§ 921 (736). **Same subject. General Doctrine.** — The author may observe that there appears to be little difference of judicial opinion

New York in the Court of Appeals, in Doolittle *v.* Broome Co. Sup., 18 N. Y. 155 (1858) ; disapproving, on this point, of the cases of Adriance *v.* New York, 1 Barb. 19 ; Brower *v.* Same, 3 Barb. 254 ; Christopher *v.* Same, 13 Barb. 567 ; Milhau *v.* Sharp, 15 Barb. 193; *Ib.* 244; and De Baum *v.* New York, 16 Barb. 392. So far as these and other prior *New York* cases hold "that a *person owning property fronting on a public street* is entitled to maintain an action to restrain the commission of an act of nuisance in the street, which, from the location of the plaintiff's premises would render it specially injurious to him, I am of opinion that the law is correctly laid down, as in Davis *v.* New York, 14 N. Y. 506." *Per Denio*, J., 18 N. Y. *supra*, p. 163, and observe street cases reviewed on page 160. (See *ante*, sec. 661.) Doctrine of this case was adhered to and extended to *cities*, in Roosevelt *v.* Draper, 23 N. Y. 318 (1861), which also considers the question when relief may be had by a *creditor*. Demarest *v.* Wickham, 63 N. Y. 320, 324 (1875). On same principle taxpayers cannot as such maintain a bill in equity against the custodian of an illegal tax to restrain its application to the purposes for which the tax was raised. Kilbourne *v.* St. John, 59 N. Y. 21 (1874) ; s. c. 17 Am. Rep. 291. Construction of Remedial Taxpayers' Acts of 1872, 1881, Code Civ. Pro. sec. 1925. See Ayers *v.* Lawrence, 59 N. Y. 152 ; Osterhoudt *v.* Rigney, 98 N. Y. 222 (1885) ; Metzger *v.* Attica, &c., R. R. Co. (action by taxpayer to restrain issue of bonds sustained), 79 N. Y. 171 ; Ottendorfer *v.* Agnew (Act of 1881), 13 Daly (N. Y.), 16. The successful bidder for the lease of the franchise of a ferry owned by the city was a railroad corporation. A taxpayer under the Act of 1881, chap. 531, "for the protection of the taxpayer," filed a bill to set aside the lease as illegal. It was held that the plaintiff as a private citizen, having no interest except that of any other citizen, could not raise the question that the railroad company had no power to take the lease. Such a question may be raised by the Attorney-General or by a stockholder, but a taxpayer is not authorized to do so by the Act of 1881. Starin *v.* Edson, 112 N. Y. 206 (1889). Where, by statute, relief against an assessment for a local improvement can be granted only to the extent to which the assessment has been increased by fraud or irregularity, the petitioner must set forth and prove by competent evidence that such excess actually exists. Mead, *In re*, 74 N. Y. 216. A similar rule to that in *New York* prevails in *California*, Merriam *v.* Yuba Co. Sup., 72 Cal. 517 (1887), holding that a taxpayer cannot restrain supervisors of county from auditing and ordering paid a claim, on the ground that it is not a valid demand and against the county, following Linden *v.* Case, 46 Cal. 171 ; McCoy *v.* Briant, 53 Cal. 247, but *quære*, and in *Louisiana*, Droz *v.* Baton Rouge, 36 La. An. 307.

Massachusetts decisions and statute: Views similar to those held by the Court of Appeals in *New York* have received judicial sanction in *Massachusetts;* and in view of the decisions there made, it seems to be unsettled or somewhat difficult to ascertain, except in the cases for which the statute (Gen. Sts. chap. xviii. sec. 79) has made provision, in what manner municipal corporations can be made to observe their duties or prevented from violating them to the injury of the inhabitants. In Hale *v.* Cushman, 6 Met. (Mass.) 425 (1843), which was a bill in equity by sixty-seven legal voters and taxpayers to restrain the officers of a town from paying money under a vote for an alleged unauthorized purpose, the court dismissed the bill on the ground that its equity jurisdiction as conferred by statute did not extend to the case, since "the bill set forth no *trust* in which the complainants have an interest." The statute above cited (Gen. Sts. chap. xviii. sec. 79) provides that "when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury any money, for a purpose other than those for which it has *the legal* right and power, the Supreme Judicial Court may, upon the suit or petition of not less than ten taxable inhabitants thereof,

as to the *right of the taxable inhabitants*, wherever the threatened illegal corporate act *will increase the burden of taxation*, to the aid of

hear and determine the same in equity." Frost *v.* Belmont, 6 Allen (Mass.), 152.

In cases not covered by this statute it is considered that the equity jurisdiction of the Supreme Judicial Court does not extend to compelling the performance of a duty by a municipal corporation or its officers upon the relation or suit of individual taxpayers. Carlton *v.* Salem, 103 Mass. 141 (1869) ; Attorney-Gen. *v.* Salem, *Ib.* 138. In these cases the court held that neither by information in the nature of a *quo warranto*, nor on a bill in equity by the Attorney-General, or by a bill in equity by taxable inhabitants, under the statute, could the city of Salem be made to observe the duties enjoined upon it by statute in relation to supplying the city with water. The court seems to treat the wrong as a *private* wrong, but is it such ? It denies that there is a *trust* over which a court of equity has jurisdiction ; but see TheAttorney-Gen. *v.* Dublin (*supra*, secs. 909, 910, note), which seems in principle analogous, in which the House of Lords declared there was such a trust as fell within the cognizance of a court of equity. The result in *Massachusetts* may be influenced by the nature of the equity jurisdiction of the Supreme Judicial Court, though such does not appear to be the case.

In the subsequent case of the Attorney-Gen. *v.* Boston, 123 Mass. 460 (1877), it was held that the Attorney-General might, where *mandamus* was the appropriate remedy, file an information for a *mandamus* to enforce the performance, by a city corporation, of a public duty ; and the justness of the above criticism on the previous cases seems to be recognized by the following observations of the Chief Justice, explaining and qualifying the Attorney-Gen. *v.* Salem, *supra* :—

"The learned counsel for the city," says *Gray*, C. J., "rely on Attorney-Gen. *v.* Salem, 103 Mass. 138, as conclusive against the application of the Attorney-General. But nothing was adjudged in that case which supports the position. The decision there was that the failure of the city of Salem to establish, as required by statute, such rates, for the use by its citizens of the water supplied by the water-works constructed by the city, as to pay the interest upon the cost of constructing and the expenses of operating those works, was neither such a usurpation of a franchise as would support an information in the nature of a *quo warranto*, nor such a public wrong as entitled the Attorney-General to maintain an information in equity. The question whether he could apply for a *writ of mandamus* was not before the court. The remark in the opinion, that the grievance complained of was *not a public wrong* in which every subject of the State was interested, and therefore could not be redressed by a public prosecution or proceeding, went beyond what the decision of the case required, and *is not quite accurate*. If the water-rates had been collected and misapplied by the city, there would have been such a misappropriation of trust funds held by the city for a public charitable purpose as would have supported an information in equity in the name of the Attorney-General. Attorney-Gen. *v.* Dublin, 1 Bligh, N. R. 312 ; Attorney-Gen. *v.* Liverpool, 1 Mylne & Cr. 171, 201 ; Jones *v.* Williams, Ambl. 651 ; Vidal *v.* Girard, 2 How. 127, 189, 190 ; Drury *v.* Natick, 10 Allen (Mass.), 169, 178. The point decided, as already observed, was only that the case did not show such a public wrong as could be redressed by information in equity ; and the true ground upon which that decision rests is that, when no misapplication of funds held upon a public trust and no nuisance to the public are shown, *the appropriate remedy to compel performance of a duty imposed upon a corporation by statute is not by decree in equity, but by writ of mandamus at common law.* Attorney-Gen. *v.* Reynolds, 1 Eq. Cas. Ab. (3d ed.) 131 ; Attorney-Gen. *v.* Birmingham & O. J. Ry. Co., 4 De G. & Sm. 490, 498, and 3 Macn. & Gord. 453, 462 ; Adams *v.* London & R. Ry., 2 Macn. & Gord. 118, 133 ; Leominster Canal Nav. *v.* Shrewsbury & H. Ry. Co., 3 Kay & Johns. 654, 673 ; Attorney-Gen. *v.* Tudor Ice Co., 104 Mass. 239." See *supra*, secs. 826, 850, 855. The occu-

equity, in proper cases, to prevent it. The chief difference is as to the *proper party plaintiff* in a bill of this character. If the ordinary principle which obtains as to public nuisances is applied, it must be admitted where the duty about to be violated by the corporation or its officers is public in its nature, and affects all of the inhabitants alike, that one, not suffering any special injury, cannot, in his *own name*, or by uniting with others, maintain a bill to enjoin it. And a reason urged against such a course is that if one citizen may maintain such a bill, an indefinite number of others may each also bring separate suits; and an adjudication in one case concludes nothing as to the others or as to the inhabitants at large. But it is substantially agreed that any taxable inhabitant, or perhaps any citizen of the municipality, has such an interest to prevent or to avoid illegal or unauthorized corporate acts that he may be a relator, on whose application the proper public officer of the Commonwealth may, on behalf of the public, file the requisite bill in cases which fall

pant of a tenement in a city entitled under the statute and ordinances of the city corporation to the use of water therein on payment or tender of the rate, may *restrain the city* and its officers *from illegally cutting off the supply of water*. Young *v.* Boston, 104 Mass. 95 (1870).

A statute similar to that in *Massachusetts* exists in *Maine*. Johnson *v.* Thorndike, 56 Me. 32. The municipal corporation must be a *party*. Allen *v.* Turner, 11 Gray (Mass.), 426. City collector is a *proper defendant*. Anderson *v.* State, 23 Miss. 459 (1852); New London *v.* Brainard, 22 Con. 552 (1853).

The *New York* view was adopted in *Kansas*, where it is held that a suit having for its object the restraining of a county board from allowing a claim alleged to be illegal, and the clerk from drawing a warrant therefor, cannot be maintained by a person having no other interest than one common to all the resident taxpayers of the county. Such a suit, it is further held, cannot be maintained by a private person, unless the act complained of produces some peculiar damage to his individual interests, or affects his rights in a different manner from other members of the community. Craft *v.* Jackson Co. Comm'rs, 5 Kan. 518. See, also, as to restraining void tax, Burnes *v.* Atchison, 2 Kan. 454 (1864). Compare Leavenworth *v.* Norton, 1 Kan. 432; Spencer *v.* Nemaha Sch. Dist., 15 Kan. 259 (1875). The *New York* view, although at first adopted in *Minnesota* (Conklin *v.* Fillmore Co. Comm'rs, 13 Minn. 454; Dawson *v.* St. Paul F. & M. Ins. Co., 15 Minn. 136), was afterwards rejected, and a taxpayer held to have the right, in the absence of an adequate remedy at law, to enjoin the illegal creation of a debt which will increase his share of taxation. Hodgman *v.* Chicago & St. P. Ry. Co., 20 Minn. 48 (1873); Harrington *v.* Plainview, 27 Minn. 224. The subject is discussed by Mr. Justice *Campbell*, in Bagg *v.* Detroit, 5 Mich. 336, 346, and in Chaffee *v.* Granger, 6 Mich. 51; see, also, Williams *v.* Detroit, 2 Mich. 560; Miller *v.* Grundy, 13 Mich. 540; Butler *v.* Detroit, 43 Mich. 552; Valparaiso *v.* Gardner, 97 Ind. 1 (1884); Kelly *v.* Chicago, 62 Ill. 279; *ante*, sec. 914, and cases in note; *infra*, sec. 921. See and compare Brown *v.* Manning, 6 Ohio, 298; *Ib.* 102; Denton *v.* Jackson, 2 Johns. (N. Y.) Ch. 320; State *v.* Perry Co. Comm'rs, 5 Ohio St. 497, 502; Culbertson *v.* Cincinnati, 16 Ohio, 579. A taxable inhabitant has no legal right to *intervene* in a pending suit and defend the action prosecuted against the corporation. Cornell College *v.* Iowa County, 32 Iowa, 520 (1871).

within the jurisdiction of equity, to enjoin the menaced illegal or wrongful act, or if it has been consummated, to have relief against it.[1] To allow the taxable inhabitant to maintain a bill for an injunction, to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and notwithstanding its departure, or apparent departure, from technical principles, has, as above shown, received the general, but not quite uniform, approval of the courts in this country; and practically this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which, when judicially determined, in effect settles the question in controversy.[2] There is no doubt but that the corporation may in its *own name* bring suits, in proper cases, to be relieved against illegal, unauthorized, or fraudulent acts on the part of its officers. Since, however, experience has shown how liable these corporations are to be betrayed by those who have the temporary management of their concerns, it would never do, we think, for the courts to hold that relief against illegal or wrongful acts can be had *only* by an authorized suit brought by and in the name of the corporation.

§ 922 (736 *a*). **General Conclusions stated.** — Upon a survey of decisions in Great Britain and the United States, while they exhibit some diversity of opinion, it seems to us, in view of the nature of municipal powers, the danger of abuse, the necessity for prompt remedy on the part of those most interested in the proper administration of municipal affairs, — to wit, the taxable inhabitants, — that the following conclusions rest upon sound reason, and have also the support of the decided preponderance of judicial authority.

1. The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers when these are acting *ultra vires*, or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant.[3] But if in these cases

[1] Text quoted. Chicago *v.* Union Building Assoc. 102 Ill. 379 (1882); *supra*, sec. 919, note.

[2] Text approved. Williams *v.* Grant Co. Court, 26 W. Va. 488. Ranney *v.* Bader, 67 Mo. 476 (1878); noticed *supra*, 919, note.

[3] Baltimore *v.* Horn, 26 Md. 194 (1866); Baltimore *v.* Gill, 31 Md. 375, 395 (1869); Holland's Case, 11 Md. 186; Baltimore *v.* Porter, 18 Md. 284 (1861); *supra*, sec. 918; citing text: Place *v.* Providence, 12 R. I. 1; Valparaiso *v.* Gardner, 97 Ind. 1 (1884). The *State* has no such interest in taxes voluntarily paid under an illegal assessment as will warrant an injunction, at its suit, against the disbursement by a city of the money

the property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere, but leave them to their legal remedy.[1]

2. That, in the absence of special controlling legislative provision, the proper public officer of the Commonwealth, which created the corporation and prescribed and limited its powers, may, in his own name, or in the name of the State, on behalf of residents and voters of the municipality, exercise the authority, in proper cases, of filing an information or bill in equity to prevent the misuse of corporate powers, or to set aside or correct illegal corporate acts.

3. That the existence of such a power in the State, or its proper public law officer, is not inconsistent with the right of any taxable inhabitant to bring a bill to prevent the corporate authorities from transcending their lawful powers where the effect will be to impose upon *him* an unlawful tax, or to increase *his* burden of taxation. Much more clearly may this be done when the right of the public officer of the State to interfere is not admitted, or does not exist;

so paid. Atchison *v.* State, 34 Kan. 379.

The doctrines of the text in sections 914–918, 921, 922, are not, in the opinion of the Supreme Court of the United States, "at this day, open to serious question." Crompton *v.* Zabriskie, 101 U. S. 601, 609, *per Field*, J. Mr. Pomeroy, 1 Eq. Juris., secs. 259–270, examines at large and with ability the question of the Jurisdiction of Equity to relieve against illegal taxes and assessments, and reaches conclusions (*Ib.* secs. 267–269) substantially the same as those in the text. Injunction, 3 Pom. Eq. Juris. sec. 1345.

The views of the text, so far as corporate property or funds are concerned, accord with those of Lord *Cottenham* in Frewin *v.* Lewis, 18 Eng. Ch. (4 Mylne & Cr. 249, 255) 249 (1838). Speaking of the principles on which chancery will enjoin public officers and bodies, this eminent equity judge wisely says: "So long as those [public] functionaries strictly confine themselves within the exercise of those duties which are confided to them by law this [chancery] court will not interfere . . . to see whether any regulation they make is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer treats them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. While the court avoids interfering with what they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; if they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction." Similar principles are asserted and applied by *McAllister*, J., in Sherlock *v.* Winnetka, 59 Ill. 389 (1871), when it was held that equity, at the instance of taxable inhabitants, would restrain and relieve against fraudulent and unauthorized acts of municipal corporations in purchasing property for private purposes, such as the establishment of a private school. The case of Frewin *v.* Lewis, *supra*, and the above observations of Lord *Cottenham* approved. Carter *v.* Chicago, 57 Ill. 288 (1870); *supra*, sec. 921.

[1] *Ante*, sec. 906, and cases there cited. Text approved, Christie *v.* Malden, 23 W. Va. 667.

and in such case it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly.[1]

§ 923 (737). **Injunction in Municipal Tax Cases; When granted; Plaintiffs.** — Respecting the right to restrain a municipal corporation from collecting taxes, the courts, in cases where this relief is proper to be granted, have generally held that *one or more taxpayers* may bring a bill for this purpose. There is, however, some want of harmony in the decisions as to what will in such cases justify equitable interference, but the correct view doubtless is that equity ought not, except for the clearest reasons, to interfere with the speedy and ordinary collection of municipal or other public revenues.[2] If there

[1] The conclusions in this section approved in Kelly *v.* Baltimore, 53 Md. 134 (1879); *supra*, sec. 918.

[2] The right of taxpayers to unite in a bill and ask for an injunction to restrain the collection of an unauthorized tax was expressly ruled in Vanover *v.* Terrell Co. Inf. Ct. Jus., 27 Ga. 354 (1859), *Lumpkin*, J., observing: "We approve the remedy resorted to in this case. It is not only more complete than any other, but the only one, in our judgment, which meets the exigencies of the case." See, also, *ante*, sec. 919; Bull *v.* Read, 13 Gratt. (Va.) 78; Nill *v.* Jenkinson, 15 Ind. 425; Lewis *v.* Henley, 2 Ind. 332; Harward *v.* St. Clair, &c., Levee Co., 51 Ill. 130; Mt. Carbon C. & R. R. Co. *v.* Blanchard, 54 Ill. 240 (1870); Fleming *v.* Mershon, 37 Iowa, 413 (1873); Barr *v.* Deniston, 19 N. H. 170, 180 (1848); Frederick *v.* Augusta, 5 Ga. 561 (1848); Baltimore *v.* Porter, 18 Md. 284 (1861); King *v.* Wilson, 1 Dillon C. C. 555 (1871); Coulson *v.* Portland, Deady, 481 (1868), where the general subject is well considered. Mechanics' Bank *v.* Kansas City, 73 Mo. 555; Teegarden *v.* Davis, 36 Ohio St. 601; Richmond *v.* Crenshaw, 76 Va. 936; Corrothers *v.* Clinton Dist. Bd. of Ed., 16 W. Va. 527; see, also, Savannah *v.* Crawford, 75 Ga. 35. Amount of tax necessary to give *Federal court jurisdiction*. King *v.* Wilson, *supra*.

One who joined in a petition for a public improvement held not to be entitled to maintain a bill to restrain the collection of the assessment made for it. Byram *v.* Detroit, 50 Mich. 56; *infra*, sec. 924, note. Courts will not interfere with legislative action concerning *what property* may be taxed by a municipal corporation, this being a *political* question. Norris *v.* Waco, 57 Tex. 635. See *ante*, sec. 914, note.

In Worth *v.* Fayetteville Comm'rs, 1 Winst. (N. C.) L. & Eq. R. No. 2, 70 (1864), *Pearson*, C. J., with doubts as to jurisdiction, expressed the opinion that equity might entertain a bill to test the legality of a tax imposed by a municipal corporation, but doubted whether such a bill will lie to enjoin the collection of State and county taxes. The case does not show that the illegal tax was sought to be made by the sale of real estate, or in what manner the tax was about to be enforced. A taxpayer, on behalf of himself and all other taxpayers of the State, may file a bill against the proper State officers and parties to enjoin the issue of State bonds under an unconstitutional statute. Galloway *v.* Chatham R. R. Co., 63 N. C. 147 (1869). After the doubt intimated in Worth *v.* Fayetteville, *supra*, the legislature enacted "that a writ of injunction is allowable in all cases against the collection of taxes illegally imposed."

is no lawful power to levy the tax in question under any circumstances, or if it be assessed upon property not subject to taxation, and the remedy at law is not adequate, a plain case for equitable interposition is made out. But if the power to levy the tax exists, and the property be subject to taxation, mere errors and irregularities should, according to the better view, be corrected on *certiorari* or other appropriate proceedings, or their effect left to be tested at law; for *equity* ought not to interfere with the collection of taxes, unless the complainant makes a case coming within some acknowledged head of equity jurisdiction, such as the prevention of a multiplicity of suits, inadequacy of legal remedy, irreparable injury, or where a cloud will be thrown upon his title to real estate. Unless he can make such a case, he must bring a legal action or pursue a legal remedy.[1]

Brodnax *v.* Groom, 64 N. C. 244 (1870). See London *v.* Wilmington, 78 N. C. 109. In *Indiana* it is considered that "the assessment of taxes for State purposes is a matter of public concern in which all the citizens of the State are interested, and hence any citizen of the State may be the relator" in proceedings to compel officers of the revenue law to see that its provisions are carried out. State *v.* Hamilton, 5 Ind. 310 (1854), *per Perkins*, J.; Hamilton *v.* State, 3 Ind. 452; Douglass *v.* Harrisonville, 9 W. Va. 162; Delphi *v.* Bowen, 61 Ind. 31, approving text.

[1] Dows *v.* Chicago, 11 Wall. 108 (1870); approving Heywood *v.* Buffalo, 14 N. Y. 534 (1856); Susquehanna Bank *v.* Broome Co. Sup., 25 N. Y. 312; Marsh *v.* Brooklyn (cloud on title), 59 N. Y. 280 (1874); Hatch *v.* Buffalo, 38 N. Y. 276; State Railroad Tax Cases, 92 U. S. 575, 613 (1875); Hannewinkle *v.* Georgetown, 15 Wall. 548; Douglass *v.* Harrisonville, 9 W. Va. 162; Cook County *v.* Chicago, B. & Q. R. R. Co., 35 Ill. 465; Ryan *v.* Leavenworth Co. Comm'rs, 30 Kan. 185. These cases fully support the doctrine of the text, which is, indeed, extracted from them. See, also, McLot *v.* Davenport, 17 Iowa, 379 (1864), in which the remedies of the taxpayer are fully pointed out by *Cole*, J. Dodd *v.* Hartford, 25 Conn. 232; Deane *v.* Todd, 22 Mo. 91; Lockwood *v.* St. Louis, 24 Mo. 20 (1856); Hughes *v.* Kline, 30 Pa. St. 227; Lovingston *v.* Wider, 53 Ill. 302 (1870); Green *v.* Mumford, 5 R. I. 472 (1858), where the rule is strictly held, that to warrant a resort to equity, the remedy at law must be inadequate. See *ante*, secs. 611, and note, 661, 906–908, 920. In *Michigan*, see Merrill *v.* Humphrey, 24 Mich. 170.

When equity will interfere with the collection of taxes is fully considered in the State Railroad Tax Cases, 92 U. S. 575 (1875), which will doubtless be hereafter regarded as a leading authority on the subject; distinguished in Allen *v.* B. & O. R. R. Co. (Virginia Coupon Case), 114 U. S. 311, noted *infra;* where an injunction to restrain distress and sale of rolling stock was sustained, and the subject of equitable interference with the collection of taxes is considered. *Infra*, sec. 924, and note. *Mode of collecting taxes and assessments.* *Ante*, sec. 815 *et seq.* Where an assessment has been made upon land in bulk, the depth of which exceeds the usual depth of lots, to pay for the improvement of a street upon which it abuts, the collection of such assessment will be enjoined at the suit of the owner of the land, without prejudice to the right of the corporation to collect the amount properly chargeable against the frontage of the land. Griswold *v.* Pelton, 34 Ohio St. 482. See on this point chapter on Taxation, *ante*.

§ 924 (738). **Same subject. When Injunction granted; When not.** — Accordingly, equity will not, according to the rule generally adopted, restrain even an illegal and void tax assessment where it is sought to be enforced against *personal property only*, since here the party has in general, or is considered to have, an adequate remedy at law; nor in such a case will equity interfere because several join in the bill asking it.[1] But under special circumstances equity will enjoin the sale of personal property where the right of the complainant is clear and the remedy at law is inadequate. Thus, equity will restrain the collection of taxes by distress of the *rolling stock of a railroad, after a tender of payment in tax-receivable coupons*, which the State, in violation of its contract, refused to accept. The ground of the jurisdiction in such cases is, that there is no adequate remedy at law.[2] Where, however, the effect of the sale will be to *cast a cloud upon the title to real estate*, equity, in many of the States, will for this reason alone, interfere to prevent it.[3] The Court of Appeals in Maryland, in holding that where a city corporation was seeking to enforce a void tax or assessment by a sale of private property the owner might enjoin it, speaking through Le Grand, C. J., said:

[1] Dodd *v.* Hartford (decided by two judges), 25 Conn. 232 (1856); Sheldon *v.* Centre Sch. Dist., *Ib.* 224. Same point, as to personal property, Lockwood *v.* St. Louis, 24 Mo. 20 (1856); Leslie *v.* St. Louis, 47 Mo. 474 (1871); Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51 (1872); Chicago & N. W. Ry. Co. *v.* Fort Howard Bor., 21 Wis. 44; Peck *v.* Fox Lake, 28 Wis. 583 (1871); Coulson *v.* Portland, Deady, 481, commenting on Ewing *v.* St. Louis, 5 Wall. 413; Dows *v.* Chicago (tax on bank stock), 11 Wall. 108 (1870); *ante*, secs. 816, 906, and notes; Atlantic & Pac. R. R. Co. *v.* Cleino, 2 Dillon C. C. 175 (1873); Youngblood *v.* Sexton, 32 Mich. 406 (1875); s. c. 20 Am. Rep. 65, 47, where *Cooley*, J., refers to numerous cases to the same point. Equity will not restrain the collection of a personal tax, or a tax levied upon personal property by a municipal corporation, upon the *sole* ground of the illegality of the tax. Milwaukee *v.* Koeffler, 116 U. S. 219 (1885), re-affirming Dows *v.* Chicago, 11 Wall. 108; Hannewinkle *v.* Georgetown, 15 Wall. 547; Union Pac. Ry. Co. *v.* Cheyenne, 113 U. S. 516, 525, where, says the court, the rule against the interference of a court of equity in the collection of taxes, and the exceptions to the rule, are restated with care and accuracy; approving Quinney *v.* Stockbridge, 33 Wis. 505; Youngblood *v.* Sexton, 32 Mich. 406, where it is shown that the same principle is asserted in the courts of *Massachusetts, New Hampshire, Connecticut, California, North Carolina, Rhode Island, Ohio, Missouri, New York*, and *Maryland*. Text approved, Delphi *v.* Bowen, 61 Ind. 31. Courts will, indeed, in all cases, cautiously interfere with the exercise of an admitted power. Manifest abuse must be shown. Sheldon *v.* Centre Sch. Dist., 25 Conn. 224; *ante*, secs. 94, and notes, 312, 352.

[2] Allen *v.* B. & O. R. R. Co. (Virginia Coupon Cases), 114 U. S. 311; distinguished from State Railroad Tax Cases, 92 U. S. 575. So a bill in equity will lie which seeks to have a wharfage ordinance declared void, and for an injunction to restrain further collection under it, and any interference with the right of the complainant to the free navigation of the river. Transportation Co. *v.* Parkersburg, 107 U. S. 691.

[3] Powell *v.* Parkersburg, 28 W. Va. 698.

"We entertain no doubt on this question. The idea that a party ought to stand by and see his property illegally exposed to public sale, and then force the purchaser to bring ejectment to gain possession or to try his title, seems sustained by no good authority. Such a doctrine would not only encourage circuity of action and multiplicity of suits, but render the title of the real owner comparatively valueless while the suits at law should be pending. Equity will not allow a title, otherwise clear, to be clouded by a claim which cannot be enforced in law or equity."[1] So in Wisconsin the law is settled that equity will interfere to prevent a cloud upon the plaintiff's title, where his lands are threatened to be sold on a *void tax or assessment.* But where the defect complained of is merely formal, not impeaching the justice of the tax or assessment, and the plaintiff ought to pay the amount, equity will not interfere, but leave him to his legal remedies.[2] The same view, substantially, is

[1] Holland *v.* Baltimore, 11 Md. 186 (1857); Baltimore *v.* Porter, 18 Md. 284 (1861); *ante*, sec. 77. In *Indiana* if "the tax is illegal and void the remedy by injunction to restrain its collection may be sought at once." Delphi *v.* Bowen, 61 Ind. 29, 37 (1878). In *New York* the somewhat stricter view is adopted, that to justify equity in interfering to prevent a cloud being cast upon the title, it must be a proceeding whose invalidity does not appear on its face, but requires extraneous evidence to show it. Heywood *v.* Buffalo, 14 N. Y. 534 (1856); cited with approval, Ewing *v.* St. Louis, 5 Wall. 413, 419 (1866); *ante*, secs. 611, 907; High on Injunctions, secs. 367, 368; 1 Pomeroy Eq. Juris. secs. 259–270.

[2] Mitchell *v.* Milwaukee, 18 Wis. 92, 97 (1864), and prior cases in that State there cited. See, also, Foote *v.* Milwaukee, 18 Wis. 270; Myrick *v.* Lacrosse, 17 Wis. 442; Bond *v.* Kenosha, 17 Wis. 284, 287, where *Cole*, J., clearly states the effect of the decisions; Howes *v.* Racine, 21 Wis. 514; Dean *v.* Gleason, 16 Wis. 1, 18; Barnes *v.* Beloit (who may not join in bill), 19 Wis. 93 (1865), *quære;* Mills *v.* Charleton, 29 Wis. 400; s. c. 9 Am. Rep. 578 (1872); *Ib.* 51; *ante*, sec. 777, note; Gilmore *v.* Fox (city necessary party to bill to enjoin municipal taxes), 10 Kan. 509 (1872); Stone *v.* Mobile, 57 Ala. 61, approving text.

So in *Iowa* a bill for an injunction to restrain sale of real estate may be sustained if the proceedings to tax it are clearly illegal. Litchfield *v.* Polk County, 18 Iowa, 70; Railroad Co. *v.* Mt. Pleasant, 12 Iowa, 112. And in the same State the collection of a tax in aid of a railroad has been enjoined at the suit of a taxpayer, suing on behalf of himself and others interested, for the reason that the vote authorizing the tax was passed upon the assurance of the president of the railroad that the road would be built upon a certain line when in fact it was built upon another and inaccessible line. Curry *v.* Decatur Co. Sup., 61 Iowa, 71.

In *Indiana* it is held that where the *owner of real estate in a city stands by and sees a street improved* adjoining his property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he cannot, after the work is completed, or nearly completed, refuse to pay for it. Lafayette *v.* Fowler, 34 Ind. 140. Same principle, Sleeper *v.* Bullen, 6 Kan. 300 (1870). Extension by the city to the contractor of the time to complete the improvement is no ground for an injunction to stay the collection of the assessment. Lafayette *v.* Fowler, *supra.* Injunction to restrain the collection of an assessment for constructing a sidewalk, on the ground of irregularities in the passage of the ordinance authorizing it, *refused because plaintiff had stood by and allowed the improvement*

also taken by the Supreme Court of Missouri.[1] It may now be regarded as settled in this State, however conflicting the decisions

to be made to the great benefit of his property without taking steps to prevent the outlay. Ritchie *v.* So. Topeka, 38 Kan. 368. So where an owner of property sees a contractor go on and make a street improvement adjoining his property, and makes no objection while the work is being done, he cannot, after the work is completed, and accepted by the city as having been done according to the contract, enjoin the collection of the entire assessments made for such improvement, on the ground that the materials used and the work done were not strictly in accordance with the contract; in such case, a complaint for an injunction must show a tender by the property-owner to the contractor of the value of the improvement. Evansville *v.* Pfisterer, 34 Ind. 36; s. c. 9 Am. Rep. 214. When the inaction of the property-owners is a ground of estoppel, and the principles on which the estoppel rests. See Schumm *v.* Seymour, 24 N. J. Eq. 143; Liebstein *v.* Newark, *Ib.* 200; Dusenbury *v.* Newark, 25 N. J. Eq. 295; Hyde Park *v.* Borden, 94 Ill. 26; New Haven *v.* Fair Haven & W. R. R. Co., 38 Conn. 422, 871; s. c. 9 Am. Rep. 399.

The writ will be refused to one who has intentionally delayed his application until he has secured an inequitable advantage thereby. Traphagen *v.* Jersey City, 29 N. J. Eq. 206 (1878). See, also, as to *effect of delay* in equity, until the improvement is completed. Weber *v.* San Francisco, 1 Cal. 455. Injunction to prevent debt beyond charter limit dissolved on ground of *laches*, the rights of third persons having attached. Collings *v.* Camden, 27 N. J. Eq. 293; *infra*, sec. 929, note. In *Michigan* this view of the estoppel of the property-owner is taken. In Motz *v.* Detroit, 18 Mich. 495, it was held that petitioners to a city council for public improvements for which the charter makes provision must be taken to ask that it may be done under the charter, and if it turned out to be invalid, the petitioners were estopped to set up such invalidity as a basis for equitable relief against the action which they had requested. But in Steckert *v.* East Saginaw, 22 Mich. 104 (1870), the above case was distinguished, and such petitioners were held not to be estopped to object that the proceedings upon their petition have been conducted contrary to law, and unless it may be in the case where they had actual knowledge of the illegality of the proceeding before the expenditure was made, they will be in time to object when proceedings are commenced to deprive them of their rights. See, also, Byram *v.* Detroit, 50 Mich. 56; Putnam *v.* Grand Rapids, 58 Mich. 416; Zeigler *v.* Hopkins (estoppel), 117 U. S. 683 (1885).

In *Kansas* it is decided that courts of

[1] Leslie *v.* St. Louis, 47 Mo. 474, 479 (1871). In this case a bill was filed for an injunction to restrain the city from selling the complainant's real estate for an assessment for benefits. The assessment was held void because no effort had been made by the city to agree with the owner. *Ante*, sec. 605. Treating of the question whether there is a remedy in equity, *Wagner*, J., says: "Courts of equity never allow relief by injunction to prevent the sale of personal property, but where real property is about to be *sold* by a municipal corporation for the payment of [illegal] taxes or assessments, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title and the court interferes to prevent it. Lockwood *v.* St. Louis, 24 Mo. 20; Fowler *v.* St. Joseph, 37 Mo. 228." But the same court in Anderson *v.* St. Louis, 47 Mo. 479 (1871), held that equity would not enjoin the city from taking possession of the plaintiff's real estate under a void condemnation, it not appearing that by trespass, ejectment, or *certiorari* there was not a complete remedy at law; the case of Ewing *v.* St. Louis, 5 Wall. 413 (*ante*, sec. 611), was approved. Text approved. St. Louis *v.* Schnuckelburg, 7 Mo. App. 536 (1878). Missouri decisions: See, further, *supra*, sec. 919, note.

here and elsewhere have been, that to prevent illegal action on the part of municipalities, tending to an increased taxation on their constituents, the State, through its appropriate officer, the Attorney-General or Circuit-Attorney, or any taxpayer of the municipality, may institute a proceeding for an injunction.[1]

Remedy by Certiorari.

§ 925 (739). **At Common Law; In this Country.** — It is well settled in England that courts of superior and general jurisdiction

equity will not interfere to restrain by injunction the collection of taxes, when the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the assessment. Amrine *v.* Kan. Pac. R. R. Co., 7 Kan. 178 (1871). Must tender what is equitably due. Morrison *v.* Hershire, 32 Iowa, 271 (1871); State Railroad Tax Cases, 92 U. S. 575 (1875). See, also, Sleeper *v.* Bullen, 6 Kan. 300 (1870); Mo. R. Ft. S. & G. R. R. Co. *v.* Morris, 7 Kan. 210 (1871); Merrill *v.* Humphrey, 24 Mich. 170. In The State *v.* McLaughlin, 15 Kan. 228 (1875), it was held that an injunction bill in *the name of the State, on the relation of the Attorney-General*, would not lie to restrain *the* collection of taxes levied by a school district to pay void bonds theretofore issued; and the decision was upon the ground that the State, *as such*, had no interest in the subject-matter, and that each taxpayer could protect himself, or all could unite to prevent a multiplicity of suits in a single bill to restrain the collection of the illegal tax. The reasoning of the court seems to distinguish such a case from one to restrain public corporations from committing threatened acts in violation of their duty and the law.

The Supreme Court of the United States has laid down this important and just rule, too often overlooked or disregarded; viz., that in a bill to enjoin the collection of taxes it is *not* sufficient to aver readiness to pay, *but the taxes which are conceded to be due, or which the court can see ought to be paid*, must be paid, or tendered without demanding a receipt in full, before an injunction will be awarded. State Railroad Tax Cases, 92 U. S. 575 (1875).

In *Massachusetts*, both with respect to general taxes and local assessments illegally levied upon land, it is held that equity will not restrain a city corporation from selling the land therefor, and the ground upon which the court bases the doctrine is that if the land-owner should pay the tax or assessment to save his land from a sale under the form of legal process, he would be entitled to recover it back as money wrongfully received by the corporation, and hence he has, in the view of the court, a complete and adequate remedy at law. Loud *v.* Charlestown, 99 Mass. 208; Arnold *v.* Cambridge, 106 Mass. 352 (1871); Whiting *v.* Boston, 106 Mass. 89 (1870); Hunnewell *v.* Boston, *Ib.* 350, and cases there cited.

The act of the *Illinois* legislature of April 16, 1869, by which taxes to pay *railroad aid bonds*, registered in the office of the auditor of public accounts, are to be levied and collected by certain State officers instead of local or municipal officers, does not infringe the Constitution of the State; but if bonds are unlawfully registered the courts will enjoin proceedings to collect taxes to pay them. Dunnovan *v.* Green, 57 Ill. 63.

For a collection of cases upon the subject of *injunctions against taxes*, see High on Injunctions, chap. vii.

[1] State *v.* Saline Co. Court, 51 Mo. 350; Newmeyer *v.* Mo. & Miss. R. R. Co., 52 Mo. 81. *Napton*, J., in Matthis *v.* Cameron, 62 Mo. 504 (1876).

The courts will not interfere with the honest exercise of the discretion vested in municipal authorities in levying a tax to meet expenses of collection, and deficiencies likely to occur over and above the sum actually required to pay debts, &c. Hyde Park *v.* Ingalls, 87 Ill. 11.

will examine on *certiorari* the proceedings of inferior or special jurisdictions or officers. Thus, *certiorari* lies to the censors of the college of physicians,[1] to commissioners of sewers,[2] and to justices of the peace.[3] Such a superintending power to restrain and correct the irregularities and mistakes of inferior officers and jurisdictions is both necessary and salutary. If the proceedings are in a common-law court of record, a writ of error is the proper remedy to correct or vacate them if erroneous; otherwise the remedy is by *certiorari*.[4] So in this country the rule has been very generally adopted by the courts, where a new jurisdiction is created by statute, and the inferior court, board, tribunal, or officer exercising it proceeds in a summary manner, or in a course different from the common law, that the Circuit or District Court of the State, or other tribunal exercising general, original common-law jurisdiction, has, in the absence of a specific remedy being given, an inherent authority to revise the proceedings of such inferior jurisdiction by *certiorari;* and in such cases a writ of error is not, without the aid of statute, the proper remedy to effect the removal of the proceedings to the revisory tribunal.[5]

§ 926 (740). **Scope of Certiorari in this Country.** — The unquestionable weight of authority in this country is, if an appeal be not given or some specific mode of review provided, that the superior common-law courts will, on *certiorari, examine the proceedings of municipal corporations*, even although there be no statute giving this remedy; and if it be found that they have exceeded their chartered powers, or have not pursued those powers, or have not conformed to the requirements of the charter or law under which they have undertaken to act, such proceedings will be reversed or annulled. An

[1] Groenvelt *v.* Burwell, 1 Ld. Raym. 454, 469, and cases there cited; 1 Salk. 144.

[2] *Ib.*

[3] Rex *v.* Inhab. Glamorganshire (Caerdiffe Bridge Case), 1 Ld. Raym. 580.

[4] Parks *v.* Boston, 8 Pick. 218, 226 (1829); Lawton *v.* Cambridge Comm'rs, &c., 2 Caines (N. Y.), 182; Wood *v.* Peake, 8 Johns. (N. Y.) 54; Wildy *v.* Washburn, 16 Johns. 49.

[5] *Ante*, secs. 440, 611; Marion Int. *v.* Chandler, 6 Ala. 899 (1844); Tarlton, *In re*, 2 Ala. 35 (1841); Negus, *In re*, 10 Wend. 34, 39 (1832); Ruhlman *v.* Commonwealth, 5 Binn. (Pa.) 26 (1812); Savage *v.* Gulliver, 4 Mass. 178; Commonwealth *v.* Ellis, 11 Mass. 465; Edgar *v.* Dodge, *Ib.* 670; Ball *v.* Brigham, 5 Mass. 406; Bob, *In re* (a slave), *v.* State, 2 Yerg. (Tenn.) 173 (1826); Lawson *v.* Scott, 1 Yerg. (Tenn.) 92; Wildy *v.* Washburn, 16 Johns. 49; Street *v.* Francis, 3 Ohio, 277; State *v.* Bill, 13 Ired. L. 373 (1852); Redfield on Railways, chap. xxvi. When remedy is by *certiorari*, and when by *bill in equity*, and when not, in *Massachusetts*, see Whiting *v.* Boston, 106 Mass. 89 (1870); Jones *v.* Boston, 104 Mass. 461; *ante*, sec. 924, note; Miller *v.* Sch. Trustees, 88 Ill. 26, citing and approving text. *Ante*, secs. 906–907 *a*, and note.