CONGRESSIONAL CONTROL OVER SUITS TO RESTRAIN THE ASSESSMENT OR COLLECTION OF FEDERAL TAXES

A Study of the Supreme Court's Interpretation of Section 3224 of the Revised Statutes

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The particular problem of this paper is but a small part of the controversial question: To what extent may Congress control the jurisdiction of the federal courts? It is our purpose to examine the manner in which the Supreme Court has interpreted section 3224 of the Revised Statutes[1] which, when first enacted March 2, 1867,[2] read as follows: "No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."

This provision was adopted as an amendment to the Act of July

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* See Contributors' Section, p. 263, for biographical data.

[1] REV. STAT. §3224 (1875). Section 3224 was incorporated in Section 3653 (a), Internal Revenue Code 1939; and re-enacted in Section 7421 (a), Internal Revenue Code 1954.

Section 7421 (a) provides that, with the exception of certain deficiency procedures in the case of income, estate and gift taxes, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Section 42-204 B of the Arizona Revised Statutes provides: "No injunction shall issue in any action or proceeding in any court against the state or against any county, municipality or officer thereof, to prevent or enjoin the collection of any tax imposed or levied." As will be noted, this section corresponds to the federal law just quoted. In its own sphere of control the state legislature is endeavoring to curtail the jurisdiction of the state courts in matters of tax collection. An examination of the interpretations of this statute by Arizona courts indicates that it has been subjected to judicial modification somewhat similar to the construction given Section 3224 by the Supreme Court. For a discussion of similar statutes of other states, see HELLERSTEIN, STATE AND LOCAL TAXATION 643-46 (2d ed. 1961).

[2] Ch. 169, §10, 14 Stat. 475 (1867).

13, 1866,[3] which forbade the maintenance of any suit for the recovery of any tax, alleged to have been erroneously or illegally assessed or collected, until after an appeal to the administrative authorities, in the manner prescribed. Later, the amendment was incorporated into the Revised Statutes as a separate section, with but one change: the revisers added the word "any" before the word "tax". On its face the provision seems unambiguous, and not likely to prove difficult of application. But the cases show that the Court has read qualifying principles and conditions into the act. What criteria for applicability has it laid down? To what extent has section 3224 curtailed the previously exercised jurisdiction of the courts? What theories did the Court assert as to the power of Congress? Its own power? What was the method of reasoning of the Court? It is to answer these questions that the present study has been made.

One may inquire, first of all, as to the basis of the power of Congress to enact section 3224. In so far as the provision is considered as a regulation of the jurisdiction of the courts, authorization must be found in Article III of the Constitution which provides for the establishment by Congress of inferior (federal) courts, and the making of "exceptions" and "regulations" with respect to the appellate jurisdiction of the Supreme Court. Considered as a measure to aid the assessment and collection of taxes, the act must be justified by Article I, section 8, which gives Congress the power to lay and collect taxes.

It is not enough, however, for the statute merely to treat of matters within the delegated powers of Congress. To be constitutional it must meet the additional test of not going beyond the limitations which other provisions of the Constitution (such as the provisions guaranteeing individual rights) have placed upon Congress. Here again the Court has approved the statute whether one considers it from the point of view of (1) denial of a remedy or (2) support of a summary administrative procedure in the assessment and collection of taxes. The power of Congress with respect to remedies in tax

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[3] Internal Revenue Act. Ch. 184, 14 Stat. 152 (1866), which provided, in section 19:

> No suit shall be maintained in any court for the recovery of any tax 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.

Quoted in Snyder v. Marks, 109 U.S. 189, 191 (1883).

cases was considered by the Court in *Snyder v. Marks*.[4] The significance of section 3224 in this connection was declared to be that of making the remedy which Congress had provided in another section the exclusive one:

> The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law.[5]

Another case involving the power of Congress over remedies in tax matters, though not directly concerned with the interpretation of section 3224, was that of *Collector v. Hubbard*.[6] The question here was the right of Congress to change a remedy by imposing additional requirements as a prerequisite to bringing a suit to recover a tax paid under protest. Hubbard instituted his suit when a judicial proceeding was open to him as a remedy. Before the suit was called, Congress passed the act of 1866, mentioned above,[7] requiring the compliance with a certain administrative procedure before a judicial action could be maintained. As Hubbard had not fulfilled these requirements, his suit was dismissed. He secured a judgment in the state courts whereupon the collector took an appeal to the United States Supreme Court, arguing that the plaintiff had no vested right to recover money illegally taken by the collector, that the whole right to sue came by necessary implication from the revenue laws, and that the authority to sue could at any time be qualified or even taken away by Congress which gave it.

The Court in substance approved the contention of the collector:

> Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the lawmaker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation.[8]

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[4] 109 U.S. 189 (1883).

[5] *Id.* at 193. The Court cited the following cases: Howland v. Soule, 12 Fed. Cas. 743 (No. 6800) (C.C. Cal. 1868); Pullan v. Kinsinger, 20 Fed. Cas. 44 (No. 11463) (C.C.S.D. Ohio 1870); Robbins v. Freeland, 20 Fed. Cas. 863 (No. 11883) (C.C.E.D. N.Y. 1871); Delaware R.R. v. Prettyman, 7 Fed. Cas. 408 (No. 3767) (C.C. Del. 1872); United States v. Black, 24 Fed. Cas. 1151 (No. 14600) (C.C.S.D. N.Y. 1874); Kissinger v. Bean, 14 Fed. Cas. 689 (No. 7853) (C.C.E.D. Wisc. 1875); United States v. Pacific R.R., 27 Fed. Cas. 399 (No. 15984) (C.C.E.D. Mo. 1877); Alkan v. Bean, 1 Fed. Cas. 418 (No. 202) (C.C.E.D. Wisc. 1877).

[6] 79 U.S. (12 Wall.) 1 (1870).

[7] Internal Revenue Act. ch. 184, 14 Stat. 152 (1866).

[8] Collector v. Hubbard, 79 U.S. (12 Wall.) 1, 14 (1870).

From these and similar cases it appears that the Court recognizes in Congress a plenary power over the remedies to be accorded to taxpayers for the correction of errors in taxation. The constitutional guarantees of individual rights are satisfied if at least one adequate remedy is provided. Moreover, Congress may postpone the existing remedy until after the tax has been paid (the import of section 3224); that is, it may set up a summary administrative procedure in the assessment and collection of taxes. Whether, under existing law, this summary action of the taxing officials is always beyond the province of the court until the tax has been paid (that is, whether there are no exceptions to the application of section 3224) will be considered later. Let us now examine the theory by which the Supreme Court justifies this summary administrative action in the collection of taxes.

The first expression of such a theory may be found in *Dows v. City of Chicago,*[9] a case in which section 3224 had no application. In this case a taxpayer sought to invoke the equity jurisdiction of the Court in restraining the collection of a municipal tax alleged to be illegal and void by state law. In refusing the injunction the Court made this comment upon the power of taxation of the several states, and the extent to which its exercise was free from judicial control:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.[10]

Five years later, in *Cheatham v. United States,*[11] the Court again had occasion to refer to the respective powers of the government and the courts with regard to the means adopted for enforcing the collection of taxes. The question was whether the plaintiff could maintain a court action for the recovery of taxes already paid, although he had not made an appeal to the administrative authorities, in accordance with the statute of 1866 which made such appeal a necessary prerequisite to a suit at law. In deciding against the plaintiff the Court commented upon the general power of the government over

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[9] 78 U.S. (11 Wall.) 108 (1870).
[10] *Id.* at 110.
[11] 92 U.S. 85 (1875).

the collection of its taxes, and the absence of any such general power in the courts to hinder or control the government in this matter. The Court said:

> All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them. . . .
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> It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.
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> If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary.[12]

In both of these cases the Court took a broad view of the power of the government in taxing matters, even when, as in *Dows v. City of Chicago*, there was no specific statutory limitation upon the Court, but jurisdiction was sought upon equitable grounds. It would appear that, in the Court's view, the principle of "Collect first, and adjudicate afterwards" is necessarily implied from the existence of the government itself. It is plain that the Court will not deny this power to the government and, if limitations are imposed, they must be justified on some other grounds.

This view was reaffirmed in *State Railway Tax Cases*[13] in which the Court not only discussed the nature and scope of the power of a government over taxation but also, by way of illustration, referred to section 3224 and the political philosophy on which it is based. Because of this reference and because these statements have been in large part quoted in later decisions, we shall reproduce them here:

> The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the executive departments. . . . But there is no place in this system for an application to a court of justice until after the money is paid.
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> That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the

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[12] *Id.* at 88-89.
[13] *Id.* at 575.

> process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice.[14]

In *Snyder v. Marks*[15] the assertion was again repeated that the government possessed the right "to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues."

Having thus found the prohibition imposed by section 3224 to rest upon the theory of the plenary power of any government to protect its revenues, let us consider the decisions of the Court determining the applicability of the act. In spite of its general wording there has never been any question but that the act applies to federal, and not to state, taxes.[16] Apparently this is because of the nature of our federal government whereby Congress may exercise only delegated powers; the power of a state over the collection of purely state taxes is one of the reserved powers of the states with which Congress may not interfere as of right. That the act places a restraint upon a state as well as a federal court, however, as concerns federal taxes, does not offend the federal principle, for in such a case the state court is merely told not to interfere with the federal agencies of collection.

Though the act applies only to federal taxes, what is the meaning of the word "tax"? Does it comprehend a tax alleged to be illegal or unconstitutional? This question was early raised in *Snyder v. Marks*, where the argument was advanced that a tax alleged to be illegal or unconstitutional did not come within the meaning of the act, and that the Court was therefore not restrained from granting an injunction. The Court found little difficulty in denying this contention, basing its decision upon an interpretation of section 3224. "This enactment in section 3224 has a no more restricted meaning," said the Court, "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."[17]

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[14] *Id.* at 613-14.

[15] 109 U.S. 189, 194 (1883).

[16] 28 U.S.C. §1341 (1948) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." For a construction of this section see Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

[17] 109 U.S. 189, 192 (1883).

Applying the rule of construction that the meaning of a word is to be discovered from its context, the Court concluded that "tax" had the same broad meaning in the amendment as in the original act. Since "tax" in the original act expressly envisaged taxes which were alleged to have been erroneously or illegally assessed or collected, it followed that section 3224 forbade injunctive relief in the case of such taxes.

Without at this time entering into a discussion of the relation of section 3224 to previously existing equity principles, we may note that before the enactment of that section the Court had, on several occasions, passed upon the question as to whether an injunction would lie against a government official seeking to collect a tax which the complainant alleged to be illegal. When the alleged illegality or unconstitutionality was the sole complaint the Court had uniformly denied the injunction on the ground that the circumstances alleged were insufficient to bring the case within its equity jurisdiction. The principles which were generally recognized as determining the equity jurisdiction of the Court were as follows: If a plain, adequate, and complete remedy may be had at law, equity will not intervene.[18] Circumstances justifying intervention in tax cases are: (1) When the enforcement of the tax would lead to a multiplicity of suits; or (2) produce irreparable injury; (3) in the case of real estate when the assessment or collection would place a cloud upon the complainant's title; and (4) when there is allegation of fraud.[19]

However, in *Snyder v. Marks* the Court did not refer to these earlier decisions, but based its opinion on section 3224 alone. Later cases, following *Snyder v. Marks*, in which the Court refused to grant an injunction on the ground that the sole objection to the application of section 3224 was the alleged unconstitutionality of the revenue act in question were *Dodge v. Osborn*[20] and *Bailey v. George*.[21] Nevertheless, in these latter cases the Court implied that extraordinary and entirely exceptional circumstances would render the act inapplicable, a qualification not hinted at in the earlier case.

Until *Lipke v. Lederer*[22] no further attempt was made to limit the application of section 3224 by restricting the meaning of the word "tax" as used in that act. *Snyder v. Marks* had laid down the general rule that if the exaction was imposed by an officer of the gov-

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[18] See DOBIE, FEDERAL JURISDICTION AND PROCEDURE 660 (1928).
[19] See 4 COOLEY, TAXATION 3292-3348 (4th ed. 1924); 4 POMEROY, EQUITY JURISPRUDENCE §§1779-80 (2d ed. 1919).
[20] 240 U.S. 118 (1916).
[21] 259 U.S. 16 (1922).
[22] *Id.* at 557.

ernment "in the course of general jurisdiction over the subject matter in question" and he claimed that it was valid, it was a tax within the meaning of the section, and no injunction would lie. In *Lipke v. Lederer* the complainant denied the application of section 3224 on the ground that the assessment against him was a penalty and not a tax and that therefore the Court should grant him equitable relief.

According to the facts, it appeared that the complainant was arrested on December 29, 1920, for selling liquor contrary to the National Prohibition Act. On March 18, 1921, he received written notice of an assessment against him and of a penalty if he failed to pay within ten days, although he had paid all the internal revenue taxes required by law. Failing to make the demanded payment, he sought an injunction to restrain the collector from seizing and selling his property, alleging that the assessment was an attempt to punish him by fine and penalty for an alleged criminal offense without hearing, information, indictment, or trial by jury, contrary to the federal constitution. The collector answered that section 3224 prohibited the relief prayed for, that the bill stated no ground for equitable relief, and that there was an adequate remedy at law.

The Court, Justice McReynolds delivering the opinion, upheld the contentions of the complainant, holding that a preliminary injunction should have been granted. The reasoning may be briefly stated as follows: The imposition in this case is a penalty. Section 3224 applies to taxes only. Therefore section 3224 does not apply. The following syllogism was implied: A court should grant an injunction to prevent summary enforcement of a penalty. Summary enforcement was attempted in this case. Therefore an injunction should be granted in this case.

In the opinion of the Court the inapplicability of the act was based upon the presumed intention of Congress:

> A revenue officer, without notice, has undertaken to assess a penalty for an alleged criminal act, and threatens to enforce payment by seizure and sale of property without opportunity for a hearing of any kind. . . .
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> And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced 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.[23]

It is to be noted that Justice Brandeis, in his dissent, expressed the

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[23] *Id.* at 562.

opinion that the injunction was properly refused because the complainant in his bill had failed to allege any fact which would constitute a basis for equity jurisdiction.

In *Regal Drug Corporation v. Wardell*,[24] decided the same year, the facts were similar to *Lipke v .Lederer*, and the Court merely applied that case. After discussing the distinction there made between a tax and a penalty, and the presumption as to the intent of Congress that section 3224 should not support summary executive action in enforcing penalties for crime, the Court concluded that "the facts impel the application of *Lipke v. Lederer*." Again, the decree of the district court denying a preliminary injunction was reversed.

The reasoning in *Lipke v. Lederer* by which the Court, from basic propositions differentiating a tax from a penalty, proceeded to the conclusion that section 3224 was inapplicable is an example of judicial logic. One might paraphrase the Court as follows: There are two distinct powers of Congress — the power to levy and collect taxes, and the power to enforce penalties for the infractions of its regulatory laws. In the first instance a summary administrative procedure is permissible, and even necessary, in consequence of the paramount importance to the government of its revenues. It is sufficient if Congress grants the aggrieved taxpayer a remedy after he has paid the tax. In the second instance, however, there are greater limitations upon the power of Congress. Constitutional guarantees to the individual forbid a summary administrative procedure in enforcing penalties for crime. Section 3224, which supports a summary administrative procedure, was enacted in support of the taxing power of the government. It is here proposed to apply it to an exaction imposed under the power to Congress to prescribe and enforce penalties from criminal acts. It is not to be presumed that Congress was unmindful of its limitattions in exercising this latter power. Therefore the Court will not, in the absence of express language to the contrary, assume that Congress intended the prohibition of section 3224 to have a broader application than is consistent with a proper interpretation of the powers of Congress.

Thus, the Court's conclusion follows logically from what seems to be the underlying premise, that is, that Congress may prescribe a summary administrative procedure under the taxing power, but not under its power to enforce penalties for crime. It may be questioned, however, whether the facts in this case justify an adoption

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[24] 260 U.S. 386 (1922).

of the above proposition as a major premise. This last "act of faith" is especially difficult. One has a feeling that the Court went out of its way to frown upon summary administrative action in "allegedly" criminal matters. Did the Court misread the operative facts, or was it really a decisive factor that the exactions in question were found to be penalties and not taxes? In this connection it is to be remembered that although section 3224 forbids the courts to maintain a suit to restrain the assessment or collection of taxes, it gives no authority whatsoever for any positive action. Thus when the Court found that there was no restraint upon the judiciary under section 3224 because the tax was a penalty, this fact alone would not authorize the injunction. There had to be other circumstances, of a positive nature authorizing the injunction; without them it was immaterial whether section 3224 applied or not. Apparently the Court thought that the attempt to enforce a penalty by summary proceedings was sufficient ground for the injunction. But Justice Brandeis, in his dissent in *Lipke v. Lederer,* thought that the facts there presented were insufficient to justify the intervention of a court of equity.

Who was right, Justice Brandeis, or the majority? In our opinion their point of difference was the primary question in the case: whether or not the facts presented justified the granting of an injunction. But the Court seems to infer that its main task was to show that section 3224 did not apply. It focused its attention on the question of whether the exaction demanded was a penalty and not a tax — and then linked the two concepts "penalty" and "summary administrative procedure" as if anyone would recognize that the result could only equal "a ground for the equity jurisdiction of the court." Of course, in some circumstances this result will follow, if the inadequacy of the legal remedy is shown. But in the instant case it seems that the Court became so disturbed by the words "penalties for crime" and "the secret findings and summary action of executive officers" that it bent every energy in the direction of protecting the helpless individual from these bogies instead of concentrating on the real question: Do the facts, as presented, actually justify the intervention of a court of equity? However, regardless of the wisdom of the Court's choice of the basic premise in these cases, it is now a settled rule that the prohibition of section 3224 will not apply with respect to so-called taxes which are really penalties.

The logic of such a distinction is to be admitted, for the elaborate justification of summary procedure in the assessment and collection of taxes on the grounds of the importance of revenue to the very existence of the government and the consequent necessity that the procedure by which it is levied and collected should not be inter-

fered with, do not apply to penalties, which are imposed not primarily for revenue but by way of regulation. The theory behind the penalty is entirely different from that of the tax. For a penalty is in the nature of a punishment for those who fail to conform to a prescribed mode of action. The purpose of a regulatory law is to punish only to the extent necessary to secure compliance with its provisions; in its ideal operation no penalties at all would be imposed. Therefore, the Court's insistence on the observance of constitutional guarantees to the individual in the imposition of penalties could not seriously affect the revenue of the government.

One further question may be raised in this connection. If the complainant fails to plead that the exaction against whose assessment or collection he is protesting is a penalty, will the Court of its own accord investigate the nature of the so-called tax? *Bailey v. George,* mentioned above, indicates that it will not. It appears from the reasoning and the argument of counsel, as found in the report of the case, that although the complainant alleged that the act of Congress under which the exaction was imposed was unconstitutional, he did not plead that the exaction was a penalty. The Court definitely held that it could not grant the injunction because of the restraint placed upon it by section 3224. Yet in *Bailey v. Drexel Furniture Co.*,[25] the next case in the reports following *Bailey v. George,* and involving the same Child Labor Tax Law, the Court reached the conclusion that the "tax" was actually a penalty.

Apparently the Court's statement in *Bailey v. George,* declaring that it was restrained by section 3224 (even though by a later decision it appeared that a penalty had been involved) is to be reconciled with *Lipke v. Lederer* and *Regal Drug Co. v. Wardell,* decided later in the same year on the ground of defective pleading in the former case. If the complainant neglects to plead averments sufficient to bring his case within the equity jurisdiction of the court, although such actually exist, that is his own fault. Of course, if he had pleaded that the exaction was a penalty, the final result might not have been different. For the distinction, which was pointed out in *Lipke v. Lederer,* between the existence of facts which take the case out of the prohibition of section 3224 (e.g., that the exaction was a penalty) and of facts which justify the intervention of a court of equity, should be kept in mind. These words of Chief Justice Taft seem to indicate that grounds for equity intervention did not exist:

In spite of their averment, the complainants did not exhaust all

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[25] Child Labor Tax Case, 259 U.S. 20 (1922).

> their legal remedies. They might have paid the amount assessed under protest and then brought suit against the collector to recover the amount paid with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy.[26]

Thus, unless summary assessment and collection of a penalty is a ground for equity intervention, it is of no practical significance in cases such as *Bailey v. George* that the complainant failed to allege the imposition of a penalty and not a tax, although the acceptance by the Court of this allegation would have rendered section 3224 inapplicable under the Court's present interpretation of that statute.

After the passage of the act setting up the Agricultural Adjustment Administration[27] the meaning of "tax" in section 3224 again became a controversial issue.[28] Were the processing taxes imposed under the AAA within the prohibition of section 3224 so that a court of equity could not grant an injunction restraining their assessment or collection? This was apparently one of the points which Congress intended to clarify when it added an amendment to the original act on August 24, 1935,[29] which specifically denied the right to enjoin the processing taxes in language very similar to that of section 3224. The further provision was made that no suit could be maintained to recover any taxes actually paid unless the taxpayer (processor) could show that he had not passed the tax on to the purchaser of the commodity. However, this amendment did not end the conflicting decisions of the lower courts. Some of them granted injunctions on the ground that the remedy provided by the amendment was arbitrary and unreasonable.[30]

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[26] Bailey v. George, 259 U.S. 16, 20 (1922).
[27] Agricultural Adjustment Act, 48 Stat. 31 (1933).
[28] 49 HARV. L. REV. 109 (1935).
[29] 7 U.S.C. § 623 (a) (1935). It provides:

> No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under . . . [this chapter] . . . on or after August 24, 1935, or (2) of obtaining a declaratory judgment under section 400 of Title 28 in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.
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> This section became section 21 (a) of the original act.

[30] See cases cited in 49 HARV. L. REV. 109, 113-16 (1935).

The question did not come before the Supreme Court until the case of *Rickert Rice Mills, Inc. v. Fontenot*[31] where a motion was made for a preliminary injunction restraining the collection of the assailed tax. The bill charged that the exaction was unconstitutional, that collection by distraint would cause irreparable injury and that the petitioner had no adequate remedy at law to recover if he paid the tax. The respondent filed a motion to dismiss, citing section 3224, and section 21 (a) of the amended AAA, as prohibiting restraint of collection, and also asserting that the petitioner had a plain, adequate and complete remedy at law.

Without passing upon these points the Court merely entered a short decree granting a preliminary injunction "pending hearing and determination of the causes in the Court," and upon condition that the amount of the tax should be paid over each month to a depository appointed by the Court. Justices Brandeis, Stone and Cardozo registered their dissent, without opinion. In view of the Court's decision in *United States v. Butler*,[32] soon thereafter, in which the processing tax was declared to be "not a true tax," but a mere incident in the regulation of agricultural production — "the expropriation of money from one group for the benefit of another" — the Court could have rejected the application of section 3224 by employing reasoning similar to that in *Lipke v. Lederer*, that is, in granting the preliminary injunction it could have reasoned that section 3224 was a restraint upon the Court only where taxes were concerned, that the processing tax was not a true tax, and that the act would therefore not apply. But it could not so easily have set aside section 21 (a) of the amended AAA which expressly concerned processing taxes and specifically enjoined the granting of an injunction to restrain their collection. Perhaps it was because the Court was aware of this difficulty, but was unwilling to express an opinion as to the validity of section 21 (a) before passing on the AAA as a whole, which accounts for the opinion without reasons in the decree granting the preliminary injunction. At any rate the Court's position is equivocal and does not resolve, in the slightest, the uncertainty evidenced by the lower courts in the injunction cases as to the extent of the limitation which section 3224, and the analogous provision of section 21 (a), placed upon the courts.

The second case of *Rickert Rice Mills, Inc. v. Fontenot*,[33] in which the preliminary injunction was made permanent, was decided after

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[31] 296 U.S. 569 (1935).
[32] 297 U.S. 1 (1936).
[33] 297 U.S. 110 (1936).

United States v. Butler. Since the Court, in the *Butler* case, had declared the AAA to be unconstitutitonal, it could now uphold on this ground the injunction against the collection of the processing tax, and a discussion as to the application of section 3224 was no longer in point. Nor was it necessary to discuss whether the AAA act had provided an adequate remedy at law for processors who first paid and then brought suits for recovery.

Let us now consider the questions: To what extent will the existence of "extraordinary and exceptional circumstances" render section 3224 inapplicable? What constitutes such circumstances? That the existence of extraordinary circumstances would make section 3224 inapplicable was at first only hinted at by the Court, by way of dicta. In *Dodge v. Osborn*[34] Mr. Chief Justice White 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." But he made no attempt to explain what, in his opinion, would constitute such circumstances, except in a negative way. He held that the averments that "[U]nless the taxes are enjoined many suits by other persons will be brought for the recovery of the taxes paid by them" and also that "[B]y reason of §3187, Rev. Stat. (Comp. Stat. 1913, §5909), making the tax a lien on plaintiffs' property, the assessment of the tax would constitute a cloud on plaintiff's title" were inadequate to sustain jurisdiction, "since it is apparent on their face they allege no ground for equitable relief independent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced."[35]

A similar reasoning was followed by the Court in *Bailey v. George,* six years later. Chief Justice Taft, delivering the opinion, said, "The averment that a taxing statute is unconstitutional does not take this case out of the section [3224]. There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable."[36] Like Justice White in the earlier case, he did not make any attempt to explain further what he would consider to be "extraordinary and exceptional circumstances." In *Graham v. du Pont*[37] the respondent alleged the existence of "entirely exceptional circumstances," but again, the Court did not find that the facts of the case supported such an allegation. The fact that the complainant had delayed paying the tax against which protest was made until his right to sue to recover had expired was held not to make a

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[34] 240 U.S. 118, 122 (1916).
[35] *Id.* at 121-22.
[36] 259 U.S. 16, 20 (1922).
[37] 262 U.S. 234 (1923).

case "so extraordinary and entirely exceptional as to render section 3224 inapplicable."

The first case in which, in the Court's opinion, the circumstances alleged were so exceptional in nature as to make section 3224 inapplicable was *Hill v. Wallace*.[38] Briefly stated, the facts were as follows: Eight members of the Chicago Board of Trade filed a bill against the Secretary of Agriculture, the District Attorney, the Collector of Internal Revenue and the Chicago Board of Trade in which they attacked the validity of the Grain Future Trading Act which imposed a prohibitive tax on all contracts for sale of grain for future delivery except those made through commodity exchanges designated as contract markets by the Secretary of Agriculture. They sought to enjoin the various officers and the Board of Trade from taking any steps to comply with the act. The bill averred that the appellants had applied to the Board of Trade to institute suit, but it refused because it feared the antagonism of the public officials.

The Court, speaking through Chief Justice Taft, proceeded first to ascertain whether, assuming the act to be invalid, the complainants' bill stated sufficient equitable grounds to justify the granting of the relief sought. After holding that there were sufficient equities as against the Board of Trade the Court undertook to answer the question: Is the suit in violation of section 3224, in so far as it seeks relief against the District Attorney and the Collector of Internal Revenue? The reply of the Court to this question was as follows:

> It has been held by this court, in *Dodge v. Brady*, 240 U.S. 120, 126, that section 3224 of the Revised Statutes does not prevent an injuncton 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.[39]

Apparently the Court considered the "extraordinary and entirely exceptional circumstances" in this case to be the untoward conse-

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[38] 259 U.S. 44 (1922).
[39] *Id.* at 62.

quences which would befall the Board members if, in an attempt to test the validity of the Future Trading Act, the Board of Trade refused to comply with its provisions. In such an event if the members sold grain without paying the tax, they would be subject to heavy criminal penalties; if they paid the heavy tax and then sued to recover it back, such a multiplicity of suits would result as would be impracticable, and besides, the trading in grain futures would be brought to a standstill. It may be noted that these onerous circumstances would arise only upon a failure of the Board of Trade to comply with the act, and yet they are considered by the Court as making section 3224 inapplicable. It seems to follow that there is a duty upon the Board of Trade to contest the act's validity in conformance with the desires of the stockholders bringing suit. However, the Court makes the further statement that "the right to sue for an injunction against the taxing officials is not, however, necessary to give us jurisdiction."

This would seem to relegate the remarks as to the inapplicability of section 3224 and the reasons therefor to the category of dicta. Yet in the later case of *Graham v. du Pont*[40] the Court dwelt at length upon *Hill v. Wallace,* cited the dire consequences which would follow an attempt to contest the validity of the Future Trading Act — the heavy criminal penalties to which the individual members would be subjected if they failed to pay the prohibitive tax on each transaction in grain futures, the utter impracticability of paying and then suing to recover the tax — and then concluded as follows:

> Under these extraordinary and most exceptional circumstances, it was held that section 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional.[41]

The Court then made this further remark: "*Hill v. Wallace* should, in fact, be classed with *Lipke v. Lederer* . . . as a penalty in the form of a tax."

This last statement does not seem to agree entirely with the Court's analysis of *Hill v. Wallace* immediately preceding and one wonders just what significance to attach to it. From the examination of *Hill v. Wallace* it appears that if there was a holding as to the inapplicability of section 3224 it was based upon the "extraordinary and exceptional circumstances," named by the Court, which would follow an attempt to test the validity of the Future Trading Act, and not upon any examination of the precise nature of the prohibitive tax in-

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[40] 262 U.S. 234 (1923).
[41] *Id.* at 257-58.

volved. The "tax" may have been a penalty, but the Court did not say so at the time, nor base its reasoning upon that fact. Perhaps the Court later regretted this omission, and sought to remedy it by means of dicta in another case!

Before leaving *Hill v. Wallace,* a further point should be noticed. In the opinion the Court cited *Dodge v. Brady*[42] as a holding "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."[43] An examination of *Dodge v. Brady,* however, fails to disclose such a holding. Apparently Chief Justice Taft was overhasty in his perusal of that case and misunderstood what Chief Justice White was trying to say. There were two bills in *Dodge v. Brady,* only the first of which sought to restrain the collection of a tax, and brought up the question of whether section 3224 forbade an injunction. The lower court held that section 3224 did apply, and the Supreme Court agreed. The supplemental bill sought the recovery of the tax, and it was in connection with this bill that the exceptional circumstances came in — but this had nothing to do with section 3224, for the tax had already been paid. Hence *Dodge v. Brady* is scarcely a precedent for holding that section 3224 is inapplicable under extraordinary circumstances.

By far the most important case with respect to the "extraordinary circumstances" doctrine was that of *Miller v. Standard Nut Margarine Co.,*[44] decided in 1932, where the Court, in a direct holding, declared that such "extraordinary and exceptional circumstances" existed as to render the provisions of section 3224 inapplicable. According to the facts the petitioner, purporting to act under the Oleomargarine Act of 1886, as amended in 1902, sought to collect from the respondent company a tax of ten cents a pound upon its manufactured product. The company asked for an injunction restraining the petitioner, alleging that it would be unable to pay the tax, that to attempt to pay it would involve forfeiture of its entire plant and the destruction of its business, that the exaction was really a penalty, so that section 3224 did not apply, and finally, that it had set up its business relying on certain district court decisions, and letters from government officials to the effect that the oleomargarine tax did not apply to its product which was made from vegetable fats.

The case came to the Supreme Court upon a writ of certiorari. The petitioner sought reversal upon the ground that section 3224 for-

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[42] 240 U.S. 122 (1916).
[43] Hill v. Wallace, 259 U.S. 44, 62 (1922).
[44] 284 U.S. 498 (1932).

bade an injunction against the collection of a tax even if erroneously assessed, and that if there was any exception to its application, this case was not within it.

The Court, speaking through Justice Butler, denied the petitioner's contention that section 3224 applied in this case. The reasoning was as follows: Section 3224 is declaratory of equity principles existing before its enactment and should be construed as near as may be in harmony with them. Two of these principles are: (1) A suit will not lie to restrain the collection of a tax upon the sole ground of its illegality, and (2) in cases where complainants show that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence a suit may be maintained to enjoin the collector. It is therefore not to be presumed that Congress, without specifically saying so, intended for section 3224 to restrain the Court when it would otherwise have equity jurisdiction. For section 3224 has never been held to be absolute, but, on the contrary, the Court has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. After remarking that "a valid oleomargarine tax could by no legal possibility have been assessed against the respondent," Justice Butler concluded:

> It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, section 3224 does not apply.[45]

This case definitely lays down the rule "that the existence of special and extraordinary circumstances sufficient to bring the case within some aknowledged head of equity jurisprudence" will make section 3224 inapplicable. The Court infers that in so holding it is following precedent, but, as has already been noted, its comments in previous cases as to the effect of exceptional and extraordinary circumstances were all dicta, with the possible exception of *Hill v. Wallace.*

The opinion in *Miller v. Standard Nut Margarine Co.* is unsatisfactory for a number of reasons. Its reliance on "extraordinary and entirely exceptional circumstances" is to be regretted, for the concept has not a fixed or certain meaning and its use in connection with the interpretation of section 3224 only leads to greater confusion as to the latter's meaning. Moreover, the Court's reasoning that without "specific language" to that effect Congress could not have intended section 3224

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[45] *Id.* at 510-11.

to apply when "extraordinary circumstances" existed appears to be an illustration of a "spurious" interpretation. For the statute is clear in its wording, and in another section Congress had provided a remedy. What, then, was the necessity of reading this limitation into the act? Did the Court mean to say that it could not be presumed that Congress would undertake to limit the equity jurisdiction of the courts? For surely this is what the holding amounts to. In effect the Court says that if special circumstances exist which bring the case within some acknowledged head of equity jurisdiction, section 3224 does not apply, and the Court may issue an injunction. But in the absence of such circumstances the Court will lack equity jurisdiction because there will be no basis for such jurisdiction. To say that section 3224 applies only in such cases seems a little absurd. It is tantamount to saying that sectiton 3224 forbids the courts to issue injunctions only when they would not have authority to issue them anyway! It denies any force whatever to sectiton 3224 except as declaratory of an equitable rule previously followed by the courts.

The Court seemed to attach some significance to the fact that "a valid oleomargarine tax could by no legal possibility have been assessed against the respondent." The inference was that since the tax was undoubtedly illegal the reasons underlying section 3224, that is, the government's right to protect its revenue, "apply, if at all, with little force."

The reasoning of the dissent may be sharply contrasted with that of the majority. Justice Stone's brief opinion may be summed up as follows: Section 3224 denies to the courts jurisdiction to restrain the assessment or collection of any tax. The purpose of the present suit is to enjoin the collection of a tax. Therefore the courts do not have jurisdiction of the present suit. The theory underlying this brief opinion apparently was that the jurisdiction of the courts in such cases was a matter of legislative and not judicial discretion. Certainly, Justice Stone did not share the majority opinion that section 3224 was merely declaratory of equity principles, for he concluded his remarks with this abrupt statement: "Enacted in 1867, this statute, for more than sixty years, has been consistently applied as precluding relief, whatever the equities alleged."[46]

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[46] *Id.* at 511. (Brandeis, J., concurred in the dissent.)
In Allen v. Regents of Univ. System of Georgia, 304 U.S. 439, 445, 449 (1938), Mr. Justice Roberts, delivering the opinion of the Court, said (at 445), "If the tax, the collection of which was threatened, constituted an inadmissible burden upon a governmental activity of the State, the circumstances disclosed render the cause one of equitable cognizance and take it out of the prohibition of R. S. Sec. 3224." The Court then held, "The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to col-

Another question which has arisen in several cases is the application of section 3224 in a suit by a stockholder against the corporation to restrain it from paying taxes. In *Pollock v. Farmers' Loan & Trust Co.*,[47] Pollock, a stockholder in the corporation, sought to restrain it from voluntarily complying with the provisions of the Income Tax Act of 1894 on the ground that the act was unconstitutional. The government appeared amicus curiae and, apparently wishing to present no bar to the Court's assumption of jurisdiction, so that the matter of the constitutionality of the Income Tax law could be immediately decided, expressly waived the question of jurisdiction so far as it was in its power to do so, and did not raise the objection of adequate remedy at law.

Under these circumstances the Court felt justified in assuming jurisdiction upon the merits. It found section 3224 to be no bar by pointing out that the complainant sought to prevent only the *voluntary* payment of the tax by the corporation. Therefore, the complainant did not seek relief in respect of assessment and collection themselves, which alone was forbidden by section 3224, and the Court would not be justified in declining to proceed to judgment on the merits.

There were four dissenting justices in the *Pollock* case, of whom Justices White and Harlan wrote opinions. Justice White thought that section 3224 forbade the suit, being unable to see any difference between a suit to prevent voluntary payment of a tax, and a suit to restrain its collection. In his opinion the stockholder was attempting to do indirectly what the corporation could not do directly and therefore section 3224 was just as applicable in the one case as in the other. His test as to the application of the section was the ascertainment of "the real object of the suit." Thus, in so far as this was different from the professed object Justice White would confer a large measure of discretion upon the Court. If the Court had followed his reasoning, the application of section 3224 would have been limited only by the inability of the Court to see in any suit "a real object" to prevent collection of taxes imposed by Congress. As

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lect from another."

Mr. Justices Reed and Stone concurred in the results reached in Allen v. Regents of Univ. System of Georgia except on the construction given to Section 3224. They apparently took the position that Section 3224 of the Revised Statutes took away the Court's jurisdiction and that it should be followed by the courts.

Of course deviations from the wording of Section 3224 have resulted in much confusion in the lower courts. Notice the recent case of Enochs v. Williams Packing & Navigation Co., 291 F.2d 402, 408 (1961). The dissenting opinion of Judge Rives there follows the views expressed by Justices Stone and Reed. Judge Rives would also base his conclusion on the fact that exceptions were written into the statute with the passage of the 1939 Internal Revenue Code. He said, "[T]he statute having provided express exceptions to its prohibition, it would seem that implied exceptions are excluded."

[47] 157 U.S. 429 (1895).

summarized by Justice Harlan, "A suit which would defeat the object of the statute is an evasion of its provisions."

Twenty-one years after the *Pollock* case the Court handed down its opinion in *Brushaber v. Union Pacific R.R. Co.*[48] which was also a stockholder's suit to enjoin the corporation from paying an income tax. The government, instead of waiving any objection to the Court's jurisdiction, specifically argued that section 3224 precluded the remedy sought. Chief Justice White, now speaking for the majority, denied the government's contention and held that the lower court had jurisdiction. How did he arrive at this conclusion in the light of his dissent in the *Pollock* case? The reasons he assigned for his holding were 1) the equitable grounds alleged in the stockholder's bill, among which was the averment that there was an absence of all means of redress if the corporation voluntarily paid the tax, and (2) the "ruling" in the *Pollock* case to the effect that to sustain "the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax" did not violate the prohibitions of section 3224.

From this holding it is clear that Chief Justice White withdrew from his previous position and accepted the majority view in the *Pollock* case as a precedent which should be sustained by the Court. A stockholder may sue (under proper averments) to prevent a corporation from voluntarily paying a tax. One may note, however, that the Court did not say that a stockholder might restrain the corporation from any payment of a tax, but only from a "voluntary" payment on its part. This implies that the corporation is still liable to an action of forcible collection by the government against which, because of the prohibition of section 3224, the stockholder will have no right to interfere.

But will section 3224 absolutely apply in this latter case? If *Miller v. Standard Nut Margarine Co.* is taken as a precedent the answer would seem to be no. If such special and extraordinary circumstances are alleged as to bring the case within some recognized head of equity jurisdiction, apparently the Court could assume jurisdiction even when the stockholder sought to prevent forcible payment by the corporation. But *Corbus v. Alaska Treadwell Gold Mining Co.*[49] indicates the difficulties which confront a stockholder who seeks to invoke equity jurisdiction,[50] so that this is not such a serious limitation upon the application of section 3224 as might be supposed. In that case it was held that a stockholder could not enjoin the corporation from

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[48] 240 U.S. 1 (1916).
[49] 187 U.S. 455 (1903).
[50] Comment, 45 YALE L. J. 649 (1936).

paying the tax unless he showed irreparable injury to the corporation as well as to himself, and also that he had taken every essential preliminary step to justify his claim of a right to act in behalf of such tax debtor. Collusion between the stockholder and the corporation was found in the *Corbus* case, and the injunction was therefore denied. Justice Brewer indirectly referred to section 3224 by saying that Congress had attempted to enforce the equity rule to the effect that equity will not restrain a tax on the ground that it is illegal and therefore that "before a court of equity will in any way help a party to thwart this intent of Congress, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury."[51]

One wonders if Justice Brewer used the word "thwart" advisedly in the above quotation. If so, this is the nearest the Court comes to expressing a view that in granting injunctions to restrain the collection of a tax, even when justified on equitable grounds, it is nevertheless acting contrary to the intent of Congress that the taxpayer should first pay the tax, regardless of the circumstances of the case, and then pursue the remedy which Congress had provided for a settlement of the conflicting issues involved.

One more case, *Phillips v. Commissioner*,[52] will be considered even though the statutory provision directly at issue was not section 3224, but section 280 (a) (1) of the Revenue Act of 1926.[53] The relation of this provision to section 3224 was such, however, that Justice Brandeis felt it necessary to discuss the latter statute in order to show, by analogy, that the former was constitutional, and not a violation of the individual's rights.

The facts of the case were as follows: A Pennsylvania corporation was dissolved and its assets distributed among its stockholders, one of whom was Phillips who had owned one-fourth of the company's stock. Later, a deficiency assessment for income and profit taxes was levied against the dissolved corporation. Section 280 (a) (1) of the Revenue Act provided that stockholders who had received the assets of a dissolved corporation might be compelled to discharge unpaid corporate taxes, and that the transferee was liable in the same man-

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[51] 187 U.S. 455, 464 (1903).

[52] 283 U.S. 589 (1931).

[53] Section 280 (a) (1) of the Revenue Act of 1926 provides:

"The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed . . . any prior income, excess profits, or war profits tax Act shall be assessed, collected, and paid in the same manner . . . as . . . a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds.)" 44 Stat. 61, cited 283 U.S. 589, 593, n. 3 (1931).

ner as any delinquent taxpayer. Acting under this section the Commissioner of Internal Revenue sent notice to Phillips that he intended to assess against and collect from him the unpaid balance of the taxes (almost the whole amount). Phillips' executors petitioned the Board of Appeals for a redistribution, but the Board held that the estate was liable for the full amount. After affirmance by the Circuit Court of Appeals, the case came to the Supreme Court on a writ of certiorari.

The question here involved was whether section 280 (a) (1) was constitutional, that is, could taxes levied against the dissolved corporation be enforced against a transferee by the same summary administrative procedure as would have been authorized against the corporation itself. The contention mainly urged was that the summary procedure as applied to a transferee was unconstitutional "because it does not provide for a judicial determination of the transferee's liability at the outset." It was said that the administrative determination by the commissioner in the first instance offended against the principle of separation of powers; also that the inherent denial of due process was not saved by provisions for deferred review in the courts.

Justice Brandeis, speaking for the Court, upheld the constitutionality of the contested statute by examining the basis upon which it rested and by refuting the arguments against it. He analyzed the statute as one which provided a new remedy for the government in enforcing tax obligations in proceedings to collect the revenue. Its purpose, therefore, was to make the tax-collecting system more effective, and the means adopted was that of summary administrative procedure. Obviously, the purpose was legitimate, so that the only question necessary to consider was the constitutionality and appropriateness of the means. Justice Brandeis apparently had no difficulty in finding an answer to this question. "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled," he said, "if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue," and "if adequate opportunity is afforded for a later judicial determination of the legal rights,"[54] summary proceedings to enforce collection may be sustained. Justice Brandeis answered the contention that summary proceedings to collect the tax in the instant case would deprive Phillips of his property without due process of law. He distinguished life and liberty in the due process clause from property, asserting that property rights must yield provisionally to governmental need, and that with respect to property

[54] 283 U.S. 589, 596-97 (1931).

rights in tax cases the mere postponement of judicial inquiry was not a denial of due process.

Thus, by Justice Brandeis' analysis, the basic propositions upon which a solution of the question in this case depended were exactly the same as those applicable in cases involving an interpretation of section 3224. The decision was based upon the proposition which had been established or accepted with respect to the government's power to collect its revenue, particularly with respect to its power to adopt a summary administrative procedure to enforce collection. The theory set forth in earlier cases was repeated, in substantially the same language, with an outline of the limits beyond which the government might not go. The fact that in earlier cases the summary procedure had been employed to enforce collection against the person directly assessed, while here it was employed to enforce the liability of a transferee for unpaid corporate taxes was an unimportant distinction, according to Justice Brandeis' analysis. Thus, the instant case did not present a new element, but could be decided by applying the propositions already established with respect to the government's power to adopt a summary procedure in collecting its taxes, and the limitations upon that power.

From this study of the cases it is clear that, in the matter of entertaining suits to restrain the assessment or collection of a tax, the courts have long recognized the necessity of a minimum of judicial interference because of the importance of taxes to the "very existence of the government," and that even before the enactment of section 3224 they applied the equity rule which forbade the intervention of the courts when the sole complaint was that of alleged illegality, unconstitutionality, injustice, or irregularity of the tax.

But when Congress, in 1867, enacted the statute forbidding the courts to maintain any suit for the purpose of restraining the assessment or collection of any tax, was it the intention of that body merely to put into statutory form an equitable principle already followed in practice, or did Congress intend, by this act, to place a further limitation upon the equity jurisdiction of the courts? We have examined the decisions involving an interpretation of the act in an endeavor to find the Court's answer to this question, but until the *Miller* case there was no direct holding on the point and even then Justice Stone expressed an emphatic dissent. As has been noted, he was of the opinion that the act definitely limited the equity jurisdiction of the courts.

It must be conceded that Justice Stone had some justification for his position. In the first place he is supported by the wording of the statute, which, in plain terms, purports to limit the courts, under the circumstances specified, and contains no phrases of exception or inapplicability. Secondly, it would seem that "the presumed

intent of Congress" argument, used at various times by the Court to justify exceptions to the application of section 3224, is even more forceful as an argument against such exceptions. For why should it be presumed that Congress did not intend to limit the jurisdiction of the courts, but intended only to express the equity rule, when the plain import of the words is a limitation of jurisdiction and the other interpretation deprives the act of any significance? As we pointed out in discussing the *Corbus* case, there is some indication that Justice Brewer inclined to Justice Stone's view of the Congressional intent, for he spoke of the caution which the Court should exercise before it would in any way "help a party to thwart the intent of Congress." Obviously if this intent was merely to state the rule of equity, it could not be "thwarted" by any court sitting as an equity court.

As a final argument in support of his position, Justice Stone remarked that, since the enactment of section 3224, the Court has always applied the act in spite of the equities alleged. Strictly speaking, this was true, for *Miller v. Standard Nut Margarine Co.* was the first case in which the Court directly held that the statute was inapplicable when there existed special facts and circumstances sufficient to constitute a basis for equity jurisdiction. But Justice Stone ignored the dicta in many of the preceding cases, particularly in *Hill v. Wallace,* which seemed to foreshadow the decision in the *Miller* case.

Regardless of the logic of Justice Stone's position one cannot deny that the majority, speaking through Justice Butler had, if not the weight of precedent, at least the weight of dicta, on their side. In fact, there was no precedent, except in a negative sense. But there was dicta, ranging from the hint, in the early cases, that the existence of special circumstances would render section 3224 inapplicable, to the elaborate pronouncement in *Hill v. Wallace* that there were such "exceptional and extraordinary circumstances with respect to the operation of this act" as to make the statute inapplicable.

Where was the line to be drawn between circumstances in which section 3224 would restrain the courts and "special" circumstances where it would not? It is doubtful whether the Court itself was agreed on an answer to this question until the *Miller* case. Yet it may be that in posing "special circumstances" as an exception to the application of the statute the Court was influenced, consciously or otherwise, by the equity rule existing before the enactment of that act, permitting an equity court to assume jurisdiction in tax cases under certain circumstances. Thus, equity would intervene when (1) the enforcement of the tax would lead to a multiplicity of suits; (2) produce irreparable injury; (3) if the property concerned was real estate, when the assessment or collection would place a cloud

upon the complainant's title; or (4) when there was allegation of fraud. Apparently, since the *Miller* case, these are the "special circumstances" making section 3224 inapplicable. But even under this interpretation, there is much uncertainty as to the application of the statute, for the Court often finds it difficult to determine whether the facts justify equitable intervention. Likewise, the Court often finds itself at variance as to determine whether there is a plain and adequate remedy at law. Consequently, the decision in the *Miller* case by no means dispels that general confusion and uncertaintly as to when section 3224 applies.

The limitation upon the application of the statute, imposed in the *Miller* case, is much more far-reaching and fundamental than in *Lipke v. Lederer.* In the *Lipke* case the Court limited the statute by a precise definition of its terms. Proceeding from the "concept" point of view it examined the facts bearing upon the nature of the exaction whose collection was demanded, compared them with the previously evolved concept of "penalty", found a coincidence, and concluded that propositions having to do with taxes did not therefore apply.

But in the *Miller* case the Court limited the application of the statute by reading into its provisions the exceptions and limitations of previously existing equitable rules and principles. Before this case there seemed to be some justification for the view that section 3224 placed a restraint upon the equity jurisdiction of the courts, although it was by no means clear just how great the restraint was. But the identification of the statute with previously existing equitable principles, in the *Miller* case, took away whatever force it might have had as an independent limitation and, as now interpreted, the act does not place a greater limitation upon the jurisdiction of the courts than existed before its enactment.