

pleadings or discussed in either of the opinions delivered in the District Court. 1 F. Supp. 134. It was not mentioned in the Jurisdictional Statement filed under Rule 12 or in the briefs of the parties filed here. So far as appears, all the members of the lower court and both parties have assumed that § 3 is controlling.

STEWART DRY GOODS CO. v. LEWIS ET AL.¹

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 27. Argued October 21, 1932.—Decided October 24, 1932.

A bill in equity to restrain the collection of state taxes under a statute alleged to violate the Federal Constitution should not be dismissed on bill and answer upon the ground that the statute affords an adequate legal remedy by payment under protest and action to recover, when the allegations of the bill put in doubt whether, if that remedy were pursued and the claim allowed, satisfaction of it could be secured certainly and within a reasonable time out of the fund designated by statute as the source of such payments. P. 10. Reversed.

These were four suits by retail merchants seeking to enjoin collection of taxes on gross sales, measured by progressively increasing rates. All the bills invoked the due process and equal protection clauses of the Fourteenth Amendment, and in two of them it was claimed, also, that the tax operated as a direct burden on interstate commerce. By stipulation the cases were heard together and disposed of by one opinion of the three-judge District Court. The cases were treated as submitted upon bill and answer as well as upon plaintiffs' motion for prelim-

¹ Together with No. 28, *Levy et al. v. Lewis et al.*, and No. 29, *J. C. Penney Co. v. Same*, both from the Western District of Kentucky, and No. 30, *Kroger Grocery & Baking Co. v. Same*, from the Eastern District.

inary injunctions and defendants' motions to dismiss; and all suits were dismissed. The tenth section of the Kentucky statute, referred to in the court's opinion, is copied below.²

Mr. Robert S. Marx, with whom *Messrs. John C. Doolan, Frank E. Wood, Harry Kasfr*, and *James W. Stites* were on the brief, for appellants.

Mr. S. H. Brown, Assistant Attorney General of Kentucky, with whom *Messrs. Bailey P. Wootton*, Attorney General, *Francis M. Burke*, Assistant Attorney General, and *Leslie W. Morris* were on the brief, for appellees.

PER CURIAM.

After interlocutory injunction had been granted, these cases went respectively to final hearing upon motions to dismiss the bills of complaint, and these were dismissed solely upon the ground that plaintiffs had an adequate remedy at law. The Court is of the opinion that the decision cannot be sustained merely upon the face of the

²“§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.”

statute invoked (Kentucky Acts of 1930, c. 149, § 10) in view of the allegations of the bills of complaint that the only remedy provided is to obtain warrants upon the General Fund of the State in the hands of the State Treasurer to be paid if and when funds are available for the payment of such warrants in the usual and orderly course; that there are now outstanding many such warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer, which have been outstanding since June, 1927, and cannot be collected by the owners or holders for lack of funds in the Treasury; and that there were at the time of the beginning of these suits outstanding warrants aggregating \$9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer, presented for payment, but not paid for lack of funds. (See *State Budget Commn. v. Lebus*, 244 Ky. 700, 703, 714; 51 S. W. (2d) 965, as to warrants outstanding.) Defendants' answers denied the above-mentioned allegations, but it does not appear that there has been a hearing upon evidence of the issue tendered and no findings of fact upon the subject have been made by the courts below.

The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by § 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under § 10 they would be afforded a certain, reasonably prompt and efficacious remedy. *Davis v. Wakelee*, 156 U. S. 680, 688; *Atlantic Coast Line R. Co. v. Daughton*, 262 U. S. 413, 426.