Michigan Law Review

Volume 49 | Issue 3

1951

TAX STATUTES-THE ROLE OF STARE DECISIS IN DETERMINING "LEGISLATIVE INTENT"

Paul E. Anderson S. Ed.
University of Michigan Law School

TAX STATUTES—THE ROLE OF STARE DECISIS IN DETERMINING "LEGISLATIVE INTENT"—An interesting case history recently unfolded by the Supreme Court reveals a novel[1] application of stare decisis to decisions which interpret an act of Congress. The peregrinations of the Court have caused Congress to intervene on two occasions to settle the questions opened by the Court—although on the second occurrence the Court construed the act precisely as had Congress when it decried the Court's first interpretation. This imbroglio issued from the Revenue Act of 1918[2] under which Congress provided that transfers "intended to take effect in possession or enjoyment at or after his death" should be included in the donor's gross estate for purposes of the Federal Estate Tax.

1. *First Interpretation—Establishment of a Precedent*

In *May v. Heiner*,[3] decided in 1930, the Supreme Court held that the "possession or enjoyment" clause of the Revenue Act did not reach a transfer under which the donor had retained an interest for his life. The Court did not trouble itself with the legislative history of the enactment; its decision was based upon the now-discarded principle that when there is a doubt as to the imposition of a tax, "that doubt must be resolved in favor of the taxpayer. . . ."[4] Here doubt arose in the mind of the Court because the transfer had been completed during the life-

non-deductible, in part or in whole. The instant case is the first that imposes the requirement of reasonableness on all business expense deductions, including those that have no element of hidden payment." 23 So. CAL. L. REV. 152 at 154 (1949). Griswold suggests that in spite of the statutory language, the I.R.C. does not give the commissioner authority to limit even salaries to a reasonable amount; that the statute was intended to be applied to closely held corporations or partnerships where no salaries were in fact paid. Griswold, "New Light 'On A Reasonable Allowance for Salaries,'" 59 HARV. L. REV. 286 (1945). Mertens' discussion of the deduction of business expenses does not raise the problem of the principal case. 4 MERTENS, LAW OF FEDERAL INCOME TAXATION, c. 25 (1942).

[1] This application of stare decisis is termed "novel" not because it is a first illustration of the Supreme Court's disregard for long-standing statutory construction [see Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938); Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444 (1940); Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826 (1946)] but because of the Court's insistence that the precedent had previously been overruled.

[2] Sec. 402(c) of the Revenue Act of 1918, 40 Stat. L. 1097 (1918). In 1938 this subsection, as later amended, became I.R.C. §811(c).

[3] 281 U.S. 238, 50 S.Ct. 286 (1930).

[4] Id. at 245. The argument for construing tax statutes strictly was based on two ideas: (1) The government had its chance to write the legislation as it wished, and (2) a liberal interpretation is likely to injure taxpayers who have relied upon the literal meaning of the language used. With respect to federal cases this principle is no longer controlling. In White v. United States, 305 U.S. 281 at 292, 59 S.Ct. 179 (1938), Justice Stone stated, "We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax

span of the donor. No *legal* interests had passed from the donor at the moment of his death to the transfer beneficiaries.[5]

Congress voiced immediate disapproval of this interpretation of its statute.[6] In order to tax transfers under which the donor had retained a life estate, Congress adopted the Joint Resolution of March 3, 1931, which not only reenacted the original "possession or enjoyment" clause, but also added a provision to reach transfers of the *May v. Heiner* stamp.[7] This amendment of the Revenue Act was designed only to be prospective in force.[8] The reason for this limitation was the fear that the Senate would not consent to a retroactive amendment.[9] Under no circumstances could this failure of Congress to overrule retroactively *May v. Heiner* be taken as an approval of that decision.[10]

case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be." That this principle of construction has not been entirely erased, see Sachs, "Church and Spiegel Add New Confusion to Section 811(c)," 27 TAXES 710 (1949). For an illustration of its application in state courts, see State v. Glander, 80 Ohio App. 527, 69 N.E. (2d) 226 (1946).

[5] " 'One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute. . . . [W]e think it at least doubtful. . . .' " May v. Heiner, 281 U.S. 238 at 244-5, 50 S.Ct. 286 (1930), following Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123 (1929).

[6] This disapproval of May v. Heiner followed the reaffirmation of that decision in three per curiam opinions about one year later: Burnet v. Northern Trust Co., 283 U.S. 782, 51 S.Ct. 342 (1931); Morsman v. Burnet, 283 U.S. 783, 51 S.Ct. 343 (1931); McCormick v. Burnet, 283 U.S. 784, 51 S.Ct. 343 (1931). A statement made on the floor of the House of Representatives by Mr. Hawley indicates his surprise at the decisions. After reading section 302(c) of the 1926 Revenue Act, he asserted, "It had generally been considered that this provision of the statute covered cases such as those referred to above." 74 CONG. REC. 7198 (1931). On the same day, March 3, 1931, Senator Smoot stated to the Senate at pp. 7078-79, "The decision of the Supreme Court came almost like a bombshell, because nobody ever anticipated such a decision. The first estate-tax law that was ever enacted contained the section to which I have called attention; but when a case went to the Supreme Court, the Supreme Court held that the property would not be taxable. . . . Everybody thought the law was perfectly plain."

[7] 46 Stat. L. 1516 (1931).

[8] "This resolution is to provide that hereafter such [May v. Heiner] shall not be the law." Mr. Hawley on the floor of the House on March 3, 1931, 74 CONG. REC. 7198 (1931).

[9] Mr. Garner voiced the fear thusly, "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it. But I do hope that when this matter is considered in the Seventy-second Congress we may be able to pass a bill that will make it retroactive. . . . What we hope in this resolution is to stop up this gap in the future. I hope in the next Congress a bill may be passed that will reach back and let the Supreme Court have one more guess." Id. at 7199.

[10] Thus, Justice Frankfurter's argument in Commissioner v. Church, 335 U.S. 632 at 682, 69 S.Ct. 322 (1949); reh. den., 336 U.S. 915, 69 S.Ct. 599 (1949), that May v.

Nor was it possible to resort to the 1931 resolution in order to determine the meaning of the words, "possession or enjoyment" used in the Revenue Act of 1918.[11] Immediately following the adoption of this resolution by Congress, the Treasury amended the Estate Tax Regulations to conform to it.[12]

In 1932 Congress again amended the "possession or enjoyment" clause to provide for additional coverage, but did not grant the section any retroactive effect.[13] However, in 1937 the Treasury seized upon the general retrogressive section of the Revenue Acts[14] to justify a new set of regulations in which the amendments to the "possession or enjoyment" clause were construed to reach transfers created before their enactment.[15] The Supreme Court struck down this effort of the Treasury

Heiner ought to be followed because Congress' "failure to alter the language indicates that it accepted that interpretation," is shown to be wholly formal and syllogistic. Justice Black, at p. 648, recognized the impossibility of reading into Congressional action an intention to accept or ratify May v. Heiner.

[11] "Congress may no doubt indicate its understanding as to the scope of its former words . . . but its interpretation as such is immaterial. It is as likely to be wrong as any one else, and in the end the courts must decide." Judge Learned Hand in Fire Companies Building Corp. v. Commissioner, (2d Cir. 1931) 54 F. (2d) 488 at 489, cert. den. 286 U.S. 546, 52 S.Ct. 498 (1932); *Accord*: Lincoln Bldg. & Saving Assn. v. Graham, 7 Neb. 173 (1878); Governor v. Porter, 5 Humph. (Tenn.) 165 (1824). The reason for this position is stated in COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed., 136 (1903): "Legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts." The rule is most clearly applied to prevent a declaratory statute from interpreting a pre-existing statute in such a manner as to affect rights which were created before the enactment of the declaratory statute. See, for instance, Stockdale v. Insurance Companies, 20 Wall. (87 U.S.) 323 (1873); Union Iron Co. v. Pierce, (C.C. Ind. 1869) Fed. Cas. No. 14,367; Matter of Coburn, 165 Cal. 202, 131 P. 352 (1913); State v. Board of Comm., 83 Kan. 199, 110 P. 92 (1910); People v. Board of Supervisors, 16 N.Y. 424 (1857); Lambertson v. McClelland, 2 Pa. St. 22 (1845); Reiser v. Wm. Tell Savings Fund Assn., 39 Pa. St. 137 (1861). Thus a declaratory statute is normally interpreted as a direct enactment to apply only in the future. United States v. Gilmore, 8 Wall. (75 U.S.) 330 (1869); Singer Mfg. Co. v. McCollock, (C.C. Ark. 1884) 24 F. 667; Greenough v. Greenough, 11 Pa. St. 489 (1849); COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed., 137 (1903); 2 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed. Horack, §3004 (1943).

[12] T.D. 4314, X-1 Cum. Bul. 451 approved by the Secretary of the Treasury, May 22, 1931, stated, ". . . The portion added by the amendment to section 302(c) of the Revenue Act of 1926 . . . will . . . be applied *prospectively* only, i.e., to such transfers coming within the amendment as were made *after* 10:30 p.m., Washington, D.C. time, March 3, 1931." Treas. Reg. 70, 1929 edition, were amended by T.D. 4336 on April 11, 1932, to conform to this letter.

[13] Sec. 803 of the Revenue Act of 1932, 47 Stat. L. 279 (1932).

[14] Sec. 302(h) of the Revenue Act of 1926, 44 Stat. L. 71 (1926) provided, "Except as otherwise specifically provided therein subdivisions . . . (c) . . . of this section shall apply to . . . transfers . . . whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

[15] Treas. Reg. 80, art. 18, published October 26, 1937.

in the following year on the twin grounds of legislative intent and administrative construction.[16]

In 1939 the Supreme Court was faced with *Helvering v. Hallock*.[17] The transfer there involved was held to be within the scope of the "possession or enjoyment" clause although no legal interest had been transmitted to the beneficiaries at the donor's death. The majority found credence in the argument that the severing of a possibility of reverter by the donor's death was a sufficient transmission of interest to satisfy the test previously adopted.[18] The majority did not refer to *May v Heiner*, but the dissent pointed out that their present holding was in conflict with the unanimous decision reached in *May v. Heiner*.[19] Whether *Hallock* had that effect was a topic that called for much discussion in legal periodicals.[20]

2. *Tax Cases and the Sanctuary of Stare Decisis*

In 1949 the *Church*[21] case came before the Supreme Court. There the donor had made a transfer in 1924 under which he had reserved to himself a life estate.[22] In 1939, before the advent of *Helvering v. Hallock*, Church died. Despite the fact that the issue had not been raised in the lower courts,[23] the Supreme Court expressly overruled *May v. Heiner* to hold that the reservation of a life estate met the requirements of the "possession or enjoyment" clause. No longer was it necessary that a legal interest be transmitted at the donor's death; it was sufficient if his death affected the transfer by giving the beneficiaries present use and enjoyment of the property.[24]

[16] Hassett v. Welch, 303 U.S. 303, 58 S.Ct. 559 (1938). T.D. 4868, 1938-2 Cum. Bul. 355, issued October 24, 1938, amended the Estate Tax Regulations to follow this decision.

[17] 309 U.S. 106, 60 S.Ct. 444 (1940).

[18] Id. at 112.

[19] Id. at 126.

[20] Eisenstein, "Estate Taxes and the Higher Learning of the Supreme Court," 3 TAX. L. REV. 395 at 473 (1948); Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 (1945); note, 49 YALE L.J. 1118 (1940); MONTGOMERY, FEDERAL TAXES—ESTATES, TRUSTS AND GIFTS 561 (1948-9); PAUL, FEDERAL ESTATE AND GIFT TAXATION §715 (1946 Supp.).

[21] Commissioner v. Church, 335 U.S. 632, 69 S.Ct. 322 (1949); reh. den., 336 U.S. 915, 69 S.Ct. 599 (1949).

[22] It ought to be noted that the 1924 Estate Tax Regulations provided, "A transfer . . . is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate." Article 18 of Regulations 68, Treasury Department (Internal Revenue) (1924 ed.).

[23] Estate of F. L. Church, P-H TAX CT. MEMO DEC. ¶45,134 (1945); Commissioner v. Church's Estate, (3d Cir. 1947) 161 F. (2d) 11.

[24] Commissioner v. Church, 335 U.S. 632 at 646, 69 S.Ct. 322 (1949).

This decision has been bitterly criticized on the ground that it flouted the concept of stare decisis.[25] Assuming, as a general matter, that stare decisis does apply to cases involving statutory construction,[26] but that it is not an absolute injunction choking off all change,[27] the inquiry necessarily arising is whether the particular circumstances of the tax decisions call for a stricter or looser use of the doctrine.

In the first place, predictability and certainty in tax law will be sacrificed if stare decisis is not resorted to in decisions construing a tax statute.[28] This consideration, although important, ought not to justify

[25] Dissenting opinions of Justice Reed, id. at 652, Justice Burton, id. at 699, and Justice Frankfurter, id. at 676. For attacks written in the same vein, see Sachs, "Church and Spiegel Add New Confusion to Section 811(c)," 27 TAXES 710 (1949); Foosaner, "Church-Spiegel Decisions, A New Bombshell to Existing Trusts," 27 TAXES 444 (1949), and note, 28 TEX. L. REV. 116 (1949).

[26] United States v. South Buffalo Ry. Co., 333 U.S. 771, 68 S.Ct. 868 (1948); Massachusetts v. United States, 333 U.S. 611, 68 S.Ct. 747 (1948); Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13 (1946); Helvering v. Griffiths, 318 U.S. 371, 63 S.Ct. 636 (1943); Douglass v. County of Pike, 101 U.S. 677 at 686-7 (1879); Newton v. Mann, 111 Colo. 76, 137 P. (2d) 776 (1943); Oliver Co. v. Louisville Realty Co., 156 Ky. 628, 161 S.W. 570 (1913). CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148 (1921); MOSCHZISKER, STARE DECISIS AND OTHER SELECTED ESSAYS 20 (1929).

[27] Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826 (1946); Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444 (1940); Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938); Eubanks v. State, (Tex. Civ. App. 1947) 203 S.W. (2d) 339. However, as Justice Brandeis ably stated, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation." Dissenting opinion to Burnet v. Coronado Oil and Gas Co., 285 U.S. 393 at 406, 52 S.Ct. 443 (1932). Thus, the Supreme Court is much readier to disregard stare decisis in constitutional cases where correction depends upon amendment than in cases involving statutory construction where remedy can be had by legislative action. See the sixteen cases cited by Justice Reed in Smith v. Allwright, 321 U.S. 649 at 665, 64 S.Ct. 757 (1944), and the forty-two cases cited in notes to Justice Brandeis' dissenting opinion in Burnet v. Coronado Oil and Gas Co., 285 U.S. 393 at 407-9, 52 S.Ct. 443 (1932).

[28] SALMOND, JURISPRUDENCE, 10th ed., 184 (1947): "Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development, and the evils of uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. . . . Justice may therefore imperatively require that the decision, though founded in error, shall stand inviolate none the less. *Communis error facit jus.*"

"If litigants and lower federal courts are not to . . . [follow and apply the law as clearly announced by this court], the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. . . . But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute." Dissent by Justice Roberts in Mahnich v. Southern S.S. Co., 321 U.S. 96 at 112-3, 64 S.Ct. 455 (1944). In Smith v. Allwright, 321 U.S. 649 at 669, 64 S.Ct. 757 (1944), Justice Roberts, again dissenting, defined that "more deplorable consequence" as "[the tendency] to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

the retention of a decision assumed to be erroneous.[29] Regardless of how strongly the courts and the Treasury may strive to create a logically consistent tax structure, their goal becomes impossible to attain because of the very nature of the subject-matter involved. As long as taxpayers seek to take advantage of established tax patterns by using them for avoidance purposes, it will be necessary for both the courts and the Treasury to reverse those precedents in order to achieve their basic policy of levying equal tax burdens upon all who enjoy an identical economic position.

It has been urged that taxpayers have a "vested" or "property" right in a tax decision once it has been laid down.[30] For that reason, it is claimed, stare decisis ought to prevent the retroactive overruling of these rights created for the taxpayers. To the same extent that stare decisis applies to decisions involving property rights, it ought to be preserved in the tax field.

The basic fallacy in this argument based on "property" rights has been pointed out.[31] The relationship affected by tax statutes is not one arising between two private persons, but is rather the connection between the private person and his tax-collecting government. With the rules of the tax structure involving only the government and its

[29] "In five cases the Court overruled decisions involving interpretations of Acts of Congress and thus cleared the stream of law of derelicts of its own creation, not waiting for Congress to act. . . . It overruled two four-year-old precedents construing the provision of the Revenue Act of 1926 that deals with transfers 'intended to take effect in possession or enjoyment' at or after the grantor's death [Helvering v. Hallock was cited]. And just the other day it overruled a nineteen-year-old decision in the same field [citing Commissioner v. Church]. In these cases . . . the Court rejected numerous pleas to let Congress correct mistakes that the Court had created. It was also reluctant to find in the silence of Congress approval of the statutory interpretations which it had adopted.

"It is, I think, a healthy practice (too infrequently followed) for a court to re-examine its own doctrine. Legislative correction of judicial errors is often difficult to effect. Moreover, responsible government should entail the undoing of wrongs committed by the department in question. That course is faithful to democratic traditions. Respect for any tribunal is increased if it stands ready (save where injustice to intervening rights would occur) not only to correct the errors of others but also to confess its own." Douglas, "Stare Decisis," 49 COL. L. REV. 735 at 746-7 (1949). *Accord,* Helvering v. Hallock, 309 U.S. 106 at 119, 60 S.Ct. 444 (1940). Evidently, Justice Douglas treats consistency as a foolish hobgoblin. Compare his opinion in Screws v. United States, 325 U.S. 91 at 112-3, 65 S.Ct. 1031 (1943): "The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it."

[30] "In reliance upon a long-settled course of legislative and judicial construction, donors have made property arrangements that should not now be upset summarily with no stronger reasons for doing so than that former courts and the Congress did not interpret the legislation in the same way as this court now does." Dissent of Justice Reed in Commissioner v. Church, 335 U.S. 632 at 652-3, 69 S.Ct. 322 (1949); Sachs, "Church and Spiegel Add New Confusion to Section 811(c)." 27 TAXES 710 at 712 (1949).

[31] 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION §7.16 (1942); Eisenstein, "Another Glance at the Hallock Problem," 1 TAX L. REV. 430 (1946).

financial supporters, it is questioned whether the normal concepts of stare decisis ought to apply, for that doctrine is an outgrowth of decisions affecting private contract and property rights.

However, it ought to be emphasized that the fiscal relationship itself is subject to certain limitations. Thus the reconstituted Supreme Court has found stare decisis to be controlling in a case where reliance upon a previous tax decision could be shown.[32] Again, the power of Congress to levy a tax upon transfers completed before the enactment of the taxing statute has been denied.[33] It would seem that a retroactive tax application of an overruling decision would contravene the same policy that forbids retroactive taxation.[34] The Supreme Court ought to be as assiduous in safeguarding the same interests from the effects of its decisions that it insists upon protecting from the exercise of Congressional power or administrative fiat.[35]

On the other hand, where actual reliance upon a previous statutory construction cannot be shown, stare decisis has much less force.[36] In

[32] Helvering v. Griffiths, 318 U.S. 371 at 402-3, 63 S.Ct. 636 (1943): "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax. . . . To rip out of the past seven years of tax administration a principle of law on which both Government and taxpayers have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety." Justice Jackson speaking for the majority.

[33] Nichols v. Coolidge, 274 U.S. 531, 47 S.Ct. 710 (1927); United States v. Jacobs, 306 U.S. 363, 59 S.Ct. 551 (1939); Wyeth v. Crooks, (D.C. Mo. 1928) 33 F. (2d) 1018; the same implication can be drawn from the language of the cases cited in note 6: "There being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved [i.e. with retained life estates as in May v. Heiner]. . . ." Burnet v. Northern Trust Co., 283 U.S. 782 at 783, 51 S.Ct. 342 (1931). Thus it is clear that Congress could not constitutionally amend the Internal Revenue Code in 1949 to tax Church's transfer executed in 1924 and *completed in 1939* on his death.

[34] The decisions cited in note 33 are based on the principle that a retroactive application of a taxing statute is invalid if coupled with a total lack of warning to the taxpayer that he might be taxed on the now completed transfer. The position of the taxpayer is fully as unexpected if his transfer is reached by a decision reversing a previous statutory construction, and may be still more worthy of protection if he can show reliance upon written precedent indicating that his transfer involved no tax consequences.

[35] Horack, "Congressional Silence: A Tool of Judicial Supremacy," 25 TEX. L. REV. 247 at 251 (1947) develops this argument further. In reversing a former statutory interpretation, the Court is no longer exercising a judicial but a legislative function. "Even assuming that the prior interpretation was incorrect, if the Court now reverses the position it took in the first case it is affirmatively changing an established rule of law under which society has been operating. This is explicitly and unquestionably the exercise of a legislative function." The chief defect, as Horack ably points out, with this process is that the Court is making a policy determination without being restricted by the normal safeguards imposed upon action of the legislature.

[36] Helvering v. Hallock, 309 U.S. 106 at 119, 60 S.Ct. 444 (1940); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151 (1921).

the estate tax field it has been quaintly argued that the reliance element is completely lacking because

> "As regards the grantor, he has already departed this life and is therefore beyond the pecuniary pain imposed by the estate tax. . . . As for the remainderman who finally obtains possession and enjoyment after the termination of the reserved life estate, he is undoubtedly receiving less than he expected; and to the extent of the difference, as Pliny was accustomed to argue, the grief and sorrow of our bereaved remaindermen are definitely augmented."[37]

The fact is that the trust donor did make a change of position in reliance upon existing tax laws. Because he is now dead, ought we to divest his interests of all claim to protection under the existing legal structure? If the latter is to be our aim, perhaps confiscation of his property after death would be a more honest solution.

3. *Stare Decisis—The "Disreputable Barnacle"*[38]

How did the Supreme Court face the principle of stare decisis when confronted with that issue in the *Church* case? The majority neatly avoided the problem by asserting that the overruling of *May v. Heiner* was a *fait accompli*—that, "The *Hallock* and *May v. Heiner* holdings and opinions are irreconcilable. Since we adhere to *Hallock*, the *May v. Heiner* interpretation of the 'possession or enjoyment' provisions of §811(c) can no longer be accepted as correct."[39]

Are the tenets of stare decisis consistent with the Court's action? The answer depends upon the scope of that doctrine. Seldom is more than the *ratio decidendi* of a case honored as an authoritative precedent.[40] That being so, the question is whether the general principle of *May v. Heiner* was affected by *Helvering v. Hallock*. *May v. Heiner* was cited time and again for the conclusion that the reservation of a

[37] Eisenstein, "Another Glance at the Hallock Problem," 1 TAX. L. REV. 430 at 437 (1946).

[38] Following the characterization by Justice Frankfurter in his dissent to the Church case as reported in 69 S.Ct. 322 at 349. Curiously, this was changed to the "doctrine of the dead hand" in the official reporter, 335 U.S. 632 at 676 (1949).

[39] Commissioner v. Church, 335 U.S. 632 at 637, 69 S.Ct. 322 (1949).

[40] Safe Deposit & T. Co. v. Virginia, 280 U.S. 83, 50 S.Ct. 59 (1929); Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 at 398 (1821); New England Mutual Life Ins. Co. v. Mitchell, (4th Cir. 1941) 118 F. (2d) 414; Wells v. Kansas City Life Ins. Co., (D.C. N.D. 1942) 46 F. Supp. 754; State v. Mellenberger, 163 Ore. 233, 95 P. (2d) 709, 128 A.L.R. 1506 (1939); State ex rel. Todd v. Yelle, 7 Wash. (2d) 443, 110 P. (2d) 162 (1941); PATON, A TEXT-BOOK OF JURISPRUDENCE 159 (1946); SALMOND, JURISPRUDENCE, 10th ed., 190-2 (1947); 3 CYCLOPEDIA OF FEDERAL PROCEDURE, 2d ed., §675, footnote 8 (1943).

life estate by the donor does not require that the transfer be included within his gross estate.[41] *Hallock,* on the other hand, laid down the general proposition that the retention of a possibility of reverter by the donor made the transfer taxable under the estate tax.[42] How then could *Hallock* overrule *May v. Heiner* as a matter of authoritative precedent? The former dealt with interests created in the *corpus* of a trust transfer; the latter was concerned with *income* interests. The approach of the majority was not that the *ratio decidendi,* but rather that the *rationale* of the two cases was inconsistent. Because *Hallock* did not require the transmission of a legal interest at death in order for the transfer to be taxable, *May v. Heiner* was overruled. Not only does this reasoning reflect an unusual view of the question of authoritative precedent,[43] but the *Hallock* case itself emphasized that the requirement of the passage of a legal interest was deemed satisfied *in that case.*[44]

Furthermore, it ought to be pointed out that *Helvering v. Hallock* did not deign to mention *May v. Heiner.* Thus, if the latter case was overruled, it was *sub silentio*—a technique universally condemned.[45]

The majority also argued that *May v. Heiner* could not "be granted the sanctuary of stare decisis . . ."[46] because of its long and troubled history in the courts and before the Treasury Department.[47] This is

[41] Hassett v. Welch, 303 U.S. 303, 58 S.Ct. 599 (1938); Helvering v. Proctor, (2d Cir. 1944) 140 F. (2d) 87; Chase National Bank v. Higgins, (D.C. N.Y. 1941) 38 F. Supp. 858; cases cited in note 6 supra.

[42] Goldstone v. United States, 325 U.S. 687, 65 S.Ct. 1323 (1945); Lloyd's Estate v. Commissioner, (3d Cir. 1944) 141 F. (2d) 758; Commissioner v. Kellogg, (3d Cir. 1941) 119 F. (2d) 54; Murray Baldwin, 43 B.T.A. 183 (1940).

[43] In 3 CYCLOPEDIA OF FEDERAL PROCEDURE, 2d ed., §680 (1943), it is pointed out that merely because later cases involving a related, but not the same question as an earlier case take a different view of the reasoning involved does not justify a departure from the earlier decision. Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc., (6th Cir. 1941) 118 F. (2d) 252 is cited.

[44] Helvering v. Hallock, 309 U.S. 106 at 112, 60 S.Ct. 444 (1940); See discussion, 48 MICH. L. REV. 666 at 673 (1950).

[45] Quaker Realty Co. v. Labasse, 131 La. 996, 60 S. 661, Ann. Cas. 1914A, 1073 (1912); SALMOND, JURISPRUDENCE, 10th ed., 188 (1947); 2 DURFEE, CASES ON SECURITY 218 (1946); "The Status of the Rule of Judicial Precedent," 14 UNIV. CIN. L. REV. 203, remarks of Hon. C. V. Weygandt, C.J., S.Ct. of Ohio at 284-5 (1940); Sachs, "Church and Spiegel Add New Confusion to Section 811(c)," 27 TAXES 710 (1949).

[46] Black, J., in Commissioner v. Church, 335 U.S. 632 at 648, 69 S.Ct. 322 (1949).

[47] Thus, two Tax Court decisions held that May v. Heiner had been overruled by Helvering v. Hallock: Estate of M. H. Hughes, 44 B.T.A. 1196 (1941); Estate of H. A. Worcester, 47 B.T.A. 909 (1942). Other lower federal courts disagreed: Commissioner v. Hall's Estate, (2d Cir. 1946) 153 F. (2d) 172; Helvering v. Proctor, (2d Cir. 1944) 140 F. (2d) 87; Commissioner v. Singer's Estate, (2d Cir. 1947) 161 F. (2d) 15; Commissioner v. Kellogg, (3d Cir. 1941) 119 F. (2d) 54; Commissioner v. Church's Estate, (3d Cir. 1947) 161 F. (2d) 11; Schultz v. United States, (8th Cir. 1944) 140 F. (2d) 945; United States v. Brown, (9th Cir. 1943) 134 F. (2d) 372; N.Y. Trust Co. v. United

probably the best argument for the overruling of *May v. Heiner.* The value of a precedent depends not only upon its age but also upon its general acceptance.[48]

The final consideration can best be phrased in Justice Burton's words: "The 1931 legislation plus the passage of time would thus have disposed of *May v. Heiner* without the injustices that will now arise from its reversal."[49]

If the policy of tax administration is to tax according to the economic station of individual taxpayers, the retention of special tax exemptions can scarcely be justified on the ground that the passage of time will eliminate all the inconsistencies.

4. *Congressional Action*

Six months after the *Church* case a bill, purposing to mitigate the retroactive effects of that case, was introduced into the House of Representatives.[50] Within four more months that bill was enacted into law as the Technical Changes Act of 1949.[51] One of the expressed motives forcing the enactment of this legislation was "to restore the estate tax law to what it was prior to the Church opinion."[52] On this argument the Senate Committee on Finance amended the original bill to wipe

States, (Ct. Cl. 1943) 51 F. Supp. 733; Estate of E. E. Bradley, 1 T.C. 518 (1943); Estate of J. Matthews, 3 T.C. 525 (1944). The troubles of the Treasury Department are detailed in Justice Frankfurter's dissent to Commissioner v. Church, 335 U.S. 632 at 677 et seq., 69 S.Ct. 322 (1949).

[48] Central National Bank of Cleveland v. United States, (Ct. Cl. 1941) 41 F. Supp. 239; Walton v. Benton, 191 Ga. 548, 13 S.E. (2d) 185 (1941); Quaker Realty Co. v. Labasse, 131 La. 996, 60 S. 661, Ann. Cas. 1914A, 1073 (1912); SALMOND, JURISPRUDENCE, 10th ed., 188 (1947); SHARTEL, OUR LEGAL SYSTEM AND HOW IT OPERATES §7-15 (1947); 3 CYCLOPEDIA OF FEDERAL PROCEDURE, 2d ed., §675 (1943), footnotes 16 and 17. On the other hand, unanimity of opinion gives added weight to a precedent: SALMOND, JURISPRUDENCE, 10th ed., 187 (1947); 3 CYCLOPEDIA OF FEDERAL PROCEDURE, 2d ed., §680 (1943).

[49] Commissioner v. Church, 335 U.S. 632 at 699, 69 S.Ct. 322 (1949).

[50] H.R. 5268 was introduced by Representative Camp on June 21, 1949. 95 CONG. REC. 8084 (1949).

[51] P.L. 378, 81st Cong., 1st sess. (October 25, 1949). For a discussion of its effects upon estate tax law, see 48 MICH. L. REV. 666 (1950); Bittker, "Church and Spiegel: The Legislative Sequel," 59 YALE L.J. 395 (1950).

[52] "In the joint resolution of March 3, 1931, Congress created a new estate tax rule with respect to transfers after March 3. It left unchanged the rule in effect for transfers before that date. It is the opinion of your committee that the old rule should have been continued in effect with respect to such transfers until changed by legislation. Since the rule has been changed by the Supreme Court in the Church opinion, your committee believes that the Congress should act to restore the estate tax law to what it was prior to the Church opinion." S.Rep. No. 831, 81st Cong., 1st sess., p. 7.

the *Church* case off the books.[53] In Conference, however, the aim of the Senate Committee was lowered through the intervention of the Treasury.[54] The result was a compromise. The rule of *May v. Heiner* was reinstated as to all donors of pre-1931 trusts who died before the end of 1949.[55] Beginning with 1950, the doctrine of the *Church* case was retained subject, however, to the privilege in the donor of releasing his retained life interest without incurring any gift or estate tax liability for that action.[56]

Thus, through the mitigating action of Congress, the policy behind stare decisis was reconciled with the correction of an erroneous precedent. The rule announced by the Technical Changes Act vitiates the retroactive effects of the *Church* decision but retains its principle for the purposes of a logical tax structure based upon the "possession or enjoyment" clause. Perhaps the ultimate worth of the *Church* case will be measured by the fact that it jarred Congress into action.[57] It is not often that the Congress has the opportunity of rectifying two errors of the Supreme Court—errors relating to the same legislation but reaching diametrically opposed results.

Paul E. Anderson, S.Ed.

[53] "Section 7 of the bill was added by your committee. It is designed to overcome the decision of the Supreme Court in the case of *Commissioner v. Church*. . . . It is the opinion of your committee that after all of these years, persons are entitled to rely on the long standing interpretation of May against Heiner as to these old trusts, and section 7 is designed to accomplish that result." Statement of Senator George, Chairman of the Senate Committee on Finance, on the floor of the Senate, Sept. 16, 1949, 95 CONG. REC. at p. 12990 (1949).

[54] "The Senate amendment has the effect of overruling the Church decision and returning to the status of the law as it existed prior to that decision. . . . This Senate amendment was vigorously opposed by the Treasury, and the conferees were able to work out a satisfactory compromise which provides substantial relief in hardship cases." Statement of Representative Lynch on the floor of the House, October 13, 1949, 95 CONG. REC. at p. 14447 (1949).

[55] Sec. 7(b) of P.L. 378, 81st Cong., 1st Sess. (1949).

[56] Id., §8.

[57] Bittker, "Church and Spiegel: The Legislative Sequel," 59 YALE L.J. 395 at 396 (1950).