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## FEDERAL JURISDICTIONAL AMOUNT REQUIREMENT IN INJUNCTION SUITS

THE expansion or contraction of federal jurisdiction under the amount in controversy requirement<sup>1</sup> has important political consequences.<sup>2</sup> It affects the distribution of power between federal and state courts; and in the case of injunctions against officials involves further the balance between the executive and judicial branches of the Federal Government, and the propriety of interference by the federal judiciary with the representatives of

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1. The jurisdictional provision reads in part: "The district courts shall have original jurisdiction . . . of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 and (a) arises under the Constitution or laws of the United States, or treaties . . . or (b) is between citizens of different States, . . ." 36 STAT. 1091 (1911), 28 U. S. C. § 41 (1) (1934). There are, however, numerous types of "case" requiring no jurisdictional amount; among the more important of these are criminal cases, cases in admiralty, in bankruptcy; suits arising under the interstate commerce laws, the patent and copyright laws; and suits concerning civil rights. 36 STAT. 1091-1093 (1911), 28 U. S. C. § 41 (1934).

2. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499; Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1934* (1935) 49 HARV. L. REV. 68, 91.

state governments. Congress, by twice raising the jurisdictional amount,<sup>3</sup> has shown its tendency to contract federal jurisdiction in favor of state courts; and by restricting the power of federal courts to issue injunctions,<sup>4</sup> has further endeavored to protect from federal judicial interference the executive arm of both federal and state governments.<sup>5</sup>

The Supreme Court, in several recent decisions involving jurisdictional amount in injunction suits, has lent its support to the Congressional policy. In *Healy v. Ratta*,<sup>6</sup> decided in 1934, the Court ruled that in a suit to enjoin a license tax the amount in controversy was confined to the amount of the tax. There was ample support for the decision;<sup>7</sup> but there were also numerous lower court precedents on which the Court could have sustained jurisdiction.<sup>8</sup> The important feature of the decision is the forthright choice in favor of narrower jurisdiction. In reaching its conclusion, the Court significantly observed:

"The policy of the statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."<sup>9</sup>

3. By the Act of March 3, 1887, 24 STAT. 552 (1887), the amount was increased from \$500 to \$2,000. Congressional debates show that the proponents of the bill were interested in preserving the importance of state courts. See 18 CONG. REC. 2544 (1887). By the Act of March 3, 1911, 36 STAT. 1091 (1911), 28 U. S. C. § 41 (1) (1934), the amount was further increased to \$3,000. A continued interest in protecting state courts is shown by the Congressional debates. See 46 CONG. REC. 1075, 1076 (1911).

4. The requirement of a three judge court to issue an interlocutory injunction suspending operation of a state statute or restraining an order of a state commission, 35 STAT. 557, 1162 (1911), 37 STAT. 1013 (1913), 43 STAT. 938 (1925), 28 U. S. C. § 380 (1934), and the extension in 1937 of this provision to include the Federal Government, 50 STAT. 752 (1937), 28 U. S. C. § 380a (Supp. 1938), are designed to prevent the indiscriminate issuance of injunctions by federal courts. See 3 MOORE'S FEDERAL PRACTICE (1938) 3537; DODD, CASES ON CONSTITUTIONAL LAW (1937) 25. The Johnson Act, 48 STAT. 775 (1934), 28 U. S. C. § 41 (1), restricts the issuance of an injunction against a state regulatory commission. A similar restriction against the issuance of state tax injunctions was added by the Act of August 21, 1937, 50 STAT. 738 (1937), 28 U. S. C. § 41 (1) (Supp. 1938). REV. STAT. § 3224 (1875), 26 U. S. C. § 1543 (1934), prohibits an injunction against a federal tax. For a discussion of the application of these restrictions see 1 MOORE'S FEDERAL PRACTICE (1938) 202-208.

5. In other fields Congress has restricted federal jurisdiction. For an extended review of the "established trend of legislation limiting the jurisdiction of the federal trial courts," see *Gay v. Ruff*, 292 U. S. 25, 35-36 (1934).

6. 292 U. S. 263 (1934).

7. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68 (1900); *Washington & G. R. R. Co. v. District of Columbia*, 146 U. S. 227 (1892).

8. *Campbell Baking Co. v. Maryville*, 31 F. (2d) 466 (W. D. Mo. 1929); *City of Hutchinson v. Beckham*, 118 Fed. 399 (C. C. A. 8th, 1902); *Humes v. Ft. Smith*, 93 Fed. 857 (C. C. W. D. Ark. 1899).

9. *Healy v. Ratta*, 292 U. S. 263, 270. Mr. Justice Stone, who wrote the opinion, has made similar statements on other occasions. See *Matthews v. Rodgers*, 234 U. S. 521, 525 (1932); *Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U. S. 64, 73 (1935).

The restrictive principle of the *Healy* case was carried further by *McNutt v. General Motors Acceptance Corporation*,<sup>10</sup> a case involving a statute regulating auto-financing. In order to show jurisdiction, counsel for plaintiff cited the general rule that "the value of the object or right to be protected against interference"<sup>11</sup> was the standard for measuring the amount involved. The Court adopted this general standard, but pointed out that in this case the right to be protected was not the broad right to conduct the business, which would be measured by the value of the business, but the specific right to be free of regulation, "measured by the loss, if any, which would follow the enforcement of the rules prescribed."<sup>12</sup> The Court then went on to put force into this requirement for precision in ascertaining the right to be protected, by resolving a long-standing conflict over the status of the burden of proof. In definite terms, the rule was set forth that one who invokes jurisdiction must prove that jurisdiction is present.

The ramifications of this case were demonstrated little more than six months later when the Court on two occasions applied the burden of proof rule with considerable strictness. In *Kroger Grocery & Baking Company v. Lutz*,<sup>13</sup> the plaintiff tried to meet the burden of proof by establishing an annual loss, under a regulatory statute, of \$500 which if capitalized at 5% would amount to \$10,000. Since, however, the statute was to expire shortly, the Court refused to accept capitalization as proof of the extent of injury and required that the loss be confined to the precise period for which the statute was certain to run. In *KVOS v. Associated Press*,<sup>14</sup> the Associated Press sued to enjoin a radio station from pirating news gathered by its press service. In reversing on jurisdiction, the Court again followed the *McNutt* formula, and dismissed as irrelevant general facts about annual expenditures and the magnitude of the operations of the association. The attempt by the association to prove specific damage was also dismissed, not as irrelevant, but as unsatisfactory.<sup>15</sup>

The 1938 term of the Supreme Court, however, produced a case which raises a doubt as to whether the strictness of preceding terms is to continue. *Gibbs v. Buck*<sup>16</sup> involved a Florida statute prohibiting the use of the copy-

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10. 298 U. S. 178 (1936). *McNutt v. McHenry Chevrolet Co.*, 298 U. S. 190 (1936), is a companion case with an identical holding.

11. *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936). For variations on the manner of stating the rule, see 1 MOORE'S FEDERAL PRACTICE (1938) 530-532.

12. *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936).

13. 299 U. S. 300 (1936).

14. 299 U. S. 269 (1936).

15. An affidavit was offered alleging a loss of an \$8,000 a month contribution should the newspapers in the area of the radio station withdraw. In answer to this the Court pointed out that it had not been shown in what way withdrawal of the \$8,000 contribution would injure the remaining members, and that even withdrawal was only a conclusion unsupported by evidence. *KVOS v. Associated Press*, 299 U. S. 269, 279 (1936).

16. 307 U. S. 66 (1939). *Buck v. Gallagher*, 307 U. S. 95 (1939), is a companion case which, however, differs from the *Gibbs* case in that a regulatory, not a prohibitory,

right pool of the American Society of Composers, Authors and Publishers.<sup>17</sup> Gene Buck, president of the Society, and other members brought a representative suit to enjoin enforcement of the statute. The value of the "right to conduct the business free of the prohibition of the statute"<sup>18</sup> was accepted as the criterion for measuring the jurisdictional sum. But in finding this right to exceed \$3,000, the opinion used language which gave the impression that the Court was making speculative deductions from the proved facts.<sup>19</sup> Nevertheless, this is undoubtedly a case in which the jurisdictional amount was present.<sup>20</sup> And in view of the fact that the Court expressly reaffirmed the burden of proof rule and, further, that the case is not one in which jurisdiction was sustained in the absence of proof, but rather one in which the Court failed to explain clearly how the admitted facts proved jurisdiction, there is no reason to anticipate a reversal of attitude.

From these recent cases two propositions are clear. First, the burden of proof rests on the proponent of jurisdiction; and second, in injunction suits, precision is required in showing exactly what the injunction is to protect. Combined, these two propositions provide one rule for determining the jurisdictional amount in injunction suits — one who invokes jurisdiction must prove that the value of the precise injury threatened exceeds \$3,000. One of the immediate effects of this rule is to settle the problem of whether the right in controversy should be measured by its value to the plaintiff or by the loss to the defendant which would result from enforcement of the right. The point of view may make quite a difference. For example, the value to the plaintiff of the abatement of a nuisance may differ from the value to

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statute was involved. The case was remanded to permit members to show whether the cost of complying with the statute exceeded \$3,000.

17. The statute declares that any substantial combination of copyright holders which fixes prices or issues licenses for performance is illegal. FLA. COMP. GEN. LAWS ANN. (Skillman Supp. 1938) § 7954(1).

18. *Gibbs v. Buck*, 307 U. S. 66, 74 (1939).

19. Although admitting that net profits had not been shown, the Court apparently assumed that if \$60,000 a year was collected in Florida, and if the business throughout the country was profitable, the jurisdictional amount was necessarily present. Inasmuch as the Court measured the jurisdictional amount only in terms of loss to individual members, and not to the association, it would seem necessary to show that the profit obtained through the association exceeded the aggregate profit which the members could obtain operating independently.

20. If the method of determining the value of continuing in business, the going-concern value minus the liquidation value [see p. 279 *infra*] were used, the amount would obviously exceed \$3,000 in aggregate for the members. There would be no liquidation value of the association, aside from office furniture, and the going-concern value would be quite large if annual income was \$60,000. That the members could not independently operate profitably is undoubtedly the case, even though the statement of facts as given by the Court does not clearly show it. Mr. Justice Black, dissenting, argued that it was not shown that independent operation would be unprofitable; but he gave away his own case by subsequently arguing that the bond fixed by the court below should have been higher in order to indemnify the citizens who were paying "tribute" to the Society. *Gibbs v. Buck*, 307 U. S. 66, 91, 94 (1939).

the defendant of the object causing the nuisance. Although the Supreme Court has long adopted the plaintiff's point of view,<sup>21</sup> some lower courts have continued to use that of the defendant.<sup>22</sup> In a suit originating in a federal court, this test is clearly at variance with the *McNutt* rule that the plaintiff must prove *his* loss.<sup>23</sup> In a case of removal from a state court, on the other hand, the fact that a defendant, who invokes jurisdiction, must sustain the burden of proof would, at first blush, lead to the belief that the defendant's stake in the case should govern.<sup>24</sup> But such an interpretation expressly violates the terms of the removal statute,<sup>25</sup> which requires that suits not originally cognizable by a federal court should not gain entrance on removal. The interpretation, moreover, is not logically justified. It is true that the burden of proof is shifted to the defendant; but the substance of the proof required remains the same. In cases of removal, therefore, as well as in cases of original federal jurisdiction, the *McNutt* and *KVOS* cases, with their emphasis on proof of the exact loss to the plaintiff, indicate the incorrectness of the lower court decisions which adopt the defendant's viewpoint, and so help to eliminate one of the confusing elements in the problem of determining jurisdiction.<sup>26</sup>

The burden of proof requirement, however, raises a host of problems of proof in injunction suits. In the first place, there may be trouble in presenting factual data which will measure accurately the loss ensuing if the injunction prayed for is not granted. Suppose, for example, the injunction seeks to prevent interference with a particular business. If the interference is of such a nature as to require expenditure of more than \$3,000, no difficulty is presented.<sup>27</sup> But if the only damage is a decrease in business, a complainant

21. *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U. S. 121 (1915); *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322 (1907). See *Dobie, Jurisdictional Amount in the United States District Courts* (1925) 38 HARV. L. REV. 733, 742-744.

22. *Armstrong v. Townsend*, 8 F. Supp. 953 (S. D. Ind. 1934), and *Ross v. Southern Ry. Co.*, 20 F. Supp. 556 (W. D. S. C. 1937), are the most recent injunction suits to take the defendant's viewpoint.

23. In *Armstrong v. Townsend*, 8 F. Supp. 953 (S. D. Ind. 1934), the plaintiff sought to enjoin the lieutenant governor of Indiana from receiving a salary of \$6,000 a year. From the plaintiff's viewpoint it was admitted that there was no jurisdiction, but the court said the pecuniary loss to either party was the criterion.

24. In *Ross v. Southern Ry.*, 20 F. Supp. 556, 557 (W. D. S. C. 1937), the court declared: ". . . it is not the claim of the plaintiff, but the value of the property of which the defendant may be deprived . . . which is the test of the jurisdictional amount."

25. 36 STAT. 1094 (1911), 28 U. S. C. § 71 (1934).

26. See *Dobie, Jurisdictional Amount in the United States District Court* (1925) 38 HARV. L. REV. 733, 736, 752; 1 MOORE'S FEDERAL PRACTICE (1938) 511-512.

27. The cost of compliance may be used. *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U. S. 209 (1938); see *Fajardo Sugar Co. v. Holcomb*, 16 F. (2d) 92, 94 (C. C. A. 1st, 1926). Although the question has not been raised, it would appear that the cost of compliance would be net cost. A requirement to spend \$4,000 in advertising should not provide jurisdiction if it could be proved that profits would increase by \$4,000.

may be faced with a nice accounting problem. If decrease in sales is shown, a court may well require a precise showing of the relationship between interference and decreased sales, and an equally precise relationship between decreased sales and the loss which is sustained.<sup>28</sup> It may be exceedingly difficult to marshal statistics which will clearly show these relationships. If an injunction seeks to prevent outright prohibition of a business, a plaintiff has, in addition to the problem of presenting his proof, the question of what is to be the measure of the right to be free from prohibition. In the *Gibbs* case, which involved prohibition, the Court talked about whether the business was profitable.<sup>29</sup> It could hardly be maintained, however, that suppression of an unprofitable business involves no loss; the owner may not only have assets valuable in that business alone, he may also have an intangible expectation that he will profit in the future. In a case of absolute prohibition, the only exact measure of the value of the right to be free from the prohibition would appear to be the difference between the going-concern value of the business and the liquidation value.<sup>30</sup> A large-scale concern would, in all probability, have little difficulty showing that this differential exceeded \$3,000; but a small business might find it an insuperable task to reduce to monetary terms the value of continuing in business. If a plaintiff threatened with either regulation or prohibition had not yet gone into business, he would be faced with even greater difficulties of proof, because he would have no past experience on which to base estimated loss in the future.<sup>31</sup>

A somewhat similar problem confronts a non-profit organization which conducts a business. In the *KVOS* case the Supreme Court by way of dictum raised the question whether an organization like the Associated Press, which did not operate for profit but rather divided operating expense among its members, could lose anything at all.<sup>32</sup> If the Court literally meant that a non-profit association could not *per se* suffer a loss, it was ignoring the

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28. See *S. S. Kresge Co. v. Amsler*, 99 F. (2d) 503, 506 (C. C. A. 8th, 1938), *cert. denied*, 306 U. S. 641 (1939).

29. "While the net profits of the business in Florida is not shown, the business of the Society, as a whole, is profitable." *Gibbs v. Buck*, 307 U. S. 66, 74 (1939).

30. See 2 KESTER, *ADVANCED ACCOUNTING* (1933) 97, for a definition of going-concern value—the value "at which the various asset, liability, and proprietorship items should be carried when viewed from the standpoint of a concern which expects to continue operations . . ." The liquidation value would be, for the purposes of determining the value of the business, the cash remaining after sale of all assets and payment of all debts. *Id.* at 765.

31. In *Equality Cleaners & Laundry, Inc. v. Florida Dry Cleaning & Laundry Board*, 26 F. Supp. 705, 706 (S. D. Fla. 1939), the court observed that "since plaintiffs have never been actually in business . . . there is no yardstick by which to measure this loss."

32. ". . . the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The association cannot therefore lose the \$8,000 in question." *KVOS v. Associated Press*, 299 U. S. 269, 278 (1936). See discussion in note 15 *supra*.

modern concept of corporate activity and putting this type of corporate body at a disadvantage in protecting its interests.<sup>33</sup> In *Gibbs v. Buck* the Court, although sidestepping the issue of whether a non-profit organization could sue in its own behalf, impliedly decided that such an association could sustain a loss,<sup>34</sup> by holding that individual members of a non-profit organization could show their individual losses; and, inasmuch as they had a common and undivided interest, could also aggregate the losses.<sup>35</sup> But if the common and undivided interest which allows aggregation is the interest in conducting a business through an association, there seems no reason for not permitting the association itself to sue. In any event, the fact that the statement in the *KVOS* case was a dictum<sup>36</sup> and the fact that the *Gibbs* case clearly enables members of a non-profit organization to protect their interests in the association by aggregating individual losses, leave little reason to fear that this important form of corporate activity is to be denied access to federal courts.<sup>37</sup>

In addition to the problem of finding tangible evidence of injury, the burden of proof requirement creates another difficulty—that of ascertaining the period of time for which the prospective loss will be sustained. If it is clear that the injury will be permanent—for example, if a regulatory commission orders the institution of a permanent service to consumers,<sup>38</sup> or a nuisance threatens to cause a decrease in property values<sup>39</sup>—the immediate loss may be capitalized. On the other hand, where a regulatory statute is to expire

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33. See 1 MOORE'S FEDERAL PRACTICE (1938) 521, n. 45.

34. In considering whether a non-profit association can sustain a loss, it may be pertinent to note that not all such associations are non-profit in the same sense. Thus ASCAP, in the *Buck* case, actually collects profits for distribution to its members; while the Associated Press, in the *KVOS* case, collects fees from its members for services rendered. It seems, however, that an association equally suffers a loss whether profits decrease or expenses mount.

35. It is an accepted rule that aggregation is allowed when the interest is one which is common and undivided. *Beatty v. Kurtz*, 2 Pet. 566 (U. S. 1829); *Local No. 7 v. Bowen*, 278 Fed. 271 (S. D. Tex. 1922); see *Pinel v. Pinel*, 240 U. S. 594, 596 (1916). See Blume, *Jurisdictional Amount in Representative Suits* (1931) 15 MINN. L. REV. 501.

36. The importance of the dictum was lessened by the holding of the case that the Associated Press had not shown how its members would be injured. See the discussion in note 15 *supra*.

37. It should be noted that it is essential that the non-profit organization conduct a business or engage in some form of activity which is the subject of the suit. Common membership alone is not sufficient to justify aggregation, or to permit a suit by the association. For example, members of an association have not been allowed to aggregate taxes levied against them individually for membership in the association. *Rogers v. Hennepin County*, 239 U. S. 621 (1916).

38. *Western & A. R. R. v. Railroad Commission of Georgia*, 261 U. S. 264 (1923).

39. In the case of a nuisance an expert on real estate estimates the value of the land with and without the nuisance. This means that the witness has speculated over the period of time that the nuisance will last and reduced that speculation to an immediate capital value. See *Leighton v. Minneapolis*, 16 F. Supp. 101 (D. Minn. 1936), for an example of this method of determining the amount in controversy.

in a short time,<sup>40</sup> or where the injunction will run only until an action at law is prosecuted,<sup>41</sup> there is a clear indication of how long the injury will last. But in cases where neither permanence nor definite cessation is certain, the necessity for speculation over the duration of the injury leads to considerable uncertainty as to whether the court will assume jurisdiction.

Most of the problems connected with the burden of proof requirement are obviated in tax cases by the rule of the *Healy* case that only the amount of the tax demanded is in dispute.<sup>42</sup> There may, however, be instances where more than the tax is in controversy, in which case the burden of proof rule may have to be used to show whether or not the tax plus the additional factors involved make up the jurisdictional sum. For example, the Supreme Court found it necessary in the *Healy* case to distinguish an earlier decision which had held that where a tax was resisted on the ground that a state statute granted a perpetual exemption from taxation, the exemption, not the tax, was the matter in controversy.<sup>43</sup> If a similar statutory exemption case arose today, the plaintiff would have to prove the value of the exemption, and it is quite possible that any attempt at proof would be so speculative that only the amount of the tax could be used.<sup>44</sup> A somewhat similar problem arises when a tax demanded is an installment of a sinking fund tax or of a special assessment. In these cases the total tax which would have to be paid, not the installment, has been held to be the amount in controversy,<sup>45</sup> provided the validity of the bond issue or the assessment was attacked.<sup>46</sup> Even though

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40. *Kroger Grocery & Baking Co. v. Lutz*, 299 U. S. 300 (1936), is an example.

41. This method of determining the period of injury could be used, for example, in labor injunction cases as a means of setting the period for which loss could be estimated. The period of the unlawful injury would not exceed the time required to determine in a tort action the legality of the strike. But see note 56 *infra*, for a more restrictive rule which could be used in labor injunctions.

42. It is important to note that taxes against different individuals may not be aggregated. *Clark v. Paul Gray, Inc.*, 306 U. S. 583 (1939); *Rogers v. Hennepin County*, 239 U. S. 621 (1916). But it appears that if one individual really pays the taxes technically levied against his employees, the total tax may be used. *Pavel v. Richard*, 28 F. Supp. 992 (W. D. La. 1938), so holds on the authority of *Healy v. Ratta*, 292 U. S. 263 (1934). The *Healy* case, however, is not clear on this point, and it may well be that the Supreme Court will allow aggregation only when the tax is technically demanded of the employer.

43. *Berryman v. Whitman College*, 222 U. S. 334 (1912). The *Berryman* decision has been criticized. See Comment (1937) 25 CALIF. L. REV. 336, 344; but see 1 MOORE'S FEDERAL PRACTICE (1938) 534.

44. The Supreme Court has indicated that the exemption exception is not to be extended. In *Gypsy Oil Co. v. Oklahoma Tax Comm.*, 292 U. S. 611 (1934), the Court modified a lower court decree so as to dismiss on jurisdiction in a case where the plaintiff was claiming that a constitutional immunity was an exemption within the exception.

45. Sinking fund: *Helena v. Helena Waterworks Co.*, 173 Fed. 18 (C. C. A. 9th, 1909); *Colvin v. Jacksonville*, 158 U. S. 456 (1895) *semble*. Assessment: *Ogden City v. Armstrong*, 168 U. S. 224 (1897).

46. See *Vicksburg, S. & P. Ry. Co. v. Nattin*, 58 F. (2d) 979, 980 (C. C. A. 5th, 1932).

it is unlikely that collection of a sinking fund tax or assessment will be discontinued, it is possible, either under the *Healy* case with its argument that future exactions are speculative or under the burden of proof rule, to limit the amount in dispute to the immediate tax demanded.

There are, however, situations when it may not be possible to confine the jurisdictional sum to the amount of the tax. If the granting of a license or other privilege is conditioned on the payment of a tax plus the filing of comprehensive data or a substantial bond, it is clear that not the tax alone, but the tax plus the cost of complying with the statute, are disputed. The rule of the *Healy* case limits the tax to the amount immediately demanded; under the burden of proof rule it would be possible to limit compliance to the immediate cost on the ground that future costs are speculative. If a statute allows discretion in granting a license or privilege irrespective of payment of the tax, the application of the general tax rule depends upon whether or not the tax has been tendered at the time of suit. If there has been no tender, the controversy can be limited to the amount of the tax on the ground that the plaintiff cannot prove that the tax would be refused. But if the tax is tendered and refused, the controversy is no longer over the tax, but over the right to a license or privilege. Consequently, the loss attributable to a denial of that right would be the criterion.<sup>47</sup> A somewhat analogous situation is that of an attack on a statute by one who asserts that his business will be ruined because the state threatens to prohibit his dealing with a manufacturer who refuses to pay a privilege tax and to file required information.<sup>48</sup> In such a case, the loss which will follow from prohibition should be the amount in controversy<sup>49</sup> even though the immediate issue to be decided is the legality of the tax and the requirement to file data.

The question whether the matter in controversy is greater than the tax demanded may also arise where a plaintiff contends that a tax is so oppressive that payment will destroy his business. The *Healy* case is careful to say that the injurious effects of non-payment, such as revocation of a license or heavy penalties, are collateral to the issue in controversy because payment would avoid the effects. But if the burden of the tax will destroy the business as effectively as the consequences of non-payment, it is hardly possible to dismiss the value of the business as collateral to the controversy.<sup>50</sup> It is certain,

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47. In *McCormick & Co. v. Brown*, 58 F. (2d) 994, 998 (S. D. W. Va. 1931), *aff'd*, 286 U. S. 131 (1932), the court, in support of its conclusion that the jurisdictional amount in a license tax injunction suit was measured by the value of the business, argued that the right to do business was clearly in issue where the licensing authority was given "some discretion as to granting or refusing to grant the permit."

48. *Dugan v. Bridges*, 16 F. Supp. 694 (D. N. H. 1936).

49. *Ibid.*

50. *Cf. Miller v. Standard Nut Margarine Co.*, 284 U. S. 498 (1932), where the Court refused to follow the Congressional prohibition of an injunction against a federal tax, partly on the ground that payment of the tax would immediately destroy the plaintiff's business.

however, that if destruction of the business would ensue only after several years of payment of the tax, the amount in controversy would be only the tax demanded, because under the *Healy* rule future taxes are too speculative. But if a complainant could show that the single tax demanded would immediately destroy his business, he might be able to sustain jurisdiction even though the tax were less than \$3,000.

The strict limitation of amount in the tax cases to the amount of the tax demanded, except where more than the taxing power is clearly in dispute,<sup>51</sup> is a striking illustration of the renewed tendency of the courts to respect the Congressional policy of restricting judicial interference with government functions.<sup>52</sup> The strict standards imposed by the burden of proof rule in injunction suits show the same restrictive tendency, but are subject to a good deal more flexibility in application. The courts, by varying the amount of proof required, can, within the general restrictive policy, impose particularly strict requirements on types of injunction especially disfavored by Congressional policy. Thus injunctions seeking to interfere with state regulatory commissions,<sup>53</sup> injunctions interfering with executive action, state or federal,<sup>54</sup> and labor injunctions, disapproved by Congress in the Norris-LaGuardia Act,<sup>55</sup> can be dealt with particularly harshly.<sup>56</sup>

On the other hand, the flexibility of the standards allows the courts to be more liberal in sustaining jurisdiction where Congressional policy objections are absent. Thus private injunctions, which involve no political problems,<sup>57</sup> may be more freely admitted, despite the identity of the formal standard for determining the amount in controversy—the value of the right to be free from interference. It is true that in the *KVOS* case, which involved a private injunction, the Supreme Court imposed strict standards of proof. But in subsequent lower court cases, general allegations of the amount in controversy, plus a recitation of the value of the business or good will, have been

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51. There is a question, of course, whether the sinking fund tax rule, allowing more than the tax demanded, has been overruled by *Healy v. Ratta*, 292 U. S. 263 (1934). See note 45 *supra*, and accompanying text.

52. See the observations in *Matthews v. Rodgers*, 284 U. S. 521, 525 (1932), and in *Albertville Nat. Bank v. Marshall County*, 71 F. (2d) 848, 849 (C. C. A. 5th, 1934).

53. The Johnson Act, 48 STAT. 775, 28 U. S. C. § 41 (1) (1934), prohibiting an injunction except where there is no remedy in state courts.

54. Congress has acted against all public injunction suits by requiring a hearing before a three judge court. See note 4 *supra*.

55. 47 STAT. 70 (1932), 29 U. S. C. §§ 101-115 (1934).

56. See *S. S. Kresge Co. v. Amsler*, 99 F. (2d) 503 (C. C. A. 8th, 1938), *cert. denied*, 306 U. S. 641 (1939), a labor injunction case in which the court took great pains to interpret the burden of proof rule as strictly as possible. The fact that the period for which a strike will continue is uncertain allows a court to refuse to permit any computation of future losses on the grounds that continuation is too speculative.

57. The distinction between public and private injunctions has often been stressed. See 1 MOORE'S FEDERAL PRACTICE (1938) 536; Comment (1937) 25 CALIF. L. REV. 336, 347; Comment (1934) 48 HARV. L. REV. 95, 101.