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Availability of Injunction to Prevent the Assessment or Collection of a Federal Tax

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THE SCHOOL OF LAW

In connection with the commencement exercises, it was announced that George Winslow Simpkins, Stanley M. Richman, and Alfred W. Petschaft had been graduated with final honors in the School of Law. The Alumni Prize for maintaining the highest scholastic average during the entire three year course of study was awarded to George Winslow Simpkins. Mr. Simpkins also was the recipient of the Richard Wagner Brown Prize, awarded annually to the member of the graduating class who, in the estimation of the faculty, best exemplifies the qualities of scholarship, leadership and character. The Mary Hitchcock Thesis Prize was won by Louis Shanfeld, with honorable mention to David Priwer.

Notes

AVAILABILITY OF INJUNCTION TO PREVENT THE ASSESSMENT OR COLLECTION OF A FEDERAL TAX

Historically courts of equity reluctantly granted injunctions as preventive relief against the levy, assessment or collection of a tax. Their reluctance was based on a conviction that courts should not embarrass or delay officers in the collection of the revenue necessary for the existence of government. Judges thought it more desirable that the collection of taxes be speedy, than that justice be speedily given to individuals.[1] The temporary inconvenience the individual suffered in paying a controverted tax and litigating his rights in a subsequent suit for recovery was held a far less grave consequence than the possible chaos which would ensue should the hands of tax officials be tied by indiscriminate use of preventive equitable processes. But this reluctance did not in any sense amount to a prohibition on the jurisdiction of courts of equity. It has not meant that an injunction could not

[1] Cooley, Taxation (4th ed. 1924) vol. 4, Sec. 1640 et seq.; 4 Pomeroy, Equity Jurisprudence (3rd ed.) sec. 1779; High, Injunctions (4th ed. 1905) vol. 1, Sec. 485; note, 10 Col. Law Rev. 564; State Railroad Tax Cases (1875) 92 U. S. 575.

be had in any case of wrongful collection of a tax. The courts have consistently been jealous of their jurisdiction. They have not given up equitable jurisdiction in tax matters. Where a well recognized ground of equitable jurisdiction was present, the taxpayer could have his restraining writ against the collector or other tax official.[2]

Legislative bodies and administrative officers have been immensely more concerned about impediments to rapid collection of taxes than have courts. Their attitude follows from the direct responsibility of the legislature and administrative officials for the raising of revenue. They are more concerned with raising money than with individual justice. The apparent harmony between the courts and tax officers in believing that the collection of taxes must necessarily be summary and speedy is not real. On the one hand the courts, while acceding to the general proposition of noninterference, have been willing to interfere and halt proceedings for assessment or collection of a tax where a proper equitable basis is shown. On the other hand, tax officers and legislative bodies have tended to apply the principle that courts should in no case intervene before payment of the tax and that the taxpayer should be confined to a suit to recover the tax after payment.[3]

It seems certain Congress intended to limit existing jurisdiction of the Federal courts and to insure observance of the second principle above when in 1867, by amendment to Revenue Act of 1866, section 3224 of the Revised Statutes was enacted. The section reads, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.[4]"

The broad language of the statute, chiefly the use of the word "any", seems to make it inclusive in its terms and to prohibit Federal courts from taking jurisdiction in any suit which has for its purpose the restraining of assessment or collection of a tax. It would have been difficult for Congress to indicate this meaning more explicitly. But, the history of the treatment of section 3224 by the courts shows they have not regarded it as absolute in its prohibitions.

The first court to construe the act, a lower Federal court, held it constitutional and applied it to deny an injunction in *Pullan v.*

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[2] Dow v. Chicago (1872) 11 Wall. 108. Cooley, Taxation, note 1 above.

[3] Cooley, Taxation, above, note 1, secs. 1200-1.

[4] 14 Stat. 474 (1867), (1928) 26 U. S. C. 154.

Two recent enactments affect the above section. 26 U. S. C. 1048 (1924) places a restriction on it by allowing an injunction in the very limited set of facts indicated. 26 U. S. C. 2604 (1928) extends the prohibition of the statute to injunctions by transferees of property. In this connection see Trinance Real Estate Co. v. Clark (D. C. E. D. N. Y. 1929) 34 F. (2d) 325.

Kissinger.[5] The court reviewed the common law and pointed out that "according to English equity an injunction would not go in any case analogous to the case at bar." The principle that an injunction would not lie to restrain a merely illegal tax was reiterated. In connection with constitutionality of the statute it was said, "The statute was wholly unnecessary, enacted only as a politic and kindly publication of an old and familiar rule."

The statute was first applied in the Supreme Court in the case of *Snyder v. Marks*[6] in 1883. In the intervening time there had been other lower court decisions which followed the result reached in *Pullan v. Kissinger.* The Supreme Court approved the current of decisions without an examination of the reasoning of the *Pullan* case. The Supreme Court indicated it regarded the inhibitions of the statute as extending to all suits directed at any tax assessed or collected by officers under color of their office.

Since that time the current of decisions has followed *Snyder v. Marks* but has recognized certain so-called exceptions which justify the granting of injunctions. The culmination of the cases establishing the so-called exceptions is the recent case of *Miller v. Standard Nut Margarine Co.*[7], which, if followed, will make section 3224 meaningless as far as changing the historic jurisdiction of equity courts.

The Standard Nut Margarine Company engaged in the manufacture of a vegetable oil product, sold for cooking purposes. In a previous decision a similar product was held not a butter imitation and not subject to a ten cent tax on oleomargarine.[8] The Commissioner of internal revenue made an administrative finding, disregarding the above decision, and held defendant's product was sold as oleomargarine and subject to the tax. An injunction against collection of the tax was granted in the instant case. The equity recognized by the court as justifying the injunction was irreparable injury, since complainant had a widespread business which would be ruined by the forced payment of the tax and the consequent higher price necessary on its product. Mr. Justice Butler speaking for the court held; (1), independently of and prior to enactment of section 3224 the Supreme Court followed the recognized equity rule that a suit would not lie to restrain a tax solely on the ground of illegality; (2), the court also recognized the rule that where complainant shows that in addi-

[5] (C. C. Ohio 1870) Fed. Cas. No. 11, 463. The act does not apply to injunction by Federal courts against a state tax. State Railroad Tax Cases, above note 2. Obviously no state court could prevent Federal officers collecting a Federal tax. Keely v. Saunders (1879) 99 U. S. 441.

[6] (1883) 109 U. S. 189.

[7] (1932) 284 U. S. 498. See comment, 32 Col. Law Review 743.

[8] Higgins Mfg. Co. v. Page (D. C. R. I. 1924) 297 F. 644.

tion to the illegality there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence an injunction will be granted; (3), section 3224 is declaratory of the first mentioned principle and is to be construed as nearly as possible in harmony with it; (4), the rule as stated in the statute does not refer to cases involving exceptional circumstances. The general words employed in the statute are not sufficient and it would require more specific words to warrant the inference that Congress intended to abrogate the salutory and well established rule as to injunctions in equitable cases. Mr. Justice Stone joined by Mr. Justice Brandeis, dissented, stating in a short opinion, "Enacted in 1867 this statute for more than sixty years has been consistently applied as precluding relief, whatever the equities alleged."

Justice Stone's brief comment adopts the view that the statute is absolute in its prohibitions and that an injunction suit should not be entertained in any case where a tax is involved (this would not exclude an injunction where a penalty, wrongly called a tax is involved). Whatever may be the reasons of policy or justice which can be advanced against the rule, it is probable that it expresses what Congress intended in enacting section 3224. A considerable number of cases had followed this view.

A second view, the one adopted by the majority of the court above is that section 3224 was a declaration of the then existing law; and when an injunction is sought, the established and accepted equitable rule will be applied. This interpretation was advanced by a small minority of courts long before the decision in the *Miller* case.[9]

The third view, and the one most widely accepted, is that an injunction will not be granted to restrain assessment or collection of a federal tax, unless the imposition is one that comes within several recognized exceptions laid down in earlier decisions.[10]

The decided cases will be examined to determine the relation of previous decisions and interpretations to the Supreme Court's conception of 3224 expressed in *Miller v. Standard Nut Margarine Co.* The situations in which injunctions have been granted in spite of the statute, and which comprise the so-called exceptions, indicate a trend towards the above conception. It can here

[9] See, Enjoining the United States. John C. Gall (1923) 10 Va. L. Review 194.

[10] See, Restraining the Collection of Federal Taxes. Clarence A. Miller (1923) 71 U. of Penn. Law Review 318. "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 extraordinary and exceptional circumstances."

be noted that the reported cases in which an injunction was denied are in a ratio of about six to one to those in which an injunction was granted, thus indicating a conservative tendency in the courts in spite of the exceptions recognized.[11]

The situation which has permitted of the largest number of injunctions is the so-called exceptions which arose in connection with the levy of a "tax" which was really a penalty. The attempted levy of a penalty as a tax and the collection of it by tax officers may be enjoined and it is uniformly held section 3224 has no application. The principle asserted is that the statute refers to taxes and is not to be extended by analogy to penalties. This rule is in accord with well recognized principle of statutory interpretation. It is easy to perceive that simply calling an imposition a tax does not make it a tax. A wide discretion has been accorded Congress in levying taxes, but where it has imposed levy or fine which fits the description of a penalty rather than a tax the courts have declared the levy void. In a true sense this is not an exception to the operation of the statute. However, in most cases the court *accepts jurisdiction* and then decides the levy is a penalty in the guise of a tax. If section 3224 were strictly applied it could not *accept jurisdiction* until after the levy had been established as not a true tax.

A majority of the cases asserting this principle arose in connection with provisions of the National Prohibition Act. Attempts were made to collect taxes provided in the act, which had all the attributes of criminal penalties, and also attempts were made to collect similar taxes existing previous to the passage of the Volstead Act. The taxpayers sought quick relief in equity courts.

In *Lipke v. Lederer*,[12] the collector of internal revenue attempted to levy a tax on an illegal sale of liquor, without a notice or hearing to complainant. The injunction was granted, the court asserting that, "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 intendment of the term a tax was laid", and further, "the collector demanded payment of a penalty and section 3224, which prohibits suits to restrain assessment or collection of any tax is without application."[13]

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[11] Out of sixty typical cases in the Federal courts in the last fifteen years injunctions were granted in only ten cases. Out of these ten five were granted because the so-called tax was held to be a penalty in the guise of a tax.

[12] (1921) 259 U. S. 557.

[13] See, Regal Drug Corp. v. Wardell (1922) 260 U. S. 234; Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375, "This is a statute having in view the

In an early case, *Frayser v. Russell,*[14] the collector of revenue imposed an additional tax or penalty after the regular tax had been paid on a quantity of tobacco, the collector being wholly without authority. An injunction was granted because the court had previously held it was an illegal levy and not a tax. Therefore section 3224 could not apply. The court also indicated there was a separate and distinct basis for an injunction in that it would prevent a multiplicity of suits because a large number of similar suits were pending. The view adopted indicates the court thought of section 3224 in terms of principles regularly enforced by the Federal courts in equity cases.

A few cases have applied section 3224 to a case involving penalties, but they can be distinguished on the peculiar facts involved. Most of them were decided before the decision of *Lipke v. Lederer.*[15]

The distinguishing of a penalty from a tax is in accord with the policy of the Supreme Court in other situations involving pseudo-taxes, such as in the second *Child Labor Case,* where the distinction was made for the purpose of determining constitutionality.[16]

It may appear that an illegal or unconstitutional tax is not properly or in the strict sense a tax and in view of the principle laid down above an injunction could properly be granted. But such is not the rule. Section 3224 is not restricted in its mean-

orderly and uninterrupted collection of the revenues of government, which are necessary to meet the current expenses and public obligations. But in order to make this statute applicable a tax which is to be collected must be lawful; it must be founded upon some proper subject of taxation; must be assessed in a proper way and collected in a legal manner." The judge's definition of an illegal tax is too broad. In Thame v. Lynch (D. C. Minn. 1921) 269 F. 995 where injunctions were granted in thirty-three cases arising under taxes levied on illicit liquor it is said "The reasoning underlying Sec. 3224 R. S. is that the government shall not be delayed or interfered with in collection of its revenues. They relate to properly called taxes; that is, exactions for revenue uses of government." In Coffer v. Noel (D. C. Va. 1926) 11 F. (2d) 399, the injunction was granted because, under pretense of taxation the government was attempting to punish for a crime. See also; Kelly v. Lewellyn (D. C. W. D. Pa. 1921) 274 F. 112; Accardo v. Fontenot (C. C. A. 5, 1922) 278 F. 871; Connally v. Gardner (D. C. E. D. N. Y. 1921) 272 F. 911.

[14] (C. C. E. D. Va. 1878) 9 Fed. Cas. No. 5067.

[15] In Wassal v. Leder (D. C. E. D. Pa. 1921) 274 Fed. 489, the trial court thought that a determination that a tax was in reality a penalty should be made by a court of final jurisdiction and therefore denied the injunction. See also Violette v. Walsh (C. C. A. 9, 1922) 282 F. 582; Kohlhammer v. Smietanka (D. C. N. D. Ill. E. D. 1917) 239 F. 408.

[16] Drexal Furn. Co. v. Bailey (1922) 259 U. S. 20. Also: Houck v. Little River District (1915) 239 U. S. 254; New Jersey v. Anderson (1906) 203 U. S. 483.

ing to a legal tax, but the words "any tax" include both legal and illegal taxes.[17]

A result similar to that reached where a penalty is called a tax, is reached where there is an attempted enforcement of a tax against the property of third party or of a non-taxpayer, which is not properly due. A non-taxpayer's property should not be taken for taxes owed by a taxpayer.[18] In *Owensboro Ditcher and Grader Co. v. Lucas*[19] the transferee of property sued to restrain the levy against him for taxes assessed before he acquired the property. The injunction was granted the court remarking, that the mere fact the collector claims under a taxing statute does not bring into play the prohibition of section 3224. The court feared that if a third party were held liable widespread abuses would be possible. A collector could levy on the property of any third person with impunity and that person would be without the needed preventive remedy.[20]

It appears to be the rule that courts of equity will grant an injunction against a corporation to prevent it from voluntarily paying an illegal or unconstitutional tax because of the multiplicity of suits involved and the irreparable damage.[21] If a corporation voluntarily pays, a suit would be precluded in most cases by the rule that a tax must be paid under protest if the taxpayer is to recover. If the corporation should refuse to sue for a return of the tax it would take a multiplicity of suits by the stockholders to recover. Injunction suits, while apparently evasions of section 3224, have been entertained by the Federal courts.[22] In *Pollock v. Farmers Loan & Trust Co.*[23] it was said, "the jurisdiction of a court of equity to prevent a threatened breach of trust in the misapplication or diversion of these funds of a corporation by illegal payment out of its capital or profits has been frequently sustained" (citing cases). It was on this principle the court took jurisdiction and no reference was made to section 3224. A suit to prevent the payment of a tax even though it does not involve an officer of the United States has been treated as a suit for the pur-

[17] Snyder v. Marks (1883) 109 U. S. 189; Dodge v. Osborn (1916) 240 U. S. 118.

[18] Long v. Rasmussen (D. C. Mont. 1922) 281 F. 236.

[19] (D. C. W. D. Ky. 1927) 18 F. (2d) 798.

[20] In Hubbard Investment Co. v. Brast (C. C. A. 4, 1923) 59 F. (2d) 709, property of one person was being distrained for tax of another. The court expressly refused to apply section 3224 but denied the injunction because of a lack of equity.

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

[22] Pollock v. Farmers Loan & Trust Co. (1895) 157 U. S. 429; Brushaber v. Union Pacific Railroad Co. (1916) 240 U. S. 1.

[23] Cf. note 22.

pose of restraining the assessment or collection of a tax, hence this principle must be classified as an exception to the operation of the statutes. There are some cases in lower courts involving identical situations in which section 3224 was applied.[24]

Trustees and receivers are officers of the courts, the funds they control are in the hands of the court and it is held not contrary to section 3224 and not in excess of the court's jurisdiction to grant a restraining order to prevent voluntary compliance with orders of Bureau of Internal Revenue,[25] or to instruct such officers as to paying a tax where it is thought that property or the income from property in their control is not subject to a tax.[26]

The broadest exception, and the one which might logically include those previously indicated, is the granting of an injunction where there exist special and extraordinary circumstances which the court believes justify a restraining order. An examination of the cases reveals the judges have a different and distinct meaning in mind when they refer to "extraordinary circumstance" than when they base their decision on the previously mentioned exceptions.

The most important case and the most widely quoted as authority in this connection is *Hill v. Wallace.*[27] A bill was sought to prevent collection of taxes under the Futures Trading Act. To pay the tax of twenty cents a bushel on wheat in each future transaction and sue to get it back would have involved a multiplicity of suits. To refuse to pay the tax involved a heavy penalty, and the stopping of the business of the Chicago Board of Trade. The court first determined if there were equities involved, and, finding there were, granted the injunction. It expressly recognized the principle 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 circumstance makes its provisions inapplicable. Two earlier cases were referred to as authority which had also enunciated this rule.[28]

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[24] Straws v. Abrant Realty Co. (D. C. E. D. N. Y. 1912) 200 F. 327; Stanton v. Baltic Mining Co. (1916) 240 U. S. 103. The Stanton case refers to the Brushaber case as deciding the issue of constitutionality raised.

[25] Weeks v. Sibley (D. C. N. D. Tex. 1920) 269 F. 155.

[26] Scott v. Western Pacific R. Co. (C. C. A. 9, 1917) 246 F. 545.

[27] (1922) 259 U. S. 44.

[28] Dodge v. Osborn (1916) 240 U. S. 119, injunction was denied because no equity was proven but note, "It is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable." Dodge v. Brady (1916) 240 U. S. 122, the bill was also dismissed on its merits, the court retaining jurisdiction because of the exceptional circumstance.

This comes near to the view taken in *Miller v. Standard Nut Margarine Co.*,[29] but Chief Justice Taft, who wrote the opinion above, was not ready to admit the full extent of his actual holding. The established equitable rule is, that jurisdiction will not be accepted except under exceptional and unusual circumstances.[30] This is exactly the same as the status of the law previous to section 3224. In *Graham v. Dupont*,[31] Chief Justice Taft said, "*Hill v. Wallace* should, in fact, be classed with *Lipke v. Lederer*, supra, as a penalty in the form of a tax". This is usually referred to as a limitation on the value of *Hill v. Wallace* as a precedent, but it is certain Chief Justice Taft did not have this in mind when *Hill v. Wallace* was decided, for jurisdiction was accepted before the tax was declared invalid on consideration of the merits. He spoke of the imposition in the *Wallace* case as a tax in accepting jurisdiction. The *Dupont* case had little effect in limiting the rule in cases which followed,[32] although at the time it was considered a decision which would stop encroachments on the statute and prevent it becoming a dead letter.[33]

The few cases in which injunctions have been granted because of unusual or extraordinary circumstances have called irreparable injury or multiplicity of suits such circumstances and thus have reached a result the same as if the statute had not existed.

The most striking fact revealed by examination of the cases decided since section 3224 is the reluctance of the courts to refuse an injunction solely under the authority of the statute. In a majority of cases the courts go to some length and what should be unnecessary detail, in view of the statute, in searching to see if there is not a lack of equity.[34] Statements like this are typical. "It seems clear that the bill states no cause of action of which a court of equity can take jurisdiction . . . no reason is set forth in this case why the legal remedy is not adequate, and it follows that relief in equity must be denied."[35]

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[29] Cf. note 7.

[30] Cf. note 2.

[31] (1924) 262 U. S. 234.

[32] See Higgins Mfg. Co. v. Page (D. C. R. I. 1927) 20 F. (2d) 948.

[33] Cf. note 6.

[34] Dodge v. Osborn (1916) note 28 above; Hubbard Inv. Co. v. Brast, note 20 above; Alexander v. Mid-continent Pet. Co. (C. C. A. 10, 1931) 51 F. (2d) 735; Thornhill Wagon Co. v. Noel (D. D. E. D. Va. 1926) 17 F. (2d) 407; Emauss Silk Co. v. McGrughn (D. C. E. D. Pa. 1925) 6 F. (2d) 661; Roepling v. Sturgess (D. C. N. J. 1923) 292 F. 1012; Union Fisherman's Co-op. Packing Co. v. Huntley (D. C. Ore. 1923) 285 F. 671.

[35] Israelite House of David v. Holden (D. C. W. D. Mich. 1926) 14 F. (2d) 701.

In *George v. Bailey*[36], injunction was sought against the Child Labor Tax. Complainant's counsel argued that this was a penalty and not a tax and hence the court was not ousted of jurisdiction by section 3224. The injunction was denied but the court did not recognize the above argument. Its decision was placed squarely on the proposition that the proof failed to show complainant lacked a remedy at law. It was said the tax should have been paid and suit brought for its recovery. In the same term of court the Child Labor Tax was declared unconstitutional in a suit brought to recover a tax already paid.[37]

In the cases in which the judge places his entire reliance on section 3224 the same result would have been reached usually without the statute.[38] An adequate remedy at law is usually available to the person seeking the injunction; hence there is no basis for an equity court to take jurisdiction. It is not meant to deny that the judges have regarded section 3224 as a bar to their interfering with the tax in these cases, but simply to assert that they need not have so regarded the statute to have reached the same result.

In the opposite extreme it has not always been thought necessary to mention section 3224 in denying injunctions. In *Keogh v. Neeley*,[39] the complainant contended that because Illinois had not been redistricted, a republican form of government no longer existed, and the national government had failed in its duty of maintaining it. Therefore, plaintiff contended, he owed no tax to the Federal government. The injunction was denied without reference to section 3224, but because the courts have no power to stay the hand of the Federal government on the ground alone that the government has become derelict in its duties, and particularly where the dereliction does not affect the tax at issue. Complainant's case failed to show an equity. There was no showing complainant could not have recovered the tax at law if he was made to pay wrongfully.[40]

Section 3224 did operate to bar a suit which would have normally been entertained in equity in the absence of such a

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[36] (1921) 259 U. S. 16.

[37] Cf. note 16.

[38] Salikoff v. McCaughin (D. C. E. D. Pa. 1928) 24 F. (2d) 434; Erie Taxi Co. v. Gnichtel (D. C. N. J. 1926) 17 F. (2d) 661; Sigman v. Reinke (C. C. A. 7, 1924) 297 F. 1005; Black v. Rafferty (D. C. E. D. N. Y. 1923) 287 F. 937; Joseph Garneau Co. Inc. v. Bowers (D. C. S. D. N. Y. 1925) 8 F. (2d) 378; Markle v. Kirkendall (D. C. M. D. Pa. 1920) 267 F. 498.

[39] (C. C. A. 7, 1931) 50 F. (2d) 685.

[40] See also, Czieslik v. Burnett (D. C. E. D. N. Y. 1932) 57 F. (2d) 715; Nicholas v. Gaston (C. C. A. 1, 1922) 281 F. 67.

statute in *Reineke v. Peacock*,[41] where a cestui que trust sought an injunction to prevent payment of taxes from the trust estate. It was contended that because of jurisdiction of courts of equity over the trust the injunction could properly be granted. The court agreed with this as a general proposition, but felt that it was prohibited from exercising its power by the statute. If the court had held the view expressed in the *Miller* case, the injunction would properly have been granted.

The usual ground for denial of equitable jurisdiction is that an adequate remedy at law is present because plaintiff can sue and recover the tax after payment under protest. A suit for return of the tax furnishes a plain, adequate, and complete remedy at law.[42] The creation of the Board of Tax Appeals has made possible a complete review of the tax before payment in income and inheritance tax cases.[43]

Dupont v. Graham[44] is usually referred to as an important case where plaintiff had no adequate remedy at law and yet failed to be successful in securing a restraining order. Complainant was barred by the statute of limitation from prosecuting a regular appeal. It was shown he had allowed the time to elapse which barred his administrative appeal by his own dilatory tactics and the court felt this should preclude a suit in equity. The decision can be explained by the maxim, "Equity aids the vigilant." Where the taxpayer's right to an administrative appeal is barred by the statute of limitations and his case does not fall within the facts of the *Dupont* case he should be allowed to bring an equitable suit.

In *Seaman v. Guaranty Trust Co. of New York*,[45] the complainant asked an injunction to prevent the trust company from turning over securities which belonged to complainant to the collector, who had levied on them for payment of a tax. He claimed the tax was barred by the five year statute. The injunction was denied, because, even if the collector's action was unauthorized and was a violation of the rights of the complainant, the latter had a remedy at law. So also in *Ellay v. Bowers*,[46] the injunction was denied under a similar state of facts, although the court stated, "Thus it is clear that the appellant's remedy at law is complete and adequate and section 3224 makes it exclusive." It is submitted that section 3224 would not have been necessary to make

[41] (C. C. A. 7, 1924) 3 F. (2d) 583.
[42] Emauss Silk Co. v. McGaughn. Note 34 above.
[43] 26 U. S. C. 211 et seq.
[44] Note 31 above.
[45] (D. C. S. D. N. Y. 1924) 1 F. (2d) 391.
[46] (C. C. A. 2, 1928) 25 F. (2d) 637.

the remedy at law exclusive, but the historic rules of equity would have accomplished the same end. The holding in these two cases makes it evident that the court does have regard to the established equitable principles even when applying the prohibitions of the statute.

Sufficient cases have been discussed to illustrate the hedging done when applying section 3224 when denying jurisdiction to issue an injunction against a tax. They are fairly typical of the majority of instances in which injunctions were denied which had for their purpose the invalidating of a tax. In most of the cases the same result would have been reached in the absence of the statute.

Where injunctions were granted the courts did not consciously disregard section 3224, but the effect of their decisions was to render it meaningless or at least superfluous. They have not regarded the statute as being absolutely prohibitory of equity jurisdiction and have issued injunctions which had the effect of restraining assessment or collection of taxes where a proper equitable basis could be shown. The principle has been laid down that this would be done only where the facts present an extraordinary case. A suit by a stockholder against a corporation to restrain payment of an illegal tax and a suit by a third party to prevent sale of his property for the taxes of another, are considered proper cases for injunction. Where the imposition was not a true tax there was no difficulty in allowing the injunction. The unusual and extraordinary circumstances doctrine enunciated in *Hill v. Wallace* can only be explained as a statement of the ordinary equity principle, for equity relief is properly given by injunction only in unusual and extraordinary cases.

Thus, it is apparent *Miller v. Standard Nut Margarine Co.* is not as revolutionary as it might appear at first blush. Mr. Justice Butler stated a principle in it that was followed in previous cases by indirection. It is submitted that the effect of the judicial holdings, climaxed by the above case, has been to repeal section 3224 as effectively as its removal from the statute books by Congress. This is the undeniable result if it be assumed Congress in 1867 meant to prohibit all injunctions, as the plain language of the statute indicated.

In view of the previous course of judicial interpretation of the statute it is not correct to say that the *Miller* decision will revolutionize equity jurisdiction in tax matters. It states no startling innovation but it does obviously and openly take away the effectiveness of the statute. This seems to open a loophole for extending the power of equity courts in granting injunctions in tax cases. The principles enforced in equity are more flexible than the prohibitory provisions of a statute and permit some equivocation on the part of judges. There should be a considerable increase in attempts to secure restraining orders against the Collector of Internal Revenue, for the net effect of previous decisions had been to discourage bringing such suits. The impression was that injunctions would be granted only in *most* extraordinary circumstances and within well defined limits. If reference is to be had only to established equity principles will not taxpayers believe their chances are better to get their complaint heard than if section 3224 is given a nearly literal interpretation? The decisions in the lower federal courts should be more harmonious since the Supreme Court has definitely accepted the view expressed in the *Miller* case. Also, it would seem that the law in relation to the granting of injunction against federal taxes should be brought in harmony with the law in relation to injunction against state taxes, if in both cases equitable rules are to be applied.[47]

The question proposed in the title to this note can now be answered; injunction against the assessment or collection of a federal tax is available, when there is not present and available to the complainant an adequate remedy at law, there is irreparable injury, or a multiplicity of suits will be prevented by a restraining order.[48]

VICTOR P. KEAY, '33.

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[47] The enjoining of state taxes has usually been treated as a separate problem. See Cooley, Taxation, above note 1, section 1662 et seq.; Note, 41 Yale Law Journal 769 (1932). A suit in equity will be entertained by Federal courts for purpose of restraining a state tax in a proper case. Johnson v. Wells Fargo Ex. Co. (1915) 239 U. S. 234. A suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal but there must be special circumstances bringing it under some recognized head of equity jurisdiction and the right to such relief must be clear where the court is asked to restrain collection of a state tax. Pristy v. Chicago, R. I. & P. R. Co. (1925) 270 U. S. 378. This seems to be the same principle which the courts have applied under section 3224 and which should be applied in view of the Miller Case. But this is the difference, the Federal courts have been much more critical of the adequate remedy at law provided in state taxing systems than they have under the Federal taxing system. If a reasonable interest on refund is not provided for in the state law, provision for refunds on application of the taxpayer does not give him an adequate remedy at law. Nutt v. Ellerpe (D. C. E. D. S. C. 1932) 56 F. (2d) 1058.

[48] See note (1932) 45 Harv. Law Rev. 1221.