RESTRAINING THE COLLECTION OF FEDERAL TAXES AND PENALTIES BY INJUNCTION.

Section 3187 of the Revised Statutes of the United States [1] provides that if any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with 5 per centum additional thereto, and interest, by distraint and sale of the goods, chattels, or effects of the person delinquent.

Just what circumstances will warrant a court of equity in interfering with the collection of a tax is a question upon which there is a diversity of opinion. It is well recognized that in any event before an injunction will be granted restraining the collection of a tax the taxpayer must show that his case falls within one of the recognized branches of equity jurisdiction.[2]

With respect to taxes levied under the authority of the federal government, Section 3224 of the Revised Statutes [3] provides that:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Legislative History of Section 3224 R. S. The Internal Revenue Act of July 13, 1866,[4] provided, as follows:

"No suit shall be maintained in any court for the recovery of any taxes alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this Act takes effect: *Provided,* That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

---

[1] Comp. Stat. (1913), Sec. 5909, 3 Fed. Stat. Ann. (2d ed.), 1014.
[2] Shelton v. Platt, 139 U. S. 591 (1891).
[3] Comp. Stat. (1913), Sec. 5947, 3 Fed. Stat. Ann. (2d ed.), 1032.
[4] 14 Stat. L. 152, Sec. 19.

By Section 10 of the Act of March 2, 1867,[5] it was enacted that Section 19 of the Act of 1866 be amended by adding the following thereto:

"And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."

In the Revised Statutes of the United States, this amendment of an addition to Section 19 of the Act of 1866 is made a section by itself (Section 3224), separated from that of which it is an amendment and to which it is an addition, and in the Revised Statutes it reads as follows:

"No suit for the purpose of restraining the assessment or collection of *any* tax shall be maintained in any court."

The word "any" was inserted by the revisers.

Mr. Justice Blatchford, in *Snyder v. Marks*,[6] after considering the foregoing legislative history of this section, said:

"This enactment in Section 3224 has no more restricted the meaning than it had when, after the Act of 1867, it formed a part of Section 19 of the Act of 1866, by being added thereto. The first part of Section 19 related to a suit to recover back money paid for a tax alleged to have been erroneously or illegally assessed or collected, and the Section, after thus providing for the circumstances under which such a suit might be brought, proceeded, when amended to say, that 'No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.' The addition of 1867 was in *pari materia* with the previous part of the Section and related to the same subject-matter. The tax spoken of in the first part of the Section was called a tax *sub modo*, but was characterized as a 'tax alleged to have been erroneously or illegally assessed or collected.' Hence, when, on the addition to the Section, a tax was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed."

---

[5] 14 Stat. L. 475.

[6] (1883) 109 U. S. 189, 27 Law. Ed. 901, 3 Sup. Ct. Rep. 157.

Before any taxpayer can resort to a court of equity and restrain the collection of a federal tax by injunction, it must be shown that the suit is not prohibited by this section of the Revised Statutes, which was held to be constitutional in *Pullan v. Kinsinger.*[7]

Application of Statute.

This section applies to taxes levied by the United States only [8] but does not apply to taxes levied by the District of Columbia, although such taxes are levied under authority of the United States.[9] Even though the application of the statute is limited to taxes levied by the United States, it is said that it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence.[10]

While the statute appears to be so drawn as to prohibit injunctions being issued in any case, it has been found that its provisions are sufficiently general as to raise a doubt as to their proper application in some cases, and in the case of *Dodge Bros. v. Osborn,*[11] Chief Justice White intimated that an injunction might be secured in exceptional cases. At page 122, the Chief Justice said:

". . . it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstances its provisions are not applicable."

In *Kissinger v. Bean* [12] the Court said:

"In other words, I should not be prepared to hold that if the commissioner were to determine that a person not a distiller and not interested in the business of distilling was subject to

---

[7] (C. C., S. D., Ohio, 1870) 2 Abb. 94, 20 Fed. Cas. No. 11,463.

[8] State Railroad Tax Cases, 92 U. S. 575 (1875).

[9] Alexandria Canal R. *etc.* Co. v. District of Columbia, 1 Mackey (D. C.) 234 (1881).

[10] State Railroad Tax Cases, *supra* in Note 8.

[11] 240 U. S. 118 (1916).

[12] (C. C., E. D., Wis., 1875) 7 Bliss 60, 14 Fed. Cas. No. 7853.

assessment as a distiller, that he was then within his jurisdiction, and that a court of equity could not, because of the prohibition in section 3224, intervene."

It is, therefore, the purpose of this article to show in what cases injunctions have been granted to restrain the collection of federal taxes and penalties, and, likewise, the cases in which the courts have refused to grant such injunctions.

Having respect for that sound instinct of the legal profession which distrusts any statement of what is the law unless such statement is based on a careful study of the decided cases, this article is confined to a statement of the law as announced in the recorded decisions of the courts. In other words, it is an exposition of the existing law, no attempt being made to show what the law should be. Since no state court can, by injunction or otherwise, prevent federal officers from collecting federal taxes,[13] the field of investigation has been narrowed to decisions of federal courts exclusively, since March 2, 1867, when this section was first enacted.[14]

Taxing Acts. The provisions of this statute have been applied to income taxes levied under the Act of July 1, 1862 (12 Stat. L. 432),[15] to taxes levied under the Corporation Tax Act of August 5, 1909 (36 Stat. L. 112),[16] to the income and surtaxes levied under the Act of October 3, 1913 (38 Stat. L. 166);[17] to stamp taxes levied under section 22 of the War Revenue Act of October 22, 1914 (38 Stat. L. 758),[18] to taxes levied under the Child Labor Tax Law (40 Stat. L. 1057, 1138,

---

[13] Keely v. Sanders, 99 U. S. 441 (1879).

[14] 14 Stat. L. 475.

[15] Magee v. Denton, *et al.*, (C. C., N. D., N. Y., 1863) 16 Fed. Cas. No. 8943.

[16] Straus v. Abrast Realty Co., (D. C., E. D., N. Y., 1912) 200 Fed. 327.

[17] Dodge v. Brady, 240 U. S. 122 (1916); Dodge v. Osborn, 240 U. S. 118 (1916); Du Pont v. Graham, (C. C. A., Third Cir., 1923) 284 Fed. 1017, affirming 283 Fed. 300.

[18] Kohlhammer v. Smietanka, (D. C., N. D., Ill., E. D., 1917) 239 Fed. 408.

Ch. 18);[19] to estate taxes levied under Title VI. of the Revenue Act of 1918 (40 Stat. L. 1096).[20]

The statute has been held to be inapplicable to the assessments levied under Title II., Section 35 of the National Prohibition Act (41 Stat. L. 305).[21] There are, however, some decisions to the contrary.[22] These cases will be discussed later. Some cases have held it applicable to the taxes levied under this Act, but not applicable as to the penalties imposed by the Act, and refused to issue the injunction as to the penalties until the taxes were paid.[23]

Because of the exceptional and extraordinary circumstances with respect to the operation of the Future Trading Act of August 24, 1921,[24] the Supreme Court refused to apply the provisions of Section 3224 R. S., to the taxes levied under that Act.[25]

In General.—Individual Taxpayers. While one court has held that Section 3224 R. S. applies to all suits to restrain the collection of taxes,[26] it appears that this is further than most courts will go in its application. It is generally held that the inhibition of this statute applies to all assessments and collections of internal revenue taxes made or attempted to be made under color of their offices, by internal revenue officers charged with general jurisdiction over the assessment and collection of such taxes.[27] In the case of *Nichols v. Gaston,* the court said:

---

[19] Bailey v. George, 259 U. S. 16 (1922).

[20] Nichols v. Gaston, (C. C. A., First Cir., 1922) 281 Fed. 67; Page v. Polk, (C. C. A., First Cir., 1922) 281 Fed. 74.

[21] Fontenot v. Accardo, (C. C. A., Fifth Cir., 1922) 278 Fed. 871; Kausch v. Moore, (D. C., E. D., Mo., E. D., 1920) 268 Fed. 668; Ledbetter v. Bailey, (D. C., W. D., N. C., 1921) 274 Fed. 375; Middleton v. Mee, (D. C., S. Dak., S. D., 1921) 277 Fed. 492; Thome v. Lynch, (D. C., Minn., Third Div., 1921) 269 Fed. 995; Lipke v. Lederer, 259 U. S. —— (1922); Regal Drug Corp. v. Wardell, 260 U. S. —— (1922).

[22] Ketterer v. Lederer, (D. C., E. D., Pa., 1920) 269 Fed. 153; Pummilli v. Riordan, (D. C., W. D., N. Y., 1921) 275 Fed. 846; Wassel v. Lederer, (D. C., E. D., Pa., 1921) 274 Fed. 489.

[23] Kelly v. Lewellyn, (D. C., W. D., Pa., 1921) 274 Fed. 112.

[24] 42 Stat. L. 187.

[25] Hill v. Wallace, 259 U. S. 44 (1922).

[26] Markle v. Kirkendall, (D. C., M. D., Pa., 1920) 267 Fed. 498.

[27] Snyder v. Marks, 109 U. S. 189 (1883); Dodge v. Osborn, *supra* in Note 17; Nichols v. Gaston, *supra* in Note 20; Page v. Polk, (C. C. A. First Cir. 1922) 281 Fed. 74; Black v. Rafferty (D. C., E. D., N. Y., 1923), not yet reported.

"It would seem . . . that the inhibition of section 3224 applies to all assessments or collections of internal revenue taxes made or attempted to be made under cover of office by internal revenue officers charged with general jurisdiction over the assessment and collection of such taxes, and that, if the Commissioner of Internal Revenue, in assessing a tax, or the collector, in collecting it, acts under cover of his office, section 3224 applies, and that no suit to restrain the assessment or collection of the tax can be maintained."

The cases of *Nichols v. Gaston* and *Page v. Polk* held that a collector who is proceeding to collect by distraint an assessment of federal estate taxes before the expiration of the time for payment allowed by the statute is acting under color of authority.

In *Kissinger v. Bean* [28] the Court said:

"If the plaintiff is within a class of persons against whom the commissioner may make assessments, though his proceedings be ever so irregular and erroneous, the court cannot interfere."

This statement of the court has lately been approved in *Markle v. Kirkendall.*[29]

In addition to the reason underlying this section—that the government shall not be delayed or interfered with in the collection of its revenues [30]—it is held that Congress has established a complete system of corrective justice and the only redress of an aggrieved taxpayer is to pay the taxes assessed and sue to recover the taxes in the method provided for therein.[31] It is not until the taxes alleged to be due have been paid under protest and the collector sued for the return of the amount paid, with interest, that the legal remedy of the taxpayer is exhausted.[32]

---

[28] (C. C., E. D., Wis. 1875) 7 Bliss 60, 14 Fed. Cas. No. 7853.

[29] (D. C., M. D., Pa., 1920) 267 Fed. 498.

[30] Thome v. Lynch, (D. C., Minn., Third Div., 1921) 269 Fed. 995.

[31] Calkins v. Smietanka, (D. C., N. D., Ill., 1917) 240 Fed. 138; Union Fishermen's Co-operative Packing Company v. Huntley, (D. C., Oreg., 1923) 285 Fed. 671.

[32] State Railroad Tax Cases, *supra* in Note 8; Bailey v. George, *supra* in Note 19.

By the provision that no suit can be maintained for the purpose of restraining either the assessment or the collection of the tax, the statute has, in fact, provided that payment must be made at all events, whether the tax was justly or unjustly levied, and that redress for an unjust exaction must be sought subsequently.[33]

The fact that the collector may be financially unable to respond is no justification for the issuance of an injunction, as the Government will assume his responsibility,[34] the claim, under Section 989 of the Revised Statutes, then being one against the United States.[35]

The prohibitions of Section 3224 R. S., cannot be waived by the Commissioner of Internal Revenue, the collector of internal revenue, or the district attorney.[36]

In *Snyder v. Marks*,[37] Mr. Justice Blatchford concluded that there is no force in the suggestion that Section 3224 R. S., in speaking of a tax, means only a legal tax, and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained. This Section, therefore, prohibits the granting of injunctions to restrain illegal taxes as well as legal taxes.

In the case of *Gouge v. Hart*,[38] a suit against a collector to cancel a sale to the Government of a taxpayer's property to satisfy a tax assessed against him, the question was raised whether or not the word "restrain" as used in this section of the Revised Statutes should be construed in a narrow sense as prohibiting the issuance of restraining orders and injunctions, or in a broad, liberal sense, as applying to all suits to hinder or impede the collection of taxes. The court, in holding that the

---

[33] U. S. v. Black, (C. C., S. D., N. Y., 1874) 11 Blatchf. 538, 24 Fed. Cas. No. 14,600.

[34] Cutting v. Gilbert, (C. C., S. D., N. Y., 1865) 5 Blatchf. 259, 6 Fed. Cas. No. 3519.

[35] Klock Produce Co. v. Hartson, (D. C., W. D., Wash., S. D., 1914) 212 Fed. 758.

[36] Gouge v. Hart, (D. C., W. D., Va., 1917) 250 Fed. 802.

[37] (1883) 109 U. S. 189, 27 Law. Ed. 901, 3 Sup. Ct. Rep. 157.

[38] (D. C., W. D., Va., 1917) 250 Fed. 802.

collection of a tax can not be restrained indirectly by a suit to have the sale of the taxpayer's property by the collector declared void, adopted the broad definition, saying:

"If Section 3224 is considered as forbidding only injunction suits, we have, . . . the result . . . that a court which is forbidden to enjoin the doing of an illegal act, may after such an act has been done, set it aside as a nullity. . . ."[39]

The word "assessment," as used in this Section, can not fairly be limited to the mental act of an officer who determines the amount, but it must include the preliminary investigation as well as the final determination, for one is as important as the other.[40] It has also been held that this Section prohibits a suit for the purpose of restraining an assessment of a tax as well as the collection of a tax.[41]

The doctrine laid down by Mr. Justice Blatchford in *Snyder v. Marks*[42] has been repeatedly applied, until it is no longer open to question that a suit may no longer be brought to enjoin the assessment or collection of a tax because of the unconstitutionality of the statute imposing it,[43] and the averment that a federal taxing statute is unconstitutional will not take the case out of the operation of the provisions of Section 3224 R. S.[44] There must be some extraordinary and exceptional circumstances to render inapplicable the provisions of this Section of the Revised Statutes.[45] What then are the exceptional and extraordinary circumstances that will prevent the application of this Section to a suit for an injunction to restrain the assessment or collection of a federal tax?

---

[39] The Supreme Court of the United States dismissed the appeal for want of jurisdiction. 251 U. S. 542.

[40] Kohlhammer v. Smietanka, *supra* in Note 18.

[41] Miles v. Johnson, (C. C., Ky., 1893) 59 Fed. 38.

[42] 109 U. S. 189 (1883).

[43] Dodge v. Osborn, *supra* in Note 17.

[44] Dodge v. Osborn, and Dodge v. Brady, *supra* in Note 17; Bailey v. George, *supra* in Note 19.

[45] Dodge v. Osborn, and Dodge v. Brady, *supra* in Note 17; Bailey v. George, *supra* in Note 19; Hill v. Wallace, *supra* in Note 25.

Frayser v. Russell[46] is often referred to as a case in which a court of equity has granted an injunction restraining federal officials in the collection of a tax since Section 3224 R. S. was enacted in 1867. But an examination of that case discloses that what the collector was asserting to be a tax was not a tax; that the collector had attempted to assess the tax himself, whereas, under Section 3371 R. S.,[47] it was made the duty of the Commissioner of Internal Revenue to make the assessment and certify the same to the collector. As the Commissioner of Internal Revenue had not assessed the tax and certified it to the collector, the latter had neither a tax to collect nor color of authority for its collection.[48]

In the case of *Dodge v. Brady*,[49] a claim for abatement had been filed with the collector alleging the tax sought to be collected was illegal because of the unconstitutionality of the taxing statute. The Commissioner of Internal Revenue ruled on the claim adversely, and in doing so passed upon the very question which he would be called upon to decide on an appeal for the refunding of the tax, if paid. In that case, the court retained jurisdiction to pass upon the merits of the tax, even though the suit was one for an injunction to restrain the collection of a tax. In so doing the court predicated its action on the fact that to follow this course would be to put an end to further useless and unnecessary controversy. The court, at page 126, said:

". . . broadly considering the whole situation, and taking into view the peculiar facts of the case, the protest to the Commissioner, and his exertion of authority over it, and his adverse ruling upon the merits of the tax, thereby passing upon the very question which he would be called upon to decide on an appeal for a refunding of the taxes paid, we think that this case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case on its merits, thus putting an end to further

[46] (C. C., E. D., Va., 1878) 3 Hughes 227, 9 Fed. Cas. No. 5067.
[47] Comp. Stat. (1913) Sec. 6180, 4 Fed. Stat. Ann. (2d ed.) 146.
[48] Nichols v. Gaston, *supra* in Note 20.
[49] 240 U. S. 122 (1916).

absolutely useless and unnecessary controversy. We say useless and unnecessary because on the merits all the contentions urged by the applicants concerning the unconstitutionality of the law and of the surtaxes which it imposes have been considered and adversely disposed of in *Brushaber v. Union P. R. Co.*, 240 U. S. 1, 60 Law Ed. 493, 36 Sup. Ct. Rep. 236."

It may therefore be said that the court will retain jurisdiction and pass upon the merits of a supplemental bill to recover the tax *after payment,* even though the *original* bill was brought to enjoin the collection of the tax, alleging the taxing statute to be unconstitutional, where it is clear that the taxpayer could not recover even if the action were rightfully brought.[50]

It has been held also that an injunction will be granted in a case where the taxpayer, if forced to pay the tax by distraint, would have no recourse at law due to the fact that the statutory period allowed for the filing of a claim for refund, or bringing suit against the collector, has expired.[51]

The District Court in its opinion in the *Du Pont* case, which was adopted by the Circuit Court of Appeals, said:

"While Section 3224 has been strictly construed in view of the remedial system providing for remedies of the taxpayer against the imposition of illegal taxes following Mr. Justice Blatchford's comprehensive discussion of the subject in *Snyder v. Marks,* 109 U. S. 189, Congress has since added to the system the limitations contained in the Act of 1921 and reading these new provisions in connection with Section 3224, I cannot conceive that Congress intended the taxpayer to be rigidly held to the inhibitions of Section 3224 if the effect should be to nullify the inhibitions against the officers of the revenue contained in the later statutes and thus to subject the taxpayer to proceedings by distraint without leaving him an adequate remedy at law, after the limitation had run against the collector's right to begin such proceedings."

---

[50] Dodge v. Brady, *supra* in Note 17.

[51] Du Pont v. Graham, (C. C. A., Third Cir., 1923) 284 Fed. 1017, affirming 283 Fed. 300. This case is now before the Supreme Court of the United States on a writ of certiorari granted February 26, 1923. 67 Law. Ed. 417. It is to be noted that the situation existing in this case could not exist under Revenue Acts subsequent to the Revenue Act of 1913.

It has been suggested that if it can be shown in any case that a suit against a collector to recover the tax paid and interest would not afford the taxpayer an adequate remedy, because in order to pay the tax he would be compelled to dispose of his property at a figure below its real worth, for which, of course, the return of the tax and interest would not reimburse him, then a court of equity in the exercise of its inherent jurisdiction to afford relief where a suitor has no adequate remedy at law, would act by injunction to prevent the collection of a tax illegally assessed.[52]

The Supreme Court of the United States in *Hill v. Wallace*,[53] a suit to restrain the collection of taxes assessed under the Future Trading Act of 1921,[54] granted an injunction against the Secretary of Agriculture on the ground that it would prevent a multiplicity of suits, which, under the circumstances of this particular case would be impracticable. The court, speaking through Mr. Chief Justice Taft, said:

"It has been held by this court, in *Dodge v. Brady*, 240 U. S. 122, 126, that Section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge v. Osborn*, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back, would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market, in order to test the validity of the act, would stop its 1600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make Section 3224 inapplicable."

An injunction will be granted to restrain the collection of the tax if it clearly appears that the action of the collector is a

[52] Montgomery, Income Tax Procedure, (1923) p. 260.
[53] 259 U. S. 44 (1922).
[54] 42 Stat. L. 187.

nullity, or that the property about to be seized is not liable for the assessment.[55] However, Section 3224 has been held to apply to parties whose property was being seized for taxes not assessed against them, as where property was owned by a company as a partnership and the taxes were assessed against the company as a corporation.[56]

Section 3224 R. S. applies to taxpayers only, who, thus deprived of one remedy are given another remedy by Section 3226 R. S., as amended, an action to recover after taxes are paid and repayment denied by the Commissioner of Internal Revenue. Nor are they limited to the statutory remedy, but, after the taxes are paid, they may have trespass or other action against the collector.[57]

This section is not applicable to non-taxpayers, and does not prevent the granting of an injunction against a collector from selling the property of a non-taxpayer in order to satisfy the demands made upon a taxpayer.[58] Such a suit is not one against the United States, but is one against an individual who, as an officer in the discharge of a discretionless ministerial duty, is committing acts of trespass illegally.[59] Congress has no power to grant, and has not assumed to grant, authority to collectors of internal revenue to distrain the property of one person to pay the taxes of another, although it is suggested that perhaps it could, were the property in the possession of the taxpayer.[60]

Receiver and Trustees. Section 3224 R. S. does not prohibit receivers, as officers of the court, applying to the court appointing them for instructions as to payment of taxes claimed by the government where they contend that the property or the income from property in their charge is not subject to the taxes claimed.

---

[55] Markle v. Kirkendall, *supra* in Note 26.

[56] See Note 55.

[57] Long v. Rasmussen, (D. C., Mont., 1922) 281 Fed. 236, and cases therein cited.

[58] See Note 57.

[59] See Note 57.

[60] Long v. Rasmussen, *supra* in Note 57; Sears v. Cottrell, 5 Mich. 251 (1858).

In the case where the receivers took this action, they were ordered not to pay any income tax. This was on the theory that the funds were in the hands of the court, the receivers being officers of the court, and the court, therefore, did not exceed its jurisdiction in making the order complained of in view of Section 3224 of the Revised Statutes.[61] But, upon an application for instructions, a state court refused to assume jurisdiction of federal tax questions raised[62] and held that trustees liquidating and dissolving a corporation as provided by Sections 23447 and 23448 of the Connecticut Statutes are not officers of the court.[63] In another case a trustee was enjoined from voluntarily complying with an order of the Bureau of Internal Revenue to pay additional tax.[64]

Suit by Stockholder to Restrain Corporation from Paying Illegal Tax. While purely injunctional bills cannot be sustained to restrain the collection of taxes upon the sole ground of their unconstitutionality,[65] in cases where a speedy determination of the constitutionality of the tax is desirable a method has frequently been adopted of determining in advance the validity of the tax, which would not be available in the case of an individual taxpayer. This is at most a justifiable evasion of the statute. It is well settled that courts of equity have jurisdiction to prevent a threatened breach of trust in the misapplication or diversion of the funds of a corporation for illegal payments out of its capital or profits. By virtue of this power a court of equity will take jurisdiction of a bill by a stockholder alleging that an illegal tax has been assessed against the corporation, and that the officers of the corporation have refused to take the necessary steps to resist the collection of the tax. In such a suit, the validity of the tax will be in issue and will be determined by the

---

[61] Scott v. Western Pacific R. Co., (C. C. A., Ninth Cir., 1917) 246 Fed. 545.

[62] Application of Willmann *et al.*, Trustees, 96 Conn. 73 (1921)

[63] Willmann v. Walsh, 96 Conn. 79 (1921).

[64] Weeks v. Sibley, (D. C., N. D., Texas, 1920) 269 Fed. 155.

[65] Shelton v. Platt, 139 U. S. 591 (1891); Allen v. Pullman's Palace Car Co., 139 U. S. 658 (1891), and case cited in Note 43.

court, although the government or agency on behalf of which the tax was assessed, or its officers, are not a party to the proceeding.[66] The object of the suit is to restrain the corporation from *voluntarily* paying the tax. It has been held that such a suit is not prohibited by Section 3224 of the Revised Statutes.[67]

The right of a stockholder to maintain such a suit was, however, denied in the cases of *Straus v. Abrast Realty Co.*[68] and *Stanton v. Baltic Mining Co.*[69] It is to be noted that in the *Stanton* case the injunction was denied even though the unconstitutionality of the tax was alleged. This case was decided about one month after the *Brushaber* case and the opinion of the court in the *Stanton* case expressly refers to the *Brushaber* case and states that all the objections of unconstitutionality raised in the *Stanton* case were disposed of in the *Brushaber* case. The court having granted the injunction in the *Brushaber* case and denied it in the *Stanton* case, would indicate that the constitutionality of a law once having been decided, further suits alleging the unconstitutionality of that law would not give rise to injunctive relief from the assessment and collection of taxes under it, even when brought by a stockholder to restrain the corporation from voluntarily complying with the demands of the collector.

While at first the jurisdiction of the courts over such bills for injunction was sustained, in part at least, on the ground that objection to the jurisdiction had not been seasonably raised, it now appears to be the rule that a case of equity jurisdiction is established in such cases, on account of the confusion, wrong, multiplicity of suits, and absence of all means of redress which would result if the corporation paid the tax without protest.[70] In such cases it is now usual for the defendant corporation to call the attention of the government to the pendency of the

---

[66] Dodge v. Woolsey, 18 How. 331 (1856).

[67] Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429 (1895); Brushaber v. Union Pacific R. Co., 240 U. S. 1 (1916).

[68] (D. C., E. D., N. Y., 1912) 200 Fed. 327.

[69] 240 U. S. 103 (1916).

[70] Brushaber v. Union Pacific R. Co., *supra* in Note 67.

suit and the nature of the controversy and its unwillingness voluntarily to refuse to comply with the act assailed.

Mr. Chief Justice Fuller in his opinion in the case of *Pollock v. Farmers' Loan and Trust Company,* at pages 553 and 554, said:

"The jurisdiction of a court of equity to prevent any breach of trust in the misapplication or diversion of the funds of a corporation by illegal payment out of its capital or profits has been frequently sustained. *Dodge v. Woolsey,* 59 U. S. (18 How.) 331; *Hawes v. Oakland,* 104 U. S. 450.

"As in *Dodge v. Woolsey,* this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also an allegation of threatened multiplicity of suits and irreparable injury."

In his opinion in the case of *Brushaber v. Union Pacific Railway Company,* Mr. Chief Justice White, at page 9, said:

"The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders, and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong, and multiplicity of suits, and the absence of all means of redress which would result if the corporation paid the tax and complied with the Act in other respects without protest, as it was alleged it was its intention to do. *To put out of the way a question of jurisdiction we at once say that in view of these averments and the ruling in Pollock v. Farmers' Loan and Trust Company,* 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of Section 3224, Revised Statutes (Comp. Stat. 1913, Section 5947), against enjoining the enforcement of taxes, we are of the opinion that the contention here made that there was no jurisdiction of the cause, since to entertain it would violate the provisions of the Revised Statutes referred to, is without merit." (Italics mine.)

In the *Straus* case the court, in denying the injunction, said:

"The complainant seeks to do the very thing that the law prohibits. If the stockholder cannot have the collector of the tax enjoined, it seems obvious that he cannot have the corporation enjoined from paying it, and thus do by indirection what he cannot do directly. To restrain a corporation or its officers from paying a tax, the collection of which cannot be restrained in any court, would be a palpable evasion of the statute."

Assessments Made Under Title II, Section 35 of the National Prohibition Act, and Other Liquor Laws. It has been held that the provisions of Section 3224 R. S. are not applicable to assessments levied under Title II, Section 35 of the National Prohibition Act (41 Stat. L. 305),[71] because the assessments authorized by this Act are penalties and not taxes.[72] In *Fontenot v. Accardo,*[73] the court said:

"We are of the opinion that the assessments involved in these cases were assessments of penalties and are not collectible by distraint proceedings."

In *Kelly v. Lewellyn,*[74] the court, after citing *Accardo v. Fontenot,*[75] said:

"I am satisfied that Congress has not placed in the hands of the collector of internal revenue the power to collect by distress and sale, the penalties provided for in the said section of the National Prohibition Act. This same question has been before

---

[71] Fontenot v. Accardo, (C. C. A., Fifth Cir., 1922) 278 Fed. 871; Connolly v. Gardner, (D. C., E. D., N. Y., 1921) 272 Fed. 911; Kausch v. Moore, (D. C., E. D., Mo., E. D., 1920) 268 Fed. 668; Kelly v. Lewellyn, (D. C., W. D., Pa., 1921) 274 Fed. 112; Ledbetter v. Bailey, (D. C., W. D., N. C., 1921) 274 Fed. 375; Middleton v. Mee, (D. C., S. Dak., 1921) 277 Fed. 492; Thome v. Lynch, (D. C., Minn., Third Div., 1921) 269 Fed. 995; Lipke v. Lederer, 259 U. S. —— (1922); Regal Drug Corp. v. Wardell, 260 U. S. —— (1922).

[72] For the distinction between "taxes" and "penalties" see: New Jersey v. Anderson, 203 U. S. 483, 492 (1906); Houck v. Little River District, 239 U. S. 254 (1915); Helwig v. United States, 188 U. S. 605 (1903); Lipke v. Lederer, *supra* in Note 21.

[73] (C. C. A., Fifth Cir., 1922) 278 Fed. 871.

[74] (D. C., W. D., Pa., 1921) 274 Fed. 112.

[75] 269 Fed. 447, affirmed in (C. C. A., Fifth Cir., 1922) 278 Fed. 871.

courts in other jurisdictions and decided in favor of the plaintiff where similar bills have been filed."

In *Ledbetter v. Bailey*[76] the court, in holding that the provisions of Section 3224 R. S. did not apply, even as to the double tax provided in the National Prohibition Act, said:

"The conclusions of the court are, therefore, that under the provisions of Section 35 of the Volstead Act taxes cannot be assessed or collected; that the double tax provided in the Act, and the penalties prescribed, are nothing more nor less than punishment for the commission of criminal offenses; that these penalties must be collected by civil actions or pronounced as judgments in criminal cases; that the provisions of Section 3224 do not apply and that these suits are not forbidden thereby; that the court has jurisdiction to entertain the suits and issue the orders of restraint or decrees for injunction sought thereby."

In *Lipke v. Lederer*,[77] the Supreme Court, speaking through Mr. Justice McReynolds, said:

"The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term, a tax was laid. *Bailey v. Drexel Furniture Co.* (May 15, 1922). When by its very nature the imposition is a penalty, it must be so regarded. *Helwig v. United States*, 188 U. S. 605, 613. Evidence of crime (Section 29) is essential to assessment under Section 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the Government,' and clearly involves the idea of punishment for infraction of the law,—the definite function of a penalty.

"Section 35 prescribes no definite mode for enforcing the imposition which it directs, and if it be interpreted as above stated, we do not understand counsel for the United States claim that relief should be denied to the appellant. Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing,—this is essential to due process of law, *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 136, 138,

[76] (D. C., W. D., N. C., 1921) 274 Fed. 375.
[77] 259 U. S. —— (1922).

142,—and certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be endorsed through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded.

"The collector demanded payment of a penalty, and Section 3224, which prohibits suits to restrain assessment or collection of any tax, is without application. And the same is true as to statutes granting the right to sue for taxes paid under protest."

In *Middleton v. Mee*[78] the court said:

"I believe, however, that a defendant, charged with a violation of this statute, should have his day in court, and an interpretation of this statute that closes to him forever the hope of financial progress, by placing this lien against him, is to imply an intent and purpose on the part of Congress, inconsistent with the intent and purpose of the act. I am, therefore, of the opinion that such of these provisions of the Volstead Act as may be enforced against violators of that law are penalties, and not taxes; that such penalties cannot be assessed by an internal revenue collector, without giving the person charged his day in court. Finally, the procedure by distraint for the collection of these penalties, as threatened in these cases, cannot be sanctioned. There has been no adjudication in court as to the liability of the plaintiffs. This liability is denied. There has been no hearing. Distraint under such circumstances is not due process of law."

In *Regal Drug Corporation v. Wardell,*[79] the Supreme Court, basing its decision on *Lipke v. Lederer,* held that Section 3224 R. S. has no application to the tax imposed under Section 35 of the National Prohibition Act, because the assessment there levied is a penalty and not a tax. The court said:

"The distinction between a tax and a penalty was emphasized. The function of a tax, it was said, 'is to provide for the support of the government;' the function of a penalty clearly in-

[78] (D. C., S. Dak., S. D., 1921) 277 Fed. 492.
[79] 260 U. S. —— (1922).

volves the 'idea of punishment for infringement of the law;' and that a condition of its imposition is notice and hearing. *O'Sullivan v. Felix*, 233 U. S. 318, 324, 58 L. ed. 980, 982, 34 Sup. Ct. Rep. 596. And even if the imposition may be considered a tax, if it have punitive purpose, it must be preceded by opportunity to contest its validity. *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463."

The court, in *Thome v. Lynch*,[80] made the following statement:

". . . I have reached the conclusion that all of the exactions provided in Section 35, whether called taxes or penalties, so far as they apply to the manufacture or sale of intoxicating liquor for beverage purposes, stand on the same footing and have the same essential character. Also, and in view of the foregoing considerations, it appears more reasonable to hold that all of said exactions in Section 35, so far as they apply to the manufacture and sale of intoxicating liquor for beverage purposes, are penalties, rather than taxes. To hold these exactions to be taxes, and collectible by distraint, would, in the instant cases, be to hold that searches and seizures may be made in private residences upon suspicion, without warrant; that these plaintiffs may be compelled to give evidence against themselves as to the commission of a criminal offense; that they may be punished for alleged violation of law without having had a day in court; that they may be deprived by administrative officers of a jury trial for an alleged criminal offense. Such results as these I do not believe were intended by Congress.

"Title 2, Section 28, of the National Prohibition Act, confers on the Internal Revenue Commissioner and subordinate officers, for the enforcement of the National Prohibition Act, the powers which are conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors. . . . Those powers include the enforcement by distraint in cases of special taxes and certain penalties annexed to them under the internal revenue laws. But if, as we have seen, the exactions under Section 35 of the National Prohibition Act are none of them taxes, but all of them penalties, so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that Section 28 gives no power

[80] (D. C., Minn., Third Div., 1921) 269 Fed. 995.

to collect these penalties by distraint. . . . Finally, the procedure by distraint for the collection of penalties, as is now threatened in the present case, is open to grave constitutional objections. As already noted, there has been no adjudication in court as to the liability of the plaintiff; the liability is denied; there has been no hearing. In many of the cases alleged evidence has been obtained by illegal searches and seizures. Procedure by distraint under such circumstances would not be due process of law.

"If the foregoing conclusion as to the nature of the exactions be correct, then Section 3224 is not a bar to the relief sought. And for the same reasons the remedies provided in Sections 3225 and 3226, R. S. (Comp. St. Secs. 5948, 5949), have no application to the instant cases. Nor is it an adequate remedy at law for the plaintiffs to pay the exactions demanded, and sue for recovery. In some cases it is alleged that it is impossible for plaintiffs to pay the amounts demanded, sums running as high as $6500, and that seizure and sale would ruin plaintiff's business and means of livelihood. The equities in favor of the plaintiffs are strong and persuasive."

In *Wassel v. Lederer,*[81] it was held that a federal trial court should not make a finding that an exaction called by Congress a tax is in fact a penalty, the enforcement of which may be enjoined under appropriate circumstances; but the duty of making such a finding should be left to a court of final jurisdiction. In that case, the court said:

"Congress has called the payment imposed a tax, and has directed it to be levied and collected as such. It is, as we view it, beyond the province of a trial court to make the finding that Congress is not exercising the power which it declares itself to be exercising, but another power which it does not lawfully possess. . . . The view we take, however, is that it is the orderly and preferred mode of judicial procedure to leave to a court of final jurisdiction the duty and responsibility of finding the facts upon which the distinction made rests."

It is to be noted, however, that the Supreme Court made the finding which this court refused to make.[82]

---

[81] (D. C., E. D., Pa., 1921) 274 Fed. 489.

[82] Lipke v. Lederer, *supra* in Note 21.

Some courts have taken a different view of the assessments levied under Title II, Section 35, of the National Prohibition Act and have refused to restrain the collection of these assessments. [83] However, all these cases except *Violette v. Walsh,* were decided prior to the decision of the Supreme Court in the case of *Lipke v. Lederer.*

The case of *Violette v. Walsh,* holding that Section 3224 R. S. prevents the granting of an injunction to restrain the tax imposed by Section 3251 R. S. on the manufacture of distilled spirits, even though said section has been repealed by the National Prohibition Act, may be distinguished from the other cases on the ground that in that case the taxpayer had been convicted and there was no question but that he was subject to the taxes and penalties sought to be collected.

Before an injunction will be granted restraining the collection of a penalty by distraint, all lawful taxes must be first paid or tendered, [84] even where the amount of the tax is doubled upon the contingency of a violation of the law. [85]

Where an injunction is sought to restrain collection of "penalties," failure to aver that "taxes" alleged to be due have been paid is cause for dismissal of the bill. [86] After denying an injunction as to taxes and penalties because the plaintiff had not averred that he had paid the taxes assessed against him in double the amount, under the Act, the court granted the injunction prayed in a subsequent bill, where such averment was made. [87]

It has been held that while the prohibition of suits to enjoin the collection of internal revenue taxes does not specifically include penalties, as such, yet, where these penalties are authorized by the statute to be added to the tax and collected as a part of

---

[83] Kohlhammer v. Smietanka, *supra* in Note 18; Pummilli v. Riordan, *supra* in Note 22; Violette v. Walsh, (C. C. A., Ninth Cir., 1922) 282 Fed. 582; Wassel v. Lederer, *supra* in Note 22.

[84] Kausch v. Moore, and Fontenot v. Accardo, *supra* in Note 21; Kelly v. Lewellyn, *supra* in Note 23.

[85] Kausch v. Moore, *supra* in Note 21; Kelly v. Lewellyn, *supra* in Note 23.

[86] Fontenot v. Accardo, *supra* in Note 21; Kohlhammer v. Smietanka, *supra* in Note 18.

[87] Kelly v. Lewellyn, *supra* in Note 23.

the tax, the penalty is a part of the tax and its collection cannot be enjoined,[88] although this is probably not now the law in view of the Supreme Court decisions in *Lipke v. Lederer* and *Regal Drug Corp. v. Wardell.*

Conclusion.

It may, therefore, be said that Section 3224 R. S. prohibits the granting of an injunction restraining the collection of federal taxes unless its provisions are rendered inapplicable to a particular case because of extraordiary and exceptional circumstances. These cases have been limited to situations where the taxpayer has no adequate remedy at law to recover back the taxes paid, if illegally assessed and collected; to cases where to sue and recover back the taxes would necessitate a multiplicity of suits which would be impracticable; to cases where the action of the collector is a nullity, the property about to be seized not being liable for the assessment; and to cases where the collector is selling the property of a non-taxpayer to satisfy the demands made upon a taxpayer. This section does not prevent the granting of an injunction to restrain the collection of a penalty if the taxes claimed to be due are paid, nor the maintaining by a stockholder of a corporation of a suit to restrain the corporation from voluntarily paying a tax alleged to be unconstitutional if the constitutionality of such tax has not been adjudicated. Nor does it prohibit a receiver appointed by a federal court from requesting instructions as to the payment of a tax.

Clarence A. Miller.

Washington, D. C.

---

[88] Kohlhammer v. Smietanka, *supra* in Note 18.