerned. But in view of the broad holding of *Altschul v. Ludwig*, it seems doubtful whether any taxpayer will ever be denied standing to complain of conduct which may injure or affect him and his fellows, though it does not necessarily affect municipal tax rates.

### *Conclusion*

While Judge Dillon has attempted a theoretical justification of municipal taxpayers' suits, it seems well to affirm, as did the South Carolina court,<sup>50</sup> that the rule governing public nuisances simply does not apply in such cases. Certainly in New York, taxpayers' suits are an attempt to supply a remedy, better supported by practical considerations than on principle.

*Hilary P. Bradford*

## RECENT DECISIONS

### COURTS—QUOTIENT VERDICT RULES HELD INAPPLICABLE TO TRIAL JUDGE

A widow petitioned to have decedent's real estate set apart for her, exempt from administration. Creditors objected to a report which valued the realty at \$1500. By statute in Alabama, homesteads are exempt from execution only to the value of \$2,000. In an action to determine the value of said property, witnesses testified before a probate judge, who upon completion of the trial *orally* stated: "Twenty-seven witnesses have testified in this case to a total of \$47,229, which gives an average figure of \$1747, which is less than \$2000. The petition of the widow is therefore granted. . . ." However, no such statement appeared in the transcript of the judgment. On appeal the creditors sought to apply the established principle that a "quotient verdict" of a jury will be set aside on motion. *Held*: the ruling of the trial judge is affirmed. His statements showing the basis on which his conclusion of fact is founded are not part of the judgment, and on appeal the judg-

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50. *Gaston v. State Highway Department*, 134 S. C. 402, 132 S. E. 680 (1926).