

Case No. 5,067.

FRAYSER ET AL. V. RUSSELL.

[3 Hughes, 227.]<sup>1</sup>

Circuit Court, E. D. Virginia.

April, 1878.

EQUITY—POWER TO ENJOIN COLLECTION OF TAXES.

Though it is true that courts of equity of the United States cannot enjoin an officer of the United States from collecting a tax, yet there are circumstances under which such collecting officers may be enjoined from claiming moneys of citizens and levying for them as if for taxes.

[Cited in *Kensett v. Stivers*, 10 Fed. 527.]

[In equity. This was a bill for an injunction by L. H. Frayser & Co. against Otis H. Russell, United States collector of internal revenue for the Third district of Virginia.]

The original bill set out the following case: “Your complainants, L. H. Frayser & Co., show to the court that they are engaged in manufacturing tobacco in the city of Richmond, in the state of Virginia, and were so engaged prior to and on the 3d of March, 1875, and ever since. That on the morning of the day last mentioned they had in their factory 15,001 pounds of tobacco, which they had manufactured and placed in boxes according to the usage of their business; that they had sold the same to be shipped to purchasers, stamped according to law, and accordingly they applied to the proper officers of the United States at Richmond for the stamps to put on said boxes according to law, bought, paid for the same, and placed them upon said boxes, and then according to contract shipped the same, and placed said tobacco out of and beyond their control. That after the said tobacco was so shipped, and had so passed from under their control, the said Otis H. Russell, collector as aforesaid, named above as defendant, informed them that he claimed on behalf of the United States an additional tax of four cents per pound, amounting to the sum of \$604.04, and required and demanded of your complainants payment of the same, upon the ground that on the night of the 3d of March congress had passed an act [of 1875 (18 Stat. 339)] imposing that additional tax; but your complainants no longer had said tobacco. They had lawfully parted with the same, after they had complied fully with all the requirements of the revenue officers of the United States, and paid the cost of stamps provided by law to be put upon said tobacco; and not only in compliance with the law had those stamps been sold to your complainants, but also in accordance with specific instructions of the commissioner of the revenue of the United States, who had directed (prior to that time) the collector to sell the stamps at certain rates, which complainants paid, till further orders, and no such further orders were received by said collector till after your complainants had shipped their tobacco as aforesaid. That the contract under which they shipped said tobacco required them to ship it stamped according to law, both contracting parties well knowing what the cost of stamps was. With this contract they complied, and the other parties were bound to them only for the amount paid

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for said stamps. If, then, there is any additional sum to be paid on said tobacco by your complainants, it will necessarily entail a loss to that extent upon your complainants, while, if demanded of them while the tobacco was unsold, the fact that the additional sum was to be paid would properly have been provided for in said contract, so that in any event, under the facts stated, it would be inequitable and unjust to require your complainants to pay a tax on tobacco which they don't own and which they had parted with, after complying with all the requirements of the law, and the regulations of the department controlling such cases. Your complainants are advised that while they have no right to institute any suit to restrain the assessment or collection of any tax of the United States, they insist that the tax assessed upon said tobacco, while in their possession and their property, has been fully paid, and that the revenue laws of the United States do not contemplate that the United States officers shall continue to assess upon property which has passed from the possession of the original owner, or rather upon him, a tax in addition to that which has already been assessed and paid

according to law. They insist that this is no assessment of a tax upon property; that it is simply an arbitrary demand upon them for a sum of money which they are not bound to pay, because they have not the property so assessed, and in so doing the collector is arbitrarily and illegally and inequitably perverting the authority given him by law, and using the same to oppress and harass your complainants. And they further state that the said Russell, collector as aforesaid, is threatening to levy, or cause a levy to be made, upon the property of your complainants for the amount of \$604.04, as aforesaid, and unless enjoined will proceed to do so to the great injury of your complainants. To the end, therefore, that your complainants may be relieved in the premises, they pray that the said Russell, collector as aforesaid, be made defendant to this bill and answer its allegations; that he be enjoined from proceeding to levy upon the property of your complainants, or either of them, or from collecting in any way said sum of money or any part thereof, and also to enjoin any other officer of the United States from so proceeding. And may it please your honor," etc. An injunction was temporarily awarded under this bill and was afterwards made perpetual.

H. H. Marshall, for complainants.

L. L. Lewis, U. S. Atty., for collector.

After the final order, the United States, by Mr. Lewis, filed a bill of review, on which the court delivered the following opinion:

HUGHES, District Judge. The bill and bill of review sufficiently show that after certain manufactured tobacco had been properly stamped at the rate of twenty cents per pound, and then sold and transferred to purchasers by the manufacturer, an additional four cents per pound were demanded by the collector, and a levy upon other property of the manufacturer threatened for this four cents. The injunction complained of in the bill of review was granted to prevent such a levy.

It is true that the collection of a tax by an officer of the government cannot be enjoined, and that all taxes due must be paid, and that the person paying them, when wrongfully levied, must resort to a suit against the collecting officer for the recovery of them. And if the collector here had in the first instance required stamps to the extent of twenty-four cents per pound to be placed upon the tobacco mentioned in the bill, and on a refusal to do so by the manufacturer had threatened to seize that tobacco, and in this attitude of the affair a bill of injunction to restrain him had been brought, the court might not have granted the injunction.

But in this case the proper tax had already been paid by the manufacturer, and he had sold and delivered the tobacco on which the tax was due. As to him the matter had been terminated, and he had passed from his ownership the tobacco which had been taxed. The collector's demand upon him afterwards for four cents a pound, which he called an additional tax, was a demand for what this court has solemnly and finally in another case

adjudicated not to be a tax. See *Salmon v. Burgess* [Case No. 12,262]; affirmed in 97 U. S. 381. Besides, the course for the collector to pursue, even if this latter four cents had been a proper demand as a tax, was marked out to him by section 3371 of the Revised Statutes of the United States. The collector did not take the course directed by law in a case where “the proper stamps” had not been used, and the proper tax had been “omitted to be paid.” His threatened levy was for what was not a tax; and it was threatened to be made in a manner which set at naught the provisions of section 3371. It was a clear case for the exercise of the restraining power of the court; and was not a case falling either within the letter, or spirit, or intention of section 3224.

There was another ground on which the court felt authorized and impelled to grant the injunction. A case was before it at the time, in which it had become its duty to pass upon the question whether the payment of the tax of twenty cents a pound upon manufactured tobacco, which was required by the law as it stood until 9 o'clock P. M. on the 3d of March, 1875 (the payment having been made in the early part of that day), discharged the tobacco thus stamped of all taxes imposed by laws then in force. This question had been raised by the collector against numerous manufacturers in Richmond, and a multitude of suits were impending, all turning upon this question of law. Although this fact did not appear in the pleadings, yet it was well known to the court, and its desire to prevent a multitude of suits turning upon a question of law then about to be adjudicated, furnished a strong inducement to the court to enjoin the collector from making the levy then threatened. Thus, not merely with reference to the rights of the complainant in the bill, but also as a measure of sound public policy, the court was justified in granting the injunction; and the bill of review will be dismissed.

For like reasons the bills of review in the cases of *A. M. Lyon & Co.*, *John K. Childrey*, and *Robert W. Oliver* will be dismissed.

<sup>1</sup> [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]