THE CHURCH AND SPIEGEL CASES: SECTION 811(c) GETS A NEW LEASE ON LIFE

BORIS I. BITTKER†

THE cornerstone of the federal estate tax, upon its enactment in 1916, was the provision—the prototype of Section 811(c) of the Internal Revenue Code—sweeping into the decedent's gross estate all property which he had transferred to others during his life either "in contemplation of . . . his death" or by a disposition "intended to take effect in possession or enjoyment at or after his death."¹ Without these aggressive clauses, the tax would have embraced little more than the property actually owned at death.² The tax collector then would have been a timid soul indeed, forced to stand by passively while taxpayers disposed of the bulk of their wealth in anticipation of the death levy. Over the years, however, and despite these clauses, the courts brought the tax collector to his knees. To prove that a gift was made "in contemplation of death," the Commissioner was forced to embark upon a hopeless search for "the motives and purposes of one who is dead, the proofs of which, so far as they survive, are in the control of his personal representatives."³ Meantime the "possession or enjoy-

† Associate Professor of Law, Yale Law School.

1. Revenue Act of 1916, § 202(b), 39 STAT. 777 (1916).

2. Section 202(a) of the Revenue Act of 1916 required the inclusion of all property "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." Section 202(c) reached property held by the decedent and any other person as joint tenants or as tenants by the entirety, "except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent." There was no specific provision relating to property transferred by the decedent subject to a reserved power to revoke, alter, amend, or terminate (*but see* *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929)), no provision relating to the proceeds of life insurance on the decedent's life, and no provision relating to property subject to the decedent's power of appointment (*see* *United States v. Field*, 255 U.S. 257 (1921)).

3. Mr. Justice Stone, dissenting in *Heiner v. Donnan*, 285 U.S. 312, 343 (1932). He went on: "As the event has proved, the difficulties of establishing the requisite mental state of the deceased donor has rendered the tax on gifts in contemplation of death a weak and ineffective means of compensating for the drain on the revenue by the withdrawal of vast amounts of property from the operation of the estate tax." See also Pavenstedt, *Taxation of Transfers in Contemplation of Death: A Proposal for Abolition*, 54 YALE L.J. 70

ment" provision was emasculated by "technical and sterile definitions;"⁴ the melancholy story of its progress "from riches to rags"⁵ is familiar and need not be retold.⁶

Despite a notable elaboration of the statute, sometimes in direct response to judicial scorn for simpler phraseology, these two clauses of Section 811(c)⁷ remain even today of central importance. Moreover, in recent years they have been emerging from dormancy in response to more sympathetic judicial treatment. A renaissance of the "contemplation of death" arm of Section 811(c) has been fostered by several Courts of Appeals,⁸ but its burgeoning has been tentative and has not yet received the encouragement of the Supreme Court. The "possession or enjoyment" provision, on the other hand, owes its new-found power to the Supreme Court,⁹ which in January of this year added spectacularly to its scope by the decisions in *Commissioner v. Church's Estate*¹⁰ and *Spiegel's Estate v. Commissioner*.¹¹ It is with the impact of these two decisions that this article is concerned.

As this article goes to press, critical comment on the decisions is just commencing;¹² it will undoubtedly rise rapidly in crescendo. One writer has said: "From one end of the country to the other, lawyers, trust officers and their clients have been given cause for great concern

(1944); Lowndes and Rutledge, *An Objective Test of Transfers in Contemplation of Death*, 24 TEX. L. REV. 134 (1945).

4. FRANKFURTER, LAW AND POLITICS 55 (1939).

5. Eisenstein, *Estate Taxes and the Higher Learning of the Supreme Court*, 3 TAX L. REV. 395, 437 (1948).

6. Eisenstein, *supra* note 5; Rottschaefer, *Taxation of Transfers Taking Effect in Possession at Grantor's Death*, 26 IOWA L. REV. 514 (1941); Oliver, *Property Rationalism and Tax Pragmatism*, 20 TEX. L. REV. 675 (1942); Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax*, 32 COL. L. REV. 1332 (1932).

7. The section was variously numbered in the revenue acts which preceded the Internal Revenue Code. "Section 811(c)" is hereafter used to refer to the parallel provision in these earlier revenue acts.

8. *Farmers' Loan & Trust Co. v. Bowers*, 98 F.2d 794 (2d Cir. 1938), *cert. denied*, 306 U.S. 648 (1939); *Davidson v. Commissioner*, 158 F.2d 239 (10th Cir. 1946); *Vanderlip v. Commissioner*, 155 F.2d 152 (2d Cir. 1946), *cert. denied*, 329 U.S. 728 (1946); *Slifka v. Johnson*, 161 F.2d 467 (2d Cir. 1947), *cert. denied*, 332 U.S. 758 (1947); *Commonwealth Trust Co. v. Driscoll*, 50 F.Supp. 949 (W.D. Pa. 1943), *aff'd per curiam*, 137 F.2d 653 (3rd Cir. 1943), *cert. denied*, 321 U.S. 764 (1944).

9. *Helvering v. Hallock*, 309 U.S. 106 (1940); *Fidelity-Philadelphia Trust Co. v. Rothensies*, 324 U.S. 108 (1945); *Commissioner v. Estate of Fields*, 324 U.S. 113 (1945); *Goldstone v. United States*, 325 U.S. 687 (1945).

10. 335 U.S. 632 (1949).

11. 335 U.S. 701 (1949).

12. Foosaner, *Church-Spiegel Decisions, A New Bombshell to Existing Trusts*, 27 TAXES 444 (1949); Conway, *I.R.C. § 811(c)—The Church and Spiegel Interpretation*, 34 CORN. L.Q. 376 (1949); Looker, *Estate Taxation of Living Trusts: The Church and Spiegel Decisions*, 49 COL. L. REV. 437 (1949); Note, *The Church and Spiegel Cases: The Meaning of A Transfer Effective at Death*, 49 COL. L. REV. 533 (1949); Schrenk and Wellman, *The Church and Spiegel Cases*, 47 MICH. L. REV. 655 (1949).

respecting literally thousands of existing trusts. A bombshell was thrown into an otherwise seemingly peaceful situation"¹³ by these decisions. The *Church* case has already led to a recommendation by the American Bar Association for remedial legislation¹⁴ and to a proposal by the Treasury Department to amend its Regulations.¹⁵ The *Spiegel* case undoubtedly will spur consideration of previously advanced proposals for legislation.¹⁶

I. PRELUDE

Both cases were argued in October, 1947.¹⁷ The Court was conspicuously silent until the last day of the 1947 term. Then reargument was ordered in both cases,¹⁸ counsel being "requested to discuss particularly" nine questions which in effect inquired whether the Supreme Court had been mistaken in its view of the "possession or enjoyment" clause of Section 811(c) in every important case before *Helvering v. Hallock*. Justices Frankfurter and Jackson announced that they "disapprove the foregoing [order] because it includes hypothetical and argumentative questions not raised by either counsel or necessary to decision of the case." The cases were reargued in accordance with these orders in October, 1948, and decided in January, 1949. Mr. Justice Black spoke for the Court, holding for the Commissioner of Internal Revenue in both cases. Mr. Justice Reed wrote a single opinion, concurring in the *Spiegel* case and dissenting in the *Church* case. Mr. Justice Jackson, without opinion, dissented in *Spiegel* and concurred in the result in *Church*. Mr. Justice Burton dissented with opinions in each case. Mr. Justice Frankfurter dissented in both cases with a single opinion. Rehearing in both cases was denied in February.¹⁹

The cases which enjoyed such unusual attention from the Court had originally asked only that the Court unravel several important but minor mysteries which were the heritage of the celebrated case of *Helvering v. Hallock*.²⁰ That case, it will be recalled, involved a transfer in trust under which the settlor had created a life estate in his wife, the principal to be paid to him if he survived his wife but to his children if he pre-deceased her. Looking to the fact that "the settlement provides for return or reversion of the corpus to the donor upon a con-

13. Foosaner, *supra* note 12, at 444.

14. See note 147 *infra*.

15. 14 FED. REG. 1824 (1949).

16. For proposals for federal legislation, see note 71 *infra*. For a state statute enacted as a consequence of the *Spiegel* case, see note 69 *infra*.

17. 16 U.S.L. WEEK 3138 (1947).

18. 68 S.Ct. 1522, 1524 (1948).

19. 336 U.S. 915 (1949).

20. 309 U.S. 106 (1940). The Court decided at the same time *Helvering v. Squire*, *Rothensies v. Huston*, and *Bryant v. Helvering*, involving similar though not identical trusts.

tingency terminable at his death," the Court held that the trust was a taxable "transfer . . . intended to take effect in possession or enjoyment at . . . death." The Court reaffirmed its still earlier decision in *Klein v. United States*,²¹ where it had said:

"It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." ²²

The *Hallock* opinion had started the "possession or enjoyment" clause back on the road from rags to riches. But it left unanswered a number of questions, among them the following:

(1) Is the transfer taxable if the settlor's reversionary interest is not expressly reserved, as in the *Hallock* case, but arises "by operation of law"? This occurs, for example, when the settlor provides that the remaindermen must be living at his death to receive the corpus, but neglects to name an alternate taker. Consequently, a "resulting trust" (a reversionary interest) may arise in favor of the settlor.

(2) Is the transfer taxable no matter how slim the settlor's chance to reacquire the property? In the *Hallock* case, the corpus would revert to him if he survived his wife. But what if the return of the corpus to the settlor depends upon an unlikely contingency, such as his survivorship of children and grandchildren? ²³

(3) In what sense must the transfer have been "intended" to take effect in possession or enjoyment at or after death? Suppose, for example, the reversionary interest, especially if remote, exists only because the draughtsman of the trust instrument (without the settlor's knowledge) had either overlooked a contingency which would create a resulting trust or, out of an excess of caution, provided for return of the corpus upon some contingency?

These were the narrow issues which confronted the Supreme Court upon the first argument in the *Church* and *Spiegel* cases. In each the settlor's reversionary interest (if he had one, which was disputed) arose only by operation of law and not by express reservation. And in each the interest was very remote and, it was argued, not consciously "intended" by the settlor. In deciding the *Spiegel* case, the Court did not stray far from these issues. But the decision in the *Church* case was on broader grounds, though even here the Court did not range as far afield as might have been expected from the questions which counsel were requested to discuss on reargument.²⁴

21. 283 U.S. 231 (1931).

22. *Id.* at 234. See note 118 *infra*.

23. See note 65 *infra*.

24. The Commissioner's Brief on Reargument several times reminded the Court that

The occasion for the breadth of decision in the *Church* case was that the decedent had retained a life estate in the transferred property, in addition to the asserted reversionary interest. The Court held that the settlor's retention of the income, even without a reversionary interest, branded the trust as a "transfer . . . intended to take effect in possession or enjoyment at . . . his death." The decision was in harmony with the uniform construction of this clause in the state death tax statutes,²⁵ from which it was borrowed by the 1916 federal statute.²⁶ Though title to the remainder interests in such a trust may be vested in the remaindermen when the trust is created, the state cases recognized that they do not gain "possession or enjoyment" of the corpus until the settlor's death. Moreover, the inclusion of such trusts had been recognized as a practical necessity: "It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate."²⁷ Yet in 1930 the Supreme Court had held in *May v. Heiner* that such a trust was not "intended to take effect in possession or enjoyment at . . . death." Mr. Justice McReynolds' characteristically cryptic—and criticized—opinion²⁸ in effect equated the statutory words "possession or enjoyment" with the concept of title:

"At the death of Mrs. May [the settlor] no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed."²⁹

When this view was reasserted the following year in three *per curiam* opinions,³⁰ Congress enacted the Joint Resolution of March 3, 1931,³¹

the cases could be disposed of upon the narrow grounds originally advanced. See *id.* at pages 4, 17-8, and 55.

25. See Note, 49 A.L.R. 864, 878 (1927); Brief for Petitioner, pp. 20-5, *Hassett v. Welch*, 303 U.S. 303 (1938). State courts passing on the issue after *May v. Heiner*, 231 U.S. 238 (1930), have not adopted the Supreme Court's construction. *In re Kutsche's Estate*, 268 Mich. 659, 256 N.W. 586 (1934); *Rising's Estate v. State*, 186 Minn. 56, 242 N.W. 459 (1932); *Blodgett v. Guaranty Trust Co.*, 114 Conn. 207, 158 Atl. 245 (1932), *aff'd*, 287 U.S. 509 (1933). Indeed, the Court of Appeals for the Second Circuit has said that such a transfer "is as nearly the substitute for a bequest as it can be and still remain a gift at all," hinting that the reservation of income from transferred property might stamp the transfer *ipso facto* as a gift in contemplation of death. *Vanderlip v. Commissioner*, 155 F.2d 152 (2d Cir. 1946), *cert. denied*, 329 U.S. 728 (1946).

26. Leighton, *Origin of the Phrase, "Intended to Take Effect in Possession or Enjoyment At or After . . . Death"* (Section 811(c), Internal Revenue Code), 56 YALE L. J. 176 (1946).

27. *Matter of Keeney*, 194 N.Y. 281, 287, 87 N.E. 428, 429 (1909).

28. 231 U.S. 238 (1930). 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION §7.14 (1942) and articles there cited; Surrey and Aronson, *supra* note 6. For contemporary comment, see 44 HARV. L. REV. 131 (1930); 29 MICH. L. REV. 123 (1930); 15 MINN. L. REV. 252 (1931).

29. 231 U.S. 238, 243 (1930).

30. *Burnet v. Northern Trust Co.*, 283 U.S. 782 (1931); *Morsman v. Burnet*, 233 U.S. 783 (1931); *McCormick v. Burnet*, 283 U.S. 784 (1931).

31. C. 454, 46 STAT. 1516 (1931).

expressly providing for a tax on such transfers. But the amended statute was later held to apply only to transfers made after its enactment,³² leaving pre-1931 transfers sheltered from tax by *May v. Heiner* and the three succeeding *per curiam* cases. In the *Church* case, the Court reexamined and overruled *May v. Heiner* though the issue had not been raised by the Commissioner.

II. THE SPIEGEL CASE

The trust provisions. The Spiegel trust (created in 1920) provided that the income should be paid to the settlor's three children during his life. Upon his death, the corpus was to be divided among these children, with the share of any deceased child going to the surviving children of that child or, in the absence of surviving children, to the settlor's other children or to their descendants. There was no gift over in the event that all of the settlor's children and their descendants predeceased the settlor. The Commissioner asserted that upon such a predecease of all beneficiaries the trust would fail and the corpus would be held upon a resulting trust for the settlor and that the settlor, therefore, had retained a reversionary interest by operation of law. The executors conceded that this would be true if the remainders of the three children were contingent upon their surviving the settlor. But in their view the remainder interest of each child was not contingent but vested and would pass (if the child died before the termination of the trust upon the settlor's death) to his legatees or next of kin, unless divested in favor of the settlor's other children or children's descendants living at the settlor's death. Thus, the executors asserted, the grantor had no reversionary interest: under no circumstances could the property return to him.³³

The Tax Court held that the settlor had no reversionary interest and that the corpus was not taxable.³⁴ The Court of Appeals for the Seventh Circuit reversed,³⁵ agreeing with the Commissioner:

" . . . [T]he interests under this trust did not vest upon the execution of the trust, as contended by the taxpayer, and could only vest upon the happening of the condition precedent, namely, that the

32. *Hassett v. Welch*, 303 U.S. 303 (1938).

33. Their argument may be recapitulated as follows: Any child who survived the settlor would receive his third of the corpus. If he predeceased the settlor, his third would pass (a) to his surviving children, if any, or (b) to the other two children or to their descendants, if any survived the settlor, or (c) to the predeceasing child's legatees or next of kin, if neither condition (a) nor condition (b) was satisfied. Of course, the settlor might be the legatee or next of kin of one of his children. But then he would get the property back not because he had reserved an interest in it, but because the child in effect had donated it back to him. See note 69 *infra*.

34. CCH TC SERV., Dec. 14,424(M) (1945).

35. 159 F.2d 257 (7th Cir. 1946).

beneficiaries or some of them survive the settlor, and this was the 'event which brought the larger estate into being for the' beneficiaries. If none of the beneficiaries survived the settlor, and that was a possibility, then the trust failed, and the trustees would hold the bare naked title to the corpus as resulting trustees for the settlor . . . This possibility that the property might return to the settlor was sufficient upon which to fasten the estate tax provisions. That the property might return to the settlor by operation of law rather than by the terms of the instrument is of no significance."³⁶

The existence of a reversionary interest. The contention most strongly urged by Spiegel's executors in their brief before the Supreme Court was that the court of appeals had misinterpreted Illinois law in holding that Spiegel possessed a reversionary interest in the trust corpus. The Court, through Mr. Justice Black, dismissed the question rather briefly:

"It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."³⁷

Mr. Justice Burton asserted that "the weight to which such announcements [of state law] are entitled will vary with the circumstances under which they are made."³⁸ Since the Justice decided that "by operation of the law of Illinois, there here existed no possibility of a reverter to the settlor"³⁹ despite the court of appeals' decision that "there was a property interest remaining in the settlor that was terminated only by his death,"⁴⁰ one might have expected a statement of the "circumstances" which made it appropriate to disregard the view of the court of appeals. But such a statement was not forthcoming. Instead, Mr. Justice Burton said that since the remainders of the settlor's three children were vested rather than contingent, he was not reexamining the court's conclusion because "it made no announcement whatever on the subject of vested remainders." Yet one of the issues of state law decided by the court of appeals was that "the interests under this trust did not vest upon the execution of the trust."⁴¹

36. *Id.* at 259.

37. 335 U.S. 701, 708 (1949).

38. *Id.* at 721.

39. *Id.* at 726.

40. 159 F.2d 257, 258-9 (7th Cir. 1946).

41. *Id.* at 259. It is true, as Mr. Justice Burton says, that the court of appeals cited the *Klein* case, 283 U.S. 231 (1931), as authority for this holding, but the excerpt from the *Klein* case which the court was "applying" was a restatement of Illinois law. Moreover, the court of appeals already only somewhat less explicitly had made evident its view

Mr. Justice Frankfurter was equally unpersuaded by the court of appeals, and advanced a novel proposal:

"It is at best a dubious assumption that such a reverter exists under Illinois law. My brother BURTON's argument in disproof is not lightly to be dismissed. At best, however, this Court's guess that Illinois law would enforce such a reverter may be displaced the day after tomorrow by the Illinois Supreme Court's authoritative rejection of the guess. If tax liability is to hang by a gossamer thread, the Court ought to be sure that the thread is there. Since only the courts of Illinois can definitively inform us about this, it would seem to me common sense to secure an adjudication from them if some appropriate procedure of Illinois, like the Declaratory Judgment Act, is available. To justify at all the Court's theory, the rational mode of disposing of the case would be to remand it to the Court of Appeals for the Seventh Circuit in order to allow that court to decide whether in fact a procedure is available under Illinois law for a ruling upon the point of Illinois law which is made the basis of this Court's decision, since the correctness of this Court's assumption is at best doubtful. . . . A determination so made would conclusively fix the interests actually held by the parties to the instrument and at the same time leave to the federal courts the tax consequences of these interests." ⁴²

The Justice did not state whether, if the declaratory judgment procedure was unavailable, he would prefer to dismiss the finding on state law of the court of appeals or the "argument in disproof" of Mr. Justice Burton.

The Supreme Court previously has imposed a self-denying ordinance on the federal courts, requiring them to await an adjudication of state law by the state courts, only in cases involving the constitutionality of state statutes ⁴³ or of state administrative action.⁴⁴ In such cases, abstention is thought to reduce state-federal friction and to avoid

that the settlor had no reversionary interest because of the contingent nature of the interests of the settlor's three children.

42. 335 U.S. 632, 673-4 (1949).

43. *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944). The decision rested upon the "one doctrine more deeply rooted than any other in the process of constitutional adjudication . . . that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." For another view, see Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 293-4 (1946).

44. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and cases there cited; see also *Stainback v. Mo Hock Ke Lok Po*, 69 S.Ct. 606 (1949). It is worthy of note that in the *Sun Oil Co.* case, even though it involved enjoining a state administrative agency, Mr. Justice Frankfurter dissented, asserting that abstention by the federal judiciary was improper unless "the federal court was practically impotent to enforce state law because of its inability to fathom the complexities, legal or factual, of local law. . . ." 319 U.S. 315, 339 (1943).

needless constitutional adjudication. Where abstention is not dictated by weighty factors of this type, however, the Court has said that "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."⁴⁵ To postpone federal judicial action pending clarification of state law by state courts would be a seriously backward step in federal tax administration. State law is relevant to federal liability in innumerable cases, and it would be an unresourceful attorney—in private practice or federal service—who could not find uncertainties in the state decisions in many of these cases.

Presumably a question of state law would have to be in serious doubt to warrant holding up federal litigation pending an authoritative state determination. Yet one need not be a prophet to foresee that an appalling body of litigation, giving rise eventually no doubt to a number of conveniently conflicting "rules," would feed on this one issue. Even if postponement were discretionary with the district or Tax Court judge, presumably some limit to his discretion would be set by the courts of appeals. And they in turn, as well as the Court of Claims, would require instruction from the Supreme Court, which has found great difficulty in deciding when the federal judiciary should withhold its hand even in the grave cases involving injunctions against state agencies.⁴⁶ Moreover, the proposal to remit the United States and the taxpayer to the state courts—assuming they will accept the burden⁴⁷—overlooks the fact that Congress has provided an elaborate statutory scheme for settling tax disputes, a scheme in which the state courts play no part.⁴⁸ It overlooks also the explicit injunction against federal declaratory judgments in controversies "with respect to federal taxes,"⁴⁹ expressing a policy which is hardly friendly to like actions in the state courts. And it would add the courts of forty-eight more jurisdictions to the already sprawling judicial network which announces federal tax law, for it would be less easy than Mr. Justice Frankfurter suggests to:

"... conclusively fix the interests actually held by the parties to the instrument and at the same time leave to the federal courts the tax consequences of these interests."⁵⁰

45. *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943).

46. See notes 43 and 44 *supra*.

47. See Clark, *supra* note 43, at 294.

48. A state court may have occasion to pass on a question of federal tax liability in the course of a probate or other state proceeding. See *Matter of Rosenberg*, 269 N.Y. 247, 199 N.E. 206 (1935).

49. 28 U.S.C.A. § 2201 (1948); see *Wilson v. Wilson*, 141 F.2d 599 (4th Cir. 1944).

50. 335 U.S. 632, 673-4 (1949).

Past experience with state court decisions sought solely to "fix the interests actually held by the parties" as a basis for determining federal tax liability does not bode well for the future; all too often, the state court proceedings have been hardly distinguishable from friendly or non-adversary actions.⁵¹ Even if the Commissioner were a party to the action, the proceeding would still be colored by the fact that the issue of state law was of importance only to federal tax liability.

The consequences of a reversionary interest arising "by operation of law." Mr. Justice Black made short shrift of the distinction taken by Spiegel's executors between a reversionary interest expressly reserved by the settlor and one arising by "operation of law." He said:

"In either event the settlor has not parted with all of his presently existing or future contingent interests in the property transferred. He has therefore not made that 'complete' kind of trust transfer that § 811(c) commands as a prerequisite to a showing that he has certainly and irrevocably parted with his 'possession or enjoyment.' " ⁵²

The validity of this insistence upon a "complete" transfer will be examined later.⁵³ But one can hardly quarrel with the conclusion that an interest arising "by operation of law" is no less significant than one expressly reserved. Both "types" of reversionary interests are created by the words used in the trust instrument and both are legally effective only "by operation of law," i.e., because a court will attach legal consequences to the words used in the instrument and enforce the grantor's claim. Restated, the distinction is between rights which are conferred by a court because the grantor has used well-chosen words and those which are conferred because the grantor has combined well-chosen words with judicious silence. So restated, the distinction reflects no difference. If the *Hallock* case carries any lesson, it is that identical legal interests should have identical tax results regardless of the formulas which create them. That case overruled several earlier decisions because in them "a mere difference in phrasing the circumstances by which identic interests in property were brought into being—varying

51. Cardozo, *Federal Taxes and the Radiating Potencies of State Court Decisions*, 51 YALE L.J. 783 (1942); Sonnenschein, *The Binding Effect of a State Court Decree with Reference to Property Rights Affected by Federal Taxation*, 7 FED. B. J. 251 (1946); Note, 61 HARV. L. REV. 1033 (1948). In *Irish v. Irish*, 65 A.2d 345 (1949), the Supreme Court of Pennsylvania held that the settlor of an irrevocable trust could maintain a bill in equity to reform the instrument, so as to eliminate a reversionary interest which was retained only "through the inadvertence and mistake of his scrivener." The bill was brought after and as a result of the *Spiegel* case. Since, as the Court held, "no interest of any person [other than the settlor-plaintiff], known or unascertained, would be affected by the decree prayed for," it is doubtful that the proceeding could be regarded as an adversary action.

52. 335 U.S. 701, 705 (1949).

53. *Infra*, pp. 840-3.

forms of words in the creation of the same worldly interests—was found sufficient” to distinguish a tax-free from a taxable transfer.⁵⁴ And this is in keeping with judicial refusal, in comparable contexts, to pitch taxability on whether an interest has been acquired by words or by silence.⁵⁵

Mr. Justice Burton, in dissent, did not really disagree. He argued only that the lack of an express reservation “was negative evidence to the effect that such a reverter was not intended and not desired by the settlor.”⁵⁶ It is of course possible that interests created “by operation of law” are ordinarily the result of the draughtsman’s failure to provide for every contingency and that interests arising from an express reservation are ordinarily the result of a deliberate desire of the grantor to recapture the property if the stated contingency occurs. This seems to have been the root of the distinction.⁵⁷ But any such “mechanical distinction”⁵⁸ points the way to easy evasion; the settlor who wants a reversionary interest can get it by golden silence. Mr. Justice Burton himself confesses that “the existence of such a reverter, accordingly, may or may not have been *intended* in fact.”⁵⁹

The role of the decedent’s “intent.” Assuming with Mr. Justice Burton that the lack of an express reservation is “negative evidence” of the settlor’s intent, is his intent of importance? The statute embraces “transfers *intended* to take effect in possession or enjoyment at or after . . . death.” While the courts had never previously laid much stress on the word “intended,”⁶⁰ Mr. Justice Black in effect read it out of the statute:

“ . . . [T]he taxability of a trust corpus under this provision of § 811(c) does not hinge on a settlor’s motives, but depends on the nature and operative effect of the trust transfer. . . . [I]t is immaterial whether such a present or future interest, absolute or contingent, remains in the grantor because he deliberately reserves it or because, without considering the consequences, he conveys away less than all of his property ownership and attributes, present or prospective. . . . [A] post-death attempt to probe the settlor’s thoughts in regard to the transfer, would partially impair the effectiveness of the ‘possession or enjoyment’ provision as an instrument to frustrate estate tax evasions.”⁶¹

54. 309 U.S. 106, 114 (1940).

55. *Howard v. United States*, 125 F.2d 986 (5th Cir. 1942); *Vaccaro v. United States*, 149 F.2d 1014 (5th Cir. 1945); *Commissioner v. Allen*, 108 F.2d 961 (3d Cir. 1939), *cert. denied*, 309 U.S. 680 (1940).

56. 335 U.S. 701, 731 (1949).

57. *See Commissioner v. Kellogg*, 119 F.2d 54 (3d Cir. 1941); *Estate of Downe*, 2 T.C. 967 (1943); *Estate of Cass*, 3 T.C. 562 (1944).

58. PAUL, *FEDERAL ESTATE AND GIFT TAXATION* § 7.23, p. 179 (1946 Supp.).

59. 335 U.S. 701, 729 (1949).

60. *But see Central Hanover Bank & Trust Co. v. United States*, 58 F. Supp. 565 (Ct. Cl. 1945); *Pennsylvania Co. v. United States*, 62 F. Supp. 697, 704 (Ct. Cl. 1945) (dissenting opinion).

61. 335 U.S. 701, 705-6 (1949).

Mr. Justice Burton, dissenting, urged that the corpus should not be included unless "the settlor did actually intend that the 1920 transfer take effect in possession or enjoyment upon the expiration of the trust at his death."⁶² He found "uncontroverted and convincing evidence of the absence of any such factual intent on the part of the settlor"⁶³ in the facts that the trust instrument made no mention of a reversion to the settlor, that the reversionary interest (if there was one) was of trivial value, and that the draughtsman of the instrument testified that the settlor intended to make an absolute gift of the corpus. Mr. Justice Frankfurter did not discuss the question of the settlor's intent. His suggestion that the existence of a reversionary interest be determined by an authoritative state court decision may imply agreement with the majority that such an interest would support the tax regardless of the settlor's intent.

The majority is on firm ground in its refusal to conduct a post mortem probe of the settlor's motives. The "contemplation of death" provision has bogged down because its application is tied to a dead man's state of mind.⁶⁴ Whatever the controversies generated by the "possession or enjoyment" provision, at least its application so far has not entailed a similar futile search. To impose a subjective standard upon this part of Section 811(c) would needlessly convert it into an auxiliary of the ineffectual "contemplation of death" provision.

The remoteness of the settlor's reversionary interest. More troublesome is Mr. Justice Black's view that the corpus is includible no matter how fantastic the possibility of reacquisition.⁶⁵ The *Hallock* principle has

62. *Id.* at 729. Deliberate retention of a reversionary interest which is extinguished by the settlor's death would stamp the transfer, in Mr. Justice Burton's view, as "intended" to take effect in possession or enjoyment at death. But even without retaining a reversionary interest, the settlor might betray his intent by providing for termination of the trust and distribution of the corpus at death. This would reveal an "intent" to postpone the possession or enjoyment of the remaindermen until that date and the transfer could easily be said to be "intended" to take effect in possession or enjoyment at death. The argument collides, however, with *Reinecke v. Northern Trust Co.*, *infra*, pp. 843-5. Unless that case falls, the choice is between disregarding the settlor's intent with Mr. Justice Black and demanding with Mr. Justice Burton evidence that the settlor "intended" to postpone possession or enjoyment by retaining an interest in the property until death. If the retention is inadvertent, the settlor hardly can be said to have "intended" the transfer to take effect at death except by describing any conduct by a rational person as "intended."

63. 335 U.S. 701, 735 (1949).

64. See note 3 *supra*.

65. 335 U.S. 701, 707 (1949). This conclusion had already been adumbrated in three post-*Hallock* decisions by the Court, cited by Mr. Justice Black to support his holding. *Fidelity-Philadelphia Trust Co. v. Rothensies*, 324 U.S. 108 (1945); *Commissioner v. Estate of Field*, 324 U.S. 113 (1945); *Goldstone v. United States*, 325 U.S. 687 (1945). But in both the *Fidelity-Philadelphia Trust Co.* case and the *Field* case, grant of certiorari was limited to the question of whether, assuming the transfer to be taxable, the value of the entire corpus rather than of the reversionary interest was to be included. Nevertheless, the Court in the *Fidelity-Philadelphia Trust Co.* case said that the transfer had been

been pushed to a "drily logical extreme"⁶⁶ when a transfer is taxed because the grantor will recapture the corpus if he outlives his children and grandchildren. In the *Spiegel* case, the grantor had three children at the time the trust was created; even assuming that they would have no descendants, he then had 17 chances out of 1000 to get the property back; this interest was worth \$4,500, based upon a corpus value of more than \$1,140,000. Just before his death, the chances had diminished to 16 out of 100,000 and the value of the reversionary interest had sunk to \$85. The estate tax cost of this sweepstakes ticket was more than \$450,000.⁶⁷

Of course, there is only a difference in degree between the slim chance of reacquisition in the *Spiegel* case and the substantial likelihood which justified the tax in the *Hallock* case. But there is also (in any practical sense, and taxation is an "intensely practical matter")⁶⁸ only a difference of degree—and a smaller difference at that—between Spiegel's vain hope of reacquisition and no hope at all. If Spiegel had thrown away his sweepstakes ticket, he would have saved his heirs \$450,000. It is inconceivable that he would have retained it with knowledge of the consequences.

A settlor can achieve this estate tax saving by guarding against a reversionary interest when the trust is created; and it is possible that carelessness at the outset can be corrected by relinquishing the reversionary interest when its existence is discovered.⁶⁹ The gift tax cost

"correctly" held to be within Section 811(c). In none of the three cases was the Court squarely faced with the issue of whether remoteness is wholly irrelevant. In the *Field* case, *supra*, at 116, where the Court volunteered its view that "[i]t makes no difference . . . how remote or uncertain may be the decedent's reversionary interest," the interest was worth \$24,930.76 on the date of death against a corpus of \$157,452.82.

66. The phrase is that of Mr. Justice Holmes, in *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911).

67. Brief for Petitioners, p. 4; see Mr. Justice Burton, dissenting, 335 U.S. 701, 733 (1949); findings of fact in opinion of Tax Court, CCH TC SERV., Dec. 14,424(M) (1945).

68. See *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 212 (1930).

69. A clause in the *Spiegel* trust instrument could have provided specifically that the remainder interest of any child predeceasing the settlor should pass to the other beneficiaries surviving him or, if no beneficiary survived him, to his estate. This would have supplied a firm foundation for the argument of the executors, note 33 *supra*, that the settlor could then take only if he were the legatee or next of kin of the predeceasing child. The possibility of recapturing the corpus in this event, dependent as it is upon the child's failure to name a legatee other than the settlor, hardly could be thought to brand the trust as a transfer intended to take effect in possession or enjoyment at or after death. See *Estate of Houghton*, 2 T.C. 871 (1943). In *Goldstone v. United States*, 325 U.S. 637 (1945), the Court held taxable the proceeds of insurance because the decedent had retained a reversionary interest for his estate, though his interest could have been cut off by the beneficiary, who had the right to assign or surrender the policy. But the sacrifice of potential value which results from the surrender of an unmaturing policy would serve to deter such action by the beneficiary (*cf.* *Guggenheim v. Rasquin*, 312 U.S. 254 (1941)). Consequently an opportunity to receive the proceeds of insurance if the beneficiary fails to sur-

of an original final gift over or of a later relinquishment would be trivial.⁷⁰ The simple fact is that the *Hallock* rule, unexceptionable as applied to transfers involving a reasonable likelihood of reacquisition, will often be a tax on bad draughtsmanship. In fact, the niceties of conveyancing being what they are, even a careful draughtsman may find that he has not provided for every contingency because a remainder is less vested than he thought or because he has overlooked some other ancient loophole equally unrelated to the policy of the taxing statute. It now appears that the "unwitty diversities" and "elusive and subtle casuistries" of the law of property were not deported from the law of taxation by the *Hallock* case. They were rather elevated to new heights. Draughtsmen will have to study, as never before, the sacred books of Fearne, Gray, and Leake for the incantations which exorcise reversionary interests. The Government, for its part, will worship at the shrine of Contingent Remainder, Worthier Title, Condition of Survivorship, and similar tribal deities. The more tax-conscious the grantor, the more likely his success in propitiating these deities before his death. Only the naive and unsophisticated need be sacrificed.

This is not to say that the author agrees with current proposals to tax only the actuarial value (just before death) of the settlor's rever-

render or assign the policy is not comparable to an opportunity to obtain the corpus of a trust if the remainderman does not dispose of it by will. See also PAUL, *FEDERAL ESTATE AND GIFT TAXATION* § 7.23 (1946 Supp.), and Looker, *supra* note 12, for other methods of eliminating reversionary interests. Another route to avoidance of the *Spiegel* decision has been attempted by the Minnesota legislature. A statute, approved on March 26, 1949, provides that under stated circumstances reversionary interests not intended by the settlor shall be held for the State rather than for the persons otherwise entitled to them. The statute, Chapter 201, Minnesota Laws of 1949, applies "if by the terms of the controlling trust instrument the settlor manifested irrevocably his intention to divest himself of all interest" in the property or "expressly and irrevocably surrendered the right to revoke the trust and the right to make the settlor or the estate of the settlor a beneficiary" of the property. If either of these conditions is met, any interest which otherwise "would be recognized in the settlor of the trust or the estate of the settlor or the heirs at law of the settlor as such . . . shall be deemed to be held upon a resulting trust for the State of Minnesota." C.C.H. *FED. ESTATE AND GIFT TAX REP.*, Report Letter No. 6, p. 2 (April 5, 1949). Thus an unsuccessful attempt to make a complete gift to named beneficiaries may effect a gift to the state. Undoubtedly constitutional objections will be advanced against the statute.

70. The amount of the gift would be the actuarial value of the reversionary interest disposed of. See *Smith v. Shaughnessy*, 318 U.S. 176 (1943). It might be impossible to calculate the value of the reversionary interest separately from the value of the remainder. *Robinette v. Helvering*, 318 U.S. 184 (1943). This problem would be troublesome if a reversionary interest, retained at the time of the original transfer, was relinquished in response to the *Hallock* or *Spiegel* case. Even then, if a gift tax had been paid on creation on the combined values of the inseparable reversionary and remainder interests, presumably no additional tax would be payable when the reversion was relinquished. But query, if the rates, exclusions, or specific exemption had changed. A relinquishment for the sole purpose of avoiding estate tax no doubt would be a transfer in contemplation of death. But the value to be included is veiled in mystery; cf. the related problem discussed in note 165 *infra*.

sionary interest.⁷¹ Where the settlor has retained a real chance to recapture the corpus, as in the *Hallock* case, the tax should embrace the value of both the reversionary and the remainder interest. Both are in suspense until the settlor's death. The *Fidelity-Philadelphia Trust Co.* and *Field* cases⁷² settle the issue in a way that is consonant with both the function and the language of the statute. If the settlor retains a life estate, the tax is levied not on the value of that estate just before the settlor's death, but rather on the value of the corpus which for the first time is directly enjoyed by the remainderman. Where the settlor has a substantial reversionary interest, there is an at least comparable improvement in the remainderman's status. And it is therefore equally appropriate to tax the corpus.

The remedy for the *Spiegel* absurdity is not legislation to destroy the *Hallock* rule. It is rather to treat reversionary interests of insignificant value as *de minimis*.⁷³ In a related area, the Treasury itself has ruled that certain types of events may be disregarded in determining liability under Section 811(c) if they are "unreal."⁷⁴ This judgment must be made in connection with the provision in T.D. 5512, the "*Hallock* regulation," that a transfer is not taxable if the beneficiaries need not survive the grantor to obtain possession or enjoyment of the transferred property.⁷⁵ The regulation states:

"Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) [limiting the tax to transfers where possession or enjoyment can be obtained only by beneficiaries who must survive the decedent] shall not be considered as satisfied unless from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded."

Thus if a named beneficiary may obtain the property either by surviving the grantor or by exercising an unrestricted power of appointment, the transfer would not be taxable.⁷⁶ Since exercise of an un-

71. H.R. 6712, 80th Cong., 2d Sess. (1948); passed by House of Representatives, 94 CONG. REC. 9322 (June 19, 1948); see H.R. REP. NO. 2087, 80th Cong., 2d Sess. (1948). For similar earlier proposals see SHATTUCK, AN ESTATE PLANNER'S HANDBOOK 258-9 (1948).

72. Note 65 *supra*.

73. A trust like *Spiegel* would not necessarily be free from tax because the reversionary interest was insignificant. If *Reinecke v. Northern Trust Co.* were to be abandoned, see *infra*, pp. 843-5, the *Spiegel* trust would be taxable because it terminated upon the settlor's death. But the existence of a fantastic reversionary interest should be irrelevant.

74. U.S. Treas. Reg. 105, § 81.17.

75. The regulation establishes two criteria of taxability, both of which must be met: the survivorship requirement described here, and the retention by the decedent of an interest in the transferred property, *infra*, p. 843.

76. U.S. Treas. Reg. 105, § 81.17, Example (8).

restricted power is a real possibility, the transfer is not one under which, as a practical matter, the beneficiary *must* survive the grantor to obtain possession or enjoyment of the property. If, however, the beneficiary could obtain possession or enjoyment either by surviving the grantor or by surviving his own descendants, the transfer probably would be taxable. For the road to enjoyment via surviving one's own descendants is "unreal," and the only practicable route for the beneficiary would be to survive the grantor. If the Bureau of Internal Revenue can draw a line between "real" and "unreal" events for this purpose, it should be equally able to decide what reversionary interests are so remote as to be ignored.

The Court has said that the *Hallock* and *Spiegel* reversionary interests fall in the same category and that both are fundamentally different from transfers where no interest remains in the grantor. The rule sacrifices sense to certainty. To classify *Spiegel* interests with complete transfers, distinguishing both from *Hallock* interests, would have been to give up certainty for the always tantalizing search for sense. It would not have been an impossible task of judicial administration. The courts could have been assisted by a Treasury administrative ruling that a reversionary interest worth, for example, less than 5% of the corpus should be ignored.⁷⁷

Are all reversionary interests embraced by Section 811(c)? In the *Spiegel* case, the transferor would regain the corpus if he survived his children and grandchildren; if he predeceased any of them, his reversionary interest was extinguished. In this respect, the case resembled the *Hallock* case, where the corpus would have returned to the grantor only if he survived his wife. The possession or enjoyment of the remaindermen of such trusts is assured only by the settlor's predecease; until then, their expectation of "coming into" the property may be disappointed by *their* predecease.

But what of the manifold situations where, though the settlor possesses a reversionary interest, his death is *not* a date of consequence to the remaindermen? To take an example from T.D. 5512, the so-called *Hallock* regulation:

"The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate."⁷⁸

77. See U.S. Treas. Reg. 111, § 29.22(a)-21 (1946), establishing mathematical criteria for application of *Helvering v. Clifford*, 309 U.S. 331 (1940).

78. U.S. Treas. Reg. 105, § 81.17, Example (2). A variation upon the same principle is illustrated by Example (4). There, however, the death of the grantor is a date of consequence to the son's heirs, though not to the son himself. The regulation renounces a Government victory: *Estate of Dominick v. Commissioner*, 152 F.2d 843 (2d Cir. 1946).

The significant feature of this transfer is that possession or enjoyment of the corpus may pass to the remaindermen *during* the transferor's life. This distinguishes the trust from the *Spiegel* and *Halloch* trusts, where so long as the settlor lived the remaindermen could never be certain of possessing or enjoying the corpus. Conversely, from the point of view of the transferor, the contingency upon which the property (in the example) will return to him is not (as in the *Spiegel* and *Halloch* cases) his survivorship of the remaindermen. Whether he survives his son or not, the property will revert (to him or to his estate) if his son dies without issue. This event may occur before, at, or after, his death.

Is such a transfer intended to take effect in possession or enjoyment at or after the settlor's death?

Though the *Halloch* case had induced a myopic fascination with reversionary interests *per se*, the Treasury Regulations say that a trust of this type is not taxable.⁷⁹ The decedent retained a reversionary interest, but it was not necessary for the remaindermen to survive him to obtain possession or enjoyment of the property. The Regulations insist that the transfer is not taxable unless such a condition of survivorship is imposed upon the beneficiaries. "The establishment of this factor as an additional requirement for taxability is the principal contribution of T.D. 5512."⁸⁰

What is the bearing of the *Spiegel* case on transfers of this type? The *Spiegel* facts, as has been noted, did not require a decision on the issue. But the Supreme Court is not easily "cabin'd, cribb'd, confined." Mr. Justice Black said:

"In the *Church* case we stated that a trust transaction cannot be held to alienate all of a settlor's 'possession or enjoyment' under § 811(c) unless it effects 'a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or enjoy the property then or thereafter. In other words, such a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies.' "⁸¹

79. U.S. Treas. Reg. 105, § 81.17.

80. Platt, *The New Halloch Regulation*, 2 TAX L. REV. 94, 95 (1946). The peculiar case of *Fidelity-Philadelphia Trust Co. v. Rothensies*, 324 U.S. 108 (1945), see note 65 *supra*, meets this requirement of the regulations, see Example (5), only because of the settlor's reserved life estate. See Conway, *supra* note 12, at 382-5; PAUL, *FEDERAL ESTATE AND GIFT TAXATION* § 7.23 (1946 Supp.). In the importance attributed to the pre-1931 reservation of a life estate, the case may be regarded as a bridge between the *Halloch* and *Church* cases.

81. 335 U.S. 701, 705 (1949).

Although the transfers which we are now considering are "unaffected by whether the grantor lives or dies," they *do* leave the grantor with a "possible reversionary interest" and in that sense they are not "out and out." It would seem to follow from the Justice's almost exasperated insistence upon the necessity for a clean break that the transfers are includible.

This conclusion is reinforced by the Justice's reference to:

"... that 'complete' kind of transfer that § 811(c) commands as a prerequisite to a showing that [the transferor] has certainly and irrevocably parted with his 'possession or enjoyment.' " ⁸²

Of course if the transferor has a reversionary interest of *any* type, he has not "certainly and irrevocably parted with his 'possession or enjoyment.'" But the statute purports to tax not all "incomplete" transfers but only those which become complete at or after the settlor's death.

Somewhat later Mr. Justice Black says, with reference to the exemption urged on the ground of the retained interest's slight value:

"The question is not how much is the value of a reservation, but whether after a trust transfer, considered by Congress to be a potentially dangerous tax evasion transaction, some present or contingent right or interest in the property still remains in the settlor *so that full and complete title, possession or enjoyment does not absolutely pass to the beneficiaries until at or after the settlor's death.*" ⁸³

At this point Mr. Justice Black appears to agree with the Treasury that the only relevance of a reversionary interest is that it *may* be a method by which "full and complete title, possession or enjoyment" is withheld from the beneficiaries until at or after the settlor's death. But elsewhere, as in the other portions of his opinion quoted above, he regards *any* reversionary interest as fair game for Section 811(c).

One cannot escape the conviction that today's Court is as unwilling as was yesterday's to stick to the statute and statutory purpose. If the earlier Court was bemused by the concept of title, the later one is bemused by the concepts of reversionary interest and of "complete" transfers and by the metaphor of "strings." This is not to say that the exchange of new shibboleths for old may not be a step forward. But even the new are not to be found in the statute, nor do they spring from extensive concern with the statutory purpose. The only significance of a retention by the grantor of a "reversionary interest" or other "string" or of his failure to make a "complete" transfer is that these *may be* devices to prevent the transfer from taking effect in pos-

82. *Ibid.*

83. *Id.* at 707 (*italics added*).

session or enjoyment until at or after his death. But if the grantor's retention of a "reversionary interest" or "string" or his failure to make a "complete" transfer are not devices to this end, Section 811(c) is not applicable. The Treasury Regulations hew more closely to the statute than do the dicta of the Supreme Court.

Is a reversionary interest necessary? One more issue demands exploration. Spiegel's trust was to terminate upon his death. Even if he had retained no reversionary interest to be cut off by his death, then, that date was of importance to the beneficiaries. Not until then would the corpus be distributed. Moreover, any child who was not alive on that date forfeited his third of the corpus; it would go instead to the deceased child's surviving children, if any, and otherwise to the settlor's other children or their descendants. Was the transfer, by virtue of these facts alone, intended by the settlor "to take effect in possession or enjoyment at or after his death?"

In *Reinecke v. Northern Trust Co.*,⁸⁴ the Court had faced the same question, viz., whether "the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed" was a taxable transfer.⁸⁵ Thinking that a tax would be "incongruous" and that it was "at least doubtful" that the statute was intended to comprehend property not "passing from the possession, enjoyment or control of the donor at his death," the court decided to resolve the doubt in favor of the taxpayer and thereby to avoid any constitutional question. Although later Courts have developed an immunity to the constitutional "doubts" which afflicted the *Reinecke v. Northern Trust Co.* Court,⁸⁶ the case has never been overruled, and the Treasury Regulations have meticulously conformed to it.⁸⁷ In directing reargument in the *Spiegel* and *Church* cases, however, the Court invited a discussion of its validity.⁸⁸

The Government argued that *Reinecke v. Northern Trust Co.* was wrongly decided. In its view a trust which terminates upon the settlor's death is "a substitute for a testamentary disposition" and is both

84. 278 U.S. 339 (1929).

85. One of the *Reinecke v. Northern Trust Co.* trusts provided, as did the *Spiegel* trust, that if a remainderman died before termination of the trust, his share of the corpus would go not to his estate but to his surviving issue or to the settlor's issue. Transcript of Record, p. 6, *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929). The other four trusts provided that the share of such a predeceasing remainderman would go as he appointed by will or, in default of appointment, to his or the settlor's surviving issue. *Id.* at 20, 23, 35, 43. The date of the testator's death is more crucial to the remaindermen under the first trust than under the other four; in the latter cases the corpus will be paid to the remainderman only if he survives that date, but he enjoys the power to route the corpus as he desires even though he may not survive.

86. *Helvering v. Bullard*, 303 U.S. 297 (1938); see Eisenstein, *supra* note 5, at 497-500.

87. See note 75 *supra*.

88. 68 S. Ct. 1522, 1524 (1948).

literally and in principle a transfer "intended 'to take effect in possession or enjoyment at or after death.' " ⁸⁹ On the oral argument counsel for the Government urged also that there is no difference in principle between a trust in which the settlor has retained a reversionary interest of "trivial" value and one in which he reserved no interest at all.⁹⁰ Spiegel's executors asserted that *Reinecke v. Northern Trust Co.* was correctly decided because the federal estate tax, unlike state inheritance taxes, is upon the "transfer of property from the dead" and not upon the "succession to property by a beneficiary." They also urged that the decision had been confirmed by Congress and by other decisions of the Supreme Court.⁹¹

Since the Court decided to accept the determination by the court of appeals that Spiegel had retained a reversionary interest in the trust corpus, it found no need to answer the question which it directed counsel to illuminate. In fact, *Reinecke v. Northern Trust Co.* is mentioned by Mr. Justice Black only in a footnote.⁹² But he does say in both the *Church* and the *Spiegel* cases that a transfer to be exempt under Section 811(c):

" . . . must be immediate and out and out, *and* must be unaffected by whether the grantor lives or dies." ⁹³

This statement suggests that even if a transfer is "immediate and out and out" because the settlor has relinquished all his rights to the property, it may nevertheless be taxable if it is "affected" by the grantor's death. Then a trust would be taxable merely because it was to terminate upon the grantor's death. If this is the meaning of Mr. Justice Black's language, *Reinecke v. Northern Trust Co.* has been overruled *sub silentio* by the Court.

Viewed in its context, however, the Justice's language may be less sweeping than it appears at first glance. He goes on to say that his prerequisites to a tax-free transfer were "declared . . . to be the effect of the *Hallock* case in *Goldstone v. United States*." ⁹⁴ In both, the settlor had retained a reversionary interest which was extinguished by his death. Neither involved a trust like that in *Reinecke v. Northern*

89. Brief for the Commissioner of Internal Revenue on Reargument, p. 19, *Spiegel's Estate v. Commissioner*, 335 U.S. 701 (1949) ; see also Eisenstein, *supra* note 5, at 443-5.

90. Taxpayers' Petition for Rehearing, p. 13n.

91. Petitioners' Supplemental Brief on Reargument, pp. 12-6.

92. 335 U.S. 701, 706 n. 2. Although Mr. Justice Reed says: "We are asked to accept an overruling . . . I think, of *Reinecke v. Northern Trust Co.*," 335 U.S. 632, 652 (1949), he apparently is referring to the contentions of counsel rather than to the opinion of the court.

93. 335 U.S. 701, 705 (1949) (italics added). The language is borrowed from Mr. Justice Holmes' opinion in *Shukert v. Allen*, 273 U.S. 545, 547 (1927).

94. 335 U.S. 632, 646 (1949). The *Goldstone* case referred to is reported at 325 U.S. 687 (1945).

Trust Co., where the settlor's death was only a dividing line which shifted possession or enjoyment from the life beneficiaries to the remaindermen. Perhaps *Reinecke v. Northern Trust Co.* should be overruled,⁹⁵ but if the Court intended to do so, it adopted a curious way to convey the message. The proposed amendments to the Treasury Regulations, announced as this goes to press, preserve as a condition of taxability the requirement that the decedent have possessed some right or interest in the property.⁹⁶ *Reinecke v. Northern Trust Co.* thus lives on.

The place of the gift tax. It is curious that none of the opinions so much as mentions the existence of the federal gift tax. It happens that the Spiegel trust was created in 1920, before the enactment of the federal gift tax statute; if the trust had not been brought under the estate tax, the transfer would have escaped tax altogether. Aside from this circumstance, which will be of diminishing frequency in the future, the real issue is whether such a trust shall be taxed as an *inter vivos* or as a testamentary transfer. If the former, it will be subjected only to federal gift tax. If the latter, a gift tax will have to be paid, but in addition the transfer will be embraced by the estate tax, against which the gift tax will be credited as a "down payment."⁹⁷ Because the gift tax is assessed at lower rates and affords a separate set of exemptions and exclusions, the transfer which is reached only by it escapes more cheaply than the transfer which falls under both taxes. The Supreme Court's emphasis upon "complete" transfers may reflect a view that the gift tax is so ineffective for these reasons that transfers should be brought under the estate tax whenever possible. Were it not for the lower rates and separate exemption and exclusions of the gift tax, it would be of little importance whether the transfer were taxed as an *inter vivos* or as a testamentary gift.

An integrated transfer tax—one way to avoid the overlapping which results from the existing dual system of estate and gift taxes—would be imposed only once. It would still be necessary to decide whether a *Spiegel* transfer was taxable when the trust was created or only when the settlor died. Though this would not be a matter of complete indifference to the taxpayer, it would be far less important than at present.⁹⁸ The integration proposal recently advanced by an advisory committee of tax specialists in conjunction with Treasury officials provides for a tax on the *Spiegel* and *Hallock* type transfer at death:

95. See Eisenstein, *supra* note 5. Of course, if a trust is to be taxed because the settlor has retained a reversionary interest of trivial value, it is absurd to exempt *Reinecke v. Northern Trust Co.* trusts from tax. See notes 73 and 90 *supra*.

96. 14 FED. REG. 1824 (1949).

97. *Smith v. Shaughnessy*, 318 U.S. 176, 179 (1943).

98. Under an integrated transfer tax, the rates would be the same whether the transfer was taxed when made or not until the transferor's death. Unless there were an al-

"A disposition of this type suspends the eventual disposition of the property until the transferor's death and is, therefore, akin to, as well as a substitute for, a testamentary disposition."⁹⁹

III. THE CHURCH CASE

The facts. The Church trust (created in 1924), unlike the Spiegel trust, reserved the income to the settlor for life. On his death, the corpus was to be distributed to his surviving issue; if no issue survived him, the corpus was to go to his surviving brothers and sisters, the children of any deceased brother or sister to take their parent's share *per stirpes*. There was no express requirement that the children of deceased brothers and sisters (i.e., the settlor's nieces and nephews) survive the settlor to take. If such a condition was implicit, however, the settlor had a reversionary interest "by operation of law," as in the *Spiegel* case, since he made no provision for alternate takers if not only his brothers and sisters, but also his nieces and nephews predeceased him. If, however, the nieces and nephews were not required to survive the settlor, then the share of those who predeceased him would pass to their legatees or next of kin. When the trust was created the settlor (who was unmarried) had six brothers and sisters and seven nieces and nephews; the value of his reversionary interest, if he had one, is not given. At the time of his death, he had no children of his own; he was survived by his six brothers and sisters and by ten nieces and nephews. The value, immediately before his death, of an opportunity to reacquire the corpus of \$188,800, by surviving the sixteen beneficiaries then living, was less than \$0.0003.¹⁰⁰

The Tax Court held that the settlor had a reversionary interest by operation of law but that such an interest was not within the *Hallock* doctrine.¹⁰¹ The Court of Appeals for the Third Circuit, one judge dissenting, affirmed on the *Dobson* principle, being unable to "identify a clearcut mistake of law."¹⁰² Whereas the court of appeals in the

lowance for interest, it would be advantageous to postpone liability until death. But a counterbalancing factor would be the fact that the tax paid during life would reduce the estate subject to tax at death. See ADVISORY COMMITTEE TO THE TREASURY DEPARTMENT, FEDERAL ESTATE AND GIFT TAXES: A PROPOSAL FOR INTEGRATION AND FOR CORRELATION WITH THE INCOME TAX 14 (1947).

99. *Id.* at 31.

100. Transcript of Record, p. 13.

101. Estate of Church, CCH TC SERV., Dec. 14,287 (M) (1944). The Tax Court's finding on this issue could have been more explicit, but the existence of a reversionary interest is implicit in its statement: "Decedent [did not] expressly reserve any possibility of reverter. The mere possibility of reverter by operation of law upon a failure of the trust, due to the death of all the remaindermen prior to the death of decedent, is not such a possibility as to come within the *Hallock* case."

102. 161 F.2d 11 (3rd Cir. 1947). In *Dobson v. Commissioner*, 320 U.S. 489, 501 (1943), the Court said: "Congress has invested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This re-

Spiegel case had held that the settlor had a reversionary interest under Illinois law, despite the Tax Court's view that he did not,¹⁰³ the court of appeals in the *Church* case made no determination of its own.

The overruling of May v. Heiner. If the *Church* case had been decided simply on the basis of the alleged reversionary interest, as was the *Spiegel* case, the Supreme Court would have had to face several minor questions left unanswered by *Spiegel*:

(1) May a court of appeals reexamine the Tax Court's determination of the law of a state *outside* the appellate court's orbit?¹⁰⁴ In the *Spiegel* case the Tax Court held that the decedent "retained 'no string or tie' amounting to a possibility of reversion."¹⁰⁵ The court of appeals decided to the contrary.¹⁰⁶ Mr. Justice Black sanctioned the independent determination of state law by the court of appeals and refused to reexamine it. The *Spiegel* trust was governed by Illinois law and the question of tax liability came before judges whose circuit includes Illinois and "who are constantly required to pass upon Illinois law questions."¹⁰⁷ But the *Church* trust was governed by New York law and the tax question was presented to the Court of Appeals for the Third Circuit, whose jurisdiction does not extend to New York.

(2) If the court of appeals in the *Church* case was entitled to make its own determination of state law, on the ground that it was as competent to decide New York law as the Tax Court, would the Supreme Court defer to its determination in the same manner as in the *Spiegel* case it deferred to a determination by a court of appeals which included the state whose law was controlling?

Instead of merely refining the learning of the *Spiegel* case, however, the Supreme Court turned the *Church* case into a vehicle for overruling

quires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting . . . exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand." That the *Dobson* rule resulted in greater finality for the decisions of the Tax Court than for those of the district court, see *Kirschenbaum v. Commissioner*, 155 F.2d 23 (2d Cir. 1946). But see INT. REV. CODE § 1141 (a), which became law on September 1, 1948. Is a determination by the Tax Court of the law of a particular state a finding of fact, at least if the state is not within the jurisdiction of the court of appeals which is reviewing the case?

103. CCH TC SERV., Dec. 14,424 (M) (1945).

104. In *Helvering v. Stuart*, 317 U.S. 154, 164 (1942), cited by Mr. Justice Black in the *Spiegel* case, the Court said: "Nor do we see any reason why we should prefer the view of the Board of Tax Appeals concerning Illinois law to that of the Circuit Court of Appeals within which Illinois is embraced."

105. CCH TC SERV., Dec. 14,424 (M) (1945). Finding that the decedent had retained no reversionary interest, the Court held the case controlled by *Reincche v. Northern Trust Co.*, *supra*, note 84.

106. 159 F.2d 257 (7th Cir. 1946).

107. 335 U.S. 701, 707-8 (1949).

May v. Heiner.¹⁰⁸ In that widely condemned decision,¹⁰⁹ handed down in 1930, the Court had held that Section 811(c) did not reach a trust by which the settlor had provided: income to her husband for life, on his death income to herself for life, then remainders over. The decision was followed within a year by three cases¹¹⁰ involving the simpler situation of trusts under which the settlor had reserved the income for his life, with remainders to others. These three cases were decided *per curiam* against the United States on the authority of *May v. Heiner*. On the very next day, March 3, 1931, Congress repudiated the decisions by Joint Resolution,¹¹¹ but the Resolution later was held applicable only to transfers made after the date of its enactment.¹¹² In compliance with these decisions the Treasury Regulations, in effect at Church's death and ever since, have provided that a transfer with life estate reserved is embraced by Section 811(c) only if made after March 3, 1931.¹¹³

May v. Heiner and the Hallock case. In killing off *May v. Heiner*, Mr. Justice Black insisted that he was only carrying out a sentence pronounced by the Court, albeit inaudibly, in the *Hallock* case:

" . . . [W]e there directly and unequivocally rejected the only support that could possibly suffice for the holdings in *May v. Heiner*. That support was the Court's conclusion in *May v. Heiner* that retention of possession or enjoyment of his property was not enough to require inclusion of its value in the gross estate if a trust grantor had succeeded in passing bare legal title out of himself before death." ¹¹⁴

Of course, in *May v. Heiner* the settlor had "succeeded" in disposing of more than "bare legal title." She had not merely transferred "bare legal title" to a trustee, but had created remainder interests in the corpus as well. And unlike the *Hallock* remainder, the *May* remainder interests were not contingent upon the predecease of the grantor. The necessary reach of the *Hallock* case was any transfer under which the named remainderman must survive the settlor or forfeit the property. It did not necessarily embrace the *May* transfer where the remainderman (or his estate) would take, come what may, with no possibility of recapture of the corpus by the settlor.

108. 281 U.S. 238 (1930).

109. See note 28 *supra*.

110. Cases cited note 30 *supra*.

111. C. 454, 46 STAT. 1516 (1931).

112. *Hassett v. Welch*, 303 U.S. 303 (1938).

113. U.S. Treas. Reg. 105, § 81.18. The Court did not explicitly justify its imposition of a tax in the teeth of the Regulations. But see *Helvering v. Hallock*, 309 U.S. 106, 121 n.8 (1940): "Since the Treasury has amended its regulations in an effort to conform administrative practice to the compulsions of the *St. Louis Trust Co.* cases, it cannot be deemed to have bound itself by this change."

114. 335 U.S. 632, 643-4 (1949).

Nor was the language of the *Hallock* case, though sweeping, in necessary conflict with *May v. Heiner*. For the purpose of the *Hallock* Court in using that language was to bring harmony into the welter of decisions concerned with trusts in which the settlor had retained a reversionary interest. The *Klein* case, decided in 1931, had held such trusts taxable because "the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living."¹¹⁵ Then the *St. Louis Union Trust Co.* cases¹¹⁶ had introduced distinctions based on the common law of real property by which trusts resulting in identical reversionary interests would be taxed or immune depending upon the "varying forms of words"¹¹⁷ used in the trust instruments. The *Hallock* case overruled the *St. Louis Union Trust Co.* cases, holding that the "unwitty diversities of the law of property" should not control the taxability of such transfers. The *Hallock* case, at half a dozen places, purported to do no more than return to the *Klein* case by rejecting "as untenable the diversities taken in the *St. Louis Union Trust Co.* cases in applying the *Klein* doctrine."¹¹⁸ As bearing upon the *Hallock* Court's intention to destroy *May v. Heiner*,¹¹⁹ it should be noted

115. 283 U.S. 231, 234 (1931).

116. *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Union Trust Co.*, 296 U.S. 48 (1935).

117. *Helvering v. Hallock*, 309 U.S. 106, 114 (1940).

118. *Id.* at 122. Eisenstein argues, however, that the *Klein* case to which Mr. Justice Frankfurter said he was returning in the *Hallock* case was not the *Klein* case decided by the Supreme Court in 1931. His view is that the *Klein* case can be reconciled with *May v. Heiner*, which preceded it by a year, and with the *St. Louis Union Trust Co.* cases, which followed it by a few years, only on the theory that "the *Klein* decision hinged on the circumstance that a contingent remainder became a vested remainder." Eisenstein, *supra* note 5, at 452. This would lead, if I understand him correctly, to the conclusion that the *Klein* case ignored "the niceties of the art of conveyancing" only to a very limited extent, if at all. It leads also to the conclusion that Mr. Justice Sutherland's description of the grantor's death as "the indispensable and intended event which brought the larger estate into being for the grantee" was not intended to have the consequences attributed to it by Mr. Justice Frankfurter in the *Hallock* case. From this view of the *Klein* case it is argued that *Hallock* is a new departure, fundamentally incompatible with *May v. Heiner*. It seems to follow that, if in the *Hallock* case Mr. Justice Frankfurter gave too much credit to Mr. Justice Sutherland, in his dissent in the *Church* case he gives too little credit to his own opinion in the *Hallock* case. I remain unpersuaded that the "dismal distinction," note 119 *infra*, is not a more likely, albeit less ingenious, explanation of what both Mr. Justice Sutherland and Mr. Justice Frankfurter were up to in the *Klein* and *Hallock* cases. It has the merit, at least, of taking them both at their word. In any event, the inquiry is now an all but profitless one, except as indicating that after the *Hallock* case there was real doubt of the continued vitality of *May v. Heiner*. This in turn sheds light on the reasonableness of reliance upon that decision. See pp. 859-60 *infra*.

119. Though the *May v. Heiner* beneficiaries had to await the settlor's death to "come into" the property, they or their estates—unlike the *Klein*, *St. Louis Union Trust Co.*, and *Hallock* beneficiaries—were certain of ultimate enjoyment. Something more than "niceties of the art of conveyancing" marked the difference. To the effect that this is a "dismal dis-

that the *Klein* case (to which the *Hallock* case announced a return) was decided in April, 1931, a year after *May v. Heiner* and only a month after it was reaffirmed by the three *per curiam* opinions. Presumably the Court, in deciding the *Klein* case unanimously, thought the holding consistent with the four cases decided, also unanimously, just a short time before.

But the doctrine of *May v. Heiner*, whether it was undermined by *Hallock* or not, always rested upon the flimsiest of underpinnings. As Mr. Justice Black points out, transfers with reserved life estates consistently had been held to be embraced by the "possession or enjoyment" clause of state death tax statutes, from which in 1916 the federal statute had borrowed the clause.¹²⁰ Moreover, the Treasury's Regulations had accepted this interpretation of the statute from 1919 on,¹²¹ and the Supreme Court in 1927 had assumed *sub silentio* that this construction was correct.¹²² *May v. Heiner* immunized these transfers from Section 811(c) only by applying a case not in point¹²³ and by substituting in effect the word "title" for the sedulously chosen statutory phrase "possession or enjoyment." Thus under *May v. Heiner* if interests were *created* during life, they did not take effect *in possession or enjoyment* at the settlor's death even though that was the event which marked the boundary between anticipation and consummation.

Indeed, the dissenters in the *Church* case made no effort to defend *May v. Heiner* on the merits, preferring to rest the case against its repudiation on *stare decisis* and upon legislative approval of the decision.¹²⁴

inction" between *May v. Heiner* and the *Hallock* case, see Eisenstein, *supra* note 5, at 474 and 469. See also note 118 *supra*.

120. See notes 25, 26 *supra*.

121. U.S. Treas. Reg. 37, art. 24 (1919).

122. *Nichols v. Coolidge*, 274 U.S. 531 (1927). Two transfers were involved: (1) A trust created in 1907, with a reserved life estate which was relinquished by the settlors in 1917. In holding that this trust was beyond the constitutional power of Congress to tax, the Court must have assumed, as did the court below, 4 F.2d 112 (D. Mass. 1925), that the statute was intended to reach it. If the statute embraced a trust of this type, *a fortiori* it would have reached one in which the life estate was not relinquished. (2) A transfer of two residences which the trial court held was absolute, with no retention of a life estate. The lower court presumably stressed the failure of the settlor to reserve a life estate because it thought that such a reservation would have resulted in a tax. The Supreme Court affirmed.

123. *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929), which acknowledged, at 348, that Section 811(c) embraced property "passing from the possession, enjoyment or control of the donor at his death. . . ."

124. Mr. Justice Reed: 335 U.S. 632, 652 (1949); Mr. Justice Burton: *id.* at 696; Mr. Justice Frankfurter: *id.* at 675. Mr. Justice Frankfurter presented a curious argument *ad hominem* in support of the doctrine of *May v. Heiner*, saying: "These decisions [*May v. Heiner* and the succeeding three *per curiam* opinions], now cast aside, were shared in by judges of whom it must be said without invidiousness that they were most alert in recognizing the public interest and resourceful in protecting it. There were brave men before

May v. Heiner and Congress. As to Congressional endorsement of *May v. Heiner*, Mr. Justice Black said:

"It would be impossible to say that Congress in 1931 intended to accept and ratify decisions that hit the Congress like a 'bomb-shell.' " ¹²⁵

Mr. Justice Frankfurter, on the other hand, concluded that:

". . . [T]he subsequent actions of Congress make the meaning announced in *May v. Heiner* and reaffirmed four times as much a part of the wording of the statute as if it had been written in express terms. An interpretation that 'came like a bombshell' certainly had the attention of the Congress. Its failure to alter the language indicates that it accepted that interpretation." ¹²⁶

The actions of Congress which led Mr. Justice Frankfurter to his view that it "accepted" the interpretation placed upon the statute by *May v. Heiner* may be conveniently discussed under three heads: the Joint Resolution of March 3, 1931; the amendment of June 6, 1932; and the subsequent reenactment of Section 811(c) as thus amended.

(1) *The Joint Resolution of March 3, 1931.* *May v. Heiner* was decided on April 14, 1930. The Treasury Department did not imme-

Agamemnon." Cf. FRANKFURTER, LAW AND POLITICS 55 (1939): "The courts threatened the effectiveness of much of this legislation by technical and sterile definitions of 'possession or enjoyment,' and in 1931 Congress was forced to close a broad avenue of escape from the estate tax" by the Joint Resolution of March 3, 1931.

125. 335 U.S. 632, 648 (1949).

126. 335 U.S. 632, 682 (1949). The Justice's comparison of the *Halloch* and *Church* cases to show that "[n]o comparable legislative history was flouted" in the former, *id.* at 683, is embodied in an interesting table. Not the least fascinating of its features is that the two *St. Louis Union Trust Co.* cases, note 116 *supra*, are counted as only one adjudication, while the three *per curiam* decisions of March 2, 1931, note 30 *supra*, count as three. And to treat *Hassett v. Welch*, 303 U.S. 303 (1938), as an "adjudication" is dubious in the extreme. Mr. Justice Frankfurter says that "[i]t is especially difficult to say that in *Hassett v. Welch*, *supra*, the Court considered only the language added by the joint resolution and not the section in its entirety. . . ." But one need only read beyond the first paragraph, upon which the Justice relies, for indisputable evidence that the Court was concerned solely with the retroactive application of the 1931 and 1932 amendments. That this would have been an idle task if *May v. Heiner* was wrong hardly converts the case into an "adjudication" of an issue not before the Court. More candid arithmetic, then, would indicate that the *St. Louis Union Trust Co.* doctrine had been adjudicated once and the *May v. Heiner* doctrine twice. We are also informed by the table that the 1931 "[c]hange [was] expressly made prospective." Yet the Supreme Court in *Hassett v. Welch*, noting that the statute expressly was applicable to transfers made "at any time," thought its scope was "involved in sufficient ambiguity to warrant our seeking . . . aid" in the "settled" canon of construction that "a law is presumed, in the absence of clear expression to the contrary, to operate prospectively." Compare Mr. Justice Frankfurter's statements that the purpose of Congress was "made manifest in a manner that leaves no doubt according to the ordinary meaning of English speech" and that non-retroactivity is "the inescapable meaning of what Congress did." 335 U.S. 632, 677, 678 (1949).

diately urge Congress to repudiate the decision, possibly hoping that the doctrine could be confined to the peculiar facts of that case: the settlor had reserved only a "contingent" life estate. This distinction, at any rate, was urged upon the Court by the Treasury in *Burnet v. Northern Trust Co.*,¹²⁷ where the settlor had a "direct" life estate. The Treasury was finally galvanized into action when the Court decided *Burnet v. Northern Trust Co.* and its two companion cases¹²⁸ on the authority of *May v. Heiner*. On March 3, 1931—the day following these three *per curiam* decisions and the day before Congress was scheduled to adjourn—both houses passed and the President signed a Joint Resolution requiring the inclusion in the gross estate of transferred property if:

" . . . the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom." ¹²⁹

Despite Treasury argument to the contrary, it seems tolerably clear (as the Court held in 1938)¹³⁰ that the Joint Resolution was intended to operate only prospectively. Congress, then, failed to overrule *May v.*

127. Brief in Support of Petition for Certiorari, pp. 20, 23-4, *Burnet v. Northern Trust Co.*, 283 U.S. 782 (1931): "The decision of this Court in *May v. Heiner*, *supra*, is open to the interpretation that, looking at the terms of the irrevocable deed of trust in that case, as of the time of its execution, under the provisions of which Mrs. May disposed of the immediate right to possession or enjoyment, subject only to a possible reversionary interest, and irrevocably disposed of the estate by title, it cannot be said that when she executed this deed she intended that the transfer take effect in possession or enjoyment at or after her death, so that whether she predeceased Mr. May or not made no difference.

"Under that interpretation, that instant case is not affected by *May v. Heiner*." (p. 20)

"The above brief was prepared by the Bureau of Internal Revenue.

"Conclusion

"For the reasons set forth above, the gravest doubt as to the correctness of the decision below is entertained by the officials of the Treasury Department and their counsel. While the Solicitor General and counsel, who have considered this decision in the Department of Justice, do not share these doubts because of the decision of this Court in *May v. Heiner*, *supra*, the importance and far-reaching effect of the decision below, not only with respect to pending cases and trusts which have already been executed, but as affording a method by which the payment of estate taxes can be avoided, are such as to warrant consideration and final determination by this Court of the questions involved." In all three cases the Government briefs argued that *May v. Heiner* was "clearly distinguishable." Cf. Mr. Justice Frankfurter's statements that in these cases "the Treasury invited the Court's reconsideration of" *May v. Heiner* and that the Joint Resolution "was formulated by the fiscal and legal expert who had that very day failed in persuading this Court to overrule *May v. Heiner*." 335 U.S. 632, 675, 677 (1949).

128. Cases cited note 30 *supra*.

129. C. 454, 46 STAT. 1516 (1931).

130. *Hassett v. Welch*, 303 U.S. 303 (1938).

Heiner as to pre-1931 transfers. Does it follow that Congress *endorsed* the decision so that, as to such transfers, it became (in the words of Mr. Justice Frankfurter) "as much a part of the wording of the statute as if it had been written in express terms"? ¹³¹

It must not be forgotten that on March 3, 1931, Congress had only one day left before its scheduled adjournment. At such a time a proposal to tax transfers which hitherto had been thought immune could not have gained a hearing. The speedy action of Congress and the debate on the floor unequivocally demonstrate its conviction that the Court had distorted the meaning of the statute. It is hard to believe that by repudiating such a decision for the future, Congress was barring reexamination by the Court as to the past.

Moreover, there is a more rational explanation of Congress' non-retroactive action than the dubious theory that it was enacting into law a doctrine of which it so emphatically disapproved. In *Burnet v. Northern Trust Co.*, as in its two companion cases, the Supreme Court had significantly said that there was "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." ¹³² With such an advisory opinion by the Supreme Court, prospective action by Congress was certainly the better part of valor. The Court's remark also sheds light on the statement in the House of Representatives by Mr. Garner, one of the sponsors of the Resolution:

"We did not make it retroactive for the reason that we were afraid the Senate would not agree to it." ¹³³

Why did he entertain fears that the Senate would not agree to retroactive action? The rapid and unanimous action of the Senate—where the Supreme Court's construction of the existing statute was described as a "bombshell" ¹³⁴—shows unmistakably that the Senate was no more friendly to the Court's view than was the House. It is a

131. 335 U.S. 632, 682 (1949).

132. 283 U.S. 782, 783 (1931). The specter of unconstitutionality may have been excoriated by later decisions (*cf.* Mr. Justice Frankfurter, 335 U.S. 632, 679 (1949)), but this does not to any degree weaken the contemporary force of the Court's statement in 1931 that Congress could "prospectively" tax transfers with reserved life estates. The knowledge of 1938 was not vouchsafed to the Seventy-first Congress. The perils of unconstitutionality were recognized by the very Treasury Decision which provided that the Joint Resolution would not be retroactively applied: "In view of the decisions of the Supreme Court . . . the amendment . . . will, notwithstanding the provisions of Section 302(h) [providing that unless "otherwise specifically provided" transfers were to be included "whether . . . made before or after the enactment of this Act"] . . . be applied *prospectively only* . . ." T.D. 4314, X-1 CUM. BULL. 450 (1931). For the Treasury's contrary view as to the force of the 1932 amendment, see note 140 *infra*.

133. 74 CONG. REC. 7199 (1931).

134. *Id.* at 7078.

reasonable inference that the Court's warning, rather than any desire to give the Court's construction the force of law, would have stimulated Senate disapproval of a retroactive measure. Reexamination of *May v. Heiner* by the Court of course would not be susceptible to those constitutional objections which might have inhibited a 1931 Congress from acting on pre-1931 transfers.

The purpose of the Joint Resolution of March 3, 1931 was "to stop up this gap in the future" and to remove "this obvious opportunity for tax avoidance."¹³⁵ There is not an iota of evidence that either the House or the Senate wished to freeze *May v. Heiner* into law by forbidding the Court to repent its error.

(2) *The amendment of June 6, 1932.* During the discussion of the Joint Resolution of March 3, 1931, in the House of Representatives, Mr. Garner had said:

"I have strong hopes that the next Congress will make it retroactive."¹³⁶

The "next Congress" (the Seventy-second) enacted the Revenue Act of 1932, approved June 6, 1932,¹³⁷ which amended Section 811(c) in several respects.¹³⁸ No action was taken, however, to fulfill the "hopes" that had been expressed in the Seventy-first Congress. Why not? We do not know. The Treasury did not ask for such action. Nor, so far as the record shows, did anyone in Congress propose it. Since Congress was not urged to repudiate *May v. Heiner* as to pre-1931 transfers, one cannot say that its failure to act was an implicit approval of the decision. Possibly the warning against retroactive action contained in *Burnet v. Northern Trust Co.* and its companion cases stood in the way of any request by the Treasury for action.

(3) *Reenactment of Section 811(c) by later Congresses.* Though Section 811(c)—as shaped by the Revenue Act of 1932—was reenacted in later years, no steps were taken toward a statutory repudiation of *May v. Heiner* as to pre-1931 transfers. But the Treasury did not "remind any subsequent Congresses of this unfinished business"¹³⁹ when it urged other changes in the estate tax. The motivation for its failure is as obscure as the reason for the inaction of Congress.¹⁴⁰ As Mr. Justice Frankfurter said so felicitously in the *Hallock* case:

135. *Id.* at 7199, 7078.

136. *Id.* at 7199.

137. 47 STAT. 169 (1932), INT. REV. CODE § 811(c).

138. For details, see pp. 867-70 *infra*. The Revenue Act of 1932 also amended Section 302(f), conforming the tax treatment of property passing under an *inter vivos* exercise by the decedent of a general power of appointment to the treatment of his own property disposed of by *intervivos* transfer. 47 STAT. 279 (1932).

139. Mr. Justice Frankfurter: 335 U.S. 632, 681 (1949).

140. From 1934 to 1938, the Department took the view that the 1932 amendment applied to the pre-1932 transfers of persons dying after its enactment. U.S. Treas. Reg. 80,

"Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."¹⁴¹

It is not possible to find "a controlling legal principle" in the failure of the Seventy-second or later Congresses to repudiate *May v. Heiner* as to pre-1931 transfers. If any Congress ever made that decision "as much a part of the wording of the statute as if it had been written in express terms,"¹⁴² it must have been the Seventy-first, the only one which considered the question. But that Congress refrained from retroactive repudiation of *May v. Heiner*, in my opinion, not because of a desire to incorporate the decision into the statute, but because the very Supreme Court which had decided the case had hinted that its retroactive repudiation would be unconstitutional.

May v. Heiner and the doctrine of stare decisis. If *May v. Heiner* was not written into the statute by the failure of Congress to write it out, should it nevertheless be protected by the doctrine of *stare decisis*? Here again there is the sharpest disagreement between Mr. Justice Black and the dissenters; the contrasting views are best illustrated by these excerpts from the opinions:

Mr. Justice Black: "In view of the struggle of the Treasury in this tax field, the variant judicial and Tax Court opinions, our opinion in the *Hallock* case and others which followed, it is not easy to believe that taxpayers who executed trusts prior to the 1931 joint

art. 18(b) (1934). Until this view was authoritatively rejected in 1938 by *Hassett v. Welch*, 303 U.S. 303 (1938), the Treasury may have thought that there was no need for further legislation. This construction of the statute was based upon Section 302(h), now Section 811(h), which had provided since 1926 that "[e]xcept as otherwise specifically provided" transfers were taxable "whether made . . . before or after" the enactment of this Act. Because of this provision, the Court in deciding *Hassett v. Welch* said that "the meaning of the section [811(c)] is not so free from doubt as to preclude inquiry concerning the legislative purpose" and also found "sufficient ambiguity to warrant" resort to several canons of construction. *Id.* at 309, 314.

141. 309 U.S. 106, 121 (1940). To some extent, of course, Mr. Justice Frankfurter is the victim of his own felicity. He might have said simply that Congressional inaction may or may not be a neutral fact, depending on the circumstances. But having said that reliance upon legislative inaction is to "walk on quicksand," as in the *Hallock* case, or is too often "the pursuit of a mirage," as in *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942), he can hardly object when his metaphors are turned against him in other cases where other judges believe that there is no significance to the inaction. For a suggestion that his "reluctance" to upset erroneous decisions has "grown with the years," see Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 369 (1949). On the other hand, Mr. Justice Black also has been willing on occasion to admit that Congress has adopted a constricting Supreme Court decision by correcting only part of the evil it generated. *Helvering v. Safe Deposit Trust Co.*, 316 U.S. 56 (1942).

142. 335 U.S. 632, 682 (1949).

resolution felt secure in a belief that *May v. Heiner* gave them a vested interest in protection from estate taxes under trust transfers such as this one. . . . Certainly *May v. Heiner* cannot be granted the sanctuary of *stare decisis* on the ground that it has had a long and tranquil history free from troubles and challenges." ¹⁴³

Mr. Justice Burton: "After reliance by the Judicial, Legislative and Executive branches of the Government for 18 years upon this authoritative statutory construction, a reversal of it can be justified only by extraordinary circumstances. . . . 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." ¹⁴⁴

Mr. Justice Frankfurter: "And even the judge who found *May v. Heiner* inconsistent with the *Hallock* case suggested that the Tax Court determine whether the grantor failed to relinquish his life estate in reliance upon *May v. Heiner*. . . . The Government at the bar of this Court suggested that hardships could be alleviated by a regulation relieving of a tax those estates which could show such reliance. The very suggestion involved a confession that the decision urged upon the Court would be unfair." ¹⁴⁵

Mr. Justice Reed: "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." ¹⁴⁶

An appraisal of these opposing views of the settled expectations of taxpayers is more than a post-mortem on *May v. Heiner*. The American Bar Association's House of Delegates adopted a resolution at its 1949 Mid-Year Meeting recommending "a return to the doctrine of *May v. Heiner* by Congressional action." ¹⁴⁷ No doubt the statements in the

143. *Id.* at 647-8.

144. *Id.* at 699.

145. *Id.* at 685 n. 14. See note 174 *infra*.

146. *Id.* at 652-3 (1949).

147. 35 A.B.A.J. 251 (1949). The resolution is so described, although it does not refer to *May v. Heiner* by name. The writer is informed that the original draft was unacceptable to the Council of the Association's Committee on Federal Estate and Gift Taxation because a specific mention of *May v. Heiner* might have been thought an approval of that decision. As redrafted and unanimously adopted by the Council of the Committee, the Board of Governors of the Association, and the House of Delegates of the Association, the resolution is as follows:

"RESOLVED, That the American Bar Association recommends to the Congress that it make clear that its purpose in enacting the Joint Resolution of March 3, 1931 (46 STAT. 1516) was to provide that the Joint Resolution should apply only to transfers made after its enactment, and that as to any transfer made prior to March 3, 1931, the mere retention by the transferor of a life estate shall not in itself cause the transfer to be taxable

dissenting opinions in the *Church* case will be the springboard for this recommendation to Congress. Moreover, as this article goes to press, the Commissioner has proposed to amend the Regulations to provide that the doctrine of the *Church* case will not be applied to estates whose decedents died on or before January 17, 1949, the date of the decision.¹⁴⁸ These proposals for administrative and legislative action should evoke a critical analysis of the extent to which there may have been reasonable reliance upon "the doctrine of *May v. Heiner*."¹⁴⁹

Until *May v. Heiner* was decided, of course, no well-advised taxpayer would have thought that property transferred with life estate reserved was beyond the reach of the federal estate tax. So far as pre-1930 legal thought was concerned, if the phrase "intended to take effect in possession or enjoyment at or after death" included anything, it included such transfers.¹⁵⁰ It may be that some students of the Supreme Court predicted the outcome in *May v. Heiner*—certainly taxpayers were litigating the issue—¹⁵¹ but anyone who relied on such a prediction was gambling rather than indulging "reasonable expectations" of the kind which may be entitled to public protection.

How did the decision in *May v. Heiner* (and in the three later cases) alter the situation? The dissenting justices assert, in effect, that once the shadow of the estate tax was dispelled by *May v. Heiner*, taxpayers accommodated themselves to a new life and acted *after 1930* in reliance upon the integrity of that decision. Their reliance, in other words, was that they refrained from relinquishing the reserved life estates. The silent premise is that if *May v. Heiner* had been decided the other way, taxpayers would have relinquished their life estates. This premise, in turn, brings us to a disturbing question: If a grantor was content in

under the provisions of Section 811(c) as a transfer to take effect in possession or enjoyment at or after death; and

"BE IT FURTHER RESOLVED, That the Association proposes that this result be achieved by the passage by Congress of a Joint Resolution expressing such intention; and

"BE IT FURTHER RESOLVED, That the Officers and Council of the Section of Taxation are directed to urge the following Joint Resolution, or its equivalent in purpose and effect, upon the proper committees of Congress:

"The amendment made by the Joint Resolution of March 3, 1931 (46 STAT. 1516) to Section 302(c) of the Revenue Act of 1926 and reenacted as Section 803(a) of the Revenue Act of 1932 and Section 811(c) of the Internal Revenue Code is not applicable to transfers made prior to March 3, 1931; and that as to any transfer made prior to March 3, 1931, the mere retention by the transferor of a life estate shall not in itself cause the transfer to be taxable under the provisions of Section 811(c) as a transfer to take effect in possession or enjoyment at or after death."

148. 14 FED. REG. 1824 (1949).

149. As elsewhere, this reference to *May v. Heiner* is intended to embrace also the three *per curiam* decisions, note 30 *supra*, which reaffirmed *May v. Heiner*.

150. See note 25 *supra*.

151. Besides *May v. Heiner* and the three 1931 cases, note 30 *supra*, there were *Frew v. Bowers*, 12 F.2d 625 (2d Cir. 1926) and *Levy v. Wardell*, 258 U.S. 542 (1922), though the latter two cases involved pre-1916 transfers.

the 1920's to invite the estate tax by reserving a life estate, why would he have relinquished it if the Court in 1930 had confirmed his expectations? Put another way: If the reserved life estate was worth the estate tax price in 1920, why wasn't it worth that price after 1930?

Presumably the answer is that the tax price went up,¹⁵² while the actuarial value of the life estate to the settlor was going down. The estate tax rates have risen substantially since *May v. Heiner* was decided, and a liability that was viewed with equanimity in 1920 may have mounted to an alarming degree since then.¹⁵³ Yet it would be fatuous to assume that an increase in potential estate tax liability would inevitably have been followed by a relinquishment of the life estate. In some cases the income may have been the settlor's chief or only means of support. Moreover, whether the income was essential or not, many settlors of such trusts must have foreseen an increase in liability as their estates increased in value during the late twenties. The failure to relinquish the life estate at that time demonstrates that not every increase in estate tax makes retention of a life estate too expensive. And the spectacular increases in income tax rates in the last two decades were surely a goad to tax-conscious grantors to relinquish life estates so the income would be taxed to others, almost invariably in lower tax brackets. If soaring income tax rates did not result in relinquishment, why assume that increased estate tax liability would have turned the trick?

These doubts arise because taxpayers are not calculating machines but human beings; every tax action is not accompanied by an equal and opposite taxpayer reaction. Despite these doubts, however, let us assume with the dissenters in the *Church* case that at least some settlors who thought a reserved life estate worth the price before 1930 would not have thought so thereafter and that, except for *May v. Heiner*, they would have relinquished the life estate in order to escape the tax liability.

We must still ask: was it *reasonable* to refrain from relinquishing a life estate in reliance upon *May v. Heiner*? Unless the reliance was

152. Brief for Neeves & Durbin as Amici Curiae on Certain Limited Points, p. 14, *Commissioner v. Church's Estate*, 335 U.S. 632 (1949): "Assuming that the settlor in legal contemplation assumed the risk of the tax, the estate tax in the 1920's was only a token tax by present standards and was used principally to induce the states to adopt inheritance tax statutes. The rates were trivial by present standards. The size of the tax as well as its philosophy was so changed in the 1930's as to make it in effect a new tax designed to take for the Government the greater part of substantial estates and a large part of modest ones. Settlors in the 1920's were not on notice and could not have expected the enactment of such a new tax and its application to their transfers."

153. Actually, of course, the tax liability depends on the vicissitudes of the settlor's fortune as well as on the tax rate. The liability may have decreased despite the increases in rates.

reasonable, no "just expectations" are defeated by the overruling of *May v. Heiner*. Did that decision, then, justifiably paralyze action?

The Joint Resolution of March 3, 1931 undid the work of *May v. Heiner* as to transfers consummated after its enactment.¹⁵⁴ Could a settlor have felt secure in the belief that this legislation, as amended in 1932,¹⁵⁵ did not also reach pre-1931 transfers? The Treasury Regulations would have warned him against this belief: from 1934 on they consistently provided that Section 803(a) of the Revenue Act of 1932 embraced pre-1931 transfers.¹⁵⁶ Several lower courts accepted the Treasury's interpretation of the statute.¹⁵⁷ Not until the Supreme Court decided *Hassett v. Welch* on February 28, 1938 was there an authoritative determination that Congress had not repudiated *May v. Heiner* as to transfers consummated before, as well as after, March 3, 1931.

A settlor who refrained from relinquishing a life estate during the period 1931-1938 because of *May v. Heiner*, then, was gambling rather than merely relying upon settled law. After *Hassett v. Welch*, of course, he was justified in the belief that the immunity which *May v. Heiner* conferred on his transferred property had not been cancelled by Congress. It follows that the only "settled expectations" which are proper candidates for protection are those which arose after February 28, 1938.

Moreover, any such expectations should have been weakened if not altogether dispelled by the *Hallock* case,¹⁵⁸ decided on January 29, 1940. Not that the *Hallock* case was irreconcilable with *May v. Heiner*; to the contrary, as argued above,¹⁵⁹ *Hallock* can be distinguished both in fact and in principle. But judges as divergent in outlook as Mr. Justice Roberts and Judge Jerome Frank thought *May v. Heiner* had been repudiated by *Hallock*, and so did an eminent commentator.¹⁶⁰ The

154. *Hassett v. Welch*, 303 U.S. 303 (1938).

155. 47 STAT. 279 (1932), INT. REV. CODE § 811(c).

156. See note 140 *supra*. The Regulations provided, however, that the Joint Resolution of March 3, 1931 (applicable only to persons dying on or before June 5, 1932, the date of enactment of the Revenue Act of 1932) did not apply to pre-1931 transfers. See note 132 *supra*.

157. *Hassett v. Welch*, 90 F.2d 833 (1st Cir. 1937) *rev'd*, 303 U.S. 303 (1938); *Smith v. United States*, 16 F. Supp. 397 (D. Mass. 1936); *Myers v. Magruder*, 15 F.Supp. 483 (D. Md. 1936). All held that the statute embraced pre-1931 transfers, but that the attempt to do so was unconstitutional.

158. 309 U.S. 106 (1940).

159. *Supra* pp. 848-50.

160. Justices Roberts and McReynolds, dissenting in *Helvering v. Hallock*, 309 U.S. 106, 123 (1940); Judge Frank, dissenting in *Helvering v. Proctor*, 140 F.2d 87, 89 (2d Cir. 1944), and dissenting in *Commissioner v. Estate of Hall*, 153 F.2d 172, 174 (2d Cir. 1946); 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 7.15 (1942). See also *Estate of Hughes*, 44 B.T.A. 1196 (1941), *overruled* by *Estate of Bradley*, 1 T.C. 518 (1943), *aff'd sub nom. Helvering v. Washington Trust Co.*, 140 F.2d 87 (2d Cir. 1944).

Commissioner attacked *May v. Heiner* shortly after *Hallock* was won, and continued to snipe at it intermittently thereafter.¹⁶¹ A settlor who was ready to relinquish his life estate unless tax immunity was assured must have been wracked by doubt after the *Hallock* case. If he retained his life estate, it was because he (or his counsel) had decided to rest upon his guess as to the Court's probable conduct. The *Church* case shows that his guess was wrong—as Mr. Justice Roberts and others had foretold. Action to reinstate *May v. Heiner* can hardly be demanded on the ground that his expectations have been defeated, unless any wrong guess is to work an “estoppel” merely because it might have been right. In this view, the only estates which can properly ask for reinstatement of *May v. Heiner* are those whose decedents died after February 28, 1938 (*Hassett v. Welch*) and before January 29, 1940 (*Helvering v. Hallock*).¹⁶²

Perhaps too much prescience is demanded of taxpayers by the suggestion that reliance upon *May v. Heiner* should have terminated with the *Hallock* case. Possibly a settlor who was convinced in 1938 by *Hassett v. Welch* that his pre-1931 trust was immune could reasonably have indulged that conviction even after the *Hallock* decision. Even so, the question asked somewhat earlier must be rephrased: If the reserved life estate was worth the price until 1938, what is the basis for assuming that the settlor would have relinquished it as not worth the price after February 28, 1938? A similar answer can be made: the price may have gone up. But the periods for comparison are now different, and, of course, it is less likely that the price did in fact rise. And here again it should be noted that retention of a life estate until 1938 in the face of stiff rises in income tax rates indicates that the grantor was not primarily concerned with tax liability. Any request for Congressional action ought to be accompanied by evidence that a substantial number of settlors found themselves in such changed circumstances after 1938 that—but for *May v. Heiner*—they would have relinquished their life estates. One or two such cases do not justify general “relief.”¹⁶³

161. Estate of Hughes, *supra* note 160; *Helvering v. Proctor*, *supra* note 160; Commissioner v. Estate of Hall, *supra* note 160. The *Proctor* case was represented to the court of appeals as a “test case,” Commissioner v. Estate of Hall, *supra*, at 174, but the United States did not surrender with its loss. In view of the Commissioner's attacks upon *May v. Heiner*, the formal acceptance of that decision by the Regulations could not have misled settlors to think that reliance upon it was safe.

162. In this view, the decedent in the *Church* case could reasonably have relied on a freedom from tax only during the period from February 28, 1938, when *Hassett v. Welch* was decided, to December 11, 1939, when he died.

163. There is one class of trusts which at first blush have a special case for relief. They are trusts (with reserved life estates) created after April 14, 1930, when *May v. Heiner* was decided, and before March 3, 1931, when the Joint Resolution became effective. It may be argued that these trusts, unlike transfers before *May v. Heiner*, were created in

The likelihood that many persons would have taken such action is diminished by two additional facts of importance. First, the relinquishment would have been a taxable gift. The grantor would have had to weigh the ultimate estate tax saving against the immediate gift tax liability. It must be assumed that the gift tax liability would have been a restraining influence of some weight. We know that the extent to which taxpayers make *inter vivos* gifts and thereby reduce their estate tax liability is far less than mathematics alone would dictate.¹⁶⁴

Second, since by hypothesis the sole motivation for a relinquishment of the type we are considering is the avoidance of estate tax on the corpus, the relinquishment would be a gift in contemplation of death.¹⁶⁵

reliance on an authoritative decision of the Court that the transferred property would be free from estate tax, and that their settlors are not trying to preserve a windfall. But was it quite clear in the period between April 14, 1930 and March 3, 1931 that the Court would treat trusts with income reserved for the settlor's life in the same manner, as, in *May v. Heiner*, it treated trusts with income to a beneficiary for life and then to the settlor for life? The Treasury, at least, urged that the case of "direct" life estates could be distinguished, note 127 *supra*, and had enough faith in the position to leave its regulations unchanged and to postpone a request for Congressional aid until that case was decided. And even if such settlors did reasonably find the germ of *Burnet v. Northern Trust Co.* in *May v. Heiner*, after 1931 they had the same warnings as pre-1930 settlors that their trusts might be unsafe: the possible retroactivity of the Joint Resolution; the uncertain scope of the *Hallock* case. If they wanted insurance against the estate tax, then, they had reason to reconsider their action. The failure to relinquish the life estates, especially under the impact of an increased income tax, suggests that they too retained their life estates because the income from the trust property was worth its possible estate tax price.

164. VICKREY, AGENDA FOR PROGRESSIVE TAXATION 205 (1947).

165. The statute requires the inclusion of "the value at the time of [the decedent's] death of all property . . . [to] the extent of any interest therein of which the decedent has at any time made a transfer . . . in contemplation of . . . death." INT. REV. CODE § 811(c). A literal application of these words would result in no tax, since the life estate is extinguished by the decedent's death. (Note that interests retained by the decedent which lapse upon death are not included in the gross estate.) The phrase "at the time of his death" might be construed to mean "immediately before his death," in which event the includible value of the life estate would be computed with regard to the decedent's life expectancy at that time. On either theory other types of property of limited life, such as copyrights, patents, leases, oil royalties, etc., would be taxed, if at all, at values below their worth at the time of transfer. The other extreme would be to tax the entire corpus, the life estate in which was released in contemplation of death. This procedure finds some support in the theory that the tax is to be computed "as if" the transfer had not occurred, *Igleheart v. Commissioner*, 77 F.2d 704 (5th Cir. 1935), see Note, 58 YALE L.J. 313 (1949). But it is one thing to hold that the transfer is to be disregarded so as to treat the transferred interest as though it had been retained until death, thus permitting fluctuations in the value of the transferred property to be reflected in the gross estate. It is quite another thing to say that the transfer is to be ignored in order to treat other property as though the interest transferred in contemplation of death had been retained. *But cf.* Estate of Sullivan, 10 T.C. 961 (1948), 37 CALIF. L. REV. 134 (1949). Section 811(j) suggests a possible though perhaps illogical way out of the dilemma: take into account all fluctuations in the value of the transferred interest between the date of transfer and the date of death except those resulting from mere lapse of time. Thus on the release of a life estate, the value to

In *Allen v. Trust Company of Georgia*,¹⁶⁶ the Supreme Court held that the relinquishment of a power to amend a trust (the retention of which would have brought the corpus into the settlor's taxable estate) in order to avoid the estate tax was not a gift in contemplation of death. But there the purpose of the original transfers in trust was to take care of the beneficiaries "come what may," "by giving them property, freed of all claims, tax or otherwise." This purpose would have been thwarted if the corpus was included in the grantor's estate and subjected to the estate tax lien. The *original* transfer had been thought by the settlor to achieve this purpose—a reasonable expectation later proved incorrect by the Supreme Court—¹⁶⁷ and the *subsequent* relinquishment was intended by the grantor "to put the trusts in the condition he had thought they were in when he made them."

But the *Georgia Trust Co.* case would be cold comfort to a settlor who had created a trust before 1931, retaining the income for life. Since he was willing to court an estate tax at the time of the original transfer, a later relinquishment of the life estate would not be designed to insure the success of an original plan of providing the beneficiaries with assets free of any possible tax claims. In relinquishing his retained rights, such a grantor, unlike the testator in the *Georgia Trust Co.* case, would not be endeavoring "merely to accomplish by an additional step what he assumed he had already done."^{167a} The relinquishment of a life estate, therefore, would have constituted a gift in contemplation of death. This reduces still further the likelihood that a settlor would have relinquished—but for *May v. Heiner*—his life estate.

For these reasons, the Treasury's proposal¹⁶⁸ to jettison the *Church* case for decedents who died before January 17, 1949 is unwise. The case for "relief" is yet to be established. It is true that many estates which enjoyed the benefits of *May v. Heiner* have been closed, and that similar benefits would be denied to "those that are still open merely because of the fortuitous circumstance that the settlor in estates now open deferred his death [!] until the last few years and after *Hallock*

be included in the gross estate would be the actuarial value at the date of release, with adjustments for changes in the earning power of the property between that date and the date of death. In any event, the uncertainties of this question of valuation cast doubt on the glib assertion that settlors would have hastened to relinquish life estates had it not been for *May v. Heiner*. And the valuation question is no more uncertain now than in earlier years.

166. 326 U.S. 630 (1946).

167. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935).

167a. The settlor of a trust created between April 14, 1930 and March 3, 1931 might be able to establish that his original plan was to provide for his beneficiaries "by giving them property, freed of all claims, tax or otherwise," note 166 *supra*, and that a later relinquishment was intended "merely to accomplish by an additional step what he assumed he had already done." But see note 163 *supra*.

168. 14 FED. REG. 1824 (1949).

was decided.”¹⁶⁹ But such discrimination is the inevitable concomitant of the statute of limitations; it can be avoided only by writing into the Internal Revenue Code a most favored nation clause so that every lenient construction of the statute will redound to the benefit of all later taxpayers. It should not be overlooked that innumerable pre-1931 estates paid taxes on transfers like Church’s. Did the American Bar Association in 1931 propose the retroactive overruling of *May v. Heiner* so as to place post-1931 estates on a par with pre-1931 estates? An ironical aspect of the Treasury proposal is that an estate whose decedent, foreseeing the demise of *May v. Heiner*, relinquished his life estate and paid a gift tax will be placed in a position less favorable than an estate whose decedent did not consider the matter, or decided to take a chance, or made a false forecast.¹⁷⁰

Even disregarding all of the foregoing considerations, there is no justification for the American Bar Association’s proposal to exempt trusts whose settlors are still living. Assume, that is, that it was a certainty in 1931 that the Joint Resolution was prospective only and hence left their trusts untouched. Assume also that the *Hullock* case was not a warning that *May v. Heiner* might fall. The fact remains that a living settlor may still release his life estate. But, it will be asserted, he could have done so *free of gift tax* before June 1, 1932 and that he would have done so had it not been for *May v. Heiner*. But is there a rational foundation for the latter assertion? If he retained the life estate until *May v. Heiner*, in the face of an almost certain estate tax, why is it likely that he would have relinquished his life estate *immediately* if the Court had gone the other way? The estate tax rates did not rise until 1932; this might have prompted a relinquishment, but by then a gift tax would have been imposed on the transfer. And later increases in the gift tax rates are probably counterbalanced by reduction in the actuarial value of the life estate to be relinquished.

In any event, the assertion that there would have been a tax-free release before 1932 calls only for relief from the imposition of gift tax upon a release of the life estate. Such relief would restore the settlor to his 1930 or 1931 position. But relief from the gift tax is not really of importance. A release will be a gift in contemplation of death resulting in an increased estate tax,¹⁷¹ against which a gift tax paid will be credited as a “down payment.”¹⁷² Relief from the gift tax will only postpone the inevitable. A release in 1930 or 1931 would have saved

169. Brief of Amici Curiae on Certain Limited Points, p. 11, *Commissioner v. Church’s Estate*, 335 U.S. 632 (1949).

170. Though the gift tax paid may be credited against the estate tax ultimately payable, the credit may not be the full amount of the gift tax, and since there is no allowance for interest the decedent will have been deprived of the use of the money during his life.

171. See note 165 *supra*.

172. *Smith v. Shaughnessy*, 318 U.S. 176 (1943). See note 170 *supra*.

a gift tax; it would not have saved the transfer from estate tax on the gift in contemplation of death. A release today will be subject to gift tax, which, however, will be applicable against the estate tax. It is hard to see how a living settlor has been handicapped by the Supreme Court's delay in properly interpreting the statute.

Throughout the foregoing it has been assumed that if a substantial number of taxpayers have acted in reliance upon the doctrine of *May v. Heiner*, they should be protected against an overruling of that decision. Yet Mr. Justice Frankfurter himself has admonished us against concluding "that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process."¹⁷³ The *Hallock* case rejected such an estoppel, though the Treasury Department thereafter declined to take full advantage of its victory.¹⁷⁴ Only in the most formal sense can the courts, the administrators, or the legislature eschew retroactivity; every economic decision by a taxpayer today may have consequences—by virtue of legislation or decisions as yet un contemplated—which are not and cannot be foreseen. Perhaps a taxpayer who thought his pre-1931 trust immune under *May v. Heiner* retired from business in the expectation that his family would receive the remainder free of tax claims. Is he different from a person who retired before 1916, after accumulating a fund for his family, because he did not foresee the federal estate tax, or from one who retired before 1932 because he anticipated no increase in estate tax rates? If the rates can be increased, though the change nullifies the most careful planning by a taxpayer, of what use to acknowledge a vested interest in but one segment of his plan?

IV. THE NEW SCOPE OF THE "POSSESSION OR ENJOYMENT" CLAUSE.

The overruling of *May v. Heiner* opens a new area of statutory construction. We now know that a pre-1931 transfer with reserved life estate is "a transfer . . . intended to take effect in possession or enjoyment at or after . . . death." But what of a reservation of income

173. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

174. U.S. Treas. Reg. 105, § 81.17 (1946), provides that a transfer made between November 11, 1935 (the date of the *St. Louis Union Trust Co.* cases, note 116 *supra*) and January 29, 1940 (the date they were overruled by the *Hallock* case) is not taxable if the Commissioner decides it was patterned on the *St. Louis Union Trust Co.* model and if the settlor reported it in full as a completed gift. Mr. Justice Frankfurter was willing to overrule the *St. Louis Union Trust Co.* cases despite the asserted unfairness of doing so. Yet curiously, in the *Church* case he cited the Treasury suggestion for limiting retroactive application of the decision as a confession that it would be unfair to overrule *May v. Heiner*, 335 U.S. 632, 677 *et seq.* (1949). In urging that the overruling of the *St. Louis Union Trust Co.* cases by *Hallock* was distinguishable, he did not mention this Treasury Regulation, though it is a much more formal "confession" of unfairness than counsel's "suggestion" in the course of oral argument in the *Church* case.

for a period to end six months before the decedent's death? A reservation for *X* years, a period which corresponds to the grantor's life expectancy? A reservation of the right—alone or in concert with another person—to designate the recipient of the income? These variations are all specifically covered by the 1931 and 1932 amendments to Section 811(c), but only with respect to transfers made thereafter. But does the "possession or enjoyment" clause of Section 811(c), now liberated by the *Church* case from thralldom to *May v. Heiner*, cover the same ground as the 1931 and 1932 amendments, so that even pre-1931 transfers of these types are now taxable?

The Joint Resolution of March 3, 1931¹⁷⁵ added to Section 811(c) these words:

"... including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom . . . "

The circumstances of the Joint Resolution's adoption by Congress demonstrate, as urged above,¹⁷⁶ that it embraced only those transfers which Congress had thought were already included in the "possession or enjoyment" clause. The legislative committees later said that "the joint resolution was designed to avoid the effect of decisions of the Supreme Court . . ."¹⁷⁷ The proliferation of language in the Joint Resolution, then, was a response to the unwillingness of the Supreme Court to harken to simple phraseology, not an attempt to say something new. It follows that a type of transfer which would be comprehended by the Joint Resolution if made *after* 1931, would be reached by the original "possession or enjoyment" clause, if made before 1931.

In the Joint Resolution Congress specified that a retention of the right to designate the recipient of income should have the same tax price as a retention of the income. This, it would seem, was only a statement of the obvious: the economic position of one who can name the income beneficiary is all but indistinguishable from the position of one who has reserved the income to himself. Specification in the Joint Resolution of this fact of life confirms—rather than denies—that the pre-1931 statute reached a reservation of the power to designate.

Yet the issue is not one of first impression. The Court of Appeals for the First Circuit has said that "it is clear that a pre-1931 reserved power to designate who should enjoy the income was not sufficient to throw the entire corpus into the gross estate."¹⁷⁸ The court is correct,

175. C. 454, 46 STAT. 1516 (1931).

176. *Supra* pp. 851-53.

177. 1939-1 CUM. BULL. (Part 2) 490, 532.

178. *Industrial Trust Co. v. Commissioner*, 165 F.2d 142, 146 (1st Cir. 1947).

but only because such a power was regarded as in the same category as the reserved life estate and hence governed by *May v. Heiner*.¹⁷⁹ Although two of the three cases¹⁸⁰ which shocked Congress into passing the Joint Resolution involved reserved life estates, the third¹⁸¹ involved a reserved power to designate the income beneficiary. The Treasury Department, Supreme Court, and Congress treated the three cases as involving the same principle, further evidence that a power to designate the recipient of income is in substance the same as a reserved life estate.¹⁸²

The other differences in phraseology between the "possession or enjoyment" clause and the Joint Resolution are more minor. The Joint Resolution applies to a retention by the settlor "for his life or any period not ending before his death."¹⁸³ It also applies to a reservation of "the possession or enjoyment of, or the income from, the property." But since the Joint Resolution was intended to correct a misinterpretation of an existing statute, not to reach out to transfers hitherto thought immune, these phrases are no broader in scope than the pre-1931 statute. With the overruling of *May v. Heiner*, the "possession or enjoyment" clause is sufficient to reach all transfers comprehended by the Joint Resolution. March 3, 1931 is no longer a date to conjure with.

The proposed amendments to the Treasury Regulations,¹⁸⁴ however, are unfortunately vague, needlessly suggesting a continued dichotomy between pre-1931 and post-1931 transfers. Pre-1931 transfers will be taxed—under the proposal—if the settlor retained "[a] right to the

179. The two cases cited by the Court, *supra* note 178, in support of the quoted statement hold merely that if a pre-1931 reserved life estate does not (under *May v. Heiner*) bring the corpus into the gross estate, a reserved power to designate the income beneficiary is equally ineffective. Neither opinion intimated that a power to designate the income beneficiary would be exempt if a reserved life estate resulted in tax.

180. See note 30 *supra*.

181. *McCormick v. Burnet*, 283 U.S. 784 (1931).

182. What of a power to designate only within a restricted class? The Court of Appeals for the First Circuit has refused in a persuasive passage to distinguish a power to designate within a restricted class from an unrestricted power to designate: "It would be a relatively simple matter to put in the instrument a list of persons which would cover practically anyone that the decedent might ever wish to designate." *Industrial Trust Co. v. Commissioner*, 165 F.2d 142, 146 (1st Cir. 1947). This consideration would seem also to bar a distinction between a life estate and a restricted power to designate.

183. If a youthful settlor reserved the income for five years and died within the period, the reservation would fit the literal requirement of the statute: "... a transfer ... for ... any period not ending before his death." But the Regulations reach only a transfer for life or "for such a period as to evidence [the decedent's] intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period." U.S. Treas. Reg. 105, § 81.18(a); see also *id.*, § 81.19(a). The settlor, then, must intend his reserved right to be effective at least throughout his life.

184. 14 FED. REG. 1824 (1949).

possession or enjoyment of the property or a right to the income therefrom." But the Regulations continue to provide in separate sections that post-1931 transfers will be taxed if the settlor retained *either* "the use, possession, right to the income, or other enjoyment of the transferred property" ¹⁸⁵ or "the right . . . to designate the person or persons who shall possess or enjoy the transferred property, or the income thereof." ¹⁸⁶ Do the proposed amendments mean that pre-1931 transfers will not be taxed if the settlor has retained only the right to designate the income beneficiary?

There remain for consideration the changes in Section 811(c) wrought by the 1932 amendment, ¹⁸⁷ which replaced the Joint Resolution. This amendment taxes property of which the decedent:

" . . . has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income, from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

To the extent that the 1932 amendment was declaratory, its scope is prefigured by the Joint Resolution and hence by the terser pre-1931 language. Changes of substance, however, mark a departure from the pre-1931 clause and (since the 1932 amendments were not retroactive) ¹⁸⁸ will preserve the vitality of 5 p.m., Eastern Standard Time, June 6, 1932, as a dividing line.

The committee reports on the 1932 amendment state that several of the changes were "to clarify" the Joint Resolution but that: "[C]ertain new matter has also been added, which is without retroactive effect." ¹⁸⁹ The reports explicitly stamp two of the changes as "clarifying:"

"(2) The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

"(3) The insertion of the words 'the right to the income' in place of the words 'the income' is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change." ¹⁹⁰

185. U.S. Treas. Reg. 105, § 81.18.

186. *Id.*, § 81.19.

187. 47 STAT. 279 (1932).

188. *Hassett v. Welch*, 303 U. S. 303 (1938).

189. 1939-1 CUM. BULL. (Part 2) 490, 532.

190. *Ibid.*

Paragraph (2) of this report presents a curious problem. It provides that a transfer is taxable if the settlor retains a life estate contingent upon the death of another person and "such other person predeceases him." This is the case of a "contingent" life estate—the very provision involved in *May v. Heiner*.¹⁹¹ One surely would have thought that the repudiation of *May v. Heiner* was complete, whether or not the preceding life tenant had predeceased the settlor. The Court in deciding the case indicated that, although the settlor "apparently" did not survive the life beneficiary, the question was irrelevant. Yet the reports on the 1932 amendment suggest that a transfer with contingent life estate is taxable only if the preceding life tenant predeceases the settlor.

The qualification ("and such other person predeceases him") in paragraph (2) was at one time regarded as essential to imposition of the tax by the Treasury Department, presumably because of this statement in the reports, and the Regulations so provided.¹⁹² In 1937, however, the Regulations were amended to include a transfer with a reservation of income "the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate."¹⁹³ The corpus then would be included irrespective of whether the settlor, by surviving the intermediate life tenant, was in actual enjoyment of the income at the time of his death. The Tax Court has taken the view that the original ruling was correct.¹⁹⁴ Accepting this theory, a minority of the Tax Court has argued that the transfer is includible under another part of Section 811(c): viz., as a reservation of income by the settlor for a period "not ascertainable without reference" to [his] death."¹⁹⁵

The Court of Appeals for the Seventh Circuit has found the corpus of such a trust includible,¹⁹⁶ but without stating whether a contingent life interest is a reservation by the settlor (a) for a period "which does not in fact end before his death" or (b) for a period "not ascertainable without reference to his death." It may be that the court thought that either clause would trap the transfer, though the dissenting minority of the Tax Court had thought only the second would do.¹⁹⁷ This also appears to be the Treasury's current construction.¹⁹⁸ The significance of the distinction is that clause (a) is declaratory of the Joint Resolu-

191. See note 127 *supra*.

192. E. T. 5, XIII-2 CUM. BULL. 369 (1934).

193. U.S. Treas. Reg. 80, art. 18(a) (1937). See U.S. Treas. Reg. 105, § 81.18.

194. Estate of Curie, 4 T.C. 1175 (1945).

195. Estate of Nathan, 6 T.C. 604, 608 (1946) (dissenting opinion), *rev'd, sub nom. Commissioner v. Estate of Nathan*, 159 F.2d 546 (7th Cir. 1947).

196. Commissioner v. Estate of Nathan, *supra* note 195.

197. Estate of Nathan, 6 T.C. 604, 608 (1946) (dissenting opinion).

198. U. S. Treas. Reg. 105, § 81.18.

tion and hence of the pre-1931 statutory phrase; consequently, pre-1931 transfers of this type would now be taxable. Clause (b), on the other hand, is said to be a change of substance from the earlier law;¹⁹⁹ if trusts of this type are included only by virtue of this clause, only those made after 1932 will be taxable. But the latter view leads to the astonishing conclusion that the Joint Resolution overruled *May v. Heiner* only in part (viz., where the settlor survives the intermediate life tenant), leaving untouched the very situation involved in that case (viz., where the settlor does not survive the intermediate life tenant).²⁰⁰

The remaining two changes effected by the Revenue Act of 1932 are explained as follows:

"(1) The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

"(4) The insertion of the words 'either alone or in conjunction with any person' is to reach a case where decedent had a right, with the concurrence of another person or persons, to designate those who should possess or enjoy the property or the income therefrom."²⁰¹

Since, as stated above, the committees acknowledge that the amendments introduced some "new matter . . . without retroactive effect," it may be surmised that, at least to some extent, these two changes go to substance.²⁰² If so, they reach transfers which were exempt under the Joint Resolution and hence under the original "possession and enjoyment" clause.

Change (1) embraces a device which is so patently an evasion of the existing statute that explicit inclusion seems unnecessary. A retention of income for life less a brief period could have been regarded, without stretching the Joint Resolution's phrase, as a transfer "for his life or for [a] period not ending before his death." And with the overruling of *May v. Heiner*, it could with equal propriety be regarded as a transfer

199. Change (1), next paragraph.

200. Avoidance of this astonishing conclusion requires a sacrifice of the Committee statement that a transfer with contingent life estate may be taxed under clause (a)—as a reservation for a period "which does not in fact end before his death"—only when the life tenant predeceases the settlor.

201. 1939-1 CUM. BULL. (Part 2) 490, 532.

202. Note that changes (2) and (3), 1939-1 CUM. BULL. (Part 2) 490, 532, are specifically described as "clarifying."

to take effect "at death." Yet the Regulations have accepted change (1) as non-declaratory; they provide that if income is reserved for life less the quarterly period in which death occurs, for example, the transfer is not included unless it occurred after June 6, 1932.²⁰³ Until the *Church* case, the issue was not of major importance; since pre-1931 transfers were protected by *May v. Heiner*, the Treasury was overlooking only transfers between March 3, 1931 and June 6, 1932. But with the overruling of *May v. Heiner*, it is surprising that the proposed amendments²⁰⁴ to the Regulations take no account of these trusts.

Change (2) is palpably more substantial. At least if the grantor's power to designate the income beneficiary can be exercised only with the consent of a person with a substantial adverse interest, there is much to say for the view that he has not reserved a life estate or the equivalent. But what if he needs only the consent of a disinterested person? Was a specific provision then required to embrace the transfer? Or would an enlightened court have found the consent of an innocent bystander so feeble a restriction that it could be ignored?²⁰⁵ If so, the transfer would have been taxable by virtue of the Joint Resolution and hence, with the overruling of *May v. Heiner*, by virtue of the pre-1931 statutory language. Here again the existing Regulations concede, perhaps more broadly than necessary, that the 1932 change went to substance,²⁰⁶ and the proposed amendments do not concern themselves with the issue.

203. U.S. Treas. Reg. 105, § 81.18 (b).

204. 14 FED. REG. 1824 (1949).

205. The 1932 provision taxing the transfer when the decedent's right to designate is exercisable "either alone or in conjunction with any person" finds a counterpart in Section 811(d). Since the Revenue Act of 1924 this provision (or its predecessors) has taxed transfers with a power to alter, amend, or revoke exercisable "either by the decedent alone or in conjunction with any person." Yet the Regulations provide that pre-1924 transfers with power to alter, amend, or revoke are includible (a) if exercisable by the decedent alone or in conjunction with any person or persons not having a substantial adverse interest and (b) even if exercisable only in conjunction with persons having a substantial adverse interest, to the extent of the interest of any person whose consent is not required or whose interest is not substantial. U. S. Treas. Reg. 105, § 81.20(b)(1). In effect, the Regulations provide that there is no difference between a power exercisable by the settlor himself and one exercisable with the consent of one who has no substantial interest in opposing the settlor. The reasoning is equally applicable to Section 811(c), and would lead to the conclusion that the 1932 provision was declaratory except as to powers exercisable only in conjunction with persons having a substantial adverse interest.

206. U.S. Treas. Reg. 105, § 81.19(2).