

# Lawyers Taxes and the Supreme Court

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## LAWYERS, TAXES AND THE SUPREME COURT

HERBERT R. BAER AND GEORGE T. WASHINGTON

*It is a spring day in 1940. At the Noontime Lunch Club, in a large American city, two members leave the dining room and settle down in the lounge for coffee and cigars. One is A. Claiborne Richey, a well-known tax attorney, and the other is John J. Mason, a younger man who has just left the United States District Attorney's staff to open his own office. After they have found chairs, they resume their conversation.\**

MASON: You were saying something at lunch about the new people on the Supreme Court. Just what do you have against them? I think they're doing a darned good job, myself.

RICHEY: For one thing, I don't think they've had enough experience in practice.

MASON: Do you really think it makes any difference?

RICHEY: I certainly do.

MASON: Well, I rather disagree with you. I think it's a good thing to get a new point of view on the Court. Even having a few doctors and engineers up there wouldn't do a bit of harm, it seems to me.

RICHEY: My boy, when you've been out for yourself for a few years, and get used to the fact that you're supporting the government—instead of the government supporting you—you'll understand the problem a little better. Your client comes to you. He pays you a fee, and you give him service. You tell him your very best belief as to what the courts will do. If the courts then go and do the opposite, you ask yourself whether you're to blame. But whether you're to blame or not, the client has been burned. Your advice didn't do him any good. It's not very nice for the lawyer.<sup>1</sup> And the present Supreme Court doesn't seem to think of these things.

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\*Any similarity between the names of the characters herein and those of any persons living or dead is purely a coincidence, as no reference to any specific person is intended. Needless to say, no conclusion should be drawn that there is any disagreement between the authors themselves on the subjects discussed, or that either is represented by any of the characters.

<sup>1</sup>Mr. Richey is perhaps reflecting the views of Honorable Frank J. Hogan, President of the American Bar Association (1938-39), who said in his presidential address delivered on July 10, 1939: "The plain result of all this is that no lawyer can safely advise his client what the law is; no business man, no farmer, can know whether or not he is breaking the law, for if he follows established principles he is likely to be doing exactly that. What was a constitutional principle yesterday may be a discarded doctrine tomorrow, and this, all this, in what has so often been proudly proclaimed to be a government of laws and not of men. 'Shifts in constitutional doctrines' is but a phrase which describes the abolition of *stare decisis*; the replacing of stability by instability, the substitution of uncertainty for certainty, and of plenary power for limitations upon power; the transfer from States and local communities to a centralized government at Washing-

MASON: We all know that the law changes. No lawyer can guarantee for his client what the courts are going to do. There has to be some room for progress.

RICHEY: I grant you that. But if I find a decision of the United States Supreme Court saying that white is white, and I tell my client to act accordingly, I get mighty sore when the Supreme Court turns around and says that white is black,<sup>2</sup> and my client is liable. It may be progress, but it looks like bad law to me.

MASON: Give me a concrete example. From where I sit, it looks as if the new Court has been handing down some pretty good law.

RICHEY: All right. I'm a tax man: I make my living telling people what the tax law is. I've got to know the law. I've got to set up trusts, advise about tax-free reorganizations, and so on. But nowadays I look up the cases—and I just can't rely on them. I don't know what to tell my clients.<sup>3</sup>

MASON: You mean you can't tell whether a certain deal is taxable or not?

RICHEY: That's the trouble. I'm pretty sure most of them are going to be taxable. A client tells me he's about to put through a deal—says he doesn't want to pay a tax. I look up the law, I find a Supreme Court case in 1930 telling me that if the deal is put through in a certain way it will be non-taxable. And then I have a terrible feeling that that case isn't going to be followed any more. I tell my client I can't be sure the deal is tax-free. Then he goes to some other tax man, or he drops the deal. I don't get much of a fee when that happens. It's terrible for business—my business and the client's business. And that's not the worst of it. I'm worried about some of the things I set up in the good old days. I used to feel like the Rock of

ton of 'most if not all activities of the Nation.' If these be consummations devoutly to be wished, then we have the fulfilment of the wish." Hogan, *Important Shifts in Constitutional Doctrines* (1939) 25 A. B. A. J. 629, 637. In this connection, see Willis, *Constitution Making by the Supreme Court since March 29, 1937* (1940) 15 IND. L. J. 179.

<sup>2</sup>"In this Court dissents have gradually become majority opinions . . ." said Mr. Justice Frankfurter in his concurring opinion in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 491, 59 Sup. Ct. 595, 120 A. L. R. 1466 (1939). This process has been referred to as the ". . . judicial miracle of the loaves and fishes, four becoming five," by Judge William Clark of the Third Circuit in *Rothensies v. Cassell*, 103 F. (2d) 834, 837 (1939).

<sup>3</sup>Mr. Richey would undoubtedly obtain the friendly ear of Mr. Justice Roberts who said in his dissent in *Higgins v. Smith*, 308 U. S. 473, 487, 60 Sup. Ct. 355 (1940): "I am of the opinion that the courts should not disappoint the well-founded expectation of citizens that, until Congress speaks to the contrary, they may, with confidence, rely upon the uniform judicial interpretation of a statute. The action taken in this case seems to me to make it impossible for a citizen safely to conduct his affairs in reliance upon any settled body of court decisions." Cf. CARDOZO, *THE GROWTH OF THE LAW* (1924) 122: "The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains."

Gibraltar—I'd look up the law, and find a set-up that was tax-free. Then I'd put it through, and everybody was happy. But now they're coming along and taxing the very deals that the United States Supreme Court once said were not taxable—getting the very people that paid me good money for sound advice!

MASON: I'm afraid I don't know much tax law. You mean that a trust set up in 1930, and tax-free in 1930, is being taxed in 1940?

RICHEY: Let me explain. Take a simple case. It used to be the law that a man could set up a trust for his children or for his wife, transferring all his interest in the property to the trustee, but creating a possibility of reverter, so that he could get the property back in case they died before he did. In the old days before the Court Fight that was considered a complete gift at the time it was made, and if he died before his wife or children the property was not subject to a tax.<sup>4</sup>

MASON: You're speaking of the federal estate tax, I suppose?

RICHEY: Yes. The Court was saying that the death of the old man passed nothing to the children, and hence there was no transfer that could be taxed. His death simply extinguished a possibility of reverter. But I should explain that there *would* be a tax if the father gave the property to the children for their life, retaining a remainder interest in case the children predeceased him, but on the understanding that if he died before they did, it was all theirs. Of course, I never advised keeping a remainder interest.<sup>5</sup>

MASON: I'm a bit rusty on my property law, but if I understood you, a man could keep a possibility of reverter and avoid the tax, whereas if he kept a remainder there would be a tax.

RICHEY: Correct.

MASON: Is there really any difference in the two situations? Why should one man's estate be taxed and not the other's? Both of them are doing exactly the same thing.<sup>6</sup>

<sup>4</sup>Richey undoubtedly has reference to *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 56 Sup. Ct. 74, 100 A. L. R. 1239 (1935), noted with disapproval in (1936) 49 HARV. L. REV. 661, and *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 Sup. Ct. 78 (1935). See on these cases Lowndes, *A Day in the Supreme Court with the Federal Estate Tax* (1936) 22 VA. L. REV. 261, 279 *et seq.*; and Comment (1936) 45 YALE L. J. 684, 690. For articles on this subject, see Leaphart, *The Use of the Trust to Escape the Imposition of Federal Income and Estate Taxes* (1930) 15 CORNELL L. Q. 587; Payne, *Inter Vivos Transfers and the Federal Estate Tax* (1933) 81 U. OF PA. L. REV. 937; Rottschaefel, *Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930) 14 MINN. L. REV. 453. See also note (1930) 5 ST. JOHN'S L. REV. 147.

<sup>5</sup>Apparently, Richey at all times avoided creating a vested remainder in the settlor and thus his clients found themselves beyond the reach of *Klein v. United States*, 283 U. S. 231, 51 Sup. Ct. 398 (1931). For a discussion of this case, see Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 COL. L. REV. 1332, 1335 *et seq.* See note (1934) 43 YALE L. J. 491.

<sup>6</sup>A similar view is expressed by Mr. Justice Stone in his dissent in *Helvering v.*

RICHEY: Not at all. The man who didn't get good tax advice kept a remainder and got nicked—my clients got good advice and kept a possibility of reverter, and weren't taxed. But the Supreme Court has changed its mind. Now they say that the tax must be paid in both cases!<sup>7</sup>

MASON: Well, I can see that if your clients have to pay a tax, when you've told them they wouldn't have to, they're going to be pretty sore. But they can't blame you, can they?

RICHEY: Maybe not, but what's to bring them back to me for more advice if my first advice doesn't hold up? I relied on the Supreme Court, my clients relied, and what good did it do? It's downright discouraging to people who look up the law and try to act accordingly. Justice Roberts dissented—more power to him—he had some pretty sound things to say on the subject.<sup>8</sup>

MASON: So you think the Supreme Court used to be right and now is wrong?

RICHEY: Let's not get into the question of whether the old decision was "right" or "wrong." It's enough to say that it was the law, that my clients

St. Louis Union Trust Co., *supra* note 4, where he said (296 U. S. at 47): "Instead, by using a different form of words, he [the settlor] attained the same end and has escaped the tax. Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form."

<sup>7</sup>Richey unquestionably has in mind *Helvering v. Hallock*, 60 Sup. Ct. 444, 84 L. ed. \*382 (1940), noted (1940) 53 HARV. L. REV. 884, (1940) 34 ILL. L. REV. 867, (1940) 26 VA. L. REV. 830, and followed in *Bradlee v. White*, 31 F. Supp. 569 (D. Mass. 1940). The decision covers three cases, *Hallock*, *Rothenbies*, and *Bryant*, each involving a different type of agreement, with variations in the language used to preserve an interest for the settlor in case the beneficiary predeceased him. Mr. Justice Frankfurter, speaking for the majority, discarded the suggestion that the Court study the technical form of the grant in each instance and endeavor to catalogue each grant as coming under either the *Klein* or *St. Louis Union Trust Co.* doctrine. To do so, he said, would be to "multiply gossamer distinctions." (60 Sup. Ct. at 451). He twists the dagger by questioning the accuracy of Mr. Justice Sutherland's use of the term "possibility of reverter" in *Helvering v. St. Louis Union Trust Co.*, *supra* note 4.

<sup>8</sup>"If there ever was an instance in which the doctrine of *stare decisis* should govern, this is it. Aside from the obvious hardship involved in treating the taxpayers in the present cases differently from many others whose cases have been decided or closed in accordance with the settled rule, there are the weightier considerations that the judgments now rendered disappoint the just expectations of those who have acted in reliance upon the uniform construction of the statute by this and all other federal tribunals; and that, to upset these precedents now, must necessarily shake the confidence of the bar and the public in the stability of the rulings of the courts and make it impossible for inferior tribunals to adjudicate controversies in reliance on the decisions of this court." Mr. Justice Roberts, dissenting in *Helvering v. Hallock*, *supra* note 7, 60 Sup. Ct. at 456.

See also the remarks of Mr. Hugh M. Bennett before the Cincinnati Conference on the Status of the Rule of *Stare Decisis*: "These cases [recent tax decisions of the Supreme Court] indicate more than a mere trend, in fact, they indicate to me a tornado in progress, wiping out what most of us thought were stout and sturdy foundations upon which our legal precepts have been built." (1940) 14 U. OF CIN. L. REV. at 232.

relied on it, and that it looks mighty like legislation when the Court changes the law overnight and makes people pay a tax who weren't supposed to!

MASON: Legislation? One swallow doesn't make a summer.

RICHEY: Well, if you want more examples, there are plenty of them. Take the income tax situation, and look at the *Higgins* case,<sup>9</sup> decided a little while ago. That case shows that it's almost impossible today for decent law-abiding people to conduct their affairs with safety. You ought to read Roberts' dissent!<sup>10</sup>

MASON: What about that case? I don't think I've heard of it.

RICHEY: First of all, I ought to explain that the rule used to be, before 1934, that a man could set up a corporation, keeping all the stock himself, and if he had any securities that had gone down in value from original cost, he could sell them to the corporation and take a loss.<sup>11</sup>

MASON: Wasn't that the same as selling to himself? He could still control the securities through the corporation, couldn't he?<sup>12</sup>

RICHEY: Yes, I suppose that it wasn't a very sound rule. But that was the settled law until Congress passed a statute preventing you from taking the loss if you owned more than fifty per cent of the company's stock.<sup>13</sup>

<sup>9</sup>*Higgins v. Smith*, 308 U. S. 473, 60 Sup. Ct. 355 (1940), *rev'g* *Smith v. Higgins*, 102 F. (2d) 456 (C. C. A. 2d 1939).

<sup>10</sup>For the language of Mr. Justice Roberts' dissent, see *supra* note 3.

<sup>11</sup>See *Jones v. Helvering*, 71 F. (2d) 214, 63 App. D. C. 204 (1934), *rev'g* 18 B. T. A. 1225 (1930), *cert. denied*, 293 U. S. 583, 55 Sup. Ct. 97 (1934). In 1921 the four Jones brothers had made a *bona fide* sale of bonds to a closed corporation of which they were the sole stockholders. The sale was made at a loss, which was taken as a deduction. The Court of Appeals, in allowing the deduction, cited in support of its action *Klein v. Board of Tax Supervisors*, 282 U. S. 19, 51 Sup. Ct. 15, 73 A. L. R. 679 (1930); *Dalton v. Bowers*, 287 U. S. 404, 53 Sup. Ct. 205 (1932); and *Burnet v. Commonwealth Improvement Co.*, 287 U. S. 415, 53 Sup. Ct. 198 (1932). The *Burnet* decision was handed down December 12, 1932, roughly two weeks before the sale was made in the *Higgins* case, and declared that a gain resulting from a transfer by a corporation to its sole stockholder was taxable as income of the corporation even though for all practical purposes the stockholder and the corporation were one.

See also *Commissioner of Int. Revenue v. Eldridge*, 79 F. (2d) 629, 102 A. L. R. 500 (C. C. A. 9th 1934), *aff'g* 30 B. T. A. 1322; *Commissioner of Int. Revenue v. McCreery*, 83 F. (2d) 817 (C. C. A. 9th 1936); *Foster v. Commissioner of Int. Revenue*, 96 F. (2d) 130 (C. C. A. 2d 1938).

It is interesting to note that when applying for the writ in the *Jones* case the Government suggested (Brief, p. 8) that *Helvering v. Gregory*, then reported only in 69 F. (2d) 809 (C. C. A. 2d 1935), but later affirmed in 293 U. S. 465, 55 Sup. Ct. 266, 97 A. L. R. 1355 (1935), afforded a basis for not allowing the deduction. The Supreme Court then refused to accept the Government's argument, but in the *Higgins* case the Court found in the *Gregory* case a satisfactory basis for not allowing the deduction.

<sup>12</sup>This was recognized by the Court of Appeals in the *Jones* case, *supra* note 11, but it said [71 F. (2d) at 217]: ". . . it is for the legislature and not the courts to find a way of taxing such a transaction."

<sup>13</sup>Two weeks after the decision was handed down by the Court of Appeals in *Jones v. Helvering*, *supra* note 11, Congress did on May 10, 1934, amend the Revenue Act and specifically forbade deductions for losses arising from sales to corporations in which the

That statute was in 1934. And so it was perfectly clear—at least to me—that as to cases arising before 1934 the old law had to govern. But in the *Higgins* case the Supreme Court says the old law was wrong—they aren't going to allow the deduction even as to sales made before 1934!<sup>14</sup>

MASON: Well, don't you honestly—yourself—think that the old rule wasn't a very good one?

RICHEY: That isn't the point! It was the law, and people relied on it. Why should their reasonable expectations be thwarted? As a matter of fact, the Supreme Court itself followed the old rule just a few weeks before the *Higgins* case! That was in the *Johnson* case, decided last December.<sup>15</sup>

MASON: You don't criticize the *Johnson* case, do you?

RICHEY: What I do criticize is one law for *Johnson* and another law for *Higgins*—and no law at all on which my clients can rely. Take another situation—taxation by more than one state. I always believed that the intangibles in a man's estate could be taxed only by one state, the state of his domicile.<sup>16</sup> There'd be an exception, perhaps, where the intangibles had

taxpayer owned more than a fifty per cent interest. Revenue Act of 1934, 48 STAT., c. 277, § 24 (a-6), p. 691.

It must be pointed out that *Jones v. Helvering* is not entitled to the weight of a direct decision of the Supreme Court, since the Court has repeatedly stated that the mere denial of *certiorari* does not necessarily mean that it agrees with the opinion below. See Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—A Criticism and a Proposal* (1938) 38 COL. L. REV. 1393, 1409.

<sup>14</sup>In the *Higgins* case, *supra* note 3, the facts were as follows: In 1926 Smith organized the Innisfail corporation, of which he was the sole stockholder. On December 29, 1932, he made a *bona fide* sale of securities to Innisfail at a price less than their cost to him. He declared the loss so sustained in his income tax return for that year. The Commissioner of Internal Revenue did not allow the deduction, whereupon Smith paid the tax and later brought this suit for a refund. The Circuit Court of Appeals reversed the Commissioner and in turn was reversed by the Supreme Court on January 8, 1940.

<sup>15</sup>*Helvering v. Johnson*, 308 U. S. 523, 60 Sup. Ct. 293 (1939), *aff'g* 104 F. (2d) 140 (C. C. A. 8th 1939). Johnson was the owner of certain securities, the market value of which had fallen. He wished to take a loss for income tax purposes. His attorneys—evidently relying on *Burnet v. Commonwealth Improvement Co.*, *supra* note 11, decided December 12, 1932—formed a corporation, of which Johnson and his wife became the sole stockholders. On December 28, 1932, Johnson made a sale of securities to this corporation and declared a loss thereon. The situation was practically identical with that in *Higgins v. Smith*, *supra* note 3. In fact, the sale by Smith had been made but one day later, December 29, 1932. The Circuit Court of Appeals held the loss declared by Johnson to be deductible. The Supreme Court allowed *certiorari*, 308 U. S. 536, 60 Sup. Ct. 114 (1939), and on December 11, 1939 affirmed the decision below by an equally divided court without rendering an opinion.

<sup>16</sup>Richey apparently has in mind the rule enunciated in *The Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 212, 50 Sup. Ct. 98, 65 A. L. R. 1000 (1930), in which Mr. Justice McReynolds, speaking for the majority, said: "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." To the

a business situs in some other state.<sup>17</sup> But in the usual situation only one state could tax—and the Supreme Court said that the Fourteenth Amendment was the reason why.<sup>18</sup> Nowadays, though, I don't know what to think. The Supreme Court said last year that the Fourteenth Amendment *didn't* prevent double taxation of intangibles.<sup>19</sup> I'm awfully afraid that any day now the

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same effect are *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436, 72 A. L. R. 1303 (1930), and *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 Sup. Ct. 174, 77 A. L. R. 1401 (1932). The *Farmers Loan* case overruled *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277 (1903).

<sup>17</sup>See *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. 110 (1899); *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585 (1900); *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 56 Sup. Ct. 773 (1936); and *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 57 Sup. Ct. 677 (1937), in which the Court determined that a Delaware corporation had so conducted its business in Minnesota as to establish a "commercial domicile" in that state and to give a business situs there for the purpose of taxation to certain of its intangibles. For a collection of state and federal authorities on the business situs doctrine, see annotation (1932) 76 A. L. R. 806 *et seq.* See also Powell, *The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89; Ramsey, *A New Theory of Corporate Domicile for Tax Purposes* (1937) 23 A. B. A. J. 543.

<sup>18</sup>Mr. Justice Sutherland, speaking for the majority in *First National Bank of Boston v. Maine*, *supra* note 16, said (284 U. S. at 327): "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." On the subject generally, see Brown, *Multiple Taxation by the States—What Is Left of It?* (1935) 48 HARV. L. REV. 407; Lowndes, *The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock* (1932) 45 HARV. L. REV. 777; Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation* (1934) 47 HARV. L. REV. 628; Lowndes, *Bases of Jurisdiction in State Taxation of Inheritances and Property* (1931) 29 MICH. L. REV. 850, 871 *et seq.*; Merrill, *Jurisdiction to Tax—Another Word* (1935) 44 YALE L. J. 582; Ohlander, *Situs of Intangibles for Inheritance Tax Purposes* (1932) 10 TAX MAG. 41; Orr, *Reciprocal Exemptions from Inheritance Taxation* (1938) 18 B. U. L. REV. 39; Rottschaefter, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305.

<sup>19</sup>Reference is undoubtedly being made to the statement of Mr. Justice Stone, who rendered the majority opinion in *Curry v. McCannless*, 307 U. S. 357, 372, 59 Sup. Ct. 900, 123 A. L. R. 162 (1939): "We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. *Bullen v. Wisconsin*, [240 U. S. 625, 36 Sup. Ct. 473 (1916)]." In the *Curry* case, the decedent, domiciled in Tennessee, had transferred during her life certain intangibles in trust to an Alabama trustee. She reserved to herself the income for life and a power to dispose of the remainder by her will which she duly exercised. Both states sought to tax the transfer, each assuming that under the Fourteenth Amendment only one of them could do so. A proceeding was brought in Tennessee under that state's declaratory judgment act, in which proceeding Alabama voluntarily appeared. The Tennessee Supreme Court ruled that Tennessee alone could tax the transfer and on *certiorari* the United States Supreme Court reversed and ruled that both states could tax. The *Curry* case is noted in (1940) 53 HARV. L. REV. 1013, (1940) 25 IOWA L. REV. 165, and (1939) 1 WASH. AND LEE L. REV. 75. For articles on the case, see Cherry, *The Taxation of Trust Intangibles* (1939) 27 CALIF. L. REV. 674, and Traynor, *State Taxation and the Supreme Court, 1938 Term* (1939) 28 CALIF. L. REV. 1. See also the companion case of *Graves v. Elliott*, 307 U. S. 383, 59 Sup. Ct. 913 (1939), in which a decedent while domiciled in Colorado established

door will be opened wide and the states will rush in on the big estates like a lot of buzzards. It makes me shudder to think about it. Here I've advised people that their stocks and bonds can't be taxed by more than one state—I've let them live in California and put their securities in the hands of New York trustees. And now, just because they've relied on what the Supreme Court once said the law was, they're probably going to have their estates eaten up by the tax collectors.<sup>20</sup> Now, I ask you, is that fair?

MASON: Frankly, it seems to me that it *is* perfectly fair. If a man wants the sunshine of California for himself and the bank vaults of New York for his securities, it seems to me that he owes something to each state.<sup>21</sup>

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a trust of intangibles with a Colorado trustee, retaining a power of revocation. The paper evidences of the intangibles were kept in Colorado. The decedent, however, after creating the trust became and remained domiciled in New York where she died. Both states taxed the transfer. The New York Court of Appeals, in *In re Brown's Estate*, 274 N. Y. 10, 8 N. E. (2d) 42 (1937), declared the imposition of the tax by New York infringed the due process clause but on *certiorari* the Supreme Court reversed and upheld the tax for the reasons stated in the *Curry* case.

<sup>20</sup>It is still an open question whether the *Curry* case, *supra* note 19, overrules *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567, 47 Sup. Ct. 202 (1926). The majority referred to the *Wachovia* case with a "Cf." and stressed the fact that in the *Curry* case it was immaterial whether the appointee of the power was deemed to derive his title from the donor or the donee since in either event title under the will was derived from the decedent who was domiciled in Tennessee. In the *Wachovia* case the donee of the power exercised it in North Carolina where she was domiciled. It was held that the property passed under the laws of Massachusetts, where the donor had created the power, and a tax by North Carolina based upon the value of the trust intangibles held by the Massachusetts trustee was declared invalid.

On the basis of this distinction between the facts of the two cases, Surrogate Foley in *In re Thayer's Estate*, 15 N. Y. S. (2d) 208 (Surr. Ct., N. Y. County, 1939) held the *Wachovia* case had not been overruled, and followed the rule stated therein. On the other hand, the conclusion of the notewriter in (1940) 53 HARV. L. REV. 1013, cited *supra* note 19, that the *Wachovia* case is no longer law, appears to be a good practical forecast of what the present membership of the Supreme Court would do if confronted with the precise question for decision. This conclusion is reinforced by a review of the history of multiple taxation of intangibles by states, which falls into the following stages: (1) The preponderance of the Holmesian view in *Blackstone v. Miller*, *supra* note 16, and *Bullen v. Wisconsin*, 240 U. S. 625, 36 Sup. Ct. 473 (1916), upholding multiple taxation; (2) the rise of the conservative view in the *Wachovia* case, *supra*, and *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 50 Sup. Ct. 59, 67 A. L. R. 386 (1929), with Mr. Justice Holmes dissenting; (3) the definite triumph of the conservative attitude in *The Farmers Loan & Trust Co. v. Minnesota*, *supra* note 16; *Baldwin v. Missouri*, *supra* note 16; and *First National Bank of Boston v. Maine*, *supra* note 16, with Mr. Justice Stone, Mr. Justice Holmes, and Mr. Justice Brandeis dissenting; and lastly, (4) the revival of the Holmesian view through the majority opinions of Mr. Justice Stone in *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 57 Sup. Ct. 466, 108 A. L. R. 721 (1937), Mr. Justice Butler and Mr. Justice McReynolds dissenting, and in the *Curry* and *Graves* cases, *supra* note 19, Mr. Chief Justice Hughes, Mr. Justice Butler, Mr. Justice McReynolds, and Mr. Justice Roberts dissenting.

<sup>21</sup>See the majority opinion in *Curry v. McCaless*, *supra* note 19, where Mr. Justice Stone said (307 U. S. at 372): "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both."

The fact that you or somebody else told him that he could have those benefits without paying for them doesn't seem very vital to me. It's like saying that I don't have to pay my grocer's bill because my lawyer told me in advance I wouldn't have to pay.

RICHEY: I'm not telling him he doesn't have to pay his grocer's bill. It's the Supreme Court that told him he wouldn't have to pay a tax.

MASON: Well, if the Supreme Court told him that—and if it was wrong—why can't it change its mind? Won't do him—or his estate—any harm to pay taxes now and then.

RICHEY: Mason, to put it frankly, I think there's something *immoral* in that attitude. Here you have the government encouraging a certain kind of conduct—telling people they won't be taxed—and then—bang!—coming down and taxing them. It leads to disrespect for law. It makes people think that their government is dishonest. Don't forget that property rights have been changed in reliance!

MASON: Would you say that there is anything immoral about taxing people who didn't get tax advice?

RICHEY: No. I hold no brief for them. If they go along regardless of the law—not caring enough about it to get advice—let the government make them pay.

MASON: Well, I don't want to hurt your feelings, but I've always thought there was something a little bit immoral about a man who has money trying to get out of paying the same taxes as other people, and going to a lawyer to find out how to be a tax dodger.

RICHEY: Mason, you're being absurd. You know as well as I do that business can't go on without lawyers to say what's right and what's wrong. A man comes to me and asks, "What is the law?" I tell him as best as I can, and then he goes ahead on that basis. If Congress says that people in one group are going to be taxed, and people in another group aren't going to be taxed, that's for Congress to decide. And if I tell a man about those two groups, and he chooses to go into the group that isn't taxed, is there anything wrong with that?<sup>22</sup> Congress has given him that choice—not me. And, what's more, I know that I'm performing a real public service. In case after case, business deals are about to be dropped—completely aban-

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<sup>22</sup>Richey might well have referred to the language of Mr. Justice Holmes in *Bullen v. Wisconsin*, *supra* note 20 (240 U. S. at 630): "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits." See also Judge Matthews in *Commissioner of Int. Revenue v. Eldridge*, *supra* note 11 (79 F. (2d) at 631): "A taxpayer may resort to any legal method available to him to diminish the amount of his tax liability." Cf. PAUL, *STUDIES IN FEDERAL TAXATION* (1937) 12 *et seq.*

doned—because the burden of taxes would be so great. Then I point out some other way the deal can be made—some way that Congress and the courts say is not taxable—and then they go ahead. Business is helped, workers are hired, and everybody is happy.

MASON: Well, maybe so. But suppose people do go ahead on your advice—let's assume that a Supreme Court case in 1930 said there wouldn't be a tax—and they carry out the deal. Then in 1940 the Supreme Court changes its mind and says that deals like that are taxable. They pay the tax. Doesn't that just put them on a level with all the other people who were paying taxes anyhow? All they've really lost is the amount of your fee.

RICHEY: Yes, but can't you see, they've *relied*. Take the case of all the school-teachers paid by the states. They thought they didn't have to pay any federal income tax. The court said they didn't have to,<sup>23</sup> so they went ahead and spent their money for other things. Then they wake up and find the Supreme Court saying they have to pay a federal income tax<sup>24</sup> and under the law they're obliged to pay taxes for years back. Why, it would put half of them in the poorhouse! Congress had to step up and save the situation—pass a law to keep them from having to pay back taxes.<sup>25</sup>

MASON: Do you think Congress would have done that if yacht-owners had been involved, instead of school-teachers and the like?

RICHEY: Of course they wouldn't—and to my mind that makes it all the worse. Why one law for yacht-owners and another for school-teachers?

MASON: I'm afraid I don't see it in quite the same light. It's good practical politics for Congress to let the school-teachers off—as to the past anyhow—but I don't see that that casts any reflection on the Supreme Court. We all sympathize with the school-teachers, but I don't sympathize with yacht-owners, and I don't think Congress would, either.

RICHEY: Forget about your yacht-owners, and think about good, honest business men who have gone into deals that they wouldn't have bothered with otherwise. They trusted the Supreme Court—and the Supreme Court has let them down.

MASON: But suppose the Supreme Court—or, rather, the new judges—honestly think that the old rules are bad and should be changed. Are you

<sup>23</sup>Collector v. Day, 11 Wall. 113, 20 L. ed. 122 (U. S. 1871); Brush v. Commissioner of Int. Revenue, 300 U. S. 352, 57 Sup. Ct. 495, 108 A. L. R. 1428 (March 15, 1937)—to cite but two of the many decisions on the general subject.

<sup>24</sup>See Helvering v. Gerhardt, 304 U. S. 405, 58 Sup. Ct. 969 (1938), upholding federal income tax on the salary of an employee of the Port of New York Authority; Graves v. New York *ex rel.* O'Keefe, *supra* note 2, upholding state income tax on the salary of an employee of Home Owners' Loan Corporation.

<sup>25</sup>Public Salary Tax Act of 1939, 53 STAT. 574, Title II, §§ 201-211.

going to tell them the old rules have to be followed whether they like them or not?

RICHEY: Yes, sir. Where people have relied, it seems to me to be just plain unconstitutional to change the law from what it was when they took action.<sup>26</sup> If Congress wants to change the law so as to catch future transactions, well and good. But as to past transactions, it's wrong—it's devilish—to go back and collect a tax. It's like the gold clause. Our government broke its sacred word of honor—a sin and a crime that will haunt us forever more. You mark my words—it's just as McReynolds said, "The Constitution is gone."<sup>27</sup>

MASON: Do you want to go back on the gold standard?

RICHEY: No, the administration has so changed conditions everywhere that it's probably impossible to undo the effects. When your arm is cut off, you can't sew it back on. But at least in these tax cases the Supreme Court should set the example and not break the law.

MASON: Let me ask you something. During the last war, Congress drafted millions of men for the army. But they left the Quakers out—Congress said they were to be exempt.<sup>28</sup> Now suppose we're just about to get into the present war, and half the able-bodied men in the country join the Quakers. Can't Congress pass a law to say that all the new Quakers will have to fight? Or will we just sit back and let them get away with it?

RICHEY: Now you're being ridiculous. The duty to defend our country is preëminent. If a lot of slackers suddenly join the Quakers, Congress could

<sup>26</sup>Does Richey mean to imply that the court should be estopped? If so, he might well consider the language of Mr. Justice Frankfurter, speaking for the majority in *Helvering v. Hallock*, *supra* note 7. After stating that the court recognized in *stare decisis* "an important social policy" rooted in the "psychologic need to satisfy reasonable expectations," he pointed out that none of the settlors had in fact relied on the *St. Louis Union Trust* decisions since their grants were made and their deaths took place before those cases. He added, however (60 Sup. Ct. at 451): "We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an *estoppel* against the responsible exercise of the judicial process." (Italics supplied.)

<sup>27</sup>In an extemporaneous speech bristling with scorn and indignation, Justice McReynolds, delivering the opinion of the minority in the gold clause cases, startled spectators in the Supreme Court chamber today with a blistering attack on New Deal currency policies. There were gasps as the 73-year old Tennessean, scarcely glancing at his manuscript, declared that Nero undertook to use a debased currency, asserted that the Constitution had 'gone' and expressed the 'shame and humiliation' of the minority consisting of himself and Justices Van Devanter, Sutherland and Butler." *N. Y. Times*, Feb. 19, 1935, p. 1, col. 7. In his reported opinion in the same cases, Mr. Justice McReynolds said: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling." *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 381, 55 Sup. Ct. 407 (1935).

<sup>28</sup>Exemptions were not, of course, limited to the Quakers. Selective Service Act of May 18, 1917, § 4, 40 STAT. 76, 78, discussed in Wigmore, *United States vs. Macintosh—A Symposium* (1931) 26 ILL. L. REV. 375, 381, citing Second Report of the Provost Marshal General, Dec. 1918, pp. 57, 323.

step right up and say, "You aren't Quakers at all—get out and fight!" Besides, there you have a statute—Congress would simply be repealing it. A court is different. And, anyhow, the tax situation is different. In the one case, you have slackers who are trying to get out of the sacred duty of defending their homes and families; in the other, you have people who have relied in good faith on the solemn words of the highest court in the land!

MASON: Well, aren't your clients trying to get out of taxes, trying to avoid doing their bit along with everybody else?

RICHEY: Not a bit of it. You don't enjoy paying taxes, do you? No. Neither do I. Neither does anybody else. It's just paying tribute to a lot of politicians, who use it to reelect themselves and pay graft to leaf-rakers. In fact, I firmly believe that the more money we can keep out of the tax collector's clutches, and retain in private industry where it can do the country some good, the better off we all are.

MASON: You know, I think what you have just said is the real point of the matter. You don't really care about whether the Supreme Court follows the old cases. If they were to overrule an old case that imposed a tax on your clients, you wouldn't complain about a change in the law, you'd hop up and down with joy.<sup>29</sup> And if the new cases which make your people pay taxes are some day reversed, when the Court turns conservative, you won't complain. There won't be any howls about failure to follow *stare decisis* when that day comes!<sup>30</sup> It isn't the state of the law that you're worrying about; it's the fact your clients are having to pay taxes for a change.

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<sup>29</sup>Undoubtedly Richey and his clients registered no complaints when the Supreme Court in *The Farmers Loan & Trust Co. v. Minnesota*, *supra* note 16, overruled *Blackstone v. Miller*, *supra* note 16, and thus temporarily at least freed intangibles from multiple taxation by states. In all fairness to Richey, however, it might be pointed out that at the time of the *Farmers Loan* case approximately two-thirds of the states had adopted reciprocal exemption laws in order to overcome the effect of the *Blackstone* decision. The states themselves were opposed to multiple taxation at that time. This was brought out by Mr. Justice McReynolds who delivered the majority opinion in the *Farmers Loan* case. While the states might be said to have expressed a willingness that the *Blackstone* case be overruled, Richey and his clients are not likely to express similar acquiescence to overruling decisions which impose rather than take away a tax.

If the *Curry* case, *supra* note 19, is an indication that we are about to see a reestablishment of *Blackstone v. Miller*, with full multiple taxation, reciprocal exemption statutes will take on renewed importance. In that event, it will be interesting to see what action is taken by states like New York, which in the light of the *Farmers Loan* case made no provision for the taxation of intangible personalty of non-resident decedents. See 59 MCKINNEY'S CONS. LAWS OF N. Y. ANN., p. 771. See also in this connection Article XVI, Sec. 3 of the New York Constitution adopted and approved in 1938.

<sup>30</sup>Mason might have added that Richey would doubtless advise his clients to ask a refund of the tax. Thus, in *O'Malley v. Sims*, 51 Ariz. 155, 75 P. (2d) 50 (1938), the decedent died domiciled in Montana. At the time of his death in 1929, he owned stock in an Arizona corporation. Arizona assessed an inheritance tax, which was paid under the rule of *Blackstone v. Miller*, *supra* note 16. After the overruling of the *Blackstone* case in 1930, a petition was filed for a return of the tax, which it was claimed now clearly ap-

RICHEY: For a change! Let me tell you, they're being taxed to death already. The really sound people of this community—the ones who hire labor and keep all the rest alive—have to foot the bill for all this boondoggling. They're mighty disturbed about the future of this country and its institutions, I can tell you! I don't mind saying that some of the recent decisions of the Supreme Court have shocked them profoundly.

*At this point, a man who has been sitting some distance away comes over and pulls up a chair. He is Professor Garvey Stiles, of the faculty of a well-known law school located near-by.*

STILES: Good afternoon, Mr. Richey! Mr. Mason! May I join you?

MASON AND RICHEY: Certainly! Certainly!

STILES: I couldn't help overhearing part of your discussion. Your voices were raised somewhat above the usual level. I am deeply interested in some of the questions you have been discussing. As a matter of fact, I am preparing an article on the subject for one of the reviews. It seems to me that the solution of some, at least, of the problems raised lies in the adoption of a more frankly legislative technique on the part of the judiciary.

RICHEY: Good God!

STILES: Wait. Let me finish. Suppose that the Supreme Court does not wish to follow a previous holding, but still wishes to protect a litigant who has relied on the former statement of the law. Why should it not adopt the policy of following the old law in the instant case, but announcing a new rule for the future?

RICHEY: Is there any precedent for such a proceeding?

STILES: Yes. There is excellent authority for it, Judge Cardozo<sup>31</sup> and

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peared never to have been due. A refund was duly allowed to the taxpayer, the court giving to the overruling decision full retroactive effect. If the *Farmers Loan* case is now in turn to be overruled, it would appear, subject to the Statute of Limitations, that Arizona might again come back at the taxpayer and collect. This "now you see it, now you don't" apparently can go on *ad infinitum*.

In *Laabs v. Wisconsin Tax Commission*, 218 Wis. 414, 261 N. W. 404 (1935), the situation was still more seesaw-like in nature. Plaintiff, owner of patent royalties, paid a state income tax on them in 1926 and 1927. When in 1928 the Supreme Court in *Long v. Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463, declared income from copyright royalties non-taxable by the states, the state voluntarily returned to the taxpayer the monies he had paid. Plaintiff paid no taxes on the royalties in 1928, 1929, and 1930. When in 1932 the *Rockwood* case was overruled, plaintiff was called upon to pay taxes on the royalties received in 1928, 1929, and 1930 together with six per cent interest. Apparently, no effort was made to regain the taxes for 1926 and 1927, which the state had voluntarily returned to the plaintiff.

See also *People ex rel. Rice v. Graves*, 242 App. Div. 128, 273 N. Y. Supp. 582 (3d Dep't 1934), *aff'd*, 270 N. Y. 498, 200 N. E. 288 (1936), *cert. denied*, 298 U. S. 683, 56 Sup. Ct. 953 (1936).

<sup>31</sup>Reference here is probably made to the address given by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals, before the New York State Bar Association on January 22, 1932. See REPORT OF THE NEW YORK STATE BAR ASSOCIATION

Professor Kocourek<sup>32</sup> both advocated it, and in fact the Supreme Court itself once considered it. Judge Cardozo wrote the opinion, as it happened. The Montana Supreme Court had held a defendant liable, but had announced a new rule for the future under which no liability would be imposed.<sup>33</sup> The defendant claimed that this was a denial of due process, and went to the United States Supreme Court. The Court said that there was no denial of due process.

MASON: What sort of case was it? A tax case?

STILES: No, It was a suit to recover an overcharge from a railroad.

MASON: You mean that the court let the plaintiff recover in this case, but then said, "Never again"?

STILES: That is correct.

MASON: So the Montana court said, "We're sorry. We have misled the bar."<sup>34</sup> There is no overcharge, and the railroad should not be liable. But since we've misled the bar, and let the plaintiff spend a little money on counsel fees, we'll give the plaintiff a big, fat judgment against the railroad. But we give notice that in the future we're going to enforce the correct rule and let the railroad off." Is that right, Professor?

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(1932) vol. LV, pp. 263 *et seq.* He cited an instance in which the majority of the New York Court of Appeals, in order that injustice might not be done in the instant case, felt obliged to follow precedent with which it no longer agreed; the minority wished to overrule this precedent, with retroactive effect. He then added (p. 296): "But was there not a third thing that might better have been done, better than what the majority or the dissenting judge approved? Would it not have been the sensible thing to say, this judgment will be affirmed because injustice would otherwise be done to the seller of the ranges who relied upon a declaration of the law now believed to have been wrong, but as to all who propose to have like transactions in the future, we give notice here and now that they are not to trust to the mistaken declaration to guide their course hereafter?"

<sup>32</sup>Professor Kocourek in a short article, *Retrospective Decisions and Stare Decisis and a Proposal* (1931) 17 A. B. A. J. 180, suggested the adoption of a statute which would expressly authorize the Supreme Court to announce a newer rule and yet apply the old rule in order to avoid injustice in the instant case. Mr. Justice Cardozo referred to Kocourek's proposed statute in his address to the New York State Bar Association, *supra* note 31, but said (p. 297): "I am not persuaded altogether that competence to proceed along these lines does not belong to the judges even now without the aid of statute. If the competence does not exist, it should be conferred by legislation reinforced, if need be, by constitutional amendment."

<sup>33</sup>The professor is undoubtedly referring to *Montana Horse Products Co. v. Great Northern Ry.*, 91 Mont. 194, 7 P. (2d) 919 (1932). In an earlier decision, *Doney v. Northern Pac. Ry.*, 60 Mont. 209, 199 Pac. 432 (1921), the same court, in construing the identical statutory provision involved, had declared the carrier liable in a like situation. See the comment of Shartel, *Stare Decisis—A Practical View* (1933) 17 J. AM. Jud. Soc. 6.

<sup>34</sup>"Having written that opinion for the court [*i.e.*, in *Doney v. Northern Pac. Ry.*, *supra* note 33], the author hereof expresses apology for having misled the profession, and welcomes this opportunity to correct the error made in interpreting our statutes. . . . We were then apparently satisfied with the correctness of the holding, and *thenceforth the profession and others were entitled to place reliance thereon.*" (italics supplied.) Such were the humble words of Judge Galen in *Montana Horse Products Co. v. Great Northern Ry.*, *supra* note 33, at 205, 211.

STILES: Substantially so.

MASON: Sounds like rotten law to me. The court says to the defendant, "You really aren't liable under the law, but you've got to pay, because we can't have it said that the court has misled the legal profession."

STILES: That's putting it rather harshly, Mr. Mason. After all, the law *did* impose liability,<sup>35</sup> as far as anyone knew, going by the old decisions. And the United States Supreme Court said that since it wouldn't have been a denial of due process to follow the old decisions, it wasn't a denial to follow the old decisions and then tag on the announcement that from now on the rule would be different.<sup>36</sup>

RICHEY: I admit that Montana case seems pretty raw to me, Professor, but I think your idea has some real possibilities in the tax field—providing always that we apply it for the protection of the taxpayer and not of the tax gatherer. In fact, come to think of it, I think it would be unconstitutional to apply such an idea in favor of the government. You couldn't have the court saying that a man would have to pay a tax just because the court had formerly announced a mistaken rule that a tax was due in such a situation. and then go on and say that in the future there would be a new rule of no tax liability. That would be ridiculous—in fact, I guess we'd all agree that that would be un-American. But the other way round—a rule for the protection of the taxpayer—I think you've got something there, Professor.

<sup>35</sup>The professor here deprives us of what would undoubtedly be a very learned discourse on the nature of law. Apparently, he is of that school of thought which believes that judges create as well as discover law, for otherwise he would tell us in true Blackstonian style that the former decision never was the law. For a very recent discussion of this age-old problem, see Spruill, *The Effect of an Overruling Decision* (1940) 18 N. C. L. Rev. 199. See also Carpenter, *Court Decisions and the Common Law* (1917) 17 Col. L. Rev. 593.

<sup>36</sup>Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 Sup. Ct. 145, 85 A. L. R. 254 (1932), noted, (1933) 28 ILL. L. REV. 277, (1933) 17 MINN. L. REV. 811, (1933) 11 N. C. L. REV. 323, (1933) 42 YALE L. J. 779. See also (1934) 47 HARV. L. REV. 1403, 1412; (1939) 23 J. AM. JUD. SOC. 32. Professor Llewellyn in his article, *The Constitution as an Institution* (1934) 34 Col. L. Rev. 1, 37, referred to the decision as one which "may yet become . . . epoch making." More recently, in *On Reading and Using the New Jurisprudence* (1940) 40 Col. L. Rev. 581, 26 A. B. A. J. 300, he refers to the decision as one "fraught with destiny" and comments on the glacial slowness of the state courts in adopting its doctrine.

Mr. Justice Cardozo, in delivering the opinion in the *Sunburst* case, said (287 U. S. at 364): "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." Professor Kocourek, who had advocated the statute mentioned *supra* note 32, was extremely heartened by this decision. In his joint article with Mr. Koven, *Renovation of the Common Law through Stare Decisis* (1935) 29 ILL. L. REV. 971, he no longer finds need for the suggested statute, but says (p. 999): "The courts already inherently have the power to accomplish this program. No statute is needed. No change in any constitution is required." For a comment on Kocourek's and Koven's article, see *Stare Decisis Freed from Baneful Effect*, (1935) 19 J. AM. JUN. SOC. 37.

MASON: Is that your idea, Professor Stiles—a one-way street leading out of taxation?

STILES: Well, Mr. Mason, I had not thought of it in exactly that light. In tort cases, where a man has been non-negligent under older judicial decisions, but is considered negligent by a modern court, I have no great sympathy for him. He probably was not relying on a court decision when he did the act which is now held to be negligent.<sup>37</sup> But in contract cases and property cases, my sympathies are very much on the side of the man who has relied on court decisions.<sup>38</sup> It seems to me that he should be protected—that the court should in his case follow the decision on which he relied, even though it may at the same time announce a new rule for the future. So the question is, are the tax cases like the contract cases?

RICHBY: Yes—emphatically, yes. The price paid for stock, for example, will often depend on whether the transaction can be put in the form of a tax-free reorganization. If it can, and there is no tax, a contract is made to reflect that situation. If later a tax is imposed, the expectations of the parties are upset.

MASON: But look at it from the other side. The government has to go on—somebody has to pay the taxes. If you let one man out of paying a tax, it means somebody else is going to have to pay a bigger tax. It seems to me that if the court concludes that a certain transaction is taxable, it should hold that the tax must be paid, even though the court has held the opposite in some previous case.<sup>39</sup> Otherwise, you will be putting an undeserved burden on the rest of the public.

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<sup>37</sup>The professor probably has in mind such a case as *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F 696 (1916), or perhaps even *Erie R. R. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 114 A. L. R. 1487 (1938). See in this connection, CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 146; Carpenter, *Stare Decisis and Law Reform* (1927) 1 So. CALIF. L. REV. 53, 61.

<sup>38</sup>Professor Stiles might well have quoted Professor Wigmore's *The Judicial Function*, a preface to Volume 9 of the MODERN LEGAL PHILOSOPHY SERIES (1917), where it is said: "In so far as the faith of contracts is involved, and the security of property, there must be adherence to prior declarations of law *in so far as such faith and such security have been rested upon them*, but so far only." (P. xxxvii).

For an able article reviewing the situations in which overruling decisions are not given retroactive effect, see Freeman, *The Protection Afforded against the Retroactive Operation of an Overruling Decision* (1918) 18 COL. L. REV. 230. Mr. Freeman concluded that courts generally were making every effort to avoid injustice by refusing to give retroactive effect to overruling decisions.

<sup>39</sup>Mason would heartily approve of the language of Justice Heffernan in *People ex rel. Rice v. Graves*, *supra* note 30 (242 App. Div. at 136): "We have not overlooked the relator's contention that a retrospective application of the decision in the *Fox Film* case works an apparent hardship as to him. We concede as much. The answer to that argument, however, is that the hardship in question is no greater on the relator than was that suffered by the State by the erroneous decision in *Long v. Rockwood*. *The ruling in that case deprived the State of revenue to which it was justly entitled.*" (italics supplied.) Similarly, the Wisconsin court in *Laabs v. Wisconsin Tax Commission*, *supra*

RICHEY: Everybody's bearing an undeserved burden, if you should ask me.

STILES: Your thought is an interesting one, Mr. Mason. But is there not much to be said for a policy of encouraging reliance on past decisions, while at the same time permitting free expression of the court's opinion as to the rule to be followed in the future?<sup>40</sup>

MASON: How is this thing going to work? I take it that we have a decision on a tax matter in 1930, holding a certain type of transaction is not taxable. Then many people, relying on the decision, enter into such transactions.

STILES: Correct.

MASON: Right. Now, in 1940, the Supreme Court wants to change the rule. What does it do? Wait for a case which brings up the exact point, or issue a decree?

STILES: Of course, it has to wait till a case comes up. It couldn't act in the absence of an actual case before it.

MASON: Well, we know that the taxpayers won't be anxious to bring the point up. They're hanging on to the old cases for dear life. So it will be the government which drags the taxpayer through the courts, knowing that

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note 30 (218 Wis. at 422), said: "To compel him to pay a tax which, by the doctrine of the *Fox Film Corp. Case*, the state was entitled to collect, does not seem to us to produce injustice or undue hardship. To deprive the state of revenue to which it was justly entitled upon a correct view of the law would produce injustice."

See also Professor Llewellyn's letter reviewing the proceedings of the Cincinnati Conference, *supra* note 8, in which he says: "Indeed, as to the tax cases in particular, it has seemed to me that one who has followed the current of opinion, judicial and other, over the past ten years, and has observed the pressure all over the country to open sources of revenue, must have been aware that *some* important shifts of ground have been impending." (1940) 14 U. OF CIN. L. REV. at 345.

<sup>40</sup>While much has been said for the policy advocated by the professor (see Kocourek and Koven, *loc. cit. supra* note 36), there has likewise been able criticism of the theory. Chief Justice von Moschzisker, in *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409, points out that if an overruling decision is given only prospective effect legislation by the court is the result; the declaration of the rule to be followed in the future is mere dictum; and as a practical matter a litigant would not attempt to induce a court to overrule its former decision, for he would realize that the battle as to him is already lost, even should he succeed in obtaining a correct declaration of the law for the future. Kocourek and Koven counter by saying that if overruling a prior precedent is not judicial legislation, it is difficult to see how postponing the effect of the overruling decision is any more a matter of legislation. As to the argument that the rule announced for the future is mere dictum, it is said the court would feel morally bound to follow such a dictum and could be relied upon to adhere to it in the future. In regard to the practical effect on the individual litigant, it is conceded that the man with but a single case will not be inclined to appeal, but it is suggested that those business interests which are repeatedly involved in the operation of certain rules of law, as railroads, utilities, and insurance companies, would find it to their interest to establish the new and correct rule for the future.

The Kentucky Supreme Court has on several occasions followed the Kocourek suggestion, citing *Great Northern Ry. v. Sunburst Oil & Refining Co.*, *supra* note 36, in support of its position. *Payne v. City of Covington*, 276 Ky. 380, 123 S. W. (2d) 1045 (1938); *World Fire & Marine Ins. Co. v. Tapp*, 279 Ky. 423, 130 S. W. (2d) 848 (1939).

the particular taxpayer will win, but hoping for a decision which will impose a tax in future cases.

STILES: Is that so different from present practice? Except, of course, that the government now hopes to win in the instant case as well as to obtain a new rule for the future.

MASON: Well, let's finish painting our picture. The Court's decision comes down, say, on November 1, 1940, at 10:30 A. M. So the public is now warned that while all transactions of a certain type occurring between the old decision date in 1930 and November 1, 1940, at 10:30 A. M. are tax-free, all similar transactions occurring after November 1, 1940, at 10:30 A. M. are taxable. Is that right?

STILES: Yes. It would be exactly like a statute—effective when officially promulgated.

MASON: I don't like your proposition, Professor, because it locks the barn door after the horse is stolen—or, rather, after it has died of old age. What good does it do to announce a new tax rule, effective after November 1, 1940? Everybody will run to friend Richey and be steered into other ways of getting out of taxes. And the government would lose its revenue on a big crop of transactions that took place between 1930 and 1940. No, sir, what's good law for the future is good law right here and now. In my opinion, a judge isn't living up to his oath of office if he doesn't decide each case according to the best that's in him—no matter if some other judge made a mistake ten years ago.<sup>41</sup>

RICHEY: My feelings are a bit mixed on this idea, Professor. In the first place, I don't like to hear you say that the Court's decision is going to be exactly like a statute. It's un-American. The courts are there to decide cases according to the law—not to put through new legislation. I like to hear a court say that such and such was the law in 1930, is the law in 1940, and will be the law in 1950, unless Congress changes it by vote of the people's elected representatives. The law's the law—and it should stay put!<sup>42</sup> But—

<sup>41</sup>Mason would undoubtedly agree with Mr. Justice Frankfurter who in *Helvering v. Hallock*, *supra* note 7 (60 Sup. Ct. at 453), said: ". . . we cannot evade our own responsibility for reconsidering in the light of further experience, the validity of distinctions which this Court has itself created."

Compare the remarks of Honorable Murray Seasongood before the Cincinnati Conference, *supra* note 8: "So I conclude, whether we like it or not, in constitutional cases, the doctrine of *stare decisis* nowadays is practically non-existent. When it is established in the United States Supreme Court that about everything is constitutional, taxable and, for administrative tribunals, permissible, the present majority of the Court may be expected to give greater effect in constitutional cases, to the doctrine of *stare decisis*. (Applause)." (1940) 14 U. OF CIN. L. REV. at 243.

<sup>42</sup>A man after Richey's heart was that Pennsylvania jurist, Judge Black, who in *Hole v. Rittenhouse*, 2 Phila. 411, 418 (Pa. 1856), voiced the following dissenting views: "The majority of this Court changes on the average once every nine years, without

and here's where I start to agree with you—if we're going to have judges who insist on changing the law, anything you can do to ease up the effects is O. K. with me. Just so my clients get the kind of treatment I told them they'd get—and the courts told them they'd get—that's all I ask.

*A steward has just come up, and starts to remove the coffee cups.*

STEWARD: Have you gentlemen finished your coffee?

MASON: Yes. Go right ahead. (*Looking at his watch.*) Gosh, it's getting late—time to start back to the office. (*Speaking to the steward.*) John, you aren't bothered by taxes, are you?

STEWARD: No, sir. I can't complain, at least not so far. But, as I see it, whether we get into the war or not the government will want every extra nickel in the country. We're all going to be taxed—and how!

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counting the chances of death and resignation. If each new set of Judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain and vicious that the civilized world ever saw. A French constitution, or a South American republic, or a Mexican administration would be an immortal thing in comparison to the short-lived principles of Pennsylvania law. The rules of property which ought to be as steadfast as the hills, will become as unstable as the waves. To avoid this great calamity, I know of no resource but that of *stare decisis*. I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority. But I would stand by their decisions, because they have passed into the law and become a part of it—have been relied and acted on—and rights have grown up under them which it is unjust and cruel to take away." In this connection, see Freeman, *loc. cit. supra* note 38; Goodhart, *Case Law in England and America* (1930) 15 CORNELL L. Q. 173; Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika* (1933) 33 COL. L. REV. 199.