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THE CHURCH AND SPIEGEL CASES: A REINTERPRETATION OF THE "POSSESSION OR ENJOYMENT" CLAUSE OF I.R.C. 811 ©

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A REINTERPRETATION OF THE "POSSESSION OR ENJOYMENT" CLAUSE OF I.R.C. 811 (c)†

William J. Schrenk, Jr. and Richard V. Wellman***

Although federal tax statutes have provided for over thirty years that "transfers intended to take effect in possession or enjoyment at or after death" shall be included in the grantor's gross estate for estate tax purposes,[1] attempts to define precisely the scope of this language have not been outstanding for their success. In two recent decisions by the Supreme Court, *Commissioner v. Church*[2] and *Spiegel v. Commissioner*,[3] a further attempt at clarification has been made.

I

LEGISLATIVE, JUDICIAL AND ADMINISTRATIVE HISTORY OF THE STATUTE

As a part of the federal tax law, section 811(c) made its first appearance before the Supreme Court in *Shukert v. Allen*.[4] In that case, the decedent had transferred property in trust in 1921, to accumulate the income until 1951, when the accumulated income and corpus were to be distributed to his children. The Court held that no part of this property was to be included in decedent's gross estate, stating significantly that ". . . the interest of the children respectively was vested as soon as the instrument was executed. . . ."[5] This position was affirmed in *Reinecke v. Northern Trust Co.*,[6] where the fact that remainders, previously vested, were not to become present interests until five years after the settlor's death was held insufficient to allow inclusion of the value of the remainders in the settlor's gross estate.

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1 This language was first included in the Revenue Act of 1916. 39 Stat. L. 777 §202(b) (1916). Currently, it is found in 26 U.S.C. (Supp. 1947) §811(c). For convenience, this provision will be referred to throughout this comment as section 811(c).

2 (U.S. 1949) 69 S.Ct. 322.

3 (U.S. 1949) 69 S.Ct. 301.

4 273 U.S. 545, 47 S.Ct. 461 (1927).

5 Id. at 547.

6 278 U.S. 339, 49 S.Ct. 123 (1929).

The decision which was the subject of greatest controversy in the *Church* and *Spiegel* cases, however, was *May v. Heiner.*[7] There, the decedent had made a transfer in trust, reserving a life estate in herself, with a remainder in her children, their distributees or appointees. In holding that nothing was to be included in the settlor's gross estate on her death, the Court stated that, "At the death of [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."[8] These decisions make it clear that the Court was refusing to interpret "possession or enjoyment" in the popular or physical sense of an active, present interest, and was further requiring a transfer of title at the decedent's death, before any interest was includible.[9]

Congress reacted promptly. On March 3, 1931, section 811(c) was amended by a Joint Resolution[10] to include in the decedent's gross estate all transfers under which he retained for his life: "(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. . . ." This amendment reflected the dissatisfaction of Congress with the interpretation adopted by the Court and might have disposed effectively of the problem of the reserved life estate, had it not been for the Court's refusal to apply it to any transfers occurring before the date of its enactment.[11] Thus, as to such transfers, the judicial construction of the statute still applied.

Shortly after *May v. Heiner,* the Court was faced with a different sort of property arrangement in *Klein v. United States.*[12] The decedent had made an inter vivos transfer of a life estate, the remainder to go to the life tenant if he survived the decedent. The entire value of the corpus was included in decedent's gross estate, for the reason 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. . . ."[13] Here the Court seemed to

[7] 281 U.S. 238, 50 S.Ct. 286 (1930); 67 A.L.R. 1244 (1930); 44 HARV. L. REV. 131 (1930); 29 MICH. L. REV. 123 (1930).

[8] 281 U.S. 238 at 243, 50 S.Ct. 286 (1930). The Court reemphasized the irrelevance of the settlor's retention of a life estate in three per curiam decisions decided one year later. Burnet v. Northern Trust Co., 283 U.S. 782, 51 S.Ct. 342 (1931); Morsman v. Burnet, 283 U.S. 783, 51 S.Ct. 343 (1931); McCormick v. Burnet, 283 U.S. 784, 51 S.Ct. 343 (1931).

[9] See Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 at 1153 (1945).

[10] 46 Stat. L. 1516 (1931).

[11] Hassett v. Welch, 303 U.S. 303, 58 S.Ct. 559 (1938); 22 MINN. L. REV. 1066 (1938).

[12] 283 U.S. 231, 51 S.Ct. 398 (1931).

[13] Id. at 234.

qualify the interpretation of "possession or enjoyment" which it had previously made, by regarding that term as referring to the point at which the interest of the grantee became indefeasibly vested. It should be noted, however, that the Court retained, in somewhat limited form, the requirement that something must be transmitted by the grantor at his death, in that decedent's chance to reacquire the property then terminated, and the contingent remainder concurrently became indefeasible.

The effect of the *Klein* decision was to be greatly reduced by the Court's holding in the *St. Louis Trust* cases,[14] where, on substantially the same facts, nothing was found to be includible in the decedent's gross estate. The cases were distinguished on the ground that in *Klein,* the remainder was viewed as contingent, whereas in the *St. Louis Trust* cases, the transferees' interests were vested subject to divesting if the grantor survived the remaindermen. In the latter situation, the Court felt that the requisite transmission at death was lacking.

Following this highly technical distinction, the landmark case of *Helvering v. Hallock*[15] came before the Court in 1940. There, decedent had made an inter vivos transfer of a life estate to his wife, and upon her death the property was to revert to the decedent if he survived; if not, it was to go to his son and daughter. Repudiating the distinction which had been made in the *St. Louis Trust* cases and overruling those decisions, the Court held that the property transferred was to be included in decedent's gross estate under section 811(c). Although this result could be reached under the principles announced in the *Klein* case, upon which the Court relied, language was used in the decision which indicated a much more comprehensive policy. The statement of Justice Frankfurter that "By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor,"[16] may indicate disregard for the requirement that, at the settlor's death, there should also occur a "transmission from the dead to the living." Did this mean that the Court would hold the corpus includible without the settlor's having retained a reversionary interest which was terminated at his death, as long as any uncertainty in the devolution of the property was determined at that time? This would be a partial repudiation of *May v. Heiner* and *Reinecke v. Northern Trust Co.* Although

[14] Helvering v. St. Louis Union Trust Co., 296 U.S. 39, 56 S.Ct. 74 (1935). Becker v. St. Louis Union Trust Co., 296 U.S. 48, 56 S.Ct. 78 (1935).

[15] 309 U.S. 106, 60 S.Ct. 444 (1940); 125 A.L.R. 1368 (1940); 38 MICH. L. REV. 1350 (1940); 26 VA. L. REV. 830 (1940).

[16] 309 U.S. 106 at 112, 60 S.Ct. 444 (1940).

some have felt this was the effect of the *Hallock* decision,[17] when the facts of the case and the Court's reliance on the *Klein* decision are considered, one may doubt that the Court intended to announce such a doctrine.[18]

The Government now felt, however, that it was authorized to include in a decedent's gross estate the entire value of any transferred property in which he had retained a reversionary interest, no matter what might be the nature of the contingency. Moreover, additional confusion was created by failure of the Tax Court to apply the *Hallock* doctrine consistently. The position was taken by that court that no tax could be imposed where the decedent's possibility of reacquisition arose by operation of law;[19] it was also held that the doctrine would not apply where this possibility was remote.[20] Another problem, analogous to but unanswered by the *Hallock* case, was presented where survivorship of the grantor was but one of the contingencies on which the certainty of the remainder interest depended.[21]

An outstanding effort to state the *Hallock* doctrine clearly and to apply it faithfully was made by the Third Circuit Court of Appeals in *Lloyd's Estate v. Commissioner*.[22] Citing all the previous Supreme Court decisions, that court stated that, ". . . the criterion for determining whether the transfer of an interest is intended to take effect in possession or enjoyment at or after the transferor's death is whether he retains a string or tie whereby he can reclaim the transferred property or whether he has otherwise reserved an interest whose passing to others is determinable by his death."[23]

The next significant decision was handed down in 1945, when the Supreme Court granted certiorari in the case of *Fidelity-Philadelphia Trust Co. v. Rothensies*.[24] The decedent, Mrs. Stinson, had settled a

[17] Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 at 1157 (1945); 49 YALE L. J. 1118 at 1123 (1940).

[18] See MONTGOMERY'S FEDERAL TAXES 482, 484 (1947-1948). The lower federal courts did not believe Hallock to be incompatible with May v. Heiner: Helvering v. Proctor, (C.C.A. 2d, 1944) 140 F. (2d) 87; Comm. v. Hall's Estate, (C.C.A. 2d, 1946) 153 F. (2d) 172; Comm. v. Lasker, (C.C.A. 7th, 1944) 141 F. (2d) 889.

[19] Joseph K. Cass, 3 T.C. 562 (1944); Henry S. Downe, 2 T.C. 967 (1943).

[20] Francis Biddle Trust, 3 T.C. 832 (1944); Benjamin L. Allen, 3 T.C. 844 (1944).

[21] When faced with this problem, a circuit court of appeals held the Hallock doctrine inapplicable. Comm. v. Kellogg, (C.C.A. 3d, 1941) 119 F. (2d) 54. See PAUL, FEDERAL ESTATE AND GIFT TAXATION (1946 Supp.), §7.23, p. 201.

[22] (C.C.A. 3d, 1944) 141 F. (2d) 758. The doctrine was held inapplicable, since the grantor's reversionary interest was wholly independent of his survivorship.

[23] Id. at 760.

[24] 324 U.S. 108, 65 S.Ct. 508 (1945); 159 A.L.R. 227 at 239 (1945); 45 COL. L. REV. 469 (1945); 44 MICH. L. REV. 673 (1946).

trust, reserving to herself the income for life; then to her two daughters for their lives; then half of the corpus to each daughter's descendants. It was further provided that if both daughters died without surviving descendants, the corpus was to go according to the decedent's appointment by will. Mrs. Stinson was survived by her two daughters, both of whom had children. The Court, speaking through Justice Murphy, held the entire corpus to be included in decedent's gross estate under section 811(c).

An initial problem is concerned with construction of the trust in the *Fidelity* case. If it is taken that the daughters' descendants must survive both the grantor and the daughters for their interests to become unequivocal, the decision may have been but a logical extension of the *Hallock* doctrine.[25] It would thus be impossible for the remainder interests to take effect in "possession or enjoyment," as that term was used in the *Klein* and *Hallock* cases, until at or after the decedent's death.[26]

It seems more reasonable, however, to interpret the trust as requiring merely that the descendants survive the daughters in order that their interests become indefeasible.[27] Considered this way, the decision seems to hold that retention of any reversionary interest by the grantor is sufficient to bring the transferred property into his gross estate, regardless of whether it is conditioned upon the grantor's survivorship.[28] Although this would retain the requirement of a "transmission" at or after death, and would not change the interpretation of "possession or enjoyment" previously adopted, such a view would depart greatly from the *Hallock* decision by eliminating the necessity of a condition of survivorship. It is difficult to reconcile this conclusion, however, with the fact that the Court cited both the *Klein* and *Hallock* decisions as supporting the result reached.

Another interpretation of the *Fidelity* case has been that the combina-

[25] From his statements in the Fidelity case, this appears to be the meaning ascribed by Justice Murphy to the trust instrument. See Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 at 1177 (1945); and MONTGOMERY'S FEDERAL TAXES 484 (1947-48).

[26] It has been pointed out that the case for inclusion under section 811(c) is even stronger here, for the decedent not only required the remaindermen to survive her to take, ". . . but also projected a dominion over their interests following her death." Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 at 1169 (1945).

[27] This construction seems to have been made by Justice Murphy when he restated the facts of the Fidelity case in a later decision. Goldstone v. United States, 325 U.S. 687, 693, n. 3, 65 S.Ct. 1323 (1945).

[28] Since this view might render almost every trust taxable, it is not surprising that the lower courts have not given this effect to the Fidelity decision. See the discussion and collection of cases in Spencer, "A Common Sense Rule for Hallock Cases," 59 HARV. L. REV. 43 at 65 (1945).

tion of both a life estate and a reversionary interest in the decedent was sufficient to persuade the Court to include the property in the gross estate.[29] This analysis has the disadvantage of being largely empirical.

Faced with the enigma of the *Fidelity* decision and endeavoring to accommodate its practice to all the Court's decisions, the Treasury, in 1946, amended section 81.17 of its regulations.[30] The new regulations provided that property transferred by a decedent may be included in his gross estate under section 811(c) where:

> "(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, *and*
>
> (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)."

The amendment explained, however, that "The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life." It is clear the Treasury intended to go beyond the scope of the *Hallock* decision, and at least to adopt what might be termed the more conservative interpretation of the *Fidelity* case. Thus, it made taxable transfers in which survivorship by the grantor is but one of the conditions upon which his reversionary interest depends.[31]

The regulations dispensed with both of the tests which had been imposed by the Tax Court; that the decedent's interest must be expressly retained, and that his interest cannot be too remote.[32]

Despite the Treasury's efforts to codify the judicial standards, the lower courts have continued to produce divergent results. In general,

[29] Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 at 1169 (1945); PAUL, FEDERAL ESTATE AND GIFT TAXATION (1946 Supp.), §7.23, p. 199. See also MONTGOMERY'S FEDERAL TAXES 488 (1947-48), where four possible interpretations of the Fidelity decision are listed.

[30] T.D. 5512, 1946-1, CUM. BUL. 264 (May 1, 1946) (italics added). See, Nelson, "The New Reverters Regulations," 24 TAXES 848 (1946); MONTGOMERY'S FEDERAL TAXES 465 (1947-48); 2 TAX L. REV. 94 (1946).

[31] T.D. 5512, example 5. Example 8 indicates the Treasury would reach a result contrary to Goldstone v. United States, 325 U.S. 108, 65 S.Ct. 1323 (1945), by excluding the transferred property where the life tenant has the power to destroy the decedent's reversionary interest.

[32] T.D. 5512, example 1. This follows from the language of the Court in the Fidelity case: "No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests." 324 U.S. 108 at 111. But it is difficult to reconcile example 6, where nothing is included in spite of a reversionary interest in the decedent, contingent upon survivorship, arising by operation of law from a gift over to his next of kin. This may be merely a concession to taxpayers. Cf. Commissioner v. Kellogg, supra, note 21.

they have refused to include the transferred property under section 811(c) where the decedent's interest is remote and arose by operation of law.[33] Although some recent decisions of the Tax Court may indicate a departure from the "remoteness" test,[34] it is unlikely that this is a result of that court's respect for the Treasury's regulations, for the administrative guides seem to have had little effect on the judiciary.[35]

II

THE FACTS, HISTORIES AND ISSUES OF THE CHURCH AND SPIEGEL CASES

In the *Church* case, a New York settlor, by deed of trust antedating the Joint Resolution of 1931, transferred securities to himself and two others as co-trustees, reserving the right to income for life and directing that upon his death, the trust was to terminate and the corpus be paid to his surviving issue. The pertinent language of the indenture next following is:

> "In the event that the settlor should die leaving no lawful issue surviving, then and in that event the trustees are ordered . . . to transfer and pay over the principal . . . to the brothers and sisters of the settlor then surviving, any child or children of a deceased brother or sister to take the shares per stirpes which their parent would have been entitled to receive if living."

At the time of the transfer, the decedent was unmarried and childless; there were living brothers and sisters and living issue of brothers.

The Tax Court decided that even if a reversionary interest was left in the settlor, it was not such interest as would amount to a "string or tie" within the meaning of the *Hallock* case.[36] The Third Circuit Court of Appeals affirmed,[37] deeming itself precluded from altering the Tax

[33] Edward P. Hughes, 7 T.C. 1348 (1946); Nettie Friedman, 8 T.C. 68 (1947) (where these factors were considered indicative of the decedent's intent); Gilliat E. Schroeder, P-H TAX CT. MEMO. DEC. ¶ 47, 489 (1947); George P. Rhodes, P-H TAX CT. MEMO. DEC. ¶ 47,135 (1947); Comm. v. Singer, (C.C.A. 2d, 1947) 161 F. (2d) 15. But cf. Thomas v. Graham, (C.C.A. 5th, 1946) 158 F. (2d) 561; Beach v. Busey, (C.C.A. 6th, 1946) 156 F. (2d) 496; Comm. v. Bayne's Estate, (C.C.A. 2d, 1946) 155 F. (2d) 475; Comm. v. Bank of Calif., (C.C.A. 9th, 1946) 155 F. (2d) 1.

[34] Mary V. Cochrane, 9 T.C. 242 (1947); Virginia H. West, 9 T.C. 736 (1947).

[35] See, for example, the summary treatment of the regulations in Edson Bradley, 9 T.C. 145 (1947); Lucy B. Platt, P-H TAX CT. MEMO. DEC. ¶ 47, 756 (1947). The shortness of its opinions seems to indicate the Tax Court was fairly sure of its position.

[36] P-H TAX CT. MEMO DEC. ¶ 45, 134 (1945).

[37] (C.C.A. 3rd, 1946) 161 F. (2d) 11.

Court's decision by the rule of the *Dobson* case.[38] One judge dissented, believing the use of the *Dobson* doctrine here to be but a convenient way of avoiding a decision on the merits. The dissenter opined that a reversionary interest was retained, and this alone was sufficient basis for inclusion of the property in decedent's gross estate: neither its infinitesimal value, nor the fact that it arose by operation of law, was of importance in applying the *Hallock* rule.[39]

The dissenting judge seems to be correct in finding that there was a remote possibility that the corpus would revest in the settlor. According to counsel for the taxpayer, proper interpretation of the deed indicated that the children of settlor's brothers need not survive the settlor to take an indefeasible interest, inasmuch as a condition of survivorship should not be implied as to them. It seems, nevertheless, that the language of the deed required that such children survive their parents, the settlor's collaterals, before their interests could become vested.[40] The deed thus created contingent remainders in the alternative with the expressed conditions failing to cover completely all possible situations. Thus, though the children of the settlor's brothers were living at the time of the deed, their death, followed by death of their parents in the lifetime of the childless settlor, would seem to dictate return of the corpus to the settlor.

The *Spiegel* case presented a different picture. There an Illinois settlor, by deed of trust, transferred securities to himself and others in 1921, the deed providing that the income was to be paid during the settlor's life to his three children. The remainder was disposed of by the following language:

> "Upon my death, the said Trustees . . . shall divide said trust fund . . . equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of

38 Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239 (1943).

39 O'Connell, C. J., dissenting, [161 F. (2d) 11 at 14] stated, ". . . there was the possibility that the gift of the corpus would fail, for want of beneficiaries. . . . The string has exactly the same characteristics as though he had expressly reserved it. . . . Is not the salient conclusion that there existed in the possession of the decedent a reversionary interest which, until his death, delayed determination of ultimate possession of the corpus?"

40 PROPERTY RESTATEMENT, §252, comment c (1940).

mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita."

As can be seen, the language is appropriate to creation of vested remainders in the children of the settlor.[41] Though these interests were not indefeasible, divestment would take place only upon the concurrence of the two conditions expressed, i.e., death during the lifetime of the settlor with other remaindermen surviving.[42] Thus it is difficult to see that the settlor retained any possibility of reacquiring the corpus. In the event of death of all three children without leaving issue in the lifetime of the settlor, the divesting conditions would be satisfied only as to the first two, leaving the remainder indefeasibly vested in the third to pass by will or intestacy upon his death.

The Tax Court held the transfer not includible, though in terms which leave it doubtful whether the court was of the opinion that any reversionary interest retained was of insufficient quantum, or that no reversionary interest was retained.[43] This decision was reversed by the Seventh Circuit Court of Appeals which held that an interest was retained, and that neither its face value nor its manner of creation was material to the applicability of the *Hallock* doctrine.[44]

Thus it can be seen that several clear cut issues were presented to the Court by the two cases. Ostensibly, there was conflict as to the application of the *Dobson* rule to the situations presented. Moreover, the

41 This statement assumes much. If the so-called "divide and pay over" rule is not followed, the remainders would seem clearly to be vested. See GRAY, RULE AGAINST PERPETUITIES, 3d ed., §108 (1915), for an example quite similar to the limitation in question.

It seems, however, that the "divide and pay over" rule is followed in Illinois as an aid to construction. See, CAREY AND SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS, §303 (1941). Nevertheless, it should be noticed this was not a class gift, since the settlor specifically named the three children mentioned in the limitation of the remainder in an earlier portion of the deed. PROPERTY RESTATEMENT, §280 (1940). Professor Simes believes the "divide and pay over" rule has slight operation except in connection with class gifts and cites an Illinois decision as embodying the clearest expression of the rationale of this distinction. 2 SIMES, FUTURE INTERESTS 173, 174 (1936). Furthermore, before a gift will be held contingent because the time of payment is postponed, it must appear that the delay was for the benefit of the estate. In the absence of evidence on this point, it seems legitimate to assume for the purpose of this article, that the reason for postponement here would be found to be to protect the corpus and preserve it for the children. See CAREY AND SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS 423 et seq. (1941).

42 KALES, FUTURE INTERESTS, 2d ed., p. 690 (1920).

43 P-H TAX CT. MEMO. DEC. ¶ 45,075 (1945).

44 (C.C.A. 7th, 1946) 159 F. (2d) 257. The decision seems to proceed on the theory that even though the remainders were held to be vested, death of the remaindermen in the lifetime of the settlor would generate a resulting trust. The suggestion that the doctrine of resulting trusts cuts across substantive property law in this manner is novel. See 3 SCOTT, TRUSTS, §411.5 (1939).

questions of future interests law here presented could hardly be dismissed as immaterial, inasmuch as the issue was not one of terminology, but whether reversionary interests, whatever they be called, were left in the settlors after the transfers in question.[45] And certainly the question which has caused division between the Tax Court and the circuit courts of appeals, as to whether the *Hallock* rule is to be applied regardless of the remoteness of the retained interest or its manner of creation, was squarely in issue.[46]

It is this last issue, plus presentation of the two cases together, which brought the top-heavy body of law concerning the meaning of the "possession or enjoyment" phrase of the estate tax statute before the Court for full reconsideration. Had this last issue been presented to the Court in a single case, perhaps the result would have been a short and definite answer, yes or no. But arising as it did in companion cases, an unequivocal answer to this question would have been a difficult judicial pronouncement.

In the first place, suppose the Court had decided the solutions to the future interests question raised in each case in accordance with the analyses suggested above. Logical application of the current Treasury regulations, which seem to be a conservative reflection of the case law on this question,[47] would have resulted in a decision of taxability in the *Church* and not in the *Spiegel* case. Aside from engendering further doubt concerning the importance of the retained life estate,[48] such a result would certainly have emphasized weaknesses of the tests heretofore developed. The present cases effectively illustrate the elusiveness of implied reversionary interests, and, in view of policy considerations which dictate relatively definite guides in tax matters,[49] it can hardly be said that policy is best served by making taxability depend upon such interests.

In its brief on re-hearing, the Treasury challenged the "retained interest" requirement in the following language:

> "A rule which makes the test of taxability turn upon the retention by the decedent until his death of some interest in the property; which makes the quantum (however insignificant) of that re-

[45] The future interests problems here presented should be contrasted with that which confronted the Court in the St. Louis Trust Co. cases, supra, note 14. A similar situation was presented in the Hallock case and was disposed of by Justice Frankfurter as involving "refined technicalities of the law of property." 309 U.S. 106 at 112 (1939).

[46] Supra, part I.

[47] Supra, part I.

[48] Cf. Fidelity Co. v. Rothensies, 324 U.S. 108, 65 S.Ct. 508 (1945).

[49] PAUL, TAXATION FOR PROSPERITY, c. 37, §1 (1947).

tained interest an immaterial consideration; and which at the same time excludes from the reach of the tax other transfers in which the interests of the ultimate takers are of precisely the same character would seem to be an illogical rule."[50]

Nor can it be said that the Court ought to have followed the prevailing view of the Tax Court that an interest such as existed in the *Church* case is not sufficient to bring the case within the *Hallock* doctrine.[51] A satisfactory distinction cannot be drawn between expressed and unexpressed reversionary interests.[52] On the other hand, an artificial rule concerning the minimum quantum necessary would have been an unbecoming judicial pronouncement.

Faced with this dilemma, the Court decided to open up the question of the proper interpretation of the "possession or enjoyment" clause. Instead of rendering decision after initial argument, it requested reargument on the basis of nine questions which it propounded.[53] A brief summary of the issues thus raised together with the positions taken by the Treasury thereon should afford further basis for comprehension of the decisions.

The subjects of the nine questions asked by the Court seem to fall into five general categories.

(a) The first of the Court's questions in effect asked whether the "retained interest" requirement should be perpetuated. Thus it was asked whether the statute required inclusion of the corpus, where an interest measured by the life of the settlor was vested in some other person, and the settlor retained no interest in the corpus.

(b) Questions numbered 3, 4, 5 and 8 were all directed to the basic issue of whether *May v. Heiner* was still controlling. Question 3 asked whether the codification of the Revenue Acts in 1939 was pertinent to the cases before the Court, while question 4 raised the issue of whether the Joint Resolution of 1931 was intended by Congress to be a repudiation of *May v. Heiner*. Question 5 asked whether the *Hallock* case overruled *May v. Heiner*. Question 8 raised a problem closely related to that suggested by question 5, in that it seemingly inquired whether the broad language used by Justice Frankfurter in the *Hallock* case represented an approach basically inconsistent with that implicit in *May v. Heiner*.

50 Brief for the Commissioner of Internal Revenue on Reargument, p. 25.

51 Supra, part I.

52 Note the language used by the dissenting circuit judge in the Church case, supra, note 39.

53 (U.S. 1948) 68 S.Ct. 1522, 1524.

(c) Another general issue, closely related to that discussed in paragraph (b) but separated in this discussion since it seems purely hypothetical as far as the instant cases are concerned, was that raised by question 2. There the Court asked whether an implied reversionary interest in favor of the settlor's estate was sufficient to warrant the operation of section 811(c). This question seemed to call for a reconsideration of the doctrine popularly ascribed to the *Fidelity* case, though none of the parties before the Court in the instant cases considered that the facts involved raised the question of the effect of a retained interest which survived the death of the settlor.

(d) Question 7 drew *Hassett v. Welch* into the discussion. Assuming that *May v. Heiner* did not survive the *Hallock* decision, did the doctrine of *Hassett v. Welch* still have controlling relevance in passing on the taxability of a transfer made before the Joint Resolution in which a life estate was reserved by the settlor?

(e) Questions 6 and 9 asked whether the retention by the settlor in both cases of the powers of a co-trustee was of importance in determining whether the trust properties should be included for estate tax purposes. Question 6 seemingly asked whether such retention could be considered sufficient interest in the corpus to satisfy the "retained interest" requirement, while question 9 sought argument on whether the doctrine of *Helvering v. Clifford*[54] should be held of significance in the principal cases.

Before examination of the Treasury's position on these five issues, it should be noted that throughout its brief on reargument, the Treasury asserted that current Treasury regulations were valid and conclusive on the questions raised by the two cases.[55] It premised its extensive views as to what the law ought to be solely on the fact that the Court's request for reargument indicated a willingness to examine the problem along more fundamental lines.

The broad position taken by the Treasury was that the "possession or enjoyment" provision has been given an interpretation contrary to that intended by Congress, ever since the decision in *Reinecke v. Northern Trust Co.* placed emphasis on the retention by the settlor of a property interest in the subject of the transfer. The Treasury argued that the whole purpose of section 811(c) was to reach inter vivos transfers which

[54] 309 U.S. 331, 60 S.Ct. 554 (1940).

[55] The Treasury asserted that example 7 of §81.17 [as amended by T.D. 5512, 1946-1 Cum. Bul. 264 (May 1, 1946)] of the Treasury regulations covered the instant cases precisely. Brief for the Commissioner of Internal Revenue on Reargument, p. 17.

might serve as substitutes for testamentary disposition. Thus the "contemplation of death" provision was designed to reach transfers made with actual intent to substitute a present gift for one which, but for the estate tax, would be made upon death. On the other hand, the "possession or enjoyment" language was supposed to reach transfers which were testamentary in effect, regardless of the actual intent of the donor. To accomplish this intended result, the latter provision must be interpreted in a lay, or colloquial, sense so that whenever actual possession or enjoyment is suspended until at or after the death of the donor, the property transferred is includible whether or not the donee's interest can be said to have been indefeasible prior to that time.

This basic position of the Treasury, in addition to giving its answer to the question separated in paragraph (a), went far in answering many of the other questions asked. Thus it argued that *May v. Heiner* was wrongly decided and should be overruled. In this connection, it was pointed out that no valid argument exists for giving the "possession or enjoyment" provisions an interpretation in an estate tax statute which is different from that accorded it in an inheritance tax statute, since in both types, the provision seeks to reach a means of avoidance rather than transfers logically covered by the basic rationale of the particular tax.

At any rate, the Treasury asserted, the Joint Resolution of 1931 was intended to repudiate *May v. Heiner*. In this connection, the Treasury pointed out that the amendment in its original form was introduced by the words "including a transfer. . .," thereby demonstrating the Congressional intent that the new provision was merely explanatory of existing law. It was argued that this interpretation is consistent with *Hassett v. Welch*, for that case decided only that the amendment itself was prospective in effect and did not consider whether the statute as it existed prior to 1931 could be held to cover the transfer there in question.

The Treasury did not urge that the codification in 1939 changed the substantive law.

In answer to question 5, bearing on paragraph (b) above, the Treasury contended on reargument that the *Hallock* case did overrule *May v. Heiner*. Though it admitted that the later decision is not necessarily contrary to the earlier one, it was argued that the *Hallock* case should be viewed as standing for an approach which is basically inconsistent with that of *May v. Heiner*. There seems no distinction between this position and the one taken by the Treasury in answering question 8. There it was argued that the transfers in question are so much like testamentary transfers that they should be included, even though property law might dictate that possession and enjoyment passed to the donees prior to the death of the donor.

On the third issue as above separated, the Treasury, in answering question 2, asserted that its current regulations are valid. Basically, its position was that whether the retained interest is cut off by the donor's death or whether it survives, capable of pulling the corpus back into his estate, the transfer is still a substitute for a testamentary disposition if the donee must wait until at or after the donor's death before obtaining possession or enjoyment. In other words, the Treasury claimed that if the retained interest requirement is held to exist, any retained interest is sufficient.

The Treasury's position on the fourth issue has already been indicated. *Hassett v. Welch* need not be overruled if *May v. Heiner* is repudiated, as the Court in the *Hassett* case did not pass on the proper interpretation of the statute prior to the 1931 amendment.

Finally, the Treasury argued that retention by each settlor of a co-trustee's power to control the corpus demonstrates that possession and enjoyment by the remaindermen was postponed. It chose to use this approach as a make-weight only, expressly refusing to assert that the retention of such power alone would satisfy the requirement that an interest be retained.

In conclusion, it should be stated that although the effect of the doctrine of *stare decisis* on the decisions in these cases is beyond the scope of this article, this factor cannot be overlooked in appraising the results announced. Persuasive arguments tending to discourage revision of what has been considered settled law were presented in the briefs of both taxpayers and in a brief filed by *amici curiae*. In addition, Justices Frankfurter and Jackson expressly disapproved the nine questions propounded as raising argumentative and hypothetical questions, neither argued by counsel nor necessary to the decisions.

III

THE CHURCH AND SPIEGEL DECISIONS

1. *The Opinions.* The majority put to rest longstanding doubts by announcing, unmistakably, that *May v. Heiner* is no longer law. Avoiding full responsibility for this move, however, the Court indicated it was merely recognizing a *fait accompli*, i.e., that the *Hallock* and *May v. Heiner* decisions are irreconcilable, and that the latter was in effect

overruled in 1940.[56] Thus, the lower court's decision in the *Church* case was reversed and the value of the corpus included in the gross estate without an investigation of the reversionary interest question; the grantor's retention of a life estate was sufficient.[57]

In an effort to present an unambiguous rule for the application of section 811(c), Justice Black, speaking for the majority, stated that to avoid inclusion of the subject of an inter vivos transfer,

> ". . . [T]he settlor [must] absolutely, unequivocally, irrevocably, and without possible reservations [part] with all of his title and all of his possession and all of his enjoyment of the transferred property. . . . [T]he 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 to enjoy the property then or thereafter. . . . [S]uch a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies."[58]

In applying this rule in the *Spiegel* case, the Court, again speaking through Justice Black, accepted the ruling of the circuit court of appeals that under Illinois law the grantor retained a possibility of reverter which was terminated at his death. Since the retention of this interest satisfied the rule stated above, the decision of the lower court was affirmed.[59] The Court considered it immaterial that the reversionary interest arose by operation of law and was of negligible actuarial value.

The other four opinions, two by Justice Burton and one each by Justices Frankfurter and Reed, fall into two groups. All three justices agreed that overruling *May v. Heiner* was inadvisable. However, their discussion of the doctrine of *stare decisis*, and that of the majority opinion, cannot be discussed here.[60] Justice Reed concurred in the *Spiegel* decision, leaving but two articulate dissents to the proposition that an unexpressed, remote reversionary interest is sufficient to warrant inclusion. In both of these opinions, the validity of the circuit court's determination

[56] ". . . [W]e conclude that the Hallock and May v. Heiner holdings and opinions are irreconcilable. Since we adhere to Hallock, the May v. Heiner interpretation of the 'possession or enjoyment' provision of §811(c) can no longer be accepted as correct." Comm. v. Church, (U.S. 1949) 69 S.Ct. 322 at 325.

[57] Comm. v. Church, (U.S. 1949) 69 S.Ct. 322.

[58] Id. at 329. This same language was quoted by the Court in Spiegel v. Commissioner, (U.S. 1949) 69 S.Ct. 301 at 303.

[59] Spiegel v. Comm., (U.S. 1949) 69 S.Ct. 301.

[60] The question cannot be passed, however, without noting Justice Frankfurter's comment that the majority has treated *stare decisis* as a "disreputable barnacle." Spiegel v. Commissioner, (U.S. 1949) 69 S.Ct. 337 at 349. See also, the majority opinion, Comm. v. Church, (U.S. 1949) 69 S.Ct. 322 at 331, n. 11. Cf. Eisenstein, "Another Glance at the Hallock Problem," 1 Tax L. Rev. 430 at 439 (1946).

that such an interest was created under Illinois law was seriously questioned. Granting the existence of the "string," Justice Frankfurter sought to demonstrate that a rational distinction might be drawn between expressed and implied reversionary interests. Justice Burton advocated actual intent of the settlor as the most satisfactory criterion. Justice Jackson, without opinion, concurred in the *Church* decision and dissented from the *Spiegel* decision.

More important from the standpoint of possible future action by the Treasury is Justice Burton's discussion of the application of the *Clifford* doctrine to cases, like those here involved, where the settlor is also trustee. Pointing out that the majority did not rest its decision on this basis, he presented cogent arguments which should help nullify any attempted application of that doctrine to estate tax cases.[61]

It is worthy of note that none of the opinions relied upon the Treasury regulations.

2. *The Consequences.* It is clear that the corpus of a trust settled before March 3, 1931, is now includible under section 811(c) in all cases where the settlor retained a life estate.[62] It is also clear that this would be the result where the settlor retains a reversionary interest which is cut off at his death; but this was true under what may hesitatingly be referred to as the old *Hallock* doctrine.

Where the possibility of reacquisition by the grantor is not conditioned upon his survival, the rule stated by the Court would seem broad enough to include the corpus.[63] Accepting this construction, the decision expands the present scope of the statute, in that the point at which a transfer is to be examined to determine its effect is the grantor's death, rather than the time of the transfer. Thus, the present requirement of the regulations that the beneficiaries *must* survive the decedent is no longer essential.[64] This principle, that the retained "string" need not be terminated by the settlor's death, was first applied in a limited manner

[61] Spiegel v. Comm., (U.S. 1949) 69 S.Ct. 301 at 306.

[62] Thus, the proviso to the second requirement of the regulations, that the retention of a life estate does not constitute "a right or interest in the property," is no longer necessary.

[63] Some question on this score is raised, however, by the Court's purported adherence to the Hallock decision and by its statement that, to be tax free, ". . . a transfer must be immediate . . . *and must be unaffected by whether the grantor lives or dies.*" Comm. v. Church, (U.S. 1949) 69 S.Ct. 322 at 329. (Italics added.) This might be taken to mean that the grantor's possibility of reacquisition must be conditioned upon his survivorship for the corpus to be taxable. But see the discussion of this language, infra.

[64] Cf. Lloyd's Estate v. Comm., supra, note 22. Examination of the eight explanatory examples given in the regulations indicates that, whereas under the regulations four of the eight were stated to be tax-free, application of the Church and Spiegel rule seems to require taxation in each case, with one possible exception. See infra, note 72.

in the *Fidelity* case, and throughout the opinions, this notion was carefully preserved by repetition of the "at *or after*" language of the statute. Justice Frankfurter expressly accepted this doctrine in his dissent, and none of the other articulate members of the Court disagreed on this point.

The decisions make it clear that neither remoteness of the retained interest nor the fact that it arises by operation of law is material in applying section 811(c). Moreover, no factual determination of the settlor's intent is required in calling that section into operation.

Literal application of this principle would seem to require the inclusion under section 811(c) of property disposed of by an inter vivos transfer of a determinable fee, e.g., a grant to *X* and his heirs so long as the fences are maintained. Yet it seems clear, in view of the context in which the rule was announced, that the Court has not gone this far, and that, in such a case, taxation would result only from the operation of section 811(a).

Of still more practical concern is the question of whether retention by a grantor of the title and powers of a trustee will render the corpus includible under the rule announced. This problem was distinguished from that concerning the doctrine of the *Clifford* case in the questions posed by the order for reargument, but the only discussion bearing on the point was that in Justice Burton's dissent, discussed above, in which no such distinction was drawn. Hence, on the precise issue of whether a trustee's title falls within the rule of the majority, the only available answer lies in the Court's silence on the point, indicating perhaps that this is not the sort of a retained interest which will warrant taxability.

Another possible area of confusion exists where, although the settlor retains no interest, present or contingent, the identity of the beneficiaries is not determined until at or after the settlor's death. Consider the case where *S* conveys to *A* and his heirs for the life of *S*, remainder to *B*, but if *B* fails to survive *S*, remainder to *C*; if neither survives, to charity. It is possible that this is also within the doctrine laid down by the Court. For instance, the rule so laboriously enunciated by the majority, concluding as it does with "such a transfer must be immediate . . . and must be unaffected by whether the grantor lives or dies," if viewed as spelling out separate requirements of a tax-free transfer, would seem to dictate taxability in the situation described above, as the transfer there involved seems much affected by the settlor's death. Nevertheless, the tenor of the decision is otherwise, and one can but conclude that this language of the Court is not intended to define an additional requirement of a tax-free gift.[65] It would seem, rather, that Justice Black was merely describing the *Hallock* situation in order to include it expressly within the broad rule as stated.

To elaborate, nothing stated in the opinions indicates that the Court considers the rule laid down to be inconsistent with *Shukert v. Allen* and the *Northern Trust Co.* case.[66] Furthermore, were the "transmission at or after death" (that is, the "retained interest") requirement abandoned, the discussion of the remote reversionary interest which was found to exist in the *Spiegel* case would be superfluous. Hence, it seems apparent that the "transmission" test remains the *sine qua non* of inclusion under section 811(c), probably because it is as good a standard for identifying taxable gifts as any which could be judicially determined and because it has the virtue of long usage. A practical reason also exists for retention of the test. Where the uncertainty in devolution is created by the grantor's retention of an interest, it would be possible for him to prevent inclusion of the property in his gross estate, under the *Church* and *Spiegel* rule, by disposing of that interest. Where this is not the cause of the uncertainty, the grantor would be powerless to prevent operation of the statute.

In this connection, a question may be raised as to whether release of a reversionary interest by the grantor, to avoid the operation of the rule here announced, would be regarded as made in contemplation of death, since the motive would be the avoidance of estate taxes.[67] And if so regarded, would the entire corpus be included in the grantor's gross estate, or merely the value of the interest released?

IV

CONCLUSIONS

It might be inferred that the Court, in disposing of *May v. Heiner*, has repudiated the two principles for which that case may be said to have stood: (1) that there must be some transmission of interest from

[65] Where there is no retained interest and the contingency is not survivorship by the grantor, the corpus would clearly not be included. Nor should the transfer be taxed under the new rule where there is no retained interest or contingency, but the beneficiary's interest merely vests in possession at or after the grantor's death (e.g., *S* to *A* and his heirs for the life of *S*; then over to *B* and his heirs). This problem was raised in the first question asked by the Court in its order for reargument. No direct answer was given by the Court, except for Justice Burton's unequivocal negative. Spiegel v. Comm., (U.S. 1949) 69 S.Ct. 301 at 305.

[66] In fact the Northern Trust Co. case was distinguished by the majority from the problem dealt with in the instant cases. Comm. v. Church, (U.S. 1949) 69 S.Ct. 301 at 303. But see Justice Reed's opinion, Spiegel v. Comm., (U.S. 1949) 69 S.Ct. 337 at 338, where he suggested that the Church decision has overruled the Northern Trust Co. case as well.

[67] Cf. Allen v. Trust Co. of Georgia, 326 U.S. 630, 66 S.Ct. 389 (1946).

the decedent at his death;[68] and (2) that "possession or enjoyment" is not used by the statute in the lay sense.

But examination of the general rule laid down leads to the conclusion that the Court has not gone this far. It would appear from the *Church* decision that the "transmission" at death concept of the *Hallock* and *Klein* decisions has merely been extended to include not only a situation where uncertainty as to the grantor's possibility of reacquisition is determined at his death, but also the case where the right to income passes from the grantor to another at that time.[69] If this is an explanation of the conceptual basis of the *Church* case, it would seem that the rationale of *May v. Heiner* has not been wholly repudiated.

By its reliance on the retention of any reversionary interest by the grantor, the Court seems to have extended further the "transmission" concept by giving extreme emphasis to the "at *or after*" language of the statute. Thus, the Court continues to predicate tax liability under section 811(c) "upon the donor's interest rather than the effect of his death upon the interests of others."[70] In appraising such an extensive application, it is hard to agree that, where the grantor's death is a wholly insignificant event in determining devolution of the corpus, such a transfer is "considered by Congress to be a potentially dangerous-tax evasion transaction," simply because "some present or contingent right or interest in the property still remains in the settlor. . . ."[71]

Except in the case of the reserved life estate, the Court continues to interpret "possession or enjoyment" in the manner of the *Klein* and *Hallock* cases—i.e., as referring to the ultimate determination of the absolute owner.

One may wonder if the decisions will not produce more uncertainty than that which they purport to dispel. Determination of what consti-

[68] This would mean a return to the early interpretation of section 811(c). See, for instance, UNITED STATES TREAS. REG. 37, art. 24 [T.D. 2910, (1921)]: "A gift of the principal of a trust fund . . . is taxable [under sec. 811(c)], although the income during the decedent's life is payable to someone other than himself."

[69] A more accurate analysis might be that the Church case merely removes an exception to the Hallock rule, since no technical transmission of property at death is required by either doctrine.

[70] See Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 at 1147 (1945).

[71] Spiegel v. Comm., (U.S. 1949) 69 S.Ct. 301 at 304. In considering such an interpretation, Eisenstein observed that "In so far as the transferred interests are concerned, there is not the slightest kinship to testamentary dispositions—the raison d'etre of subsection (c)." Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 at 1160 (1945). He further predicted that if the Court adopted such an interpretation, "it will of course be legislatively overruled." Id. at 1179. See also Spencer, "A Common Sense Rule for Hallock Cases," 59 HARV. L. REV. 43 at 47 (1945); and Nelson, "The Stinson Case," 23 TAXES 245 at 248 (1945), where the author stated that such a holding would turn section 811(c) into a gift tax.

tutes an interest retained by the grantor may cause the courts as much difficulty as any problems arising under the original *Hallock* doctrine.[72] However, if the announced rule remains the law for long, it may well goad state courts and legislatures into sharpening the concepts of future interests law which generate implied reversionary interests. Moreover, the decisions may have the merit of stimulating Congressional consideration of the problems involved.[73]

[72] Consider, for instance, example 6 of T.D. 5512, where the grantor made a final gift over to his next of kin (see note 32, supra). Example 8 may pose a similar problem; see note 31, supra.

[73] One legislative solution was proposed by Alexander, "Possibilities of Reacquisition and the Federal Estate Tax," 1 TAX L. REV. 291 (1946), where the author suggested that section 811(c) be amended to include only the actuarial value of the reversionary interest at the time of the settlor's death. This suggestion was rejected as in effect repealing section 811(c) to the extent which that section seeks out transfers already made. Eisenstein, "Another Glance at the Hallock Problem," 1 TAX L. REV. 430 (1946). Eisenstein believed that T.D. 5512 provided a satisfactory solution. See also, PAUL, TAXATION FOR PROSPERITY 313 (1947).