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TRANSFERS OF JOINT PROPERTY IN CONTEMPLATION OF DEATH

A CALL FOR IMMEDIATE STATUTORY REVISION

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FOR years the Tax Court sided with the government and the Court of Appeals for the Third Circuit in asserting that the contemplation-of-death provision¹ of the estate tax act was sufficiently elastic to include the tax concept of ownership reflected in the joint-property provision² of the same act.³ The alliance between those tribunals on this point was recently broken, however, when the Tax Court shifted to the competing view supported by taxpayers⁴ and the appellate court for the Ninth Circuit.⁵ It now believes that the two provisions mentioned above are complete strangers even though at one time these two were consecutive subsections of the same section.⁶ The consequence, if that court is right: Certain inter vivos arrangements, though entered into in contemplation of death, will effectively and substantially reduce anticipated estate taxes which would otherwise be assessed. This saving is effected by an exclusion from the

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¹ I.R.C. (1939), §811 (c), now I.R.C., §2035.

² I.R.C. (1939), §811 (e), now I.R.C., §2040.

³ Cf. *Commonwealth Trust Co. of Pittsburgh v. Driscoll*, (3d Cir. 1943) 137 F. (2d) 653, cert. den. 321 U.S. 764, 64 S.Ct. 521 (1944); *Estate of Frank K. Sullivan*, 10 T.C. 961 (1948), revd. (9th Cir. 1949) 175 F. (2d) 657; *Estate of Henry Wilson*, 2 T.C. 1059 (1943) (acq.); *Estate of William MacPherson Hornor*, 44 B.T.A. 1136 (1941) (nonacq.), affd. (3d Cir. 1942) 130 F. (2d) 649. Cf. also *Estate of Edwin W. Rickenberg*, 11 T.C. 1 (1948), revd. (9th Cir. 1949) 177 F. (2d) 114, cert. den. 338 U.S. 949, 70 S.Ct. 487 (1950).

⁴ *Estate of Edward Carnall*, 25 T.C. No. 78 (1955); *Estate of A. Carl Borner*, 25 T.C. No. 70 (1955); *Estate of Don Murillo Brockway*, 18 T.C. 488 (1952) (acq.), affd. on other issues (9th Cir. 1954) 219 F. (2d) 400.

⁵ *Sullivan's Estate v. Commissioner*, (9th Cir. 1949) 175 F. (2d) 657. Cf. *Rickenberg v. Commissioner*, (9th Cir. 1949) 177 F. (2d) 114, cert. den. 338 U.S. 949, 70 S.Ct. 487 (1950). See also *Baltimore Nat. Bank, Exrs. v. United States*, (D.C. Md. 1955) 136 F. Supp. 642.

⁶ Revenue Act of 1916, §202 (b) and (c).

gross estate and will, if the arrangement is properly planned, be in addition to that expected from the marital deduction.

The Tax Court was concerned with the death duties to be exacted from the estates of two different husbands, each of whom during life had furnished the entire cost of acquiring certain property which each then held for several years with his wife as tenants by the entireties.

Decedent *X* and his wife *W*, shortly before and "in contemplation of his death," executed the necessary instruments to effect an immediate division of their entireties property between them. The Commissioner's determination, calling for inclusion of the entire property in the decedent-husband's gross estate, was rejected. The Tax Court concluded that *W*'s interest should be excluded from her husband's gross estate even though the *whole* would have been included under the joint property provision had the arrangement in contemplation of his death *not* been effected.⁷

Decedent *Y* and his wife *W*, in contemplation also of his death, established a trust with the property which they had held as tenants by the entireties. The income from the trust was to be divided between them for their joint lives, then to the survivor for his life, remainder over. Again the court upset the Commissioner's determination by holding that the parties had successfully reduced that amount which otherwise would have been included in the husband's gross estate under the joint-property provision. Now only the one-half which, according to *local* law, *he* had transferred to the trust was includible at his death.⁸

Proper Tax Policy. Policy-wise these decisions obviously give rise to absurd results. From the inception of the estate tax, the act has required the value of entireties property to be included in the gross estate of a decedent in the proportion to which he had furnished the consideration for the original acquisition.⁹ Inclusion of the whole in *H*'s gross estate where he had furnished the entire consideration did not mean that the draftsman of that section was ignorant of the fact that under local law *H*'s wife had acquired some sort of interest in the corpus *before* his death. A tax on the entire value was justified, in spite of that fact, on

⁷ Estate of Edward Carnall, 25 T.C. No. 78 (1955).

⁸ Estate of A. Carl Borner, 25 T.C. No. 70 (1955). Cf. Estate of Don Murillo Brockway, 18 T.C. 488 (1952) (acq.), affd. on other issues (9th Cir. 1954) 219 F. (2d) 400.

⁹ Revenue Act of 1916, §202 (c), now I.R.C., §2040.

the theory that *H's* death was really the pivotal event which brought to fruition *W's* interest in the corpus, as distinguished from any income interest she may have had. If she had died first, her *chance* to get the fee, a matter dependent solely upon survivorship, would have been cut off. Since *H's* death alone made *W's* interest in the corpus certain, such estates were deemed by Congress to be sufficiently testamentary in character to warrant taxing them as though *H* had held the entire fee until the very moment of his death.¹⁰

The decedents in the two cases before the Tax Court sought to avoid this latter equation, that is, sought to avoid the impact of the statutory language dealing with jointly held property by concluding a second inter vivos arrangement which eliminated the joint character of their estate. Normally, of course, the estate tax act does not freeze tax incidence according to the *original* way in which a taxpayer may have held his property. One is usually free to re-arrange his affairs during his life and to expect that death duties will be determined in accordance with that re-arrangement. But this is only generally true. Again from the inception of the estate tax, the act has also incorporated a special provision designed to reach certain inter vivos arrangements entered into in contemplation of death.¹¹ Here, too, the underlying conception has rested on the testamentary flavor of such arrangements.¹² That the contemplation-of-death principle equates with ordinary testamentary transfers those transactions which are inter vivos primarily only in terms of form is another way of saying that the contemplation-of-death principle is essential in preserving the integrity of the estate tax theory against unwarranted avoidance.

If it is assumed, as it is here, that both of the statutory provisions just described deserve to be retained in the code,¹³ sound

¹⁰ This was the explanation made of that section by the Supreme Court when it turned aside charges of unconstitutionality. *United States v. Jacobs*, 306 U.S. 363, 59 S.Ct. 551 (1939). Thus the joint-property provision is geared to the same basic philosophy as that which was attributed to I.R.C. (1939), §811 (c) (1) (C), now I.R.C., §2037. *Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 444 (1940).

¹¹ Revenue Act of 1916, §202 (b), now I.R.C., §2035.

¹² *United States v. Wells*, 283 U.S. 102, 51 S.Ct. 446 (1931).

¹³ However, aside from the basic problem considered here, the joint-property provision should also be amended for the purpose of deleting one clause. In determining who furnished the original consideration, that section now provides that any part of the consideration literally furnished by the survivor will be attributed to the decedent if it is shown that the consideration in question was acquired "at any time" by the survivor from

tax policy requires that the contemplation-of-death principle be sufficiently broad in its conception to protect the joint-property provision as well as those other subsections which serve to identify the gross estate. This means that the ownership and transfer principles of the joint-property provision—nothing more nor less than *tax* concepts—must be imported by construction or amendment into the contemplation-of-death provision. In a loose sense, this would in effect neutralize for tax purposes any inter vivos arrangement affecting entireties property where the arrangement was entered into in contemplation of the death of that tenant who furnished the original consideration.¹⁴ The whole of joint or entireties property would then be included in his gross estate if such would have been the case under the joint-property provision absent the later and now neutralized transaction.

If the tax concept of the joint-property provision is not imported into the contemplation-of-death provision, then the whole purpose of the former can be easily and intentionally defeated by a taxpayer up until the very moment before his death by effecting another arrangement which is equally testamentary in character because entered into in contemplation of his death.

the decedent without full and adequate consideration in money or money's worth. This attributes to a decedent consideration which the survivor may have owned as completely separate property for many years. See *Estate of N. Koussevitsky*, 5 T.C. 650 (1945) (acq.). Similar statutory language is not contained in I.R.C. (1954), §2037 where, absent the applicability of the Step Transactions Doctrine, the survivor, not the decedent, would be deemed the transferor in such case. Since, with reference to interests in the corpus, jointly held property is similar in all economic respects to the types of situations covered by §2037 [see, e.g., *Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 444 (1940)], the two should have the same general transfer concept.

¹⁴ That this would be true only in a *loose* sense stems from the fact that in some situations *complete* neutralization would have effects over and beyond that which would follow if nothing more is said than that the words "interest" and "transfer" in the contemplation-of-death provision will be deemed to embrace the ownership and transfer concept of the joint-property provision. Illustratively, consider the effect of complete neutralization on a transfer of jointly held property by the two tenants in contemplation of one tenant's death, the income therefrom to be *accumulated* until his death, the corpus and income to be distributed then to S and his heirs. If the decedent had furnished the consideration with which the jointly held property was acquired, complete neutralization of the subsequent arrangement would also result in including in the gross estate at least one-half and perhaps all of the accumulated income as well as all of the original corpus. However, the reference in the contemplation-of-death provision to an "interest" of which the "decedent" has made a *transfer* has been construed as a limitation which serves to exclude *all* of the accumulated income from the decedent's gross estate. *Burns v. Commissioner*, (5th Cir. 1949) 177 F. (2d) 739. Cf. *Commissioner v. Estate of James D. McDermott*, (7th Cir. 1955) 222 F. (2d) 665; *Estate of Daniel Guggenheim*, 40 B.T.A. 181 (1939), modified and aff'd. (2d Cir. 1941) 117 F. (2d) 469, cert. den. 314 U.S. 621, 62 S.Ct. 66 (1941). The point is that one can argue that the "transfer" concept of the contempla-

Just as two wrongs never make a right, so two transactions,¹⁵ both of which are essentially testamentary in character, can hardly produce a result to which we can even in part justifiably assign an inter vivos complexion for tax purposes.

Identification of the Precise Statutory Issue. There are three main types of inter vivos arrangements which could involve substantial estate tax savings under the Tax Court's theory even though such transactions were entered into just before and in contemplation of the husband's death:

- (1) *H* and *W* could go through the necessary procedure to divide between them the entireties property originally acquired with *H*'s funds. They might, e.g., emerge as tenants in common;
- (2) *H* could transfer his undivided entireties interest to *W*;
or
- (3) *H* and *W* could transfer their respective interests to *S* and his heirs.¹⁶

The first interpretative difficulty in determining on the husband's death the present estate tax consequences of all three

tion-of-death provision should embrace the transfer concept of the joint-property provision without arguing that the word "transfer" in the former is without any limiting effect at all. That is not to say as a matter of policy and as a general proposition that the contemplation-of-death principle should not be so designed as to reach the accumulated income in such cases.

Complete neutralization, as distinguished from importation of the joint-property transfer concept, might also lead to inclusion in the gross estate of the amount of the gift tax which the decedent earlier paid the federal government and with reference to which he would be entitled to a credit if the whole of the joint property is also included in his gross estate. I.R.C., §2012.

¹⁵ The first is the creation of the joint estate; the second is the joint transfer in contemplation of the first tenant's death.

¹⁶ The exact extent by which death duties will be reduced because of the exclusion permitted under the Tax Court's theory will depend upon a variety of circumstances. Indeed, in some cases there will be no saving at all. Assume, e.g., that prior to the execution of the final arrangement, the husband's anticipated adjusted gross estate, consisting only of jointly held property purchased by him, is \$120,000. A division of that property during life would not reduce the death duty at all if it is intended that the wife is eventually to get his whole estate. In that case, the exemption and the marital deduction, standing alone, would have immunized the whole at his death. On the other hand, if the anticipated adjusted gross estate had been \$240,000, the exemption and the marital deduction would have freed only \$180,000 from tax. But a division of the property during life, the retained one-half going to *W* at *H*'s death, would free the whole \$240,000 from death duties.

In computing anticipated overall savings from a plan which relies upon the Tax Court's theory, account must also be taken of the possible gift tax implications of the plan.

such arrangements is attributable to differences in the literal language of the two sections under consideration. The provision dealing with jointly held property does *not* literally provide that where one joint tenant furnished the entire consideration, he shall be deemed to have been the owner in fee for purposes of the *whole* estate tax act. The literal approach of that section is less sweeping. Where one tenant furnished the original consideration, the act simply provides that the *entire* value of such entirety property held at his death shall be included in his gross estate.¹⁷ On the other hand, the provision regarding contemplation of death has literally called only for inclusion of that "*interest . . . of which the decedent has . . . made a transfer . . . in contemplation of his death.*"¹⁸

In cases where the husband during his life transferred his own undivided entirety interest to *W* or where they jointly transferred their total interests to *T*, the joint property provision was no longer *directly* applicable at the moment of his death.¹⁹ And where these arrangements were executed in contemplation of *H*'s death, his executor later contended, and the Tax Court held, that the only *interest* which the *decedent* in fact *transferred* in that contemplation was an undivided one-half interest. Accordingly, only that one-half was included in his gross estate.²⁰ And where *H* and *W* divided their entirety property between themselves, emerging perhaps as tenants in common, *H*'s executor contended, and the Tax Court agreed, that *H* *transferred* nothing to *W* "in contemplation of his death," for, so the argument goes, she already owned that which was in essence an undivided one-half interest even before this arrangement. Under that circumstance, only the one-half which *H* retained was included, for it remained a part of his probate estate.²¹

In all three cases, the first statutory issue was whether the phrase in the contemplation-of-death provision, "*interest . . . of which the decedent has . . . made a transfer . . .*"²² was to be inter-

¹⁷ I.R.C., §2040. That section does not in so many words limit its direct applicability to property which is jointly held *at the moment of death*. Read in context, however, that must surely be its meaning. But see Estate of Harold W. Grant, 1 T.C. 731 (1943).

¹⁸ I.R.C. (1939), §811 (c), now I.R.C., §2035. (Italics supplied.)

¹⁹ See note 17 *supra*.

²⁰ Estate of A. Carl Borner, 25 T.C. No. 70 (1955); Estate of Don Murillo Brockway, 18 T.C. 488 (1952) (acq.), *affd.* on other issues (9th Cir. 1954) 219 F. (2d) 400.

²¹ Estate of Edward Carnall, 25 T.C. No. 78 (1955).

²² I.R.C. (1939), §811 (c), now I.R.C., §2035.

puted literally in accordance with *H's* contention or was to be given a broad interpretation so that it would be geared to the philosophy of the joint-property provision. Another way of putting this question is to ask whether the previously-quoted key phrase should be interpreted in accordance with the ownership and transfer principles prevailing under *local* law, or in accordance with the *tax* concepts of ownership and transfer reflected in the joint-property provision of the estate tax act. Only in the latter event could the husband be treated as though he owned the whole at the time the parties entered into the final arrangement in contemplation of his death.

But even if the latter more expansive interpretation should prevail, there is an added question in the case where the entireties property is divided between *H* and *W*. The additional question here is whether such a division would be covered by a stated exception to the contemplation-of-death provision which immunizes a "bona fide sale for an adequate and full consideration in money or money's worth."²³ Here three subsidiary questions are raised: (1) Could such a transaction be considered "bona fide"? (2) Was it a "sale"? (3) Was the giving up by the wife of her chance to secure the whole through survivorship "full and adequate consideration in money or money's worth" for the release by him of his chance to get the whole, each now taking one-half?

MANIFESTATIONS OF CONGRESSIONAL INTENTION AND THE JUDICIARY'S REACTION

The Initial Legislative and Judicial Responses to the Meaning of "Interest . . . of Which the Decedent Has . . . Made a Transfer." When the estate tax act was first adopted in 1916, all matters bearing on the determination of the gross estate were included in one section.²⁴ Its three subsections then specifically dealt only with the following:

- (1) The "*interest . . . of the decedent at the time of his death which 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*";²⁵

²³ Ibid.

²⁴ Revenue Act of 1916, §202.

²⁵ Now, as revised, I.R.C., §2033. (*Italics supplied.*)

- (2) An "*interest . . . of which the decedent has . . . made a transfer . . . in contemplation of or intended to take effect in possession or enjoyment at or after his death*";²⁶ and
- (3) Jointly held property under the circumstances previously described.²⁷

The scanty committee reports of that day²⁸ and the discussion on the floor of Congress²⁹ included nothing with reference to the meaning of the word "interest" which appears in both of the first two subsections. Nor was anything else said bearing on the question of whether Congress intended the contemplation-of-death provision to reflect the ownership and transfer principles embodied in the joint-property provision. However, congressional attention was called two years later to a number of the difficulties which were then arising in the government's effort to fix the character of the ownership and transfer principles to be applied in connection with the shot-gun clause of the act—the first of the three subsections enumerated above. Illustratively, taxpayers' representatives were contending that nothing need be included in a decedent's gross estate with reference either to the dower interest of his surviving wife or his exercise of a testamentary general power of appointment.³⁰

The developments relating to the powers-of-appointment question were to include the first legislative and judicial response to the meaning of the statutory word "interest."

Claimed immunity for property with reference to which a decedent had exercised such a power at his death posed two separate statutory issues under the shot-gun clause, only the first of which is really relevant here:

- (1) Did the fact that he had such a power mean that the property subject to the power constituted an "*interest . . . of the decedent*"; and
- (2) Even if it did, was his interest of such a character as to satisfy the three added conjunctive conditions of the shot-gun clause which provided that the government

²⁶ Now, divided between §§2035 and 2047 in I.R.C. (1954). (Italics supplied.)

²⁷ Now, as revised, I.R.C., §2040.

²⁸ One and a half pages were devoted to the whole of the first federal estate tax in H. Rep. 922, 64th Cong., 1st sess., pp. 3 and 5 (1916). Only one paragraph was devoted to the subject in S. Rep. 793, 64th Cong., 1st sess., p. 5 (1916).

²⁹ See 53 CONG. REC., Parts 11 and 13 (1916).

³⁰ See H. Rep. 767, 65th Cong., 2d sess., p. 211 (1918).

could reach the decedent's interest only to the extent that the property was "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."

Before these two issues were resolved by the judiciary, Congress in 1918 responded *adversely*, but only *prospectively* so, to taxpayers' claims of immunity by incorporating new subsections specifically dealing with powers of appointment as well as with the dower interest of a surviving spouse.³¹

Those who drafted the new subsection bearing on the testamentary exercise of a power of appointment were aware that a question also might thereafter arise as to whether Congress intended an (1) *exercise* of a (2) *power* during life but in contemplation of death to be equated with, and thus covered by, that language in the general contemplation-of-death provision which literally embraced only a (1) "*transfer*" by a decedent of (2) an "*interest*" in property. While the Congress itself responded to the problem reflected by this question, it did not respond to the precise question itself. It attacked from the flank, and again only with prospective effect, by including specific language in the *power-of-appointment subsection* calling for inclusion in a decedent's gross estate where his power was *exercised* in contemplation of his death.³² That this particular drafting technique was chosen to resolve the anticipated difficulty did not necessarily mean, however, that Congress thought in 1918 that the general contemplation-of-death provision would fail by construction, in the case of those who died prior to 1918, to reflect the ownership and transfer concept which was now being embodied on a prospective basis in the new power-of-appointment subsection. In fact, the sponsoring committee's report stated that all of the foregoing changes were "for the purpose of clarifying rather than extending the existing statute."³³ But that the committee was not wholly sure of this stated position may or may not have been indicated in one of the succeeding sentences of the same report to the effect that the "absence of a provision including property transferred by a power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the

³¹ Revenue Act of 1918, §402 (e), now reflected in I.R.C., §2041.

³² *Id.*, §420 (e), now reflected in I.R.C., §2041 (a) (1) (B) and (a) (2).

³³ H. Rep. 767, 65th Cong., 2d sess., p. 21 (1918).

payment of only *one* tax."³⁴ The *one* tax to which that statement referred was, of course, the tax originally paid by the *donor* of the power.

Three years later, in *United States v. Field*,³⁵ the Supreme Court had occasion to deal with the meaning of "interest" in both of the first two original subsections. The context involved a decedent who had exercised a testamentary power of appointment, having died before the effective date of the statutory changes above. Taxability here turned first on the shot-gun clause. The Court doubted that any weight could be attached to the belated statement by the congressional committee to the effect that the foregoing statutory changes simply clarified, without extending, the sweep of the shot-gun clause. It noted in this connection that the same report had indicated, as stated above, that absent those statutory changes there would be no tax on the estate of the donee of a power. It then relied upon *local* law in arriving at a negative answer to the two enumerated issues noted above. In keeping with general property law notions, it concluded first that the subject matter of the power was not the property of, i. e., was not the "interest" of, "the decedent."³⁶ Nor with reference to the qualifying conditions of the shot-gun clause did the Court think the property passed as a part of "*his* estate,"³⁷ as distinguished from the estate of the donor of the power.

The government also insisted that the second subsection of the gross-estate provision justified the tax. That section, it will be recalled, related to an "*interest . . . of which the decedent has . . . made a transfer . . . in contemplation of or intended to take effect in possession or enjoyment at or after his death. . . .*"³⁸ The government argued that the testamentary exercise postponed the possession or enjoyment of the beneficiary until decedent's death.³⁹

³⁴ *Id.* at p. 22. (Italics supplied.)

³⁵ 255 U.S. 257, 41 S.Ct. 256 (1921).

³⁶ Revenue Act of 1916, §202 (a), now, as modified, I.R.C., §2033.

³⁷ The view was taken even though the decedent's creditors could have looked to the appointed property for satisfaction of claims against that estate if the other assets were insufficient. Significant here was the fact that any excess over creditors' claims went not to the next of kin or to legatees but to appointees.

³⁸ Revenue Act of 1916, §202 (b), now divided between §§2035 and 2037, I.R.C. (1954). (Italics supplied.)

³⁹ While the court chose to meet the government's contention on the latter's own ground, it could have also rejected this contention on the theory that §202 (b) of the Revenue Act of 1916, now divided between I.R.C., §§2035 and 2037, related only to *inter vivos* transfers with a testamentary complexion and that §202 (a), now I.R.C., §2033, pre-empted the field with reference to the shifting of interests where *all* facets of the transfer

Since the three qualifying conditions of the shot-gun clause had not been repeated in this subsection, the basic issue to which the Court addressed its attention was whether the word "interest" here had the same meaning which had been given to it in the context of the shot-gun clause. The Court answered this affirmatively. In short, the word "interest" in the subsection which also contained the general contemplation-of-death principle was said to relate only to interests of the decedent as prescribed by *local law*.

The Subsequent Role of United States v. Field. Following the *Field* decision, though we are not expressly told that it was the cause, care was taken by Congress when new subsections were added to the gross-estate provisions of the old code to insert language in the new subsection itself which would expressly tie the new ownership and transfer principle proclaimed by it—again nothing more nor less than a federal *tax* concept—to the contemplation-of-death principle. For example, the revocable-trust provision, adopted first in 1924, specifically provided, *inter alia*, that a *release* in contemplation of death of the donor's reserved power over the trust would bring into his gross estate that property subject to the power.⁴⁰ However, the Congress never did go back to the joint-property provision for the purpose of inserting an express link of this type.

It was with this background that a lower court first approached the question with which this article is directly concerned. In *Estate of William MacPherson Horner*,⁴¹ entireties property for which the decedent-husband had originally furnished the consideration was transferred by the two spouses in contemplation of his death to a trust, the income being reserved for their joint lives, then to the survivor for his life, remainder over, but with a possibility of reverter in the spouses. A power of revocation, never to be exercised, was also retained by the two spouses for their joint lives. The government sought to include the whole of the corpus in the decedent-husband's gross estate.

took place at death. This reasoning would have centered attention only on the latter subsection.

⁴⁰ Revenue Act of 1924, §302(d), now I.R.C., §2038. Shortly thereafter Congress also added special language in the revocable-transfer section tying that principle to the then newly initiated presumption which was applied to transfers made shortly before death. See Revenue Act of 1926, §302. Later the presumption was also linked to the powers-of-appointment principle. Revenue Act of 1950, §501(a), adding §811(1) to I.R.C. (1939). Both of these links are now consolidated in I.R.C., §2035(b).

⁴¹ 44 B.T.A. 1136 (1941).

Since the reserved power was never exercised, the specific language in the revocable-trust provision dealing with the exercise of such powers during life but in contemplation of death was, of course, inapplicable. The case was to turn on other portions of that subsection and on two other provisions, the same pivotal issue being common to all three. These subsections dealt respectively with the tax effects of the possibility of reverter,⁴² the power of revocation,⁴³ and the fact that the trust had been established by the spouses with entireties property in contemplation of *H's* death.⁴⁴ All three subsections literally related only to that "interest" of which the "decendent" had made a "transfer." The common question, therefore, was whether the ownership and transfer principle of the joint-property provision⁴⁵—a *federal tax* concept—would be read into those other subsections.

Judge Sternhagen, in an opinion reviewed by the whole Board, ignored without citation what had been said by the Supreme Court in the *Field* case and now answered this affirmatively. He stated that under these circumstances a "trust created by joint tenants or tenants by the entirety has no greater force to keep the property from the gross estate of one of the settlers than would a similar trust created by an individual."⁴⁶ Since the decedent's estate had failed to show that the transfer in trust, made within two years of his death at age 76, was not made in contemplation of death, "for this reason, if for no other, the property transferred is within the gross estate."⁴⁷ Of course, he did add that the other two subsections could also be invoked for the same reasons.

The common issue on which the Board had turned the case was dodged by the Court of Appeals for the Third Circuit when the matter came before it. That appellate court rested on the questionable conclusion that the interest of the two parties in the trust was still in the nature of a joint interest and was, therefore, still covered by the joint-property provision.⁴⁸ The Tax Court, successor to the Board, continued, however, to adhere to its first

⁴² Revenue Act of 1926, §302 (c), now I.R.C., §2037.

⁴³ Id., §302 (d), now I.R.C., §2038.

⁴⁴ Id., §302 (c), now I.R.C., §2035.

⁴⁵ Id., §302 (e), now I.R.C., §2040.

⁴⁶ 44 B.T.A. 1136 at 1140 (1941).

⁴⁷ Id. at 1139.

⁴⁸ *Hornor's Estate v. Commissioner*, (3d Cir. 1942) 130 F. (2d) 649.

philosophy⁴⁹ and was finally joined on the point in 1943 by the above appellate court.⁵⁰

The Tax Court applied its view in cases where the husband and wife transferred the entireties property to third persons in contemplation of his death,⁵¹ where the husband transferred his remaining undivided interest to his wife,⁵² and where such property was divided between them.⁵³ In the latter situations, however, that tribunal was also compelled to consider the additional issue of whether the division between the spouses was a "bona fide sale for an adequate and full consideration in money or money's worth." This immunizing language was thought not to apply for three reasons.⁵⁴ A transaction between spouses, designed solely for the purpose of reducing estate taxes, was not considered "bona fide." Less persuasive, if only for reasons of policy, was the conclusion that the word "sale" did not embrace exchanges, bona fide or otherwise. And most persuasive was the conclusion that any *quid pro quo* which failed to replenish the decedent's *taxable* estate fell short of "full and adequate consideration in money or money's worth." The legislative history of another provision afforded some indirect support for this latter construction.

In this latter connection, after Congress had added the provision which specifically required the dower interest of a decedent's surviving spouse to be included in the decedent's gross

⁴⁹ Estate of Frank K. Sullivan, 10 T.C. 961 (1948), revd. (9th Cir. 1949) 175 F. (2d) 657; Estate of Henry Wilson, 2 T.C. 1059 (1943) (acq.); Estate of Harold W. Grant, 1 T.C. 731 (1943).

⁵⁰ The Tax Court's theory was adopted in Commonwealth Trust Co. of Pittsburgh v. Driscoll, (D.C. Pa. 1943) 50 F. Supp. 949, which was then affd. per curiam (3d Cir. 1943) 137 F. (2d) 653, cert. den. 321 U.S. 764, 64 S.Ct. 521 (1944).

⁵¹ Estate of Frank K. Sullivan, 10 T.C. 961 (1948), revd. (9th Cir. 1949) 175 F. (2d) 657.

⁵² Estate of Henry Wilson, 2 T.C. 1059 (1943) (acq.). Cf. Estate of Harold W. Grant, 1 T.C. 731 (1943).

⁵³ Estate of Frank K. Sullivan, 10 T.C. 961 (1948), revd. (9th Cir. 1949) 175 F. (2d) 657. The transfer concept of the joint-property section was also read by the Tax Court into the section of the old code dealing with insurance. However, the language of that provision, I.R.C. (1939), §811 (g) (2), was somewhat more accommodating than is the language of the contemplation-of-death provision. The insurance section provided, inter alia, that insurance proceeds would be included in a decedent's gross estate in the proportion to which he had "directly or indirectly" paid the premiums. Where the surviving wife paid the premiums from a joint bank account traceable originally to separate funds of her decedent-husband, the latter was said to have indirectly paid them. Estate of A. D. Saunders, 14 T.C. 534 (1950). Cf. Rule v. United States, (Ct. Cl. 1945) 63 F. Supp. 351. As applied to community property, this concept was codified in the provision dealing with insurance. Revenue Act of 1942, §404 (a), adding §811 (g) (4) to I.R.C. (1939).

⁵⁴ Estate of Frank K. Sullivan, 10 T.C. 961 (1948), revd. (9th Cir. 1949) 175 F. (2d) 657.

estate,⁵⁵ the question arose whether a contract between spouses, calling upon *H* to leave a sum to *W* in lieu of dower, was supported for tax purposes by full and adequate consideration so as to justify a subsequent deduction for a claim filed by the surviving spouse. Accompanying a subsequent specific and adverse legislative response to this⁵⁶ was the sponsoring congressional committee's comment that previous contrary holdings amounted "to a subversion of the legislative intent"⁵⁷ reflected in the earlier provision which called for inclusion of dower in the gross estate. This was some indication that Congress contemplated that "full and adequate consideration in money or money's worth" was not satisfied by a *quid pro quo* which, in the absence of the transaction in question, would have been included in any event in the decedent's gross estate. Later in 1945 the Supreme Court in *Merrill v. Fahs*⁵⁸ indicated that the above amendment by Congress was simply declaratory of the meaning which would have been assigned, absent the amendment, to the full-and-adequate-consideration requirement. However, in 1949 the appellate court for the Ninth Circuit, concerned with a division of entireties property between the spouses in contemplation of the husband's death, ignored the implications of the *Merrill* decision. But of even more sweeping effect was its total rejection also of the Tax Court's views with reference to the relationship between the contemplation-of-death provision and the joint-property subsection.⁵⁹

That appellate court concluded that the contemplation-of-death provision was not in *pari materia* with the joint-property subsection. While no reference was made to the Supreme Court's much earlier analysis in the *Field* case, this court of appeals did, nevertheless, conclude that the contemplation-of-death provision was geared under these circumstances to the principles of ownership prevailing under local law. Accordingly, that court could not see how it could be said that a *husband* had *transferred* in contemplation of his death an interest which his wife *already* owned in their entireties property. Having reached that conclusion it was relatively unimportant in *this* case that the court also refused to subscribe to the trial court's view with reference to the meaning

⁵⁵ Revenue Act of 1918, §402 (b), now I.R.C., §2034.

⁵⁶ Revenue Act of 1932, §804, now I.R.C., §§2053 (d) and 2043 (b).

⁵⁷ H. Rep. 708, 72d Cong., 1st sess., p. 47 (1932).

⁵⁸ 324 U.S. 308, 65 S.Ct. 655 (1945).

⁵⁹ *Sullivan's Estate v. Commissioner*, (9th Cir. 1949) 175 F. (2d) 657.

of the full-and-adequate-consideration clause. It seemed, nevertheless, to think that the Tax Court's view on this matter was simply another way, a backhanded one at that, of reading the *tax* concept of ownership reflected in the joint-property provision into the contemplation-of-death subsection.

That same appellate court had another opportunity in the same year to reaffirm its overall philosophy. A husband and wife in contemplation of his death voluntarily divided community property which was traceable to his earnings. They were attempting to avoid that language which was inserted into a new paragraph in the joint-property subsection in 1942 calling for inclusion in the husband's gross estate of the entire value of that community property which had originated with him. In keeping with earlier practice, Congress had simultaneously written into that same paragraph a provision tying that particular ownership principle, a tax concept, to the contemplation-of-death principle.⁶⁰ Unfortunately, however, those two principles were expressly linked in the new paragraph only in the case where such community property was transferred by the husband and wife to a *third* person. This meant that a division of such property between spouses in contemplation of the husband's death would result in inclusion of the whole in his gross estate only if the *general* contemplation-of-death provision was deemed to embody the tax concept of ownership reflected in the then new provision dealing with community property. But again the court in question insisted that the general contemplation-of-death provision could not be so construed.⁶¹ A little more than a month later, however, Congress furnished some evidence, if only by implication, that it thought the transfer concept in the general contemplation-of-death provision was sufficiently elastic to embrace at least one federal tax concept as distinguished from the principle prevailing under local law.

The medium for this expression was the Technical Changes Act of 1949.⁶² There, it will be recalled, Congress, *inter alia*, sought to cushion the alleged hardship which arose out of the judicially-inspired but long delayed demise of *May v. Heiner*.⁶³

⁶⁰ Revenue Act of 1942, §402 (a), adding §811 (d) (5) to I.R.C. (1939).

⁶¹ *Rickenberg v. Commissioner*, (9th Cir. 1949) 177 F. (2d) 114, cert. den. 338 U.S. 949, 70 S.Ct. 487 (1950).

⁶² Act of Oct. 25, 1949, P.L. 378, 81st Cong., 1st sess., 63 Stat. L. 891.

⁶³ 281 U.S. 238, 50 S.Ct. 286 (1930), overruled by *Commissioner v. Estate of Church*, 335 U.S. 632, 69 S.Ct. 322 (1949), reh. den. 336 U.S. 915, 69 S.Ct. 599 (1949).

Back in 1931 Congress had inserted into an old subsection, dealing with transfers in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, specific language to the effect that there would also be included in the gross estate any property which a decedent transferred *after that date* if he retained the income or the possession and enjoyment for his life.⁶⁴ That amendment was further expanded in 1932 to reach cases where, *inter alia*, an interest in the income was retained for a period which was not ascertainable without reference to the decedent's death.⁶⁵ Neither of these amendments of that old subsection expressly identified the tax consequence which would follow if such a decedent subsequently, but during life, sought to escape the impact of that language by an assignment or surrender of his retained life estate in contemplation of his death. Literally, the precise subject matter of that second transfer would have no value *at* his death, for the life estate would be exhausted coincident with that pivotal dateline. Accordingly, if the phrase which was common to the whole subsection, "interest . . . of which the decedent has . . . made a transfer," was construed in a contemplation of death context so as to embrace only the notions of ownership and transfer prevailing under local law, there would be nothing to include in such a decedent's gross estate. On the other hand, the corpus itself would be included if that phrase was deemed to reflect the overall *tax* transfer concept of the 1931 and 1932 amendments.

That Congress at least later supposed in 1949 that the latter would be the case is indicated by the way in which it referred to the problem in the Technical Changes Act of that year. There, of course, it was primarily concerned with the fact that the Supreme Court had just held under other language of the *same* subsection (the traditional "possession and enjoyment" clause) that transfers *before* 1931 would also be included in the gross estate if the decedent had retained a life estate.⁶⁶ In cushioning the alleged hardship of this holding, Congress first provided that life estates reserved prior to the pivotal dateline, 1931, could be assigned

⁶⁴ Joint Res. of March 3, 1931, 71st Cong., 3d sess., 46 Stat. L. 1516, now in I.R.C., §2036. It took a decision by the Supreme Court to demonstrate that this amendment was only to have prospective effect. *Hassett v. Welch*, 303 U.S. 303, 58 S.Ct. 559 (1938).

⁶⁵ Revenue Act of 1932, §803 (a), now in I.R.C., §2036.

⁶⁶ *Commissioner v. Estate of Church*, 335 U.S. 632, 69 S.Ct. 322 (1949), reh. den. 336 U.S. 915, 69 S.Ct. 599 (1949).

during 1949 and 1950 without gift tax incidence.⁶⁷ More important here, however, was the further provision to the effect that such assignments would "not be deemed to have been made in contemplation of death. . . ."⁶⁸ It does not expressly appear whether Congress deemed it absolutely necessary that it express this dispensation. But that it thought so appears from the further fact that the previously quoted negative and immunizing statement with reference to contemplation of death was said *not* to apply to the assignment, inter alia, of a retained life estate if the original transfer of the corpus was made between 1931 and 1932 *and* if that corpus would have been reached, *absent the subsequent assignment of the income interest*, by the 1931 amendment standing alone.⁶⁹ On the one hand, it is true that Congress used a double negative. It did not affirmatively say that the one word, "interest," which identified the subject matter of the contemplation-of-death clause as well as that of the possession-and-enjoyment clause, was to be interpreted in such case so as to include the entire corpus. But that seems obviously to have been the legislative supposition. And while nothing whatever was said with reference to such assignments of a retained life estate where the original inter vivos transfer of the corpus was made *after* 1932, it would be difficult to argue persuasively that Congress intended that assignments of such life estates, though in contemplation of death, would free the corpus of the death duty. Yet literally, taxability of the corpus would follow only if a court would read the special *tax-transfer* concept, relating to retained life estates, into the general contemplation-of-death clause. However, if the legislative intention was clear, though not adequately expressed, it is not unknown for a court to conform the statute to the intention. Indeed, in other contexts the Supreme Court has so responded even where the statutory words were exactly opposite to the legislative intention otherwise expressed.⁷⁰

Without expressly considering the indirect significance of any of this legislative history, the Tax Court in 1952 shifted its long-

⁶⁷ Act of Oct. 25, 1949, P.L. 378, 81st Cong., 1st sess., 63 Stat. L. 891, §8. Cf. §6.

⁶⁸ Ibid. By virtue of the provisions in the new code, freeing from tax those transfers which originated before March 3, 1931, this provision has lost its practical importance. I.R.C., §2036.

⁶⁹ The same was true if the property would have been reached, absent the assignment, under I.R.C. (1939), §811 (d).

⁷⁰ *Hassett v. Welch*, 303 U.S. 303, 58 S.Ct. 559 (1938), where the Court relied upon a statement made on the floor of the House to completely neutralize language to the contrary in the statute.

standing position by adopting the view of the Court of Appeals for the Ninth Circuit to the effect that the words "interest" and "transfer" in the contemplation-of-death provision were geared to the ownership principles prevailing under local law and thus did not incorporate the tax concepts reflected in the joint-property subsection.⁷¹ This attitude was solidified by two like decisions in 1955.⁷² Indeed, in the interim, even the Commissioner conceded that this was the case with reference to situations which arose prior to 1948 where community property traceable to the husband's earnings was divided between the spouses in contemplation of his death.⁷³ But that particular situation *might* be distinguished from cases involving other types of jointly held property where, prior to the last transaction, there was a right of survivorship. Congress had inserted into the community-property paragraphs an all too narrow *specific* link between transfers of community property and the contemplation-of-death principle, and might thereby be said to have pre-empted the community property field. In any event the government did continue thereafter to litigate in the context of other types of jointly held property the basic question with which this article is concerned.⁷⁴ Now, however, while the evidence is inconclusive, there is some reason to believe that the government may have given up the ghost.⁷⁵

The Effect of the 1954 Code. The only new provision added by the 1954 code which might affect the answer to the problem considered here is to be found in that chapter of the new code which deals with gift taxes.

Section 2515 now provides that the *creation* of, or the enlargement of the equity in, a joint tenancy between spouses in real property, or a similar entireties estate, is *not* to be deemed a *transfer* for purposes of *that* chapter unless the donor elects

⁷¹ Estate of Don Murillo Brockway, 18 T.C. 488 (1952) (acq.), affd. on other issues (9th Cir. 1954) 219 F. (2d) 400.

⁷² Estate of Edward Carnall, 25 T.C. No. 78 (1955); Estate of A. Carl Borner, 25 T.C. No. 70 (1955).

⁷³ U.S. Treas. Dec. 6016, May 29, 1953, amending U.S. Treas. Reg. 105, §81.15.

⁷⁴ Estate of Edward Carnall, 25 T.C. No. 78 (1955); Estate of A. Carl Borner, 25 T.C. No. 70 (1955).

⁷⁵ In October 1955 it acquiesced in Estate of Don Murillo Brockway, 18 T.C. 488 (1952) (acq.), affd. (9th Cir. 1954) 219 F. (2d) 400, almost two months before it tested the same issue in the Carnall and Borner cases. Int. Rev. Bul. 1955-41, p. 7. Cf. the government's admission back in 1951 in Steen v. United States, (D.C. Cal. 1951) 51-1 U.S.T.C. ¶10,818, affd. on other issues (9th Cir. 1952) 195 F. (2d) 379, cert. den. 344 U.S. 822, 73 S.Ct. 21 (1952).

otherwise in a gift tax return. Now the donor spouse will normally be deemed to have made a gift on the *termination* (other than by reason of death) of such estates to the extent the proportion of the proceeds received by such spouse is less than the proportion of the total original consideration furnished by him.

Importation now of this ownership and transfer principle into the contemplation-of-death provision would certainly seem to require the Tax Court to shift the position which it has recently been taking in the cases first discussed. Unfortunately, however, it is not at all clear that the principle of the above provision will be imported into the general contemplation-of-death clause.⁷⁶ The literal language of the new provision specifically limits its applicability to the *gift tax chapter*. The contemplation-of-death provision resides elsewhere, in the preceding chapter which covers the estate tax. However, since the gift tax was intended to supplement the estate tax, it is common for courts to treat them in *pari materia*. Indeed, the Supreme Court did just that in a previously discussed case which raised a problem somewhat similar to that involved here. It will be recalled in this connection that the claims provision in the subchapter of the old code on estate taxes was amended to provide that the relinquishment by contract of dower or other marital rights in return for other promised benefits would not satisfy the previously existing statutory requirement calling for full and adequate consideration in money or money's worth.⁷⁷ While the language of that amendment specifically limited its applicability to that "subchapter," the Court did, nevertheless, subsequently import the same meaning into the full-and-adequate-consideration provision of the separate subchapter covering the gift tax act.⁷⁸ However, the two situations may not be exactly parallel, for the Court there also seemed to think that it would have reached the same result under the full-and-adequate-consideration clause of the gift tax act even in the absence of this amendment of the estate tax act.

The problem considered by this article will not be adequately solved even if this statutory gift-tax principle is imported into the contemplation-of-death provision. The new amendment re-

⁷⁶ RABKIN AND JOHNSON, *FEDERAL INCOME, GIFT, AND ESTATE TAXATION* §52.03 (10) (1954) assumes that the new principle of the gift tax chapter will be imported into the estate tax act.

⁷⁷ Revenue Act of 1932, §804, reflected later in I.R.C. (1939), §812 (b), now in I.R.C., §§2053 (d) and 2043 (b).

⁷⁸ *Merrill v. Fahs*, 324 U.S. 308, 65 S.Ct. 655 (1945).

lates only to cases which satisfy certain cumulative requirements, that is, relates only to joint interests (1) in real property, (2) between husband and wife, (3) which are created or enlarged after the effective date of the 1954 code, and (4) where the donor fails to elect in a gift tax return to treat the creation of the tenancy as a present gift. The first and third of these, limiting that provision to *real* property and even then to estates created *after*, or to the equity enlarged after, the effective date of the new code, provide blind spots of significant proportions. An adequate marriage between the contemplation-of-death principle and the joint-property provision will, therefore, require something more, either from the judiciary or the Congress.

CONCLUSION

Admittedly, a taxpayer does have the right "to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits."⁷⁹ But except as this indicates, as the Supreme Court intended, that the taxpayer's motive in fixing the shape of his affairs is usually irrelevant,⁸⁰ the quoted statement is not very useful in resolving specific cases like the one under consideration. It begs the pivotal question. The central issue remains: what does the law permit?⁸¹ In determining this, obviously the judiciary's function is to implement the legislative prescription, not to undo that which Congress has done. Accordingly, in determining the thrust of the contemplation-of-death provision, appropriate importance must be attached to its exact language. But there is also another important policy which is sometimes spoken of as though it were cast in a competing role. On one occasion, the Supreme Court put it as follows:

"But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections or if the mind be isolated from

⁷⁹ *Gregory v. Helvering*, 293 U.S. 465 at 469, 55 S.Ct. 266 (1935).

⁸⁰ Sometimes, of course, it is quite relevant. The statute itself makes it relevant under the contemplation-of-death provision with reference to the death duty treatment of inter vivos gifts. I.R.C., §2035. Also in the very case wherein the quoted remark was made by the Supreme Court, the taxpayer was deprived of the tax advantage which the literal words of the statute accorded him. *Gregory v. Helvering*, 293 U.S. 465, 55 S.Ct. 266 (1935).

⁸¹ See Judge Clark's dissent in *Kraft Foods Co. v. Commissioner*, (2d Cir. 1956) 232 F. (2d) 118 at 128. See also Eisenstein, "A Case of Deferred Compensation," 4 TAX L. REV. 391 (1949).

the history of the . . . tax legislation of which it is an integral part."⁸²

While the broad outlines of the two foregoing rules of construction are clear enough, abstract statements of those standards do not precisely identify the result which should be reached in a specific case. For example, what does the law permit when the language of one section might well be so construed, when isolated, as to fall short of fulfilling the logical function of that section when it is read in the context of the philosophy of another, perhaps related, section? More specifically, *exactly* how clear must be the general purpose of the whole statute and the so-called literal meaning of one section for the former in a given instance to affect the latter in the necessary degree to resolve the specific case?

In the more or less twilight type of case, the judiciary should resolve the matter by balancing the interests reflected in each of the two loosely woven rules of construction. The goal, of course, is to determine the manifested congressional purpose.

This method, one of balancing, provides the real explanation for such otherwise unrelated Supreme Court cases like *Helvering v. Clifford*⁸³ and *Commissioner v. Tower*.⁸⁴ The weight to be assigned in any given case to each of those principles, when they seem to be cast in somewhat competing roles, becomes a question of degree. And because it is just such a question, little differences in the setting,⁸⁵ in the degree to which application of each serves clearly to prove the congressional purpose,⁸⁶ or in judges, can count for much.⁸⁷

This is aptly illustrated by comparing the problem in the *Tower* and *Clifford* cases with the problem central to this article.

⁸² *Helvering v. Morgan's Inc.*, 293 U.S. 121 at 124, 55 S.Ct. 60 (1934).

⁸³ 309 U.S. 331, 60 S.Ct. 554 (1940), dealing with short term trusts with reference to which the grantor retained a substantial reversion and significant powers of management.

⁸⁴ 327 U.S. 280, 66 S.Ct. 532 (1946), wherein a family partnership was ignored for tax purposes though it was valid under local law. Cf. *Commissioner v. Culbertson*, 337 U.S. 733, 69 S.Ct. 1210 (1949).

⁸⁵ Cf. *Poe v. Seaborn*, 282 U.S. 101, 51 S.Ct. 58 (1930), with *Lucas v. Earl*, 281 U.S. 111, 50 S.Ct. 241 (1930).

⁸⁶ In *Hassett v. Welch*, 303 U.S. 303, 58 S.Ct. 559 (1938), the literal language of the statute was directly opposite to a statement made on the floor by the spokesman for the House Ways and Means Committee. Since the Congress hurriedly passed the new provision on the basis of the oral statement and without even waiting for the bill itself to be printed and distributed to the membership, the Court felt that the oral statement should take priority in representing the manifest congressional purpose.

⁸⁷ Cf. *Commissioner v. Culbertson*, 337 U.S. 733, 69 S.Ct. 1210 (1949, with *Commissioner v. Tower*, 327 U.S. 280, 66 S.Ct. 532 (1946).

There, in an income tax context, the Supreme Court was really weighing the relative significance of the *basic* purposes of the income tax law, gleaned by it from the progressive rate structure and old section 22 (a) which defined gross income,⁸⁸ against the seemingly contrary thrust, *if* applied to those cases, of other language which dealt specifically with partnerships⁸⁹ and trusts.⁹⁰ In balancing the interests of the two competing principles, effect was finally given to what the Court believed to be the basic purposes of the law. This was accomplished by saying that the language of the partnership and trust provisions, though literally applicable, did not apply to those particular cases. The consequence was that taxpayers were denied the opportunity to get away with something which many thought Congress by those specific sections had literally permitted.

While the result which followed *there* from balancing the interests of the two principles previously described is now clear, the extent to which a given court in a somewhat different case will emphasize one to the prejudice of the other is not at all clear. Again little differences may count for much. In the *Tower* and *Clifford* cases the Court was asked to say that a provision containing broad language, old section 22 (a), overrode another section, the specific and more narrow language of which was literally applicable. In making its choice, i.e., in choosing to support what it gathered was the basic purpose of the act, the Court was clearly aided and comforted by the exceedingly sweeping character of the language of the broader provision. In our situation, on the other hand, we are asking whether a court should impute a tax notion of ownership to language unfortunately narrow when read in the strict property sense in order more fully to effectuate the underlying purpose which provided the only justification for that section. For how much should this difference count?

Actually, of course, the relevance of that difference need not be considered in a vacuum. Before such a court also should be the reaction of an earlier high Court, reflected in the *Field* case, to the key phrase, common then to the contemplation-of-death and the possession-and-enjoyment paragraphs of the same subsection,

⁸⁸ Now I.R.C., §61.

⁸⁹ I.R.C. (1939), §182 et seq., now in I.R.C., §702. A special provision which now deals with the problem of that case appears in I.R.C., §704(e).

⁹⁰ I.R.C. (1939), §161 et seq., now as modified, I.R.C., §641 et seq. Special provisions have now been added to deal with the problem posed by that case. I.R.C., §673 et seq.

which read "*interest . . . of which the decedent has . . . made a transfer.*" The view there expressed by certain justices who were all too prone in tax cases to lay down broad abstract principles⁹¹ was that those words reflected the property and transfer concepts which prevailed under *local* law. It was one thing, however, for the Supreme Court to say this in an effort to show that the language in question should not be construed to reflect a special tax concept, relating to powers of appointment, which Congress itself did not concoct until later, after that decedent had died. It would be something else again to say that the contemplation-of-death provision was also a stranger to those special tax concepts which were enacted simultaneously with it. This difference furnishes an intelligent, though not necessarily compelling, basis by which the *Field* case could be distinguished by present-day justices who have already indicated elsewhere, though not always consistently, a belief in empirical case-by-case analysis and a reluctance to attach a magic quality to earlier generalizations.⁹²

Even more favorable to the government's position is the significance which might well be attached to the negative approach made by the Congress in the Technical Changes Act of 1949.⁹³

Its force here is to be distinguished from that of earlier instances where newly enacted tax concepts of ownership and transfer were affirmatively linked to the contemplation-of-death principle by special language incorporated in the body of the new subsections. The different, i.e., the negative, approach of the Technical Changes Act would seem to demonstrate that Congress contemplated that the general contemplation-of-death provision itself embraced at the very least the federal tax concept of ownership and transfer reflected in the retained-life-estate provision. To that extent, a court as a minimum should treat the 1949 statutory language as an implied amendment of the meaning to be attached to that phrase in the contemplation-of-death provision which reads "*interest . . . of which the decedent has . . . made a transfer.*"⁹⁴ And since the prescription there was accomplished by

⁹¹ See the analysis of *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189 (1920), and its aftermath in Wright, "The Effect of the Source of Realized Benefits upon the Supreme Court's Concept of Taxable Receipts," 8 STAN. L. REV. 164 (1956).

⁹² See, e.g., Justice Frankfurter's approach in *Bazley v. Commissioner*, 331 U.S. 737, 67 S.Ct. 1489 (1947). Cf. Justice Warren's approach in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 75 S.Ct. 473 (1955).

⁹³ Act of October 25, 1949, P.L. 378, 81st Cong., 1st sess., 63 Stat. L. 891, §8.

⁹⁴ Now I.R.C., §2035.

use of negative phraseology, reinforced by a double negative, there would seem to be no substantial reason to suppose that the legislative supposition contemplated the attribution to that phrase of one congressionally acceptable tax concept of "interest" and not another. At least this should be true in the case of other tax concepts of ownership and transfer (illustratively that of the joint-property provision) to which the Congress is equally committed *and* the justification for which is *equal* to that of the retained-life-estate provision.⁹⁵

That the justification for the transfer concept of the joint-property provision is equal to that of the retained-life-estate provision is important only because it deprives the Tax Court of a distinction which it has been willing to draw elsewhere. That court recently indicated that the key phrase quoted above, when repeated in different subsections, did not carry the same meaning. When it affirmed in 1955 that the meaning of that phrase was geared to local property law,⁹⁶ it distinguished one of its early contrary holdings,⁹⁷ ignoring the others.⁹⁸ It asserted that in the earlier case the inter vivos arrangement entered into between the spouses regarding their jointly held property, and in contemplation of the husband's death, was accompanied also by their retention of a joint power of revocation.

Attempted reconciliation of the cases on this basis means that the key phrase, "interest . . . of which the decedent has . . . made a transfer," which serves also to limit that subsection dealing with revocable transfers,⁹⁹ does in that context incorporate the tax concept of ownership reflected in the joint-property provision though the opposite is said to be true of that phrase when lodged in the context of the contemplation-of-death principle. This is not the only situation in which the courts have indicated, and perhaps quite properly, that the Congress is most closely wedded to the basic philosophy of the revocable-transfer section and that fulfillment of its legitimate function requires that it be given the broad-

⁹⁵ The latter is justified on the ground that the decedent retained the entire income or use of the property until the moment of his death. The former is justified on the theory that while he retained only one-half of the income or use for that period, he also retained a chance until his death of recapturing the entire corpus.

⁹⁶ Estate of A. Carl Borner, 25 T.C. No. 70 (1955).

⁹⁷ Estate of William MacPherson Hornor, 44 B.T.A. 1136 (1941) (nonacq.), *affd.* (3d Cir. 1942) 130 F. (2d) 649.

⁹⁸ Estate of Frank K. Sullivan, 10 T.C. 961 (1948), *revd.* by (9th Cir. 1949) 175 F. (2d) 657; Estate of Henry Wilson, 2 T.C. 1059 (1943) (acq.).

⁹⁹ I.R.C. (1939), §811 (d), now I.R.C., §2038.

est possible meaning.¹⁰⁰ However, in resolving the basic question with which this article is concerned, it is doubtful that the varying degrees of congressional devotion to different tax concepts of ownership justifies the judiciary in treating the contemplation of death section as a stranger to the jointly held property provision. After all, Congress has indicated by the Technical Changes Act of 1949 that it did not consider the transfer principle in the retained-life-estate subsection as a stranger to the contemplation-of-death provision. Why should we suppose otherwise in the case of another equally legitimate theory of ownership contained in the jointly-held property provision?

From the foregoing considerations, it appears on balance that the congressionally manifested purpose favors that construction of the contemplation-of-death provision which incorporates in it the ownership and transfer doctrine contained in the joint-property provision. But there is room here for a difference of opinion. One cannot say that the Tax Court was *clearly* wrong in treating the two provisions as strangers. Because the basic question is of that type, and because the tendency of the lower courts is to favor the

¹⁰⁰ That the Congress does not think such trusts have much substance is evident from the fact that from an early date the corpus has been included in the transferor's gross estate [Revenue Act of 1924, §302 (d), now as revised, I.R.C., §2038] and the income therefrom was taxable to him until his death. Revenue Act of 1924, §219 (g), now as revised, I.R.C., §676. By way of comparison, while the former is true in the case of certain gifts in contemplation of death (I.R.C., §2035), the latter is not.

In any event, on the one hand, the Tax Court has held that the pivotal statutory phrase around which this article is written served in a contemplation-of-death context to exclude from the gross estate the income from a corpus which was accumulated after the original transfer. *Estate of James E. Frizzell*, 9 T.C. 979 (1947), reh. 11 T.C. 576 (1948), affd. *Burns v. Commissioner*, (5th Cir. 1949) 177 F. (2d) 739. However, that court has reached a contrary result with reference to the accumulated income of a trust over which the transferor retained a power of revocation. *Estate of E. A. Showers*, 14 T.C. 902 (1950), remanded and vacated per stipulation of the parties, (5th Cir. 1951) 51-2 U.S.T.C. ¶10,832; *Estate of Cyrus C. Yawkey*, 12 T.C. 1164 (1949). Cf. *Commissioner v. Estate of James D. McDermott*, (7th Cir. 1955) 222 F. (2d) 665; *Estate of Daniel Guggenheim*, 40 B.T.A. 181 (1939), modified and affd. (2d Cir. 1941) 117 F. (2d) 469, cert. den. 314 U.S. 621, 62 S.Ct. 66 (1941).

The effect under the estate tax act of reaching the accumulated income of a revocable trust is to treat such transferred property as though it would have been embraced by I.R.C. (1954), §2033. However, the Supreme Court has indicated that §2033 would not, standing alone, have reached property now covered by the revocable-transfer section. See *Porter v. Commissioner*, 288 U.S. 436, 53 S.Ct. 451 (1933).

Any implication from this, that the contemplation-of-death provision would not have embraced the ownership and transfer principle of the revocable-transfer section, would not demonstrate that the contemplation-of-death principle should also be a stranger to the joint-held property transfer concept. All that was said above about the Field case is equally applicable here.

taxpayer who engages in what is obviously a "gimmick," this writer is led to say that immediate statutory revision is warranted to stop that tendency and thus to neutralize the gimmick. At the same time this will afford the Congress an opportunity to fix the relationship between the jointly-held property provision and certain other special tax concepts, such as those contained in sections 2036, 2037, and 2038.