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THE LIMITATION OF TAXATION OF TRANSFERS IN CONTEMPLATION OF DEATH BY THE REVENUE ACT OF 1950

*Edmund W. Pavenstedt**

THE REVENUE ACT of 1950[1] amended the estate tax provision dealing with transfers in contemplation of death,[2] which has been on the books ever since the estate tax first appeared as a war emergency measure during World War I,[3] by eliminating from this category all transfers made more than three years prior to the date of death.[4] All

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1 Pub. L. No. 814, 81st Cong., 2d sess., enacted September 23, 1950.

2 Section 501(a) of the 1950 act amends I.R.C. §811 by adding thereto a new subsection (1). Section 501(b) of the act contains two complementary amendments.

3 Section 202(b), Revenue Act of 1916, in so far as relevant reads as follows:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: . . .

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of . . . his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

There was a six-year interval during which a conclusive presumption prevailed with respect to transfers in excess of $5,000 to any one person made within two years of death; see Revenue Act of 1926, §302(c). But such a presumption was held unconstitutional in Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358 (1932), and the statute reverted to the two-year rebuttable presumption; see Revenue Act of 1932, §803(a).

4 The new §811(*l*) of the Internal Revenue Code reads:

"(1) CONTEMPLATION OF DEATH.—If the decedent within a period of three years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of subsections (c), (d), and (f); but no such transfer, relinquishment, exercise, or release made prior to such three-year period shall be deemed or held to have been made in contemplation of death."

The words "deemed or held" appear to be words of art denoting a conclusive presumption; in any event the words "deemed and held" were used in §302(c) of the 1926 act to express the conclusive presumption of contemplation of death with respect to all gifts above a stated amount made within two years of death.

The inclusion in the new subsection of a reference to relinquishment of "a power" permitted the elimination, rather than redrafting, of §811(d)(4) of the Code which contained a rebuttable two-year presumption with respect to the relinquishment of a power to alter, amend, revoke, or terminate the enjoyment of any interest transferred by trust or otherwise (except for full consideration).

The reference to the exercise or release of a power of appointment complements the existing §811(f)(1)(B) of the Code.

transfers made within that period are deemed under the new law to have been made in contemplation of death (and hence are includible in the transferor's gross estate) unless the contrary is shown. Such a rebuttable presumption formerly was limited by the statute to transfers of "a material part" of the decedent's property made within two years of death.[5] But the prior law furthermore covered *all* transfers made in contemplation of death *"at any time."*[6] Because of the presumption of correctness which attaches to the ordinary determination made by the Commissioner of Internal Revenue, this meant that the burden of proof was always upon the executor, even with respect to transfers made more than two years prior to death.[7]

[5] The House in the Revenue Bill of 1916 originally proposed a four-year rebuttable presumption which was changed in conference to two years. H.R. Rep. No. 1200, 64th Cong., 1st sess. (1939-1 Cum. Bul. Part 2, p. 38).

[6] Prior to the amendment made by the Revenue Act of 1950, §811(c)(1)(A) of the Internal Revenue Code read as follows:

"(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT, DEATH—

(1) GENERAL RULE.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of his death. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter."

This pattern began with §202(b) of the Revenue Act of 1916 (supra note 3) and was modified only during the six-year interval of the two-year conclusive presumption. However, the 1926 change from rebuttable to conclusive with respect to the presumption applicable to transfers made during the two years preceding death, did not in any way affect that part of the contemplation of death provision which referred to transfers made "at any time."

[7] It has been stated that "The intent of the law was to place the burden upon the Government of proving that gifts made prior to the 2-year period were 'in contemplation of death.'" Roy C. Osgood, representing the United States Chamber of Commerce, Hearings before the Committee on Ways and Means, Revenue Revisions, 1947-48, p. 1550. Some Notes submitted by the Secretary of the Treasury as early as 1919 indicate that this may, indeed, have been the contemporary construction since these Notes contain the suggestion of extending the prima facie presumption to transfers made within six years of death, and an absolute presumption as to transfers made within two years of death; see PAUL, FEDERAL ESTATE AND GIFT TAXATION, c. 6, footnote 8 (1942). In 1927, however, in Wickwire v. Reinecke, 275 U.S. 101, 48 S.Ct. 43 (1927) the Supreme Court set at rest whatever doubts there may have been on this point when, in discussing a transfer made within two years of death, it stated at 105: "Upon the issue whether the transfer had been made in contemplation of death, the burden of proof was by the terms of the statute [Sec. 402(c), 1918 Act] on the petitioner, *as indeed it would have been without the special provision of the statute, because she was the plaintiff.*" (Italics supplied.)

The handful of cases involving transfers made more than 2 years prior to death decided prior to the Wickwire case (in only one of which, incidentally, the Government obtained a favorable decision) do not indicate that taxpayer's counsel argued that in such a case the burden of proof was on the Government. Fidelity & Columbia Trust Co. v. Lucas, (D.C. Ky. 1925) 7 F. (2d) 146; Mason v. United States, (D.C. Fla. 1926) 17 F. (2d) 317; Beltzhoover v. Donald, (D.C. Miss. 1926) 15 A.F.T.R. 510; Norris v. Goodcell, (D.C. Cal.

The recent change was made in response to demands originating both with the Treasury and with taxpayers. The latter were not infrequently forced in order to avoid the costs and delay of litigation to make some unjustified concession[8] when settling federal estate tax liability on account of the inclusion in the estate by an overzealous revenue agent on contemplation of death grounds of transfers made as long as ten, twelve and even fifteen years before death.[9] The Government, on the other hand, has fared very badly in the courts with this type of case despite the fact that in 1940 it resorted to the dubious ex-

1927) 17 F. (2d) 181; Rengstorff v. McLaughlin, (D.C. Cal. 1927) 21 F. (2d) 177; Smart v. United States, (D.C. Mo. 1927) 21 F. (2d) 188; Appeal of Starck, 3 B.T.A. 514 (1926); Hausmann v. Commissioner, 5 B.T.A. 199 (1926); Phillips v. Commissioner, 7 B.T.A. 1054 (1927); Brehmer v. Commissioner, 9 B.T.A. 423 (1927); Stein v. Commissioner, 9 B.T.A. 486 (1927). But that the law might have developed in this way is inferable from the following statement by the Court of Claims in Meyer v. United States, 60 Ct. Cl. 474, 5 A.F.T.R. 5400 at 5403 (1925): "In the absence of proof as to express declarations of the decedent, seldom, we may assume, available to the government, the burden of affirmative proof could but rarely, if ever, be successfully assumed; and wisely therefore, and perhaps of necessity also, the law has relieved the government, under the condition stated, of the burden and created the presumption."

Statistics of all litigated contemplation of death transfers show that the statutory two-year presumption has been rather meaningless. In the first place, the Government has lost with respect to 67% of the challenged transfers made within two years of death. Secondly, as shown by the following table, the Government's record with respect to transfers made within 1 to 2 years is not sufficiently better than that with respect to those made within 2 to 5 years of the date of death as to require attribution of the difference to the statutory presumption rather than to the normal factor that the more remote the date of death, the less likely that the gift will be held in contemplation of death.

Time Elapsing Between Gift and Death	Government Won	Government Lost	Percentage Won
Less than 3 months	20	24	45%
3 to 6 months	12	24	33%
6 months to 1 year	23	45	34%
1 year to 2 years	26	73	26%
2 to 5 years	32	114	22%
5 to 10 years	15	85	15%
10 to 20 years	7	33	18%
Over 20 years	—	3	—

[8] "Recent experience has shown that it is the policy of the Government to assert that all gifts in any substantial amounts were made 'in contemplation of death' regardless of when made. . . . Many of such cases have been compromised in the past simply because of the difficulties involved in any litigation. There is no question but what the Treasury Department has used this section of the law to exact taxes, through such compromises, which would not have been sustained by the courts." Statement of Roy C. Osgood, in behalf of Committee on Federal Finance, Chamber of Commerce of the United States, Hearings before the Committee on Ways and Means, 80th Cong., 1st sess., Revenue Revisions 1947-1948, p. 1550.

[9] Statement by Ellsworth C. Alvord, Chairman, Committee on Federal Finance, Chamber of Commerce of the United States, Hearings before the Committee on Finance, U.S. Senate, 81st Cong., 2d sess., Revenue Revisions of 1950, p. 840.

pedient, by a change in the regulations,[10] of abandoning the dominant motive test established by the Supreme Court;[11] in lieu thereof the amended regulation prescribed that the presence of any motive associated with death, such as the saving of estate tax, was sufficient to bring a transfer within the scope of the contemplation of death statute, regardless of the presence of other and more compelling motives associated with life.[12]

The Treasury's statement that the contemplation of death provision "has been productive of litigation but not of revenue"[13] is borne out by a review of the decisions. The poor results obtained in the cases decided up to about October 1, 1944 were set forth by the writer in an earlier article.[14] A survey of the past six years shows that, in the main, the Government's record can have afforded the Treasury little satisfaction. This is especially true with respect to the trial courts where the Government was successful in only one case out of five.[15]

During the six-year period ending October 1, 1950 two contemplation of death cases were reviewed by the Supreme Court. Both involved rather narrow questions. The taxpayer was successful in *Allen*

[10] T.D. 4966, 1940-1 Cum. Bul. 220, amending Reg. 80 (1937 ed.), Art. 16.

[11] United States v. Wells, 283 U.S. 102, 51 S.Ct. 446 (1931).

[12] The background of the amended regulation is discussed in Pavenstedt, "Taxation of Transfers in Contemplation of Death: A Proposal for Abolition," 54 YALE L.J. 70 at 74-79 (1944). No cases have been found among those decided during the past six years which follow the amended regulation. The Tax Court, indeed, in several cases involving mixed motives has decided in favor of the taxpayers even though one of the motives in each instance was to save estate taxes. Estate of John H. Scheide, 6 TCM 1271, 1272-1273 (1947); Estate of Charles J. Rosebault, 12 T.C. 1, 5 (1949); Estate of Dell Hinds Higgins, 9 TCM 426 (1950). It seems apparent that the Commissioner has not urged upon this sophisticated court a regulation which has jettisoned the dominant motive test. On the other hand, there is evidence that he has tried it on a district court which in Omaha National Bank v. O'Malley, (D.C. Neb. 1946) 69 F. Supp. 354 at 358, note 4, refused the Government's request for the following instruction to the jury: "If the purpose to be effective at her death is to reduce or avoid estate taxes, then section 302(c) is applicable. It is the presence of that state of mind, as an inducing motive, *and not the superior weight or strength of another concurring motive,* that brings the transfer within the taxing statute." (Italics supplied.)

It is submitted that the Treasury should withdraw the amended regulation, which is so inconsistent with the test laid down by the Supreme Court in the Wells case, and should reinstate a regulation incorporating the dominant motive test.

[13] Statement of Randolph E. Paul, tax adviser to the Secretary of the Treasury, Hearings before the Committee on Ways and Means, 77th Cong., 2d sess., Revenue Revision of 1942, p. 91.

[14] Pavenstedt, "Taxation of Transfers in Contemplation of Death: A Proposal for Abolition," 54 YALE L.J. 70 at 71-73 (1944).

[15] Most of the statistics in this article and some of its subject matter have been taken from a recent paper, privately published, on the taxability under federal law of transfers made in contemplation of death, by Walter S. Orr, Esq., member of the New York bar. The writer of this article assisted Mr. Orr in the preparation of the paper.

v. Trust Company of Georgia,[16] involving a transfer made solely to save estate tax which, however, was held not to have been made in contemplation of death since it merely perfected an earlier transfer concededly not made in such contemplation.[17] The Treasury won a partial, but very substantial, victory in *City Bank Farmers Trust Company v. McGowan,*[18] where the Court ruled that the bulk of the transfers which were made out of the estate of an incompetent by order of a New York State court must be judged by the same test applicable to a transferor *compos mentis.*[19]

[16] 326 U.S. 630, 66 S.Ct. 389 (1946).

[17] Commissioner v. Church, 335 U.S. 632, 69 S.Ct. 322 (1949) and Spiegel v. Commissioner, 335 U.S. 701, 69 S.Ct. 301 (1949) focussed attention on the probable scope of the Trust Company of Georgia rule. Could the settlor of a pre-1931 trust with a reserved life estate (deemed not subject to estate tax prior to Church) or of any trust in which lurked a possibility of reverter by operation of law (not definitively regarded as subject to estate tax until Spiegel) escape the impact of either or both of these decisions by assigning the retained interest free of risk of contemplation of death? It is submitted that the relinquishment of a possibility of reverter by operation of law, which in almost every case was probably retained inadvertently, should be deemed within the scope of the rule as a transfer made merely to perfect what had been thought accomplished by the earlier transfer. The assignment of a reserved life estate, however, probably should be held not covered by the rule since such a transfer constitutes a change in the disposition originally made. Whether the transfer of an *express* reversionary interest should be deemed as falling within or without the rule would seem to depend on the facts and circumstances of each particular case. The provisions of many trust instruments make it perfectly clear that the settlor "disposed of his interests in the corpus of the trust as well as any man could" [Commissioner v. Kellogg, (3d Cir. 1941) 119 F. (2d) 54] but that an express reversion was inserted as the ultimate contingent remainder by a meticulous scrivener. In such a case the Trust Company of Georgia rule ought to be held applicable. The relief granted by sections 7 and 8 of the Technical Changes Act of 1949 has greatly diminished the importance of correctly appraising the ambit of the Trust Company of Georgia rule.

[18] 323 U.S. 594, 65 S.Ct. 496 (1945).

[19] The feature of this case which seems of more general interest than the unusual primary issue is the differentiation which was made between the various transfers out of the incompetent's property. The lion's share went to her daughters, who, since there was no will, were going to receive this money in any event when the mother died. Despite the fact that they had ample funds, the state court decreed to each an annual allowance of $75,000 out of the incompetent's estate. The Supreme Court agreed with the courts below in excluding from the taxable transfers the amount of $6,000 which the incompetent, when still sane, had annually given to each daughter. The Supreme Court went further than the Second Circuit by also excluding all payments made to certain collateral relatives, even such as were in excess of the annual payments made to these persons while the donor was competent. The Court reasoned that since these collateral relatives were needy persons, the decedent, if sane, would have made the same payments to them which were authorized by the state court and noted that the amounts so paid were not prepayment of an expected inheritance since the collateral relatives would not benefit when the decedent died intestate.

Several other cases show the same careful differentiation between transfers. In re Kroger's Estate, (6th Cir. 1944) 145 F. (2d) 901; O'Neal's Estate v. Commissioner, (5th Cir. 1948) 170 F. (2d) 217; Estate of D. I. Cooper, 7 T.C. 1236 (1946); Estate of Ambrose Fry, 9 T.C. 503 (1947) Acq., 1948-2 Cum. Bul. 2; Estate of George F. Hurd, 9 T.C. 681 (1947) Acq., 1948-1 Cum. Bul. 2.

The most striking example is found in Garrett's Estate v. Commissioner, (2d Cir. 1950) 180 F. (2d) 955, affg. 8 T.C. 492 (1947), where a single transfer was held partly made in contemplation of death and partly not so. There the decedent had created what

In the United States courts of appeals the Government's record during the past six years shows great improvement, with twenty-one victories as against only nine defeats.[20] Without seeking to disparage this achievement, it should be observed that eleven or more than half of the Treasury's victories, came in cases which concerned either a peculiar type of property or an unusual sort of motive.

The peculiar type of property was policies of life insurance, assignments of which were held to have been made in contemplation of death in nine of the cases won by the Government in appellate courts.[21] While the radical change in the value of life insurance which can result only from the insured transferor's death might naturally seem to render any assignment of such property peculiarly suspect as having been made in contemplation of that event, no such approach was adopted by the courts until fairly recently. The old rule was that a transfer of life insurance was to be judged by the same contemplation of death tests as a transfer of any other type of property[22] and prior to

may be termed an overfunded insurance trust, which provided that excess income be distributed to his wife. Only about 30% of the trust income was required to meet the premium payments. It was held that the preservation of the policies was decedent's main concern and that, therefore, they and so much of the securities as was required to keep them in effect must be deemed to have been transferred in contemplation of death. *Contra*, however, with respect to 70% of the securities which supplied an income during decedent's lifetime to his wife. This transfer was thought to have been made for an immediate purpose and to be in no way similar to a bequest. Judge Learned Hand recognized the unusual nature of the decision, saying at p. 957: "At first blush it may indeed seem curious to hold that only part of a single trust fund has been transferred in contemplation of death; usually, the question is whether, taking the gift as a whole, the testamentary motive predominates. However, it becomes plain on reflection that one motive may dispose the settlor to convey one kind of property, and another, another kind; and that it is quite irrelevant that he groups the two in one deed."

20 Actually the number of cases involved was only 27 but in a few, each of which involved several transfers, some transfers were held made in contemplation of death and some not. This feature is also present in 3 of the Tax Court cases decided during this period.

21 Liebmann v. Hassett, (1st Cir. 1945) 148 F. (2d) 247, affg. on this issue (D.C. Mass. 1943) 50 F. Supp. 537; United States v. Tonkin, (3d Cir. 1945) 150 F. (2d) 531, revg. (D.C. Pa. 1944) 56 F. Supp. 817, cert. den. 326 U.S. 771, 66 S.Ct. 173 (1945); Vanderlip v. Commissioner, (2d Cir. 1946) 155 F. (2d) 152, affg. 3 T.C. 358 (1944), cert. den. 329 U.S. 728, 67 S.Ct. 83 (1946); Davidson's Estate v. Commissioner, (10th Cir. 1946) 158 F. (2d) 239, affg. 4 TCM 972 (1945); Thomas v. Graham, (5th Cir. 1946) 158 F. (2d) 561, revg. an unreported district court decision; Diamond's Estate v. Commissioner, (2d Cir. 1947) 159 F. (2d) 672, affg. 5 TCM 372 (1946); Slifka v. Johnson, (2d Cir. 1947) 161 F. (2d) 467, affg. (D.C. N.Y. 1945) 63 F. Supp. 289, cert. den. 332 U.S. 758, 68 S.Ct. 57 (1947); Sloan's Estate v. Commissioner, (2d Cir. 1948) 168 F. (2d) 470, affg. 6 TCM 840 (1947); Garrett's Estate v. Commissioner, (2d Cir. 1950) 180 F. (2d) 955, affg. in part and revg. in part 8 T.C. 492 (1947).

22 Estate of Charles A. Bickerstaff, 1 TCM 28 (1942). Some tax lawyers have urged that this rule be written into the Internal Revenue Code. A suggested amendment to §811(g) which, however, did not appear in any of the recent major revenue bills reads: "(3) APPLICATION OF OTHER PROVISIONS.—An amount receivable as insurance under a policy upon the life of a decedent not includible in the value of the gross estate under the

1941 no discussion of life insurance being a peculiar kind of property appears in any of the contemplation of death decisions of the Board of Tax Appeals or the Tax Court.[23] During the next four years, however, the Tax Court and several circuit courts of appeals with almost monotonous regularity agreed with the Commissioner in taxing transfers of life insurance on contemplation of death grounds, with an occasional voice crying in the wilderness that the testamentary nature of life insurance policies standing alone does not create an inference that the *transfer* of rights in such policies, as distinguished from the *creation* of such rights, is in contemplation of death[24] or expressing fear of "the reiterated suggestion made on behalf of the Commissioner that any dealing with life insurance is by nature testamentary."[25] Indeed, a judicial reaction has set in against the blind acceptance of this suggestion, for late in 1947 and early in 1948 two circuit courts of appeals in rather scathing terms reversed Tax Court decisions involving life insurance transfers.[26] The Fifth Circuit specifically criticized the view that the aug-

foregoing provisions of this subsection shall not be included in the gross estate under the provisions of any other subsection of this section unless such amount would be includible if it were property other than insurance."

[23] May Billings, et al., Executors, 35 B.T.A. 1147 (1937); Old Point National Bank, Executor, 39 B.T.A. 343 (1939); Estate of Louis Baskind, C.C.H. Dec. 11,829-E (BTA mem. 1941); Anna R. Marsh, Executrix, C.C.H. Dec. 12,411-F (BTA mem. 1942); Estate of Charles A. Bickerstaff, 1 TCM 28 (1942); Estate of Charles T. Smith, 1 TCM 518 (1943); Estate of Charles Delany, 1 T.C. 781 (1943). These cases were all decided in favor of the taxpayer except the Billings case, where the decision was bottomed upon the decedent's grave ill health (she died 6 months after the transfer) and the absence in the record of any motive associated with life.

[24] Estate of Wilbur B. Ruthrauff, 9 T.C. 418 (1947).

[25] Goodrich, C.J., dissenting in Garrett's Estate, (2d Cir. 1950) 180 F. (2d) 955, affg. in part and revg. in part 8 T.C. 492 (1947).

It has been pointed out that the presence or absence of present enjoyment by the donee has been a particularly important factor in the decisions involving transfers of life insurance. Comment, 47 MICH. L. REV. 811 at 819 (1949). The absence of any benefit during the transferor's lifetime has also militated against the taxpayer in cases of transfers of property other than life insurance. Reeves' Estate v. Commissioner, (2d Cir. 1950) 180 F. (2d) 829, affg. 8 TCM 131 (1949), cert. den. Oct. 9, 1950 (transfers of stock of corporation controlled by decedent with no dividend payments while he lived though earnings were large); Burns v. Commissioner, (5th Cir. 1949) 177 F. (2d) 739, affg. Estate of James E. Frizzell, 9 T.C. 979 (1947), affd. on reconsideration of contemplation of death issue, 11 T.C. 576 (1948), two judges dissenting (circumstances showed that no distribution was intended from trust created for an incompetent son until after grantor's death); Estate of D. I. Cooper, 7 T.C. 1236 (1946) (income of trust for children to be accumulated until grantor's death).

[26] In Cronin's Estate v. Commissioner, (6th Cir. 1947) 164 F. (2d) 561, revg. 7 T.C. 1403 (1946), the appellate court said at p. 565: "There is, in the present case, no scintilla of evidence that the decedent's motive was to escape taxes. Though concern over taxes, if proved, may of itself sustain an inference that an inter vivos gift is a substitute for a testamentary disposition, no other purpose appearing [citation omitted], yet to infer a purpose to make a testamentary disposition, from a purpose to avoid taxation, which is

mented value of life insurance at date of death affects the nature of a gift thereof for contemplation of death purposes, saying:[27]

> "Even though it be true, as the Tax Court reasoned, that all life insurance reaches its greatest value at the death of the insured, nevertheless Congress has not undertaken to convert a valid, absolute, complete gift inter vivos into a gift causa mortis or a substitute for testamentary disposition merely because the gift will have a greater value after the death of the donor."

The unusual sort of motive for the transfer which was present in two cases won by the Government in the Sixth and Eighth Circuits was a purpose to bar a prospective second wife from her dower rights.[28] However, in a very recent case[29] the Ninth Circuit has held that such a transfer, being made on the threshold of imminent remarriage, was rather clearly motivated by purposes associated with life.

Whether such appellate decisions in favor of decedents who have made these two particular types of transfers will continue is probably of importance only with respect to those who died before September 23, 1950, the effective date of the 1950 act. This prediction is hazarded because in eight of the nine life insurance cases[30] and in both of the dower cases[31] in which the Government was successful in the United States courts of appeals the transfers were made more than three years before death.

itself but the product of inference, is to indulge in that superimposition of inferences one upon another so abhorrent to American law."

In Flick's Estate v. Commissioner, (5th Cir. 1948) 166 F. (2d) 733 (1948), revg. 6 TCM 72 (1947), the Fifth Circuit criticized the Tax Court as follows (p. 742): "When the opinion of the Tax Court is shorn of the considerations revolving around the subject matter of life insurance . . . there will be found to be a complete absence of evidence, or of evidentiary basis for the drawing of a reasonable inference to support the finding of the Tax Court that the trust was made in contemplation of death."

[27] Flick's Estate v. Commissioner, (5th Cir. 1948) 166 F. (2d) 733 at 740.

[28] In re Kroger's Estate (6th Cir. 1944) 145 F. (2d) 901, affg. 2 TCM 644 (1943), cert. den. 324 U.S. 866, 65 S.Ct. 915 (1944); Pate v. Commissioner, (8th Cir. 1945) 149 F. (2d) 669, affg. Estate of James S. Wahl, 3 TCM 835 (1944).

[29] Gillette's Estate v. Commissioner, (9th Cir. 1950) 182 F. (2d) 1010, revg. 8 TCM 91 (1949).

[30] Interval between date of gift and date of death in the 9 cases involving assignments of life insurance cited, supra note 21, was as follows: Liebmann v. Hassett (1 year, 10 months); United States v. Tonkin (3 years, 1 month); Vanderlip v. Commissioner (5 years); Davidson's Estate v. Commissioner (4 years, 3 months); Thomas v. Graham (5 years, 9 months); Diamond's Estate v. Commissioner (3 years, 6 months); Slifka v. Johnson (5 years); Sloan's Estate v. Commissioner (11 years); Garrett's Estate v. Commissioner (17 years).

[31] Interval between date of gift and date of death in the 2 cases involving transfers to bar dower cited, supra note 28, was as follows: In re Kroger's Estate (10 years, 6 months); Pate v. Commissioner (10 years, 2 months).

In contemplation of death cases which did not go beyond the trial courts[32] the score against the Government during the past six years was 24 to 4 in the federal district courts and 55 to 18 in the Tax Court. Of eighteen Tax Court cases in which the Government was successful seven concerned assignments of life insurance[33] and two were for the purpose of barring a future spouse from dower.[34] Here, again, it may be noted that five (and possibly six) of the transfers of life insurance and one of the transfers to bar dower were made more than three years before death and hence would have escaped tax under the new law.

In view of such a long continued record of unsuccessful litigation it is not surprising that the Treasury has striven tenaciously to induce Congress to substitute an objective rule for a "state-of-mind test."[35] Such a rule would obviate the difficulties of establishing the requisite mental state of a deceased donor, who may not have disclosed his purpose[36] and who may, even, have been careful to build a record negativing contemplation of death. When the Revenue Act of 1942 was under consideration Mr. Randolph Paul, then tax adviser to the Secretary of the Treasury, proposed inclusion in the gross estate of all gifts in excess of a specified sum made by donors over sixty-five years of age.[37] Another Treasury representative, expressing personal views which did "not necessarily reflect those of the Treasury Department,"[38] in 1945 clairvoyantly suggested consideration of a three-year conclusive presump-

[32] Two of the Tax Court decisions, Estate of William W. Parish, 8 TCM 257 (1949) and Estate of Jacob Gidwitz, 14 T.C. 1263 (1950) have been appealed to the Seventh Circuit, but when this article was written had not yet been decided.

[33] Estate of James Stuart Pritchard, 4 T.C. 204 (1944); Estate of George F. Hurd, 9 T.C. 681 (1947); Estate of William Maxwell, 3 TCM 1207 (1944); Estate of George P. Rhodes, 6 TCM 174 (1947), affd. on other grounds (3d Cir. 1947) 174 F. (2d) 584; Estate of Barneth Satuloff, 6 TCM 1246 (1947); Estate of Thomas R. Tennant, 8 TCM 143 (1949); Estate of Joseph E. Goar, 9 TCM 854 (1950).

[34] Estate of Marion S. Gane, 4 TCM 13 (1945); Estate of William W. Parish, 8 TCM 257 (1949), on appeal by taxpayer to the Seventh Circuit.

[35] Statement of Thomas J. Lynch, General Counsel to the Treasury, Hearings before the Committee on Ways and Means, 81st Cong., 2d sess., Revenue Revisions of 1950, pp. 162-163.

[36] See Justice Stone's dissent in Heiner v. Donnan, 285 U.S. 312 at 342, 52 S.Ct. 358 (1932).

[37] Hearings before Committee on Ways and Means, House of Representatives, 77th Cong., 2d sess., Revenue Revision of 1942, p. 91. The writer made a somewhat similar suggestion with respect to gifts of a certain part of a decedent's estate made at age 70 or over and within two years of death; Pavenstedt, "Taxation of Transfers in Contemplation of Death: A Proposal for Abolition," 54 YALE L.J. 70 at 91 (1944). This suggestion of a conclusive presumption was, however, coupled with the requirement that all other gifts be deemed and held not made in contemplation of death. Any proposal which involves an age limit is, of course, subject to the criticism that it may induce persons to make large transfers shortly before attaining the critical age.

[38] Martin Atlas, senior attorney, Office of Tax Legislative Counsel, PROCEEDINGS OF NEW YORK UNIVERSITY FOURTH ANNUAL INSTITUTE OF FEDERAL TAXATION 18-20 (1946).

tion. It is not clear whether either of these suggestions included the complementary feature of a conclusive presumption of nontaxability if the transfer, in the one case, was made before age sixty-five or, in the other, more than three years prior to the date of death.

Such a provision excluding stale claims was also urged by nongovernmental organizations, principally on the ground that in the case of gifts made long before death, witnesses are often dead, records are no longer available, and the executor fails simply because he cannot prove the facts.[39] In 1947 the American Bar Association proposed that all transfers made more than five years prior to death be subject only to gift tax.[40] A similar amendment to the contemplation of death provision appeared in the 1950 bill sponsored by the Association.[41]

By this time the Treasury had also come around to the point of view that transfers made prior to a certain period ought to be completely removed from the category of contemplation of death. When the Revenue Act of 1950 was before the Ways and Means Committee, Secretary of the Treasury Snyder proposed that only transfers made within three years of death should be included in the gross estate.[42] Although this suggestion was described by a Treasury representative as replacing or removing the contemplation of death provision,[43] it is difficult, if not impossible, to distinguish it from a conclusive presumption that all gifts made within three years of death are to be deemed transfers in contemplation of death.

The somewhat arbitrary effect of this Treasury proposal—as for example, on the estate of a middle-aged man who gives some property to his children and shortly thereafter dies in an accident—apparently disturbed the Chairman of the Ways and Means Committee.[44] In any event, that committee rejected the Treasury's recommendation and in

39 Statement of H. Cecil Kilpatrick, Chairman, Section of Taxation of the American Bar Association, Hearings before the Committee on Finance, United States Senate, 81st Cong., 2d sess., Revenue Revisions of 1950, p. 401.

40 Statement of William A. Sutherland, Chairman, Section of Taxation of the American Bar Association, Hearings before the Committee on Ways and Means, 80th Cong., 1st sess., Revenue Revisions, 1947-1948, p. 1743.

41 Section 204, H.R. 7738, 81st Cong., 2d sess. (1950).

42 Hearings before the Committee on Ways and Means, 81st Cong., 2d sess., Revenue Revision of 1950, pp. 75, 163. The Treasury's primary recommendation was to replace the estate and gift taxes by an integrated transfer tax, under which transfers made during life and at death would be aggregated and taxed under the same rate structure. If this recommendation were not adopted, the Treasury urged replacing of the contemplation of death provision by an objective rule. Transfers in contemplation of death were listed as one of eleven miscellaneous tax loopholes for the closing of which remedial legislation was recommended.

43 Id. at 162-163.

44 Id. at 162.

lieu thereof resurrected a provision which had appeared in the Revenue Bill of 1948[45] excluding from the contemplation of death category all transfers made more than three years prior to death and providing for a rebuttable presumption as to transfers made within that period. Before the Senate Finance Committee, Secretary of the Treasury Snyder characterized this three-year rebuttable presumption as "undesirable" and recommended its rejection,[46] but the provision was retained without change. It was made applicable to estates of decedents dying after September 23, 1950, the date of enactment of the Revenue Act of 1950.

The provision is a compromise between the suggestions with conclusive effect sponsored by the Treasury and proposals advanced by other sources. Among the latter have been that the Government at the time of any inter vivos transfer be required irrevocably to elect whether to tax such transfer as a gift or to tax it in the estate as being made in contemplation of death;[47] that there be excluded from the contemplation of death clause all inter vivos gifts except gifts actually "causa mortis";[48] that the two-year cut off date be retained;[49] and that the new provision excluding all transfers made prior to the three-year period be made retroactive to cover all cases not barred by the statute of limitations or res judicata.[50]

While, as in the case of all compromises, there will presumably be some dissatisfaction, it is submitted that the new provision is a long step in the right direction. It embodies the most important basic consideration on which the Treasury and all other parties were agreed, namely, to eliminate a tax depending upon proof of the intent of a dead man with respect to transfers made more than a reasonably short time prior to his demise.

Both the conclusive presumption urged by the Treasury and the rebuttable presumption enacted by Congress differ from prior law in that they make no exception for small gifts. The conclusive two-year presumption imposed under the Revenue Act of 1926 contained an

[45] Section 204, H.R. 6712, 80th Cong., 2d sess., passed by the House but not acted on by the Senate.

[46] Hearings before the Committee on Finance, United States Senate, 81st Cong., 2d sess., Revenue Revisions of 1950, p. 35. The Treasury's view was supported by the American Federation of Labor which saw in the modification of the contemplation of death clause a further commitment "to a perpetuation of the present hodge-podge, ineffective, discriminatory estate and gift tax set-up." Id. at 480.

[47] Statement of Roy C. Osgood, supra note 8, at 1550.

[48] Ibid.; see also statement of Ellsworth C. Alvord, supra note 9, at 840.

[49] Statement of Ellsworth C. Alvord, supra note 9, at 840.

[50] Ibid.; see also statement of Donald E. Chafey, staff member of Commerce and Industry Association of New York, Inc., id. at 446.

exclusion of $5,000 with respect to each donee. The former two-year rebuttable presumption was applicable only to transfers of "a material part" of a decedent's estate. Sensible administration of the new provision should preclude burdening executors with the task of establishing the motive for any relatively unimportant transfers made during the three-year period before death. If the Treasury does not adopt such a policy, it would seem reasonable to expect that Congress will amend the new provision to insure its practical working, say, by granting exemption to any gift within the amount of the gift tax exclusion. It is very much to be hoped that no such amendment will be required and that a reasonable time will be permitted to elapse before there is any further tinkering with the statute in order that all concerned may have a fair opportunity to ascertain how it operates.

The new provision should cut litigation by about fifty per cent.[51] It is conceivable that the restriction of the contemplation of death period to three years may influence courts to give greater weight to the statutory presumption than they have in the past.[52] In any event, both the Treasury and taxpayers should rejoice by reason of the drastic limitation of the area in which it will in future be necessary to apply the very elusive and subjective test of motive, since

> "The devil himself... knoweth not the mind of man; and even if he did, the devil's advocate might experience considerable difficulty in proving it to a court of law."[53]

[51] This statement is based on the cases decided during the past six years. It is interesting to note that in the period beginning with the first contemplation of death decision and ending November 15, 1938, 119 of the decided cases involved transfers made within three years of death and only 37 those made more than three years prior to death. During the period from November 15, 1938 to May 15, 1944 this relationship was 67 to 40. In the past six years the ratio is almost 50-50 (59 to 58, to be exact) which would seem to indicate that the Commissioner in recent years has reached farther and farther back to challenge transfers.

[52] Supra note 7.

[53] Statement of William A. Sutherland, Chairman, Section of Taxation of the American Bar Association, Hearings before the Committee on Ways and Means, 80th Cong., 1st sess., Revenue Revisions, 1947-1948, p. 1744.