1942

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FEDERAL TAXES AND THE RADIATING POTENCIES OF STATE COURT DECISIONS

MICHAEL H. CARDOZO, IV.†

The process of decision in the federal courts has enabled a number of taxpayers to reduce their taxes by preventing the Commissioner of Internal Revenue from arguing in court what may be the vital issue of a case. They have accomplished this by obtaining a decision of a state court on issues of local law involved in a federal tax proceeding. Recent Supreme Court decisions have indicated that a local rule of law is what any state court has most recently said it is, although such court may be far from the top of the local judicial hierarchy.† Federal judges now apparently have no power to look into the sources of local law, once the local court has spoken. They must accept the latter's view unless some undefined "convincing evidence" shows it to be wrong.

Professor Corbin, in a trenchant article, has analyzed a few of the ramifications of these decisions.‡ He dwelt principally on the plight of the litigant unwillingly brought into the federal court, possibly on diversity of citizenship, and confronted with an adverse decision of a local lower court, rendered in a prior case, on the issue involved in his proceeding. The later litigant may have more at stake and may be able to retain more learned and diligent counsel than the losing party in the earlier case who failed to appeal.§ Nevertheless, he has no chance to present his argument on the local law.

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1. Fidelity Trust Co. v. Field, 311 U. S. 109 (1940); Six Companies v. Highway Dist., 311 U. S. 189 (1940); West v. A. T. & T. Co., 311 U. S. 223 (1940). Although the decisions relied upon in the Field case came from courts of original jurisdiction, the Court may have intended to hold that only decisions of intermediate appellate and higher courts would be binding. Compare Vandenbark v. Owens-Illinois Co., 311 U. S. 534, 543, n. 21 (1941).

‡ Corbin, The Laws of the Several States (1941) 50 Yale L. J. 762. The tax aspects of the question are discussed briefly and the relevant cases cited in Paul, Federal Estate and Gift Taxation (1942) §1.11.

§ The litigants in two of the three cases cited supra note 1 did have considerably more at stake than those in the state court proceedings on which the decisions depended. In the Field case $4,230.36 was in issue. Record on Appeal, p. 18. In the two cases cited as binding authority there were $502.05 [Thatcher v. Trenton Trust Co., 119 N. J. Eq. 408, 182 Atl. 912 (1936)] and $496.51 [Travers v. Reid, 119 N. J. Eq. 416, 182 Atl. 908 (1936)] at stake. In the Six Companies case, over $140,000 was at stake, while in the case cited as binding authority there was under $23,000 involved. Sinnott v. Schumacher, 45 Cal. App. 46, 187 Pac. 105 (1919).
This situation enables certain taxpayers to profit in dealing with the Commissioner of Internal Revenue, notwithstanding the latter's access to advice on the law of each case from a battery of attorneys, ready to present scholarly briefs and arguments.\(^4\) The taxpayers' advantage is founded on the facts that substantially all federal tax cases arise in federal courts and that the results often turn on issues of local law. The cornerstone of the practice is obtaining the decision from a local court, which is then submitted to the presiding official in the federal court with the confident assurance that his honor need look no further for the local rule of law. Although the policy of the federal courts to follow state decisions in this field allowed the perfection of the technique before the Supreme Court handed down its decision in \textit{Erie Railroad v. Tompkins},\(^5\) that celebrated overruling has probably made the application of the technique more easily successful.

Take, as a pre-\textit{Tompkins} case example, the case of Mr. Edward T. Blair, beneficiary of a testamentary trust created under the will of his father. In 1923 he executed instruments of assignment of parts of the income from the trust in favor of his children. The Commissioner, in connection with 1923 taxes, ruled that the trust was spendthrift in nature, and that the assignments were invalid. Consequently the entire income was held taxable to Mr. Blair. As is usual in such cases, allocation of all the income to one person rather than its dispersal among several resulted in higher aggregate taxes. Mr. Blair sought relief from this ruling by appeal to the Board of Tax Appeals, and won a temporary victory.\(^6\) The Board's decision, however, was soon reversed by the Circuit Court of Appeals for the Seventh Circuit, which found that under the law of Illinois the assignments were invalid and that the income was taxable to Mr. Blair.\(^7\) Certiorari was denied.\(^8\)

In the month following the denial of certiorari, the trustees, expressing fear that they might be surcharged if they continued to pay the trust income under the assignments, requested the Superior Court of Cook County, which had jurisdiction of the estate, to enter a decree construing the trust instrument and instructing them as to their power to distribute income to the children. In the petition the trustees called

\(^4\) Not only are all the attorneys in the Bureau of Internal Revenue available, but also those in the Tax Division of the Department of Justice, and several more in the office of the Solicitor General.

\(^5\) 304 U. S. 64 (1938). It has been suggested that the \textit{Tompkins} case should be applied only in cases arising in Federal Courts on diversity of citizenship and not in cases involving original jurisdiction, such as bankruptcy and the like. See D'Oench, Duhme & Co., Inc., v. F.D.I.C., 10 U. S. L. Week 4223 (U. S. 1942), and especially the concurring opinion of Mr. Justice Jackson, \textit{id.} at 4226; see also (1938) 13 St. John's L. Rev. 71, 80.

\(^6\) Edward T. Blair, 18 B. T. A. 69 (1929).

\(^7\) Commissioner \textit{v.} Blair, 60 F. (2d) 340 (C. C. A. 7th, 1932).

\(^8\) Blair \textit{v.} Commissioner, 288 U. S. 602 (1933).
attention to the decisions of the Board and of the Circuit Court. All
the beneficiaries of the trust were summoned before the court, but there
is no evidence that notice of the proceedings was given to the Com-
missioner. The judge of the Superior Court agreed with the Circuit
Court of Appeals and held that the assignments were invalid, although
he also stated obiter that the trustees, not having been parties to the
actions in the federal courts, were not bound by the decisions therein.
The assignees, in danger of losing the portions of the income that their
father wanted to give them, appealed the decision to the Appellate Court
of Illinois, and obtained a reversal. The assignments were there held
valid, one of the three judges dissenting. Clearly the split in the Illinois
courts showed that the applicable rule of law was not obvious. A party
truly interested in having the assignments invalidated might have tried
to appeal the case. However, it would have been surprising if the mem-
bers of the taxpayer's family should have really wanted to upset the
settlement that he had made. They would naturally be willing to abide
by a decision confirming it, and it is not surprising that apparently no
appeal to the Illinois Supreme Court was sought. Nor is it unlikely that
the family foresaw a tax saving as a result of the decision. As already
noted, the Commissioner was not in court to take a stand adverse to
the family, or to protect his own interests by asking for review.
About three weeks after the entry of the decree pursuant to the Illinois
Appellate Court's decision, a motion was made requesting a final hearing
on the taxpayer's appeal to the Board of Tax Appeals in connection
with income taxes for 1924, 1925 and 1926. At this hearing, the state
court proceedings were duly admitted in evidence, and the Board held
itself bound to accept the verdict that the assignments were valid. The
Circuit Court of Appeals agreed that the state court's opinion as to
Illinois law, although "not unlike a consent decree," was binding. Never-
theless, it reversed the Board on the ground that the assignments did
not mean that the income was no longer that of the taxpayer, but merely
that he had instructed the trustees to deliver it to the assignees after
he had constructively received it when due. The Supreme Court deemed
the latter view a strained construction and reversed, holding that none
of the assigned income was taxable to the assignor, Mr. Blair, because
the state court had ruled that it was not his. The Court pointed out

10. Id. at 77-78.
12. Record on Appeal, supra note 9, at 2, 13.
15. Blair v. Commissioner, 300 U. S. 5 (1937). The Court rejected the res judi-
cata argument by citing the intervening decision of the state court as creating a new
situation and warranting a new decision.
that there was no "basis for the charge that the [state court] suit was collusive and the decree inoperative."

No quarrel can be had with the general rule that the judgments of state courts on local law must govern such questions when they arise in the federal courts. Nor is there objection herein to the principle that the local decisions are law even though rendered by lower or intermediate appellate courts. Nevertheless, the Circuit Court of Appeals for the Seventh Circuit, in rendering its first decision in the Blair case, was not violating the rule later established in Erie Railroad v. Tompkins when it held, in accordance with the Commissioner's determination, that the assignments by Mr. Blair were invalid. Its reading of the Illinois law, admittedly controlling, was the basis of its decision. Of course, it did not then have the benefit of a "datum" by a state court on the precise question before it, namely, whether the particular trust was spendthrift or not. It did have the benefit of research and argument by Government counsel, however, which were not available to the Appellate Court of Illinois, although the latter had before it the reasoning of the federal circuit court.

As pointed out by Professor Corbin, the important feature of the rule of the cases under discussion is that the principle adopted by the Supreme Court seems to prevent one of the parties from arguing its view of the law. By use of the local forum, the parties interested in the Blair trust effectively prevented the Government from arguing that the trust was spendthrift. It was "not open to the Government" to argue that question, the Supreme Court stated. From a purely legal point of view, the surface regularity of the state court proceedings stands in the way of a charge of fraud or collusion, but it is highly significant that the two trustees who brought the state court proceedings were Mr. Blair, the taxpayer, and one of his sons, an assignee of the income. Clearly no one who appeared in that suit had any palpable interest in invalidating the assignments. The right to receive the income might have been restored to the taxpayer, but he himself originally procured the assignments. The Government was the only party in fact adversely affected by the outcome of the proceedings, but it never had a day in court to argue the rule of law before the judges who finally decided issues which governed its right to the taxes claimed.

16. But cf. note 5 supra.
17. See Corbin, supra note 2, at 768, 775.
18. Record on Appeal, supra note 9, at 53-54. Compare Otto C. Botz, 45 B. T. A. No. 151 (1941), where the Board held that the state court proceedings were collusive and could be disregarded because there was no adverse interest represented. Occasionally a local court's action might be attacked for another reason. For example, in Tooley v. Commissioner, 121 F. (2d) 350 (C. C. A. 9th, 1941), the court held that the probate court had acted without jurisdiction and that its decision was not binding.
The pattern of the Blair litigation may be found in a number of other federal tax cases. A leading example is Freuler v. Helvering, which concerned income from a trust created by the will of A. C. Whitcomb. The trustees for a number of years had distributed the income to the beneficiaries without withholding sums for depreciation reserves. However, deductions for the proper amounts of each year’s wear and tear on the assets were taken by the beneficiaries in computing federal taxes on the trust income. Liability for higher taxes claimed by the Commissioner depended on whether or not these sums were “distributable” under the instrument, in accordance with the statutory terms. The Board of Tax Appeals twice held that they were distributable and taxable to the beneficiaries to whom they were actually distributed. A few months thereafter the trustees started accounting proceedings in the California court having administrative jurisdiction over the trust. A ruling was obtained to the effect that the sums were not distributable, and should be repaid. No one appealed. The beneficiaries, armed with this decision, promptly returned to the federal courts and pointed out the error of the previous holdings. The United States Supreme Court ultimately said that the taxpayers were right, that the sums representing depreciation were not distributable, because the state judge had said so in a proceeding which could not be deemed collusive or based on consent of all the parties. However, the only party whose interests were in truth at stake was the unrepresented Commissioner of Internal Revenue. The beneficiaries, including the taxpayers involved, devised a method of repayment approved by the California court which the three dissenting justices in the United States Supreme Court thought specious as a means of reducing the amount of taxable income.

The result in the Freuler case is paralleled by the decisions of the Circuit Court of Appeals for the Eighth Circuit in the litigation over the tax liability of the beneficiaries of the Hubbell trust. That court reversed itself on the question of the distributability of certain income.

20. Revenue Act of 1921, §219(d).
24. The purpose in the minds of the persons who instituted the state court action is at least equivocal. In Commonwealth v. Fidelity & Columbia Trust Co., 171 Ky. 519, 183 S. W. 658 (1916), appears the pertinent statement that a decision in a prior action would be binding in a tax proceeding unless “rendered with the purpose of defeating the commonwealth in the collection of its taxes.”
from the trust after a judge of the Polk County, Iowa, District Court had said that its interpretation of the trust was wrong.\footnote{26}

It is noteworthy that these taxpayers, like the parties involved in the \emph{Blair} case, did not appeal to the higher courts of the state after obtaining decisions in the lower courts which would effectively prevent the collection of the taxes the Commissioner was claiming. This is not surprising. However, in occasional cases appeals have been taken to the highest state courts for interpretations of local law to be used later in federal courts. For example, in the litigation over who should pay the taxes on the income from certain trusts established by Mr. F. W. Fitch, it became necessary to determine the Iowa law on the finality of divorce settlements in that state. The United States Supreme Court had admitted its inability to do more than speculate as to the power of the Iowa courts to modify an alimony award.\footnote{27} Consequently, Mr. Fitch, who had been burdened with unexpected taxes as a result of his inability to dispel the Court's doubt, took the obvious course. He commenced proceedings to "test out the Iowa law"\footnote{28} and eliminate doubt thereafter. The form of the Iowa action, of course, had to appear regular and could not be merely a proceeding to determine tax liability. So he sued to have the alimony award modified, naming his former wife as defendant. The lower Iowa court held that he had no right to the relief requested. Then, although the decision was in accord with the position he had taken previously in the Supreme Court, and had believed to be correct, he appealed to the Supreme Court of Iowa, which duly affirmed the lower court with the comment that it had thought the law to have been "fairly well settled."\footnote{29} When the Commissioner once more had a chance to argue to the contrary, he was still in a federal court, the Board of Tax Appeals, and it was too late for him to express his view of the Iowa law. A state judge had spoken. Thenceforth Mr. Fitch's income taxes would be just what he had intended them to be when he created the alimony trust.\footnote{30}


\footnote{27} Helvering v. Fitch, 309 U. S. 149 (1940). In certain cases the federal courts may not decide doubtful questions depending on state law until a state court has spoken. Thompson v. Magnolia Co., 309 U. S. 478 (1940); Railroad Comm. v. Pullman Co., 312 U. S. 496 (1941). Could this rule be applied to tax cases such as Helvering v. Fitch, \textit{supra} and Pearce v. Commissioner, 120 F. (2d) 228 (C. C. A. 2d, 1941), \textit{aff'd}, 10 U. S. L. \textit{Week} 4260 (U. S. 1942)?

\footnote{28} Transcript of Record, p. 6, quoting from the oral argument of counsel for Fitch before the Board of Tax Appeals in Numbers 93340 and 98131.

\footnote{29} Fitch v. Fitch, 229 Iowa 349, 294 N. W. 577 (1940). If Mrs. Fitch had been eager and well advised, she could have argued that the question of power to revise was moot because Mr. Fitch had not shown any valid ground for obtaining a reduction of his payments.

\footnote{30} F. W. Fitch, 43 B. T. A. 773 (1941).
The mists of the Supreme Court's uncertainty, now pierced by authentic evidence of the law of the locality, had been scattered.31

The litigation involving the Lowe estate is one of the most interesting examples of the use of state courts for the solution of federal tax problems. The executors of the estate of Albert Lowe, in conjunction with his children, obtained from a county circuit court in Florida an interpretation of the decedent's will. The court ruled in accordance with the construction requested by all persons appearing in the case, so that there was no losing party. This decision was appealed to the Florida Supreme Court and affirmed.32 The opinion indicates that the action had been brought to settle a controversy arising out of the claim for taxes asserted by the Commissioner. The interpretation of the will which was adopted by the court seems to conflict with a number of its previous decisions, which were apparently not being overruled.33 However, it did effectively put a stumbling-block in front of the collection of the estate taxes claimed by the Commissioner, who, of course, was not represented before the court. Although the liability of the Lowe estate for taxes has not as yet been fixed, the decision has already been cited by other litigants to defeat a tax claim arising out of similar circumstances.34

Local law does not control in every case involving interpretations of words or acts. Local rules of property do not, for example, govern cases in which the issue is the applicability of the words of the revenue act to the particular facts, rather than the determination of the taxpayer's legal interest.35 Thus, in United States v. Pelzer36 the Court held that the taxpayer had made a gift of "future interests in property." However, it was emphasized that the words "future interests in property" in the gift tax act are not necessarily the same as "future interests" under the common law of the state from which the case arose. The taxpayer in that case had good reason to believe that the local courts would hold that the donees had received present vested interests under

31. Compare Hawks v. Hamill, 288 U. S. 52, 57 (1933). Also in that case the following appears at p. 58: "Indeed the radiating potencies of a decision may go beyond the actual holding."

32. Lowe v. Lowe, 142 Fla. 266, 194 So. 615 (1940).


34. See Webster v. Commissioner, 120 F. (2d) 514, 515 (C. C. A. 5th, 1941).


36. 312 U. S. 399 (1941). The tax statute concerned was the gift tax act. Revenue Act of 1932, § 504(b).
Alabama law, but it would not have aided him to get the local courts to say so.

One taxpayer actually went to the trouble of obtaining a state court decree which ultimately proved futile. In that case the state court action was started about two weeks after the argument in the Circuit Court of Appeals, and the local judge's decision, which was rendered on the day after the hearing, was introduced in the latter court by motion. The motion was to reverse and remand to the Board for consideration of the effect of the state court decision. Service of the motion papers constituted the Commissioner's first notice of the proceeding in the local court. However, the Circuit Court refused to consider the decree binding on the Government, "which was not a party, and which of course has no right of appeal." Possibly the Supreme Court, following the Blair decision, would have disagreed with the Circuit Court's view of its duty with respect to state court decisions, but the appeal was dismissed at the threshold of argument.

Another class of cases in which local decisions may be irrelevant are those where the parties are in disagreement over the facts and not the law. The Supreme Court has never held that the Commissioner must follow a decision of a state court in a case where the only issues before the local court were pure questions of fact. Most issues do not fall clearly into one or the other category of questions of law and fact, but there are a few available examples of issues of fact un tarnished by a dispute over the legal conclusions. For example, whether a written document is a forgery and whether it was signed on a given day would clearly be questions of fact. Similarly, the intention of the parties as expressed in the document would be a matter for the trier of facts to determine. If a probate court decides that a decedent owned certain property, it is reaching a legal conclusion on the question of who is the owner. However, the parties may be in agreement as to what the consequences of the facts will be: that if A handed a document to B on Christmas day, B owned the property involved, and vice versa. The whole case may turn on whether the trier of facts believes A or B. Therefore, the final judgment that A actually is the owner, although a conclusion of law, is merely a resolution of a controversy over the factual issues. If a distinction is to be made between the binding effect of state decisions on questions of law and of fact, then the Commissioner

38. The record of proceedings in the Circuit Court of Appeals shows the manner in which the state court decree was introduced.
39. Brainard v. Commissioner, 91 F. (2d) 880 (C. C. A. 7th, 1937), cert. denued, 303 U. S. 665 (1938). Even if the state court decree had been deemed binding, the Government might have prevailed on the strength of other issues in the case.
must go beyond the decision and determine whether or not the parties were in disagreement on the facts alone or on the law. If the only controversy was over the facts, perhaps he could ignore the ruling of the state court. The Blair and Frculcr cases would not be strictly in point, since in those cases the facts were stipulated and the courts had only questions of law to decide.

In one decided case the difference between factual and legal issues was urged upon a Circuit Court of Appeals as a reason for instructing the Board of Tax Appeals to make findings of fact independently of certain state court decrees. In that case, four children had executed an instrument which was clearly worded as an absolute assignment to their mother of all their interests in their father's estate. After their mother's death about ten years later, they alleged that they had misunderstood the purport of the instrument, and had intended only to give their mother a life interest. They sought and obtained, without notice to the Commissioner, an order from a county circuit court in Missouri, reforming the instrument to read that only a life interest was given to the mother. As a result, at her death she was deemed to have owned one-fifth of her husband's estate rather than all of it. The effect on the federal estate tax liability was a reduction from $13,000 to zero. The Board of Tax Appeals held that the Commissioner had to accept the state court's conclusion as the intention of the children, and this was approved by the Circuit Court of Appeals for the Eighth Circuit.

The only issue decided by the lower state court was that the children had intended to give their mother a life estate rather than a fee interest. This involved a decision on a question of fact only. All the witnesses before that court were called by the proponents of the reformation, and there was no opposition to the granting of it. An administrator ad litem appeared for the estate, but obviously his interest was not adverse to the petition because the ultimate effect was to reduce the taxes against the estate by a substantial sum. All the heirs and legatees of the decedent were in favor of the change, and it is clear that their ultimate financial interests were benefited by it. There is, of course, no evid

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42. Helvering v. Rhodes' Estate, 117 F. (2d) 509 (C. C. A. 8th, 1941).
43. Hugh D. Rhodes et al., 41 B. T. A. 62 (1940).
44. The intention of a party is a question of fact. Colorado Bank v. Commissioner, 305 U. S. 23 (1938).
45. This is demonstrated by the record of proceedings before the local court.
46. The four children were the sole legatees of the residuary estate of their mother. The result of the case was to give them the same property without administration as part of their mother's estate. Although the three sons did lose a contingent right to receive the sister's share in case of her death within eight years, it is clear that the additional sums received as a result of the tax saving were greater than the value of these remote contingent interests.
dence that they were not entirely truthful in their allegation that the original intention was to give only a life estate, but sometimes cross-examination by an adverse party can turn up discrepancies in testimony not otherwise evident. If the reformation had not been binding on the Commissioner, the intention of the children and the question of the ownership of four-fifths of the property would have been in issue before the Board of Tax Appeals, not treated as though res judicatae. The Board would have perceived a reason to question the testimony of the interested parties and their witnesses which was not at all evident to the local judge, who was not apprised of the tax consequences involved. Although the judge might be expected to scrutinize the proceedings for ulterior motives, why should he not accept the word of every party in apparent interest as to the facts of a case? Are not issues frequently presented on agreed statements of facts?

Indeed, the Commissioner has frequently been confronted with the problem of dealing with clear cases of agreed alterations of the facts of cases. These arise most often in estate tax matters, where the persons interested in the estate have composed their differences by making a settlement acceptable to all. The state probate court then enters a decree settling the accounts of the executors or administrators in accordance with the agreement of the heirs and distributees. Thereafter, the Commissioner is asked to accept such decree as determinative of the size of the estate, the amount left to charity and so forth. The compromise in the probate court may have been made with no thought of tax consequences, and surely the law favors such conclusions of litigation. But why should the Commissioner be forced to accept lower taxes as a result of the consent decree? As a matter of fact, in one case the Circuit Court of Appeals for the Third Circuit refused to allow a deduction from an estate although the probate court had decided that the claim was valid in an uncontested accounting. In a number of other decisions the Commissioner has been permitted to show the true facts as they existed when the death occurred, and the taxes have been collected without consideration of the compromise arrangement.47

There is no ground in logic for requiring the Commissioner to abide by the finding of a state court on a question of fact.48 The principle


48. In Shulman, The Denise of Swift v. Tyson (1938) 47 YALE L. J. 1336, 1349-50, it is suggested that the Tompkins rule does not apply where only facts were in issue in the state court.
of comity, the desirability of uniformity in legal rules, and the theory that local judges have a special competence to understand local usages, customs and the common law are the reasons for requiring adherence to decisions of local courts. But they do not demand acceptance by federal judges of findings on factual issues made in cases arising in state courts between parties not litigating again and not in privity if the litigants before the federal court.\footnote{49} Identical issues of fact must frequently be tried over, for the rule of res judicata applies only when the parties are identical or in privity.\footnote{50} Each party is entitled to have his day in court and his argument of the facts heard once, even though the same issues may have been determined in a prior case involving someone else.

The denouncers of \textit{Swift v. Tyson},\footnote{51} who hailed the decision in \textit{Erie Railroad v. Tompkins}, were more concerned with the danger of diverse rules of law within the borders of one state than with the possibility that a litigant might be forced to argue one issue twice. Indeed, Mr. Justice Brandeis, who wrote the prevailing opinion in the \textit{Tompkins} case, has said that “unless duly summoned in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.”\footnote{52} In the same place it was stated that the law does not expect a person to intervene voluntarily in a suit to which he is a stranger in order to obtain a hearing. Furthermore, as pointed out by Professor Corbin, there are indications in recent Supreme Court decisions that a litigant may argue that the most recent decision of a state court is not in line with the law of that state as declared in other sources.\footnote{53} The essence of the rule of the \textit{Tompkins} case seems to be that the federal courts must avoid any suggestion that they are not following state law, where it is applicable, as declared by the state courts. There must be one uniform rule within each state, and this rule is what the local judges say it is. However, there is no evidence that the Supreme Court meant that the latest statement of any local judge shall determine what the local law is. In fact, the court admitted that it might be possible


\footnote{50. “The foundation of the doctrine of res judicata is that there has been a judicial inquiry into the subject matter, in which the person to be affected by the judgment has had an opportunity by representative to be heard fully.” Rugg, J., in Old Dominion Copper Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193 (1909), aff’d, 225 U. S. 111 (1912).}

\footnote{51. 16 Pet. 1 (U. S. 1842).}


\footnote{53. Fidelity Trust Co. v. Field, 311 U. S. 169, 180; Six Companies v. Highway Dist., 311 U. S. 180, 188 (1940).}
to discover more convincing evidence of the state law than the latest opinion of a lower court judge. In one case the Court intimated that it would be willing to consider a reason, if advanced, for supposing that the ruling of the state court on the very facts before it would not again be followed. Consequently it seems apparent that the Court would permit the Commissioner's representatives to argue their view of the law as long as they stuck to an exegesis of the local law, based on statutes, decisions and other authorities emanating from the state only, possibly embellished with references to changing mores and analogies with rules in other states. Such an argument would be no less persuasive where the latest local decision was rendered in connection with the facts of the very case pending before the federal court. The local law is still to be found by studying precedents, as in any case in a state court.

Since res judicata is not involved, the local court's opinion on the identical facts is entitled to no more weight than any precedent that would be cited for purposes of stare decisis.

Certain more complicated procedures could be devised for protecting the revenue from the particular evil discussed herein. If the taxpayer who seeks a state court adjudication on an issue of law that will be involved in a subsequent tax proceeding gives the Commissioner notice of the pending action and the latter is allowed by the court to file a brief and appear in oral argument, then there can be no objection to his being bound by the decision reached on legal issues. He has had his day in court. It is clear, however, that if the issue is on the facts, it would be difficult to arrange to give him an opportunity to present all the evidence that he deems necessary and to allow cross-examination. Furthermore, it would be complicated to present all the evidence needed for a tax case during a trial in which the ultimate issues were between private litigants.

Consequently the Commissioner can have his day in court where the facts are disputed only if he is allowed to litigate them from the beginning in the actual tax proceeding before a federal court. The courts may eventually hold that the Commissioner is not bound by the state court findings of fact. Congress might hasten such a result by enacting a


55. In Jackson v. Chew, 12 Wheat. 153 (U. S. 1827), the Supreme Court, while acknowledging that the law of New York governed the issues, did not blindly accept a decision of a New York court rendered in a prior case involving the same will and facts. The Court first studied other sources of New York law to ascertain whether the New York court had been right.


57. However, in the Blair case the Court used language equally appropriate to a discussion of res judicata. See 300 U. S. 5, 10 (1937).
provision in the tax law giving the Commissioner's determination of fact a presumption of correctness until evidence of the facts themselves, and not of another court's findings of fact, has been presented to the federal court trying the tax case. This is a reasonable requirement which would permit the Commissioner to have his just day in court. No undue burden is placed on taxpayers, who generally must present evidence in court in order to contest a tax claim.

When a taxpayer, without opposition by a determined opponent, has obtained a judgment of a state court on a question of law and the Commissioner has not been heard in defense of his view of the local rule, the latter should be given an opportunity to show that the state judge erred. Courts have frequently stated that a decision should only bind those who had an opportunity to appeal from it. Possibly an appeal to the highest court of the state would have resulted in a different decision in the Blair case, for example. Of course, if the decision of the state court appears clearly correct, so that further argument, even by another party with a strong adverse interest, would not change the result, then no harm is suffered from requiring the Commissioner to follow the decision despite the denial of an opportunity to present his case. However, the best test of the correctness of a decision is its ability to withstand attack by those adversely affected by it. Judges have been known to admit that their previous views were in error, and courts have frequently reversed themselves. The fact that a decision even of the state's highest court has been obtained need not always be deemed conclusive evidence of the law of that state. In the Fitch case, for example, the local decisions which caused the United States Supreme Court to think the law of Iowa was in confusion were considered clear by the Supreme Court of Iowa. The opinion of the latter court, however, was rendered in a case in which the plans of both parties, carefully considered prior to the divorce, would have been upset if a different decision had been reached. Is it not possible that the eloquence of Government counsel could have convinced the state court that the power to alter did exist? They appeared before the United States Supreme Court, which concluded that the Iowa law was in doubt. The Iowa Supreme Court, without hearing Government counsel, decided that its

60. In this connection it is noteworthy that three state court judges thought the trusts were not spendthrift in nature, but two others, the lower court judge and the dissenting Appellate Court judge, thought otherwise, as had the three judges of the Circuit Court of Appeals.
62. Reversals of prior holdings by the same court are not uncommon. See Burnet v. Coronado Oil & Gas Co., 283 U. S. 393, 406-10 (1932).
prior decisions had left no room for dispute that the decree was unalterable.

It was long believed that the founding fathers provided for federal jurisdiction in cases of diversity of citizenship because they feared the prejudices of local judges in favor of their own people. Perhaps the fear was groundless, but today in tax cases the Commissioner may well fear harm from the decisions of individual state judges, although more because of the taxpayers' guile than judicial prejudice. The collection of revenue should be protected from obstruction by state court judgments procured in cases involving spurious or trumped-up issues between parties who have no fundamental difference of opinion. Proper administration of the tax structure requires that no taxpayer be allowed an advantage not available to others similarly situated, although amounts involved in particular cases may be small.

In recognition of the need for greater protection of the interests of the Government in cases where the constitutionality of federal laws is questioned, Congress has provided that all federal courts must notify the Attorney General and permit him to intervene as a party whenever such an issue arises before them. A desire for assurance that the Government's position will be presented by competent and zealous counsel engendered this bill, since the parties on both sides of some constitutional cases have been found equally hopeful that the act would be held invalid. Without a real party in interest represented, the arguments for constitutionality were unlikely to be urged sincerely.

The Commissioner could not be notified of every case involving issues that might eventually arise in a federal tax matter, and the nature of the Government's interest might be obscure before the tax proceedings had been started. The tax aspects of the questions might not even appear for many years after the decision, although only in those cases brought in the best of faith would this occur. State court decisions in which the ultimate effect on tax liability was not in the mind of the moving

64. See Friendly, The Historic Basis of Diversity Jurisdiction (1928) 41 Harv. L. Rev. 483.
65. See 50 Stat. 751 (1937), 28 U. S. C. §401 (1940). In this connection it is noteworthy that the Government had intervened in the obviously important cases of Helvering v. Davis, 301 U. S. 619 (1937), and Carter v. Carter Coal Co., 298 U. S. 238 (1936), both of which had started as suits between private litigants. See also David M. Heyman, 44 B. T. A. 1009 (1941), pending on appeal before the Circuit Court of Appeals for the Second Circuit, where the taxpayer sought a state court adjudication of his rights under a trust indenture and the Commissioner filed an affidavit pointing out the tax aspects of the proceedings. Heyman v. Heyman, N. Y. L. J., January 31, 1942, p. 478, col. 5.
67. See id. at 3272.
party may even redound to the Commissioner's ultimate benefit, as well as to the taxpayers'.

The unfortunate results of other cases might be avoided by requiring a taxpayer to litigate anew every issue of law and fact in his controversy with the Commissioner, unless he gave adequate notice to the latter when the earlier proceeding was instituted. The Commissioner might then intervene to present the Government's views.

However, this might well prove to be but slight protection, since the position of the Government is not static, and must perforce conform to new statutes and court decisions. Furthermore, the Government's prime interest is not in arguing for one or another particular rule of state law, but in the assurance the decision shall be reached after full deliberation rather than casual presentation by the advocates of only one side. The better solution to the problem would be to give all state court decisions only their proper weight. Whether or not notice were given to the Commissioner before presentation of the question in the federal court, the earlier decision should be treated only as a precedent, not given effect equivalent to res judicata. If the prior litigation had involved only issues of fact, then the facts should be tried over again, upon the same or new evidence, as is always the situation when new parties oppose each other. If legal issues were presented, the federal judge should be as free as a state judge to decide what the law is. Thus the Commissioner could always have his say. Moreover, the federal revenue would be protected against the perfunctory actions of local courts, induced, frequently surreptitiously, by taxpayers who perceive that a judge is more likely to decide his way if no one on the other side has a true interest in a different result.

68. See Plunkett v. Commissioner, 118 F. (2d) 644 (C. C. A. 1st, 1941); Commissioner v. Greene, 119 F. (2d) 383 (C. C. A. 9th, 1941); Dysart v. Commissioner, 95 F. (2d) 652 (C. C. A. 8th, 1938), cert. denied, 305 U. S. 698 (1938); Cassius E. Wakefield, 44 B. T. A. 677 (1941).