

RECENT DEVELOPMENTS IN FEDERAL TAX INJUNCTIONS—THE RICE MILLERS CASES

The Supreme Court in the recent *Rice Millers Cases*¹ has brought to the fore an issue which for some years has been considered as fairly definitely settled, viz. the availability of an injunction to enjoin the collection or assessment of a federal tax.²

The suit was instigated by eight rice millers against the defendant, as Acting United States Collector of Internal Revenue, for injunctions to enjoin the assessment and collection of taxes levied pursuant to the Agricultural Adjustment Act.³ The Court of Appeals of the fifth Circuit having refused the relief,⁴ the Supreme Court granted certiorari.⁵ In a brief opinion, delivered by Mr. Justice Roberts, in which all the justices concurred, the injunction was granted. No cases are cited as authority for the court's decree: the court was satisfied to say that the exaction was not a true tax.⁶ To understand satisfactorily the full significance of this holding it is necessary to review briefly the legislative and judicial history of tax injunctions.

I.

Since 1868⁷ there has existed upon the statute books of the United States a statute which denied to taxpayers the right to injunctive relief to enjoin the assessment or collection of taxes. Many states have similar statutes.⁸ This statutory declaration is

¹ *Rickert Rice Mills, Inc. v. Fontenot*; *Dore v. same*; *United Rice Milling Products v. same*; *Baton Rouge Rice Mill, Inc. v. same*; *Simon v. same*; *Levy Rice Milling Co. v. same*; *Farmers Rice Milling, Inc. v. same*; and *Noble-Trotter Rice Milling Co. v. same*. (Jan. 13, 1936) 56 S. Ct. 374.

² For a good discussion of this problem see Miller, "Restraining the Collection of Federal Taxes." 71 U. of Pa. L. Rev. 318; (note) "Availability of Injunction to Restrain Assessment or Collection of a Federal Tax," 18 ST. L. LAW REV. 311; Cooley, *Taxation* (4th ed. 1924) chap. 27, part III.

³ (1933) 48 Stat. 31; amended 1935, 49 Stat. 750; 7 U. S. C. A. sec 601 et seq.

⁴ *Rickert Rice Milling Co. v. Fontenot* (1935) 79 F. (2d) 700.

⁵ (1935) 56 S. Ct. 249.

⁶ The A. A. A. law was declared unconstitutional a week prior in the case of *United States v. Butler et al* (1936) 56 S. Ct. 312. See for discussion note *New Limitations on the Powers of Congress—The AAA Decision*, *infra* p. 149.

⁷ (1867) 14 Stat. 475. In 1875 the word "any" was added before the word "tax." The present citation is R. S. sec. 3224; 26 U. S. C. A. sec. 1543. "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Simultaneously with this section was adopted one in which the procedure to be followed in the recovery of illegal taxes is prescribed. R. S. sec. 3226. For the latest revision see 26 U. S. C. A. sec. 1672-1673. See *infra* note 70.

⁸ Alabama, Arkansas, California, Colorado, Delaware, District of Columbia, Illinois, Massachusetts, Minnesota, Mississippi, New Jersey, New York, North Dakota, Oklahoma, Oregon, West Virginia. See cases cited in Cooley, *Taxation* (4th ed. 1924) vol. 4, p. 3293.

merely declaratory of the common law principle that courts should be reluctant to enjoin the collection of taxes, because to do so would be to interfere with the current governmental activities.⁹ The first expression of this principle by the Supreme Court was in the case of *Snyder v. Marks*.¹⁰ Some thirty years later¹¹ the Supreme Court took the opportunity of announcing that this rule was not absolute, but, on the contrary, inapplicable where circumstances exist which, in themselves, are proper subjects of equity jurisprudence. This dictum was repeated in *Bailey v. George*¹² six years later. Then came what appeared to be a milestone case. In *Hill v. Wallace*¹³ an injunction was granted against the collection of the taxes imposed upon the Chicago Board of Trade by virtue of the Future Trading Act. The imposition by the statute of heavy criminal penalties for nonpayment of the tax and the high degree of public interest in the plaintiff's business, were a combination of circumstances deemed worthy of equitable relief, and sufficient to justify the classification of this case within the "special and extraordinary" circumstance qualification enunciated in *Bailey v. George*.¹⁴ Immediately taxpayers began to contend that their cases were "extraordinary and exceptional" and the Supreme Court was called upon to indicate the possible limits of this exception. In *Dupont v. Graham*¹⁵ an injunction was refused although the petitioner had no adequate remedy at law. In this case it was established that by his own dilatory tactics the petitioner had allowed the time to elapse which barred his administrative appeal, and this fact the court held was sufficient reason for precluding equitable relief.¹⁶ More important, however, was the court's statement that in the *Wallace* case it was not the collection of a tax but of a penalty, not coming within the prohibition of the statute, which was enjoined.¹⁷ Then followed in 1932 the

⁹ *Bailey v. George* (1922) 259 U. S. 16; *Miller v. Standard Nut Margarine Co.* (1932) 284 U. S. 498; *Cheatham v. United States* (1875) 92 U. S. 85, 89; *Wells Fargo & Co. v. Dayton* (1876) 11 Nev. 161; *State R. R. Tax Cases* (1875) 92 U. S. 575, 614.

¹⁰ (1883) 109 U. S. 189. In this case an injunction was denied in a suit brought to restrain the collection of a tobacco tax.

¹¹ *Dodge v. Osborne* (1916) 240 U. S. 118.

¹² (1922) 259 U. S. 116.

¹³ (1922) 259 U. S. 44.

¹⁴ *Supra*, note 10.

¹⁵ (1924) 262 U. S. 234.

¹⁶ Whereas this case is an example of the maxim, "Equity aids the vigilant" the courts have also required "clean hands." *Singer Sewing Machine Co. v. Cooper* (1919) 261 Fed. 635; *Glos v. Stuckart* (1917) 277 Ill. 346, 115 N. E. 536.

¹⁷ *Lipke v. Lederer* (1922) 259 U. S. 557; *Regal Drug Co. v. Wardell* (1922) 260 U. S. 386.

"tribute to the tenacity of the American taxpayer"¹⁸ decision in *Miller v. Standard Nut Margarine Co.*¹⁹ In this case for the first time the Court enjoined the collection of a tax because of the "special and extraordinary" circumstances involved.^{19a}

In these injunction suits there has not been complete harmony among the justices. In the *Standard Nut* case Justices Stone and Brandeis dissented on the ground that a statute (R. S. sec. 3224) which is so explicit should not be judicially qualified, whatever the equities involved; And in *Lipke v. Lederer*²⁰ the dissenting opinion of Justices Brandeis and Pitney expressed the view that the mere designation of the levy as a "tax" should conclude against injunctive relief restraining its collection so long as there existed a means of recovering "taxes" illegally taxed. The dissenters relied generally upon the opinion of Justice Blatchford in *Snyder v. Marks*²¹ to the effect that the statutory expression, "any tax", means a purported tax as well as a true tax.

It is evident, therefore, that the statutory prohibition against restraining the collection of taxes is often rendered inapplicable to a particular case by extraordinary and exceptional circumstances. The cases granting relief have been limited to situations where the taxpayer has no adequate remedy at law to recover back the illegally assessed or collected taxes;²² where there is danger that a present adequate remedy will be removed;²³ and where actions to recover back the taxes paid would necessitate a multiplicity of suits.²⁴ Additional circumstances may greatly

¹⁸ Gorovitz, "Federal Tax Injunctions and the Standard Nut Cases" (1932) 10 Tax. Mag. 446.

¹⁹ (1932) 284 U. S. 498. In this case plaintiff's product had been declared unassessable, but the collector subsequently assessed it and this suit was brought to enjoin the collection. The company was financially unable to pay the tax, and the assessment would have created a cloud. It is to be noted that in *Dodge v. Osborne*, supra, the court refused to consider such circumstances as exceptional.

^{19a} See discussion by note 63, infra.

²⁰ (1922) 259 U. S. 557.

²¹ Supra, note 10.

²² *Pacific Express Co. v. Siebert* (1890) 44 Fed. 310; *Wallace v. Hines* (1920) 253 U. S. 66; *Wilson v. Ill. So. Ry.* (1923) 263 U. S. 574. So where the statutory remedy is doubtful the remedy by injunction is available. *Brinkerhoff Farris Trust & Savings Co. v. Hill* (1930) 281 U. S. 673; *Atlantic Coast Line R. Co. v. Doughton* (1923) 262 U. S. 413; *Fox v. Standard Oil Co.* (1935) 294 U. S. 87.

²³ *Gebelein, Inc. v. Milbourne* (1935) 12 F. Supp. 105. See discussion by note 46, infra.

²⁴ *Rowley v. Chicago, etc. Ry.* (1934) 68 F. (2d) 527; *Western Union Tel. Co. v. Trapp* (1911) 186 Fed. 114; *City v. Beckham* (1902) 118 Fed. 399; (note) 19 Minn. L. Rev. 133. Contra, *Rohlhemer v. Smietanka* (1917) 239 Fed. 408.

enhance the opportunities for injunctions, such as where the assessment would constitute a cloud upon title;²⁵ where the tax is a nullity and the property about to be seized is not liable for the assessment;²⁶ and where the collector is selling the property of a non-taxpayer to satisfy the demands made upon a taxpayer.²⁷ The statute does not, however, prevent the granting of an injunction to restrain the collection of a penalty²⁸ nor the maintaining by a stockholder of a suit to restrain a corporation from voluntarily paying an alleged unconstitutional tax.²⁹

In determining whether or not the taxpayer has an adequate legal remedy the courts, as a rule, apply the standard that to oust equitable relief the legal remedy must be plain and adequate; as practical and efficient to the ends of justice and its prompt administration as the equitable remedy.³⁰ Such a remedy, the courts have held, is provided where the aggrieved taxpayer is permitted to sue to recover the tax, allegedly illegal, and the validity of the assessment is tested in such an action.³¹ Where this remedy is present it is held immaterial that the tax may be unconstitutional, illegal, irregularly assessed, etc. There seems to be some ground for questioning the adequacy of the remedy

²⁵ *Tilton v. Oregon, etc. R.* (1874) 23 Fed. Cases 1289; *California Land Co. v. Gowen* (1892) 48 Fed. 770; *Shaffer v. Carter* (1920) 252 Fed. 37; *McPike v. Pen* (1872) 51 Mo. 63. All illegal tax assessments would not create a cloud on title. For example, where the tax has no semblance of legality, i. e., where the legality is patent no cloud is created. *Hannerwinkle v. Georgetown* (1872) 15 Wall. (U. S.) 547. Where, however, the illegality does not appear on the face of the record, but must be shown by evidence courts of equity will consider the assessment as a cloud and grant the appropriate relief. *Dows v. Chicago* (1870) 11 Wall (U. S.) 108.

²⁶ *Markle v. Kirkendall* (1920) 267 Fed. 498; *Thome v. Lynch* (1921) 269 Fed. 995; *Nichol v. Gaston* (1922) 281 Fed. 67; *Long v. Rasmussen* (1922) 281 Fed. 236; *Brabham v. Cooper* (1935) 9 F. Supp. 904.

²⁷ *Hubbard Inv. Co. v. Brast* (1932) 59 F. (2d) 709; *Livingston v. Becker* (1929) 40 F. (2d) 673.

²⁸ *Lipke v. Lederer* (1922) 259 U. S. 557; *Regal Drug Co. v. Wardell* (1922) 260 U. S. 386; *Green v. Page* (1935) 9 F. Supp. 844; *Kansch v. Moore* (1920) 268 Fed. 669. But query, whether one seeking to enjoin the collection of a penalty for nonpayment of a tax has, as is required of one seeking equitable relief, done equity, not having paid or tendered the taxes due. See *Kohlhamer v. Smietanka* (1917) 239 Fed. 408; *Bank v. Kimball* (1880) 103 U. S. 732; *Pelton v. Commercial, etc. Bank* (1879) 101 U. S. 143.

²⁹ *Pollock v. Farmers Loan & Trust Co.* (1895) 157 U. S. 429; *Brushaber v. Union Pac. R. R.* (1916) 240 U. S. 1.

³⁰ The test is expressed generally in *Boyce v. Grundy* (1830) 2 Pet. (U. S.) 210. As to its application in tax injunctions see *Wallace v. Hines* (1920) 253 U. S. 66; *Atchinson, etc. R. v. Sullivan* (1909) 173 Fed. 456.

³¹ *Emanus Silk Co. v. McCaughn* (1925) 6 F. (2d) 660; *Snyder v. Marks*, supra, note 10; *Singer Sewing Machine Co. v. Benedict* (1912) 229 U. S. 481; *Roebing v. Sturgess* (1923) 292 Fed. 1012; *Shelton v. Platt* (1891) 139 U. S. 591; *Richmond Hosiery Mills v. Camp* (1934) 74 F. (2d) 200; *Henrietta Mills v. Rutherford* (1930) 281 U. S. 121.

at law where it merely permits the taxpayer to bring an action to recover the tax back, for it is a well-known fact that the road to the recovery of taxes is a slow and difficult one to travel: clustered with technicalities and complications which often frustrate success by the taxpayer in cases of even unquestionable merit.³² It has been held too, where the taxpayer is permitted to maintain an action against the taxing official in trespass for the taking and selling of the property to satisfy the tax,³³ or where the statute makes provision for having an assessment set aside by appealing to a Board of Equalization,³⁴ that an adequate remedy, sufficient to preclude equitable interference, is provided. So too, where the collection of the disputed tax has been barred by the Statute of Limitations no restraining order will issue, for the remedy at law is plainly adequate.³⁵ There are, to be sure, scattered cases which hold contra to the above enumerations, but they may be classed as minority holdings without hesitation. One authority³⁶ has said, in reference to this field of jurisprudence that ". . . upon no branch of the law of injunctions has there been manifest greater apparent want of harmony in the decisions of the court than that pertaining to the exercise of the jurisdiction in restraint of taxation."

II.

Immediately after the National Industrial Recovery Act was declared unconstitutional³⁷ an avalanche of suits was filed by millers and processors who sought to restrain the collection of the taxes levied in pursuance of the Agricultural Adjustment Act.³⁸ The decisions rendered in these actions are irreconcilable. A remarkable confusion and diversity of judicial interpretation existed. The confusion has, however, favored the processors. In the following paragraphs the writer will attempt to summarize the judicial treatment afforded these units, which until the *Rice Millers Cases* amounted to approximately 1900 in number, in-

³² *Supra*, note 18.

³³ *Metcalf Co. v. Martin* (1907) 54 Fla. 531, 45 So. 463. But where he is judgment proof it is otherwise. *Richardson v. Scott* (1872) 47 Minn. 236; *Beatie v. Brown* (1872) 46 Ga. 458. But in *Noll v. Morgan* (1899) 82 Mo. App. 112 it was held that an injunction will lie, solvency or insolvency of the tax official being immaterial.

³⁴ *Douglas County v. Stone* (1903) 191 U. S. 557; *Camp v. Simpson* (1886) 118 Ill. 224, 8 N. E. 308; *White v. Raymond* (1900) 188 Ill. 298, 58 N. E. 976; *Cole v. Forto* (1913 Tex. Civ. App.) 155 S. W. 350.

³⁵ *Ellay v. Bowers* (1928) 25 F. (2d) 637, cert. denied 277 U. S. 602; *Converse Cooperage & Yocono Co. v. Reinecke* (1928) 26 F. (2d) 747; *Peerless Woolen Mills v. Rose* (1928) 24 F. (2d) 576; *Bashara v. Hopkins* (1924) 295 Fed. 319.

³⁶ High (4th ed.) *On Injunctions*, sec. 484.

³⁷ *A. L. A. Schechter Poultry Corp. v. U. S.* (1935) 55 S. Ct. 837.

³⁸ *Supra*, note 3.

volved a sum of nearly \$200,000,000, and resulted in the granting of 1250 injunctions.³⁸

The vanguard of the influx was the case of *Butler et al. v. United States*³⁹ in which the Circuit Court of Appeals of the First Circuit held the purported tax unconstitutional. Following this pronouncement other lower federal courts considered that this decision alone raised such doubts as to the validity of the tax (and, of course, of the act in general) as to warrant the issuance of temporary injunctions.⁴⁰ Those courts which enjoined the collection of the taxes based their decisions on the "extraordinary circumstance" condition. The courts were willing to accept the word of the processors that they were financially unable to pay the taxes. Financial ruin was the predominating contention.

In a minority of cases the injunctions were denied.⁴¹ In these cases the courts felt that sec. 21a,⁴² which is in substance a reenactment of R. S. 3224, denied relief by injunction. Those courts which denied relief disposed of the "financial ruin" contention by answering, logically, that it was no easier to pay the tax into the registry than it was to pay the collector.^{42a} In an apparent effort to avoid direct conflict with the section denying the injunctive relief, other processors and millers employed the declaratory judgment procedure to test the validity of the entire act.⁴³ This type of relief was soon withdrawn, however, by an amendment to the Act.⁴⁴ The removal of this remedy, of course, did not prevent injunctive relief.⁴⁵

During the summer of 1935, with the majority of cases going

³⁸ 3 U. S. Law Week 431.

³⁹ (1935) 78 F. (2d) 1.

⁴⁰ *Inland Milling Co. v. Huston* (1935) 11 F. Supp. 813; *Gebelin v. Milbourne* (1935) 12 F. Supp. 105.

⁴¹ *Cohen v. During* (1935) 11 F. Supp. 824; *Danahey Packing Co. v. McGowan* (1935) 11 F. Supp. 920; *Larabee Flour Mills v. Nee* (1935) 11 F. Supp. 132; *La Croix v. U. S.* (1935) 11 F. Supp. 817; *Fisher Flouring Mills v. Vierhus* (1935) 12 F. Supp. 597.

⁴² 7 U. S. C. A. sec. 623a "No suit . . . shall be brought or maintained in any court if such suit . . . is for the purpose or has the effect of preventing or restraining the assessment or collection of any tax imposed. . ."

^{42a} *Meridan Grain & Elevator Co. v. Fly* (1935) 12 F. Supp. 64. Generally when injunctions are granted it prevents further action, and as applied to cases of this type would seem to mean that the taxes no longer had to be paid. In the majority of these processing tax cases, however, the injunctions were granted conditionally upon the taxes being paid into court pending a final determination by the Supreme Court.

⁴³ 28 U. S. C. A. sec. 400. Section 274 D, Judicial Code. See *Vogt & Sons v. Rothensis* (1935) 11 F. Supp. 225; *Black v. Little* (1935) 8 F. Supp. 867; (note) *Declaratory Judgments with Recent Missouri Developments* 21 ST. L. LAW REV. 49, l. c. 67 et seq.

⁴⁴ Sec. 405 Revenue Act of 1935. Adopted Aug. 30, 1935. See *Meridan Grain & Elevator Co. v. Fly* (1935) 12 F. Supp. 64; *Henrietta Mills v.*

against the government, Congress began to consider other means of thwarting relief to processors and millers. One bill under consideration would have denied all rights of refund. The imminence of such legislation had alarming results. Courts at once began to grant injunctions because of the threatening danger to the only legal remedy.⁴⁶ Others took the view that anticipated legislation was of no concern for the court.⁴⁷ The amendment finally adopted, however, was not so drastic,⁴⁸ and denied recovery of the taxes only where the processor was unable to show that he had not passed the tax on to the vendee. Plaintiffs thereupon challenged this provision as a virtual withdrawal of the legal remedy because, it was claimed, it was impossible to determine what portion of the tax was passed on and what portion was not.⁴⁹ Some courts refused to follow this contention and took judicial notice of the fact that modern systems of accounting were such as to enable the requisite determination to be made.⁵⁰ The Supreme Court apparently has little faith in the accuracy of modern accounting, for in the *Rice Millers Cases* reference was made to the necessity of a "showing of facts not susceptible of proof."⁵¹

Upon the adoption of the amendments to the Act the Attorney General ordered the District Attorneys to file motions to have injunctions, where they had been granted, dissolved. This procedure was successful in only forty instances, for generally the courts did not consider the adoption of the amendments sufficient reason for dissolving the injunctions.⁵² In fact in the Ninth Circuit injunctions were refused before the amendments⁵³ but granted after.⁵⁴ Whereas a few courts refused injunctions after

Hoey (1935) 12 F. Supp. 61. See also sec. 21a (2) of A. A. A. act, as amended. 7 U. S. C. A. sec. 623a (2).

⁴⁵ *Inland Milling Co. v. Huston*, supra, note 40; *Gebelein v. Milbourne*, supra, note 40.

⁴⁶ *Washburn Crosby Co. v. Nee* (1935) 11 F. Supp. 822; *Neild Mfg. Corp. v. Hasset* (1935) 11 F. Supp. 642; *Gebelein v. Milbourne*, supra, note 40; *Gold Medal Foods, Inc. v. Landry* (1935) 11 F. Supp. 65.

⁴⁷ *Merkle, Inc. v. Rasquin* (1935) 12 F. Supp. 215; *La Croix v. U. S.* (1935) 11 F. Supp. 817; *Lake Erie Provisions Co. v. Moore* (1935) 11 F. Supp. 522.

⁴⁸ Sec. 21d; 7 U. S. C. A. 623d (1).

⁴⁹ In the hearing before the Supreme Court in the instant case Chief Justice Hughes ask the attorney for the processors, "So you contend that sec. 21d, as amended, is virtually a withdrawal of the government's consent to be sued?" These words epitomize the basis of the processors claim to a right to injunction to prevent the collection of the tax.

⁵⁰ *Rieder v. Rogan* (1935) 12 F. Supp. 307.

⁵¹ 56 S. Ct. 374 at 375.

⁵² 3 U. S. Law Week 45.

⁵³ *Fisher Flouring Mills Co. v. Vierhus* (1935) 78 F. (2d) 889.

⁵⁴ *Luer Packing Co. v. Rogan* (1935) 79 F. (2d) 1.

the adoption of the amendments,⁵⁵ the majority continued to grant them.⁵⁶ The line of cleavage seems to have remained largely unchanged.

On January 13, 1936 the Supreme Court decision was rendered which put a halt to the conflicting holdings of the lower courts. On the next day the Attorney General ordered the collection of the A.A.A. taxes stopped.⁵⁷ Processors lost no time in applying for releases of funds impounded by injunctions, which were as readily granted.⁵⁸ On January 22 the Federal Court in St. Louis released impounded taxes in a number of suits.⁵⁹ Attempted interventions by butchers, grocers, etc., who claimed to be entitled to the tax money, since they had paid it to the plaintiffs, have not been successful.⁶⁰ In defense of these rulings it is to be interposed that to permit interventions would mean ultimately to permit consumers to intervene—a practical impossibility.

There still remains for determination the question of the effect of the invalidity of the taxes on processors seeking refunds by the procedure provided by sec. 21d, as amended.⁶¹ The question was noted by the Supreme Court, but its decision made a determination unnecessary. In the refund suits that will undoubtedly follow in the wake of the *Rice Millers* decision, the court will, in all probability, be called upon to determine the validity of this procedure, as limiting the prior statutory right of a taxpayer to recover taxes illegally exacted regardless of their incidence.

III.

Since the case of *Snyder v. Marks*⁶² the doctrine has been consistently accepted that an injunction will not lie to enjoin the

⁵⁵ *Rieder v. Rogan*, supra, note 50; *Hentietta Mills v. Hooey* (1935) 12 F. Supp. 61; *Jones v. Viley* (1935) 12 F. Supp. 476; *Louisville Provisions Co. v. Glenn* (1935) 12 F. Supp. 545; *Frye & Co. v. Vierhus* (1935) 12 F. Supp. 597.

⁵⁶ *Grosvenor Dale Co. v. Bitgood* (1935) 12 F. Supp. 416; *Gold Medal Foods v. Landry* (1935) 12 F. Supp. 406; *Larabee Flour Mills v. Nee* (1935) 12 F. Supp. 395; *Danahy Packing v. McGowan* (1935) 12 F. Supp. 457; *Inland Milling Co. v. Huston* (1935) 12 F. Supp. 554; *Baltic Mills Co. v. Bitgood* (1935) 12 F. Supp. 132; *A. P. W. Paper Co. v. Riley* (1935) 12 F. Supp. 738; *Kingan & Co. v. Smith* (1935) 12 F. Supp. 328; *Shenandoah Milling Co. v. Early* (1935) 3 U. S. Law Week 119; *Regensburg & Sons v. Higgins* (C. C. A. 2) Oct. 29, 1935. 3 U. S. Law Week 197.

⁵⁷ Comptroller's Decision No. A-69783.

⁵⁸ *Perry Mill & Elevator Co. v. Jones* (D. C., W. D. Okl.) Jan. 25, 1936, 3 U. S. Law Week 455. *Larabee Flour Mills v. Nee* (C. C. A. 8) 3 U. S. Law Week 517.

⁵⁹ *Imbs Milling Co. v. Sheehan*, Suit no. 11591; *Saxony Mills v. Sheehan*, suit no. 11517.

⁶⁰ *Acme Evans & Co. v. Smith* (D. C., S. D. Ind., Jan. 22, 1936) 3 U. S. Law Week 496. See also *St. Louis Daily Record* for Jan. 23, 1936. Also *Washburn v. Nee* (O. C. W. O., Mo.) 3 U. S. Law Week 563.

⁶¹ See discussion by note 48.

⁶² *Supra*, note 10.

assessment of collection of a federal tax on the mere ground of unconstitutionality.⁶³ In the instant case, it is to be noted, the court completely ignored the necessity of equitable circumstances if such in fact were present.

The present situation must be juxtaposed with that which existed fourteen years ago. In 1922 the Supreme Court refused to grant an injunction restraining the collection of a tax⁶⁴ which on the same day was declared unconstitutional.⁶⁵ Despite the denial of the injunction no attempt was ever made to collect the tax, for the obvious reason that, it having been declared unconstitutional, the collector had no colorable right to demand payment. In the present instance the invalidity of the tax was declared a week prior.⁶⁶ It was easy for the Supreme Court to say then: the plaintiff has not paid, we have already said that it was not a true tax, therefore he cannot be made to pay. Although this seems to be the true distinction between the instant case and *Bailey v. George*⁶⁷ there is some room to justify the belief that since the opinion does not distinguish the two cases, that the rule of law enunciated by the latter case (as distinguished from its practical result) is now overruled by inference.⁶⁸

While the result of the decision has been severely criticized by some,⁶⁹ it remains for consideration whether in general the maxim of "Pay first, litigate later" has, any longer, any value. This requirement was admittedly harsh on the taxpayer and resulted in much harassment. Nor does it appear that the government gained by the procedure. It simply required double work: of collecting and then refunding, with the result the same as if the taxes had never been collected. The old rule was predicated upon the theory that courts should not interfere with the government's revenue which, presumably, was necessary for current

⁶³ *Shelton v. Platt* (1891) 139 U. S. 591; *Bailey v. George* (1922) 259 U. S. 16; *Richmond Hosiery Mills v. Camp* (1934) 74 F. (2d) 200.

⁶⁴ *Bailey v. George*, (1922) 259 U. S. 16.

⁶⁵ *Child Labor Cases* (1922) 259 U. S. 20.

⁶⁶ *Supra*, note 6.

⁶⁷ (1922) 259 U. S. 16.

⁶⁸ The government in their motion for a rehearing in the *Rice Millers Cases*, *supra*, note 1, stressed the point that the lower federal courts would probably interpret the decision to mean that *Bailey v. George* was overruled.

⁶⁹ Senator Norris referred to this decision as "the greatest gift since God made salvation free." Congressional Record vol. 30, p. 1925; Secretary of Agriculture Wallace denounced the result of the decision in a radio address on Jan. 28, 1936 (N. B. C.'s National Farm & Home Hour Program) as a "legalized steal." He added that it was inconsistent for the Supreme Court to say on one Monday that it is unconstitutional to collect from all groups (the consumers) to pay to one group (the farmers) and to say the next Monday that it is constitutional to repay the money taken from all groups (the consumers) and give it to one group (the processors).

governmental activities. Such a condition no longer exists. The government's immediate credit is unlimited: sounder than that of any business. The government can well afford to delay the collection of a tax until its constitutionality has been judicially declared.

One step in the direction of disregarding the restrictions surrounding tax refunds which have co-existed with the statutory denial of injunctive relief, and which are based upon similar considerations, is the abandonment of the requirement that a tax be paid under protest if the taxpayer is ever to recover it back. This change has been effected by an Act of Congress applicable to internal revenue taxes generally.⁷⁰

Time alone will reveal the effect and scope of the instant decision. It is noteworthy, however, that the meaning of an apparently succinct and unambiguous statutory expression is, after a judicial battle of 69 years, still in doubt.

WALTER FREEDMAN '37.

NEW LIMITATIONS ON THE POWERS OF CONGRESS THE A. A. A. DECISION

The United States Supreme Court in the recent case of *United States v. Butler*¹ held the Agricultural Adjustment Act² unconstitutional on the grounds that: a) it did not in reality provide for a tax but for an exaction which was regulatory and b) the expenditures in the act were made in such a way as to amount to regulation of matters in which the sole regulatory powers were reserved to the states.

The case arose in the District Court of the United States for the District of Massachusetts under the title of *Franklin Process Co. v. Hoosac Mills Corporation*.⁴ The receivers for the Hoosac Mills Corporation presented a report recommending that a claim of the United States for \$81,694.28 representing accrued processing taxes and flour taxes assessed pursuant to sections 9 and 16 of the Agricultural Adjustment Act³ be dismissed. The District Court refused to adopt the report⁴ and held that the claim should be allowed. On appeal to the United States Circuit Court for the

⁷⁰ 26 U. S. C. A. sec. 1672-1673. Subsection (3) "Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress." This provision was adopted June 6, 1932. 47 Stat. 286.

¹ (1936) 80 Law. Ed. Adv. Op. 287.

² May 12, 1933, Chap. 25, 48 Stat. at L. 31, U. S. C. A. Tit 7 sec. 601.

³ *Supra*, note 1.

⁴ (1934) 8 F. Supp. 552.