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## Transfers Intended to Take Effect in Possession or Enjoyment at or After Transferor's Death Under the Federal Estate Tax

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TRANSFERS INTENDED TO TAKE EFFECT IN POSSESSION  
OR ENJOYMENT AT OR AFTER TRANSFEROR'S DEATH  
UNDER THE FEDERAL ESTATE TAX

ALFRED HARSCH\* and MAX KAMINOFF†

I. INTRODUCTION

The federal estate tax has, at all times since its adoption in 1916, provided for the inclusion in the gross estate of the decedent of all transfers "intended to take effect in possession or enjoyment at or after death".<sup>1</sup> The purpose of this provision, obviously, is to prevent avoidance of the estate tax through the medium of transfers legally *inter vivos* which operate in such a manner as to make them fairly satisfactory substitutes for the testamentary dispositions to which the estate tax primarily applies.

In describing the types of transfers to be included within the ambit of the provision here examined, Congress used the words "intended to take effect *in possession or enjoyment*". No reference is made to time of transfer, to transfer of title, to vesting of the interest in the transferee, to the character of the interest or the control which the transferee retains over the thing transferred. Complete, unlimited ownership of chattels or realty carries with it rights of control and disposition, as well as of possession and enjoyment. By referring only to transfers in which possession or enjoyment is postponed until the transferor's death, it would seem that the statute contemplated the inclusion in the decedent transferor's gross estate of the value of things transferred *inter vivos*, which, in certain respects, may have been complete before death, as long as either one of the two statutorily designated incidents of ownership—possession or enjoyment—was postponed until death.

An examination of the cases in which this statutory language has been construed for the purpose of determining its applicability to va-

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<sup>1</sup>Revenue Act of 1916, § 202 (b), 39 STAT. 777 (1916). The present statute, Internal Revenue Code § 811, 53 STAT. 120 (1939), 26 U. S. C. § 411 (1934) reads:

"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, except real property situated outside of the United States . . .

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth . . ."

rious types of transfers made by decedents does not indicate, however, that the fact of "possession or enjoyment" withheld until the transferor's death is determinative of the application of the statute. Rather, it appears that the highest court, with one possible exception, has employed as the criterion for the statute's application a test which concerns itself solely with the retention by the transferor of power to direct in some way the disposition of the subject matter of the transfer after the transferring instrument has been executed; that it has, in fact, construed the statutory language as applying only to those cases in which the decedent, despite his *inter vivos* transfer, has retained over the subject matter of the gift powers comparable to those which the maker of a will retains during his lifetime; and that in explaining the results which have been reached, the Court has most frequently talked of the vested or contingent character of the transferee's interest as determinative of the statute's application to the transfer then before it. The result is a statutory construction which appears to substitute for the legislative standard a judicially constructed one, the application of which has produced some unexpected results.

If by a presently operative conveyance *inter vivos* a person transfers immediately to another all of his property interests in a thing, there is no deferment of "possession or enjoyment" or any other incident of ownership, and the statutory language here considered does not apply.<sup>2</sup> If an *inter vivos* transfer comes within this statutory language, it must be one by which some of the incidents of ownership—the statute mentions "possession or enjoyment"—are postponed until at or after the death of the transferor. The statutory language is designed to include only those transfers which operate to divide among two or more persons the aggregate of interests constituting full and complete ownership for the period of the transferor's life.

As the statute is phrased in terms of postponed "possession or enjoyment", it would seem that that which should be subjected to scrutiny is the character and quantum of that which has been withheld from the transferee; that the applicability of the statute depends upon whether that which has been withheld from the transferee deprives him of "possession or enjoyment" of the subject matter until at or after the death of the transferor. The Supreme Court, however, seems not to have employed this approach. Although it has with great frequency mentioned the vested or contingent character of the transferee's interest, sometimes putting much stress upon this aspect, it has, nevertheless, primarily focused its attention upon what the transferor retained. While there should be no logical difficulty in approaching the problem from the standpoint of the transferor rather than that of the transferee, because the two interests are complementary, still the em-

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<sup>2</sup>Cf. *Shukert v. Allen*, 273 U. S. 545 (1927).

phasis placed upon the extent of the transferor's retained interest seems to have led the Court to adopt an interpretation quite different from that which would be expected if greater consideration were given to the extent of the transferee's interest.

For the purpose of examining the decisions interpreting this statutory provision, it is proposed to group the cases according to the character of the interest retained by the transferor and at the same time to note the character of the transferee's complementary interest and to consider what differences might have resulted if more emphasis had been placed upon the latter.<sup>3</sup>

## II. RETENTION OF LIFE INCOME BY A TRANSFEROR

### (a) *Prior to May v. Heiner.*<sup>4</sup>

From the time of the original enactment of the estate tax until the decision in *May v. Heiner* it seems to have been simply assumed by the lower federal courts, as it was in most of the state courts,<sup>5</sup> that if a person transferred assets reserving for the period of his life the benefits of the property so transferred, the transfer was one intended to take effect in possession or enjoyment at the time of the transferor's death. During this period, therefore, the courts were concerned only with whether the transferor had in fact retained an interest in the assets for the period of his life or had made an outright transfer without the retention of any such interest. In the normal case the interests retained by the transferor and given to the transferee will be indicated with more or less certainty. There are situations, however, where the respective interests are not clearly indicated and in which the circumstances are such as to cast doubt on the nature of the transaction. In such cases as these the problem with which the Court has to deal is whether the facts show actual retention of a life interest by the transferor.

This problem may arise when a deed or a stock certificate is delivered to a purported transferee but the deed is not recorded or the stock is not registered in the name of the transferee until after the transferor's death. While recording is no essential part of a conveyance, being for

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<sup>3</sup>There is a preliminary problem as to what constitutes a "transfer" by the "decedent" within the meaning of the statutory provision. In *Williams v. United States*, 41 F. (2d) 895 (Ct. Cl. 1930), it was held that where decedent procured conveyance, upon recited consideration, to himself as trustee no such transfer is shown. But *Chase National Bank v. United States*, 278 U. S. 327 (1928), 63 A. L. R. 394 (1929) may indicate that the Supreme Court would reach a different conclusion. See also *Estate of Christian Mooyer*, 2 B. T. A. 723 (1925) and *Nelson A. Elsasser, Executor*, 12 B. T. A. 681 (1928).

<sup>4</sup>281 U. S. 238 (1930). In this case A conveyed to trustees, the income to be paid to B for his life and then to A for her life, remainder to A's children. Upon the death of A, held that the value of the corpus is not to be included in the gross estate of A under the "possession or enjoyment" clause. See II (b), *infra*, for discussion of the case.

<sup>5</sup>See note 28, *infra*.

the protection of subsequent purchasers only, failure to record or register may indicate that the parties actually intended that the transferor should continue to enjoy the subject matter until the time of his death. While none of the cases found<sup>6</sup> have held that failure to record or register shows that the intention was to reserve a life interest, it does seem that such failure could be properly considered as some evidence of that intent.

The same question arises when, after a nominally complete and unconditional transfer of bonds or stock, the transferor actually receives the interest accruing or the dividends thereafter declared. This type of case is susceptible of two interpretations. It may be considered either a transfer whereunder the transferor retains the benefits for his life or an outright transfer of the bonds or stock with recurring gifts of the interest or dividends by the transferee to the transferor.<sup>7</sup> In one case the former interpretation was made of the facts, with consequent tax liability.<sup>8</sup>

The situation most frequently presenting this problem was that in which there was an *inter vivos* transfer coupled with an undertaking by the transferee to pay to the transferor a certain sum annually for the period of the transferor's life. If the transfer was complete and without reservation and the transferor took only the transferee's promise to pay the stipulated amounts, the transfer was treated as an absolute one.<sup>9</sup> If, on the other hand, the transferee promises to pay over to the transferor the income actually received from the transferred assets or if the transferred assets were charged with or stood as security for performance of the transferee's promise,<sup>10</sup> the transfer was held to be one whereunder the transferor retained an interest and the case was within the statute.<sup>11</sup>

*May v. Heimer*, of course, destroyed the major premise upon which all of these cases were based, namely, that the reservation of a life

<sup>6</sup>Henry Riffel, 3 B. T. A. 436 (1926); George W. Dulany, Jr., 17 B. T. A. 486 (1929); Estate of James F. Foster, 13 B. T. A. 496 (1928).

<sup>7</sup>Una Libby Kaufman, Executrix, 5 B. T. A. 31 (1926).

<sup>8</sup>City National Bank of Dallas, Executor, 16 B. T. A. 719 (1929). The instrument by which the transfer was effected also contained a stipulation that the stock was "to be transferred to her within ten days" after transferor's death.

<sup>9</sup>Hirsh v. United States, 35 F. (2) 982 (Ct. Cl. 1929); Polk v. Miles, 268 Fed. 175 (D. Md. 1920); Lincoln v. United States, 65 Ct. Cl. 198 (1928); United States Trust Co., et al., Executors, 1 B. T. A. 1086 (1925); Security Trust & Savings Bank, Trustee, 11 B. T. A. 833 (1928); Farmers' Loan & Trust Co., Executor, 16 B. T. A. 438 (1929). See also George C. Doerschuck, et al., Executors, 17 B. T. A. 1123 (1929), where decedent had transferred the controlling interest in a corporation to his sons in return for an agreement on their part to maintain him as president of the corporation for life at a designated salary.

<sup>10</sup>Tips v. Bass, 21 F. (2d) 460 (W. D. Texas 1927).

<sup>11</sup>The decisions under state inheritance tax statutes are in accord. Notes (1927) 49 A. L. R. 864, 885, (1930) 67 A. L. R. 1253, (1936) 100 A. L. R. 1254.

interest brought the transfer within the ambit of the "possession or enjoyment" clause. Cases of this type thereafter decided, consequently, hold that this clause does not give rise to tax liability in the cases just discussed.<sup>12</sup> As to transfers made after the 1931 and 1932 amendments the same problem is again presented because these amendments make express provision for the taxation of transfers in which a life interest has been reserved by the transferor.<sup>13</sup>

(b) *May v. Heiner and Thereafter.*

As has already been indicated, prior to March 3, 1931, there was no express provision such as that which is now to be found in the statute,<sup>14</sup> for the taxation of transfers in which the income has been reserved for life. Even without the benefit of such express provision it would seem "that the reservation of a life interest that is in fact enjoyed by the transferor until his death affords the clearest case of the creation of an interest intended to commence in possession or enjoyment at such death."<sup>15</sup> It so seemed to the Commissioner of Internal Revenue, and the Regulations of the Department of Internal Revenue accordingly provided that such transfers were taxable under this clause;<sup>16</sup> and the lower federal courts agreed.<sup>17</sup>

In *May v. Heiner*<sup>18</sup> the Supreme Court had under consideration a situation in which the decedent had transferred certain securities to her husband and others, as trustees, to collect the income and pay the balance over expenses to the husband for life, after his death to the settlor for her life, and after her death the corpus to be distributed among her children. The circuit court of appeals, in a *per curiam* decision,<sup>19</sup> had affirmed the holding of the district court<sup>20</sup> that the transferred securities should be included in the decedent's gross estate.

The Supreme Court, however, reversed the circuit court of appeals

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<sup>12</sup>Reservation of dividends: *Smith v. Commissioner*, 59 F. (2d) 533 (C. C. A. 7th, 1932); *Kaufman v. Reinecke*, 68 F. (2d) 642 (C. C. A. 7th, 1934); cf. *Estate of Warner D. Hunt*, 19 B. T. A. 624 (1930); *Irving Bank-Columbia Trust Co., Executors*, 16 B. T. A. 897 (1929); *George W. Dulany, Jr.*, 17 B. T. A. 486 (1929).

<sup>13</sup>See note 26, *infra*.

<sup>14</sup>See note 1, *supra*.

<sup>15</sup>*Rottschaefer, Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930) 14 MINN. L. REV. 453, 473.

<sup>16</sup>See, for instance, U. S. Treas. Reg. 70, Art. 18.

<sup>17</sup>*McCaughan v. Girard Trust Co.*, 11 F. (2d) 520 (C. C. A. 3d, 1926) (contains an excellent statement of the position that the "possession or enjoyment" clause applies to this type of case); *Reed v. Howbert*, 8 F. (2d) 641 (D. Colo. 1925); *Stark v. United States*, 14 F. (2d) 616 (S. D. Ohio 1926). Cases *contra* are collected *infra* note 25. The state courts have quite uniformly held that the "possession or enjoyment" clause is applicable to the case in which the transferor retains a life interest. *Rottschaefer*, *op. cit. supra* note 15.

<sup>18</sup>281 U. S. 238 (1930), (1930) 44 HARV. L. REV. 131, (1930) 29 MICH. L. REV. 123, (1931) 15 MINN. L. REV. 252.

<sup>19</sup>32 F. (2d) 1017 (C. C. A. 3rd, 1929).

<sup>20</sup>25 F. (2d) 1004 (W. D. Pa. 1928).

and held that the property was not part of the decedent's estate because,

"The transfer . . . was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May 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. The interest therein which she possessed immediately prior to her death was obliterated by that event."<sup>21</sup>

According to the Supreme Court, the test would seem to be whether the *inter vivos* transfer operated irrevocably to fix the interests of the parties in the subject matter of the transfer. In other words, it is here indicated that the court will look not to whether, as to beneficiaries, the gift takes effect in possession or enjoyment at or after the settlor's death, but to whether, as to the settlor, the transfer is irrevocable or leaves some power of disposition in the transferor. The significant factor here seems to be whether the transferor has permanently deprived himself of power to thereafter direct or control the disposition of the assets which are the subject matter of the transfer. In referring to the testamentary or non-testamentary character of the transfer, the Court seems to be thinking in terms of dispositions which are ambulatory or alterable until the death of the transferor, as is true in the case of a will. Inferentially, the Court seems to adopt the theory that as the interests of all persons are vested in title, in the technical property sense, at a time prior to the transferor's death the statutory language here considered cannot be construed to apply.<sup>22</sup> Had the statute referred merely to transfers intended to take effect at or after death, such an interpretation might be proper. But the statute does not so provide. The

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<sup>21</sup>May v. Heiner, 281 U. S. 238, 243 (1930). Yet in *Y. M. C. A. v. Davis*, 264 U. S. 47, 50 (1924), the Court had said: "What this law taxes is not the interest to which the legatees and devisees succeeded on death, but *the interest which ceased by the reason of the death. Knowlton v. Moore . . .*" (Italics supplied.)

Less than three years later, the Supreme Court, in *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509 (1933), upheld a state inheritance tax on a transfer in which the income had been reserved for life. *May v. Heiner* was not mentioned. The basis for the decision in the *Guaranty Trust* case was that the Court was bound by the decision of the Connecticut court "as though the meaning as fixed by the court had been expressed in the statute itself in specific words." There is thus no necessary inconsistency between the two cases. The *Guaranty Trust* case was thus the equivalent of one involving the constitutionality of an express statutory provision taxing transfers in which income for life had been reserved. As such, the decision is no more inconsistent with *May v. Heiner* than is the very recent case of *Helvering v. Bullard*, 303 U. S. 297 (1938), cited *infra* note 26, in which the Supreme Court upheld the constitutionality of the 1931 amendment to the federal act, making such transfers taxable under the Federal Estate Tax.

<sup>22</sup>For a well discussed criticism of that result see *Surrey & Aronson, Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 COL. L. REV. 1332, 1340. See also Shapiro, *What Interests May a Transferor Retain in Transferred Property Without Liability for the Federal Estate Tax?* (1930) 5 Sr. JOHN'S L. REV. 147.

statute refers specifically to transfers intended to take effect in *possession or enjoyment* after death. The words "in possession or enjoyment" were at least presumably inserted for a purpose. The result of the above decision is to ignore them and to construe the statute as though they were absent. While such an interpretation might be justifiable were the question one of retroactive application of the statute, it is difficult to see its validity in the instant situation.

It should be noticed that in *May v. Heiner* the decedent had retained only an equitable life estate dependent upon the termination of a prior life estate, and it might be thought that the decision of the court was based on a feeling that it would, perhaps, be unjust to include the whole corpus on the basis of the retention of what the Court might have felt was a very small interest, and that there was no purpose to evade the estate tax. That possibility might have been a factor in the Court's decision, but the far-reaching effects of the decision, and the fact that it served without question to establish the test of irrevocability and of the time when title vested, was indicated a few months later. Then, in three *per curiam* decisions,<sup>23</sup> "upon the authority of *May v. Heiner* . . ." it was held that where the transferor had created a trust whereunder he was to receive the income for his life, with remainder over at his death, the transfer was not one intended to take effect in possession or enjoyment at the transferor's death.

Looked at from the standpoint of the transferee and what has been withheld from him, the results in the trust cases here discussed seem insupportable as a matter of statutory construction. There would be little doubt in the mind of any but a property tax lawyer that this type of settlement does withhold "possession or enjoyment" from the remaindermen until the time of the transferor's death.<sup>24</sup>

But according to the highest court in the land, a transfer in which the transferor reserves to himself the income for life is not a transfer intended to take effect in possession or enjoyment at or after the transferor's death,<sup>25</sup> and an amendment to the statute expressly including

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<sup>23</sup>*McCormick v. Burnet*, 283 U. S. 784 (1931); *Morsman v. Burnet*, 283 U. S. 783 (1931); *Burnet v. Northern Trust Co.*, 283 U. S. 782 (1931).

<sup>24</sup>An example of how far-reaching the decision of *May v. Heiner* has been interpreted to be, is furnished by the case of *Hodgkins v. Commissioner*, 44 F. (2d) 43 (C. C. A. 7th, 1930), where in addition to reserving the income to the settlor for life, the trust agreement expressly stated that no interest should vest in any beneficiary prior to actual distribution. The transfer was held *not* taxable because "the trust agreement was an irrevocable one" despite the fact that the court recognized that "The legal effect of this provision was to limit and restrict and *perhaps postpone* the beneficiary's full *enjoyment* . . ." (Italics supplied.) See also *Daisy Christine Patterson, Executrix*, 36 B. T. A. 407 (1937).

<sup>25</sup>In addition to the cases already discussed, transfers involving a reservation of all or part of the income of the property transferred, to the transferor for life were held not taxable in the following cases, some of which, it will be noticed, antedate the decision in *May v. Heiner*: *McCaughn v. Carnill*, 43 F. (2d) 69 (C. C. A. 3rd, 1930); *Otto T. Brehmer*,



such transfers was essential to overcome the effect of this holding and to prevent the defeat of the purpose of the statute in this respect.<sup>26</sup>

### III. RETENTION OF CONTROL BY THE TRANSFEROR

As noted above, the statute speaks of "possession or enjoyment". As to the effect of the retention of a very important incident of ownership—control—it is silent. It follows, then, that reservation by the transferor of various degrees of control will or will not render the transfer taxable, depending upon how such a reservation affects those incidents of ownership with which the statute does concern itself, that is, possession or enjoyment. The cases may be classified into four groups: Those involving the reservation of powers of management in an irrevocable trust; cases involving the reservation of a power of revocation; cases involving the reservation of a power of testamentary disposition, and cases involving reservation of a power to designate who shall enjoy the income during the transferor's lifetime.

#### (a) *Powers of Management in an Irrevocable Trust.*

In the irrevocable trust situation, assuming the reservation of substantial powers of management, we are faced with considerations similar to those in the reservation of income cases. The transferor has retained an interest which is clearly an element of enjoyment, and might even expressly include the right to possession, as trustee, for instance. Accordingly, the statute would again appear to be applicable. Even before *May v. Heimer*, though, the Supreme Court held such a transfer not taxable on the ground that the interests of the transferees had vested at the time the trust was created, that there was no power of recall, and that control over the property for the transferor's benefit ceased

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*et al.*, Executors, 9 B. T. A. 423 (1927); Edmund H. Fleming, *et al.*, Executors, 9 B. T. A. 419 (1927); Laura R. Hilton, 21 B. T. A. 3 (1930); Frances Plumer McIlhenny, *et al.*, Executors, 22 B. T. A. 1093 (1931); Charles H. W. Foster, *et al.*, Executors, 26 B. T. A. 708 (1932); Frederic Ullman, *et al.*, Executors, 20 B. T. A. 782 (1930); Myers v. Magruder, 15 F. Supp. 488 (D. Md. 1936); Commissioner v. City Bank Farmers' Trust Co., 74 F. (2d) 242 (C. C. A. 2nd, 1934); Commissioner v. Austin, 73 F. (2d) 758 (C. C. A. 7th, 1934); Citizens' & Southern National Bank v. United States, 4 F. Supp. 408 (S. D. Ga. 1933); Miller v. United States, 62 Ct. Cl. 404 (1926), *cert. granted*, 273 U. S. 683 (1926); Arnold v. United States, 62 Ct. Cl. 439 (1926), *cert. granted*, 273 U. S. 683 (1926), *dismissed* 275 U. S. 578 (1927).

See also, Smith v. Commissioner, 59 F. (2d) 533 (C. C. A. 7th, 1932); and Kaufman v. Reinecke, 68 F. (2d) 642 (C. C. A. 7th, 1934) (involving the transfer of stock with retention of dividends), and Jacob Schneider, *et al.*, Executors, 35 B. T. A. 183 (1936), a more recent case in which retention of life income together with management powers (neither alone sufficient) was held to bring the case within the statute.

<sup>26</sup>The statute was first amended, immediately following the aforementioned decisions, on March 3, 1931, by joint resolution (46 STAT. 1516 (1931)) which provided for the taxation of transfers intended to take effect at death, etc., "including" transfers in which income for life was reserved. While doubts as to the constitutionality of the amendment were expressed—Marx, *When the Settlor of a Trust Reserves a Life Estate* (1936) 14 TAX MAG. 143; Surrey & Aronson, *Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 COL. L. REV. 1332, 1341-1353—its validity was sustained in *Helvering v. Bullard*, 303 U. S. 297 (1938).

at the time of the transfer.<sup>27</sup> Accordingly, transfers were held not "intended to take effect in possession or enjoyment at or after death" even though the trustee could not vary investments without the settlor's approval;<sup>28</sup> where the settlor conveyed to *himself* as trustee;<sup>29</sup> and where the transferor of stock had reserved to himself the "voting and all other privileges, excepting the ownership of income".<sup>30</sup>

In other words, the general rule is that the reservation of extensive powers of management by the transferor in an irrevocable trust will not render the transfer taxable.<sup>31</sup> The reason advanced is that these powers may not be exercised in such a manner as to benefit the transferor, and that the transfer is beyond recall. The test here applied seems to be the same as that applied in the reservation of income cases. From the standpoint of the transferee, the reservation of such powers by the transferor may or may not operate to postpone possession or enjoyment. The question is purely factual and it has been so treated in the state cases.<sup>32</sup>

(b) *Power of Revocation.*

In contrast with the irrevocable trust situation just discussed are the cases in which the transferor has reserved the power to revoke. A power of revocation reserved to the transferor alone will render the transfer incomplete until the transferor's death and taxable as a transfer intended to take effect in possession or enjoyment at or after death.<sup>33</sup>

<sup>27</sup>Reinecke v. Northern Trust Co., 278 U. S. 339 (1929), 66 A. L. R. 404 (1930), (1929) 29 COL. L. REV. 533, (1929) 6 N. Y. U. L. Q. REV. 487, (1929) 13 MINN. L. REV. 628, (1929) 8 TEX. L. REV. 163.

<sup>28</sup>Cover v. Burnet, 53 F. (2d) 915 (App. D. C. 1931); Flora M. Bonney, 29 B. T. A. 45 (1933).

<sup>29</sup>Becker v. St. Louis Trust Co., 296 U. S. 48 (1935); Commissioner v. Duke, 62 F. (2d) 1057 (C. C. A. 4th, 1933), *aff'd*, 290 U. S. 591 (1933); Lillian M. Wheeler, Executrix, 20 B. T. A. 695 (1930); Estate of Robert L. Holt, 14 B. T. A. 564 (1928). See also Mackay v. Commissioner, 94 F. (2d) 558 (C. C. A. 2d, 1938) (where settlor was one of the trustees).

<sup>30</sup>Estate of James F. Foster, 13 B. T. A. 496 (1928). But see Jacob Schneider, *et al.*, Executors, 35 B. T. A. 183 (1936), cited *supra* note 25, wherein the reservation of management powers plus income was held to render a transfer taxable, although neither alone would do so.

See also Sampson v. Welch, 23 F. Supp. 271 (S. D. Cal. 1938), where a transfer by a husband of separate property to the marital community was conceded to vest a present interest in the wife as to half the property, but was held taxable nevertheless on the ground that under the community property statutes of the jurisdiction (California), the legal effect of the transfer was the retention by the transferor of "the possession, management, and control of this property for his lifetime".

<sup>31</sup>Rottschaefer, *op. cit. supra* note 15, at 632.

See also Payne, *Inter Vivos Transfers and the Federal Estate Tax* (1933) 81 U. OF PA. L. REV. 937; HUGHES, *THE FEDERAL DEATH TAX* (1938) § 101.

<sup>32</sup>The state decisions on this point seem to go off on the basis of the degree of control reserved to the transferor. Rottschaefer, *op. cit. supra* note 15, at 480.

<sup>33</sup>Reinecke v. Northern Trust Co., 278 U. S. 339 (1929); Commissioner v. Erickson, 74 F. (2d) 327 (C. C. A. 1st, 1934), *cert. denied*, 294 U. S. 730 (1934); McCaughn v. Fidelity Trust Co., 34 F. (2d) 443 (C. C. A. 3rd,

But it has also been held that if the power is exercisable only in conjunction with one having an adverse interest, then the power will not render the transfer taxable, because in such an instance, said the Supreme Court:

“ . . . the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.”<sup>34</sup>

In dealing with this type of transfer, the Court has considered only that which the transferor has retained. If the transferor alone still has the power to designate the ultimate taker, the transfer is within the statute; if that power is substantially restricted, it is not within the statute.

From the standpoint of the transferee, his interest may be either one of present enjoyment or one in which possession or enjoyment is postponed until some future time, such postponement being either with or without reference to the time of the transferor's death. In either case, however, the transferee's interest is subject to total divestiture by the exercise of the reserved power, whether that power be had by the settlor alone, or by the settlor in conjunction with one or more of the beneficiaries. By its holdings the Court has affirmed that “possession or enjoyment” may be withheld through the medium of a retained power of revocation. But in differentiating between cases wherein such a power has been retained, it has considered differences from the transferor's standpoint which, from the standpoint of the transferee, are largely immaterial. The transferee's interest is subject to defeasance by reason of the existence of the outstanding power, whether the power is exercisable by the settlor alone or by the settlor in conjunction with one or more beneficiaries. The fact that joint action is essential to the exercise of the power merely affects the probabilities that it will be exercised. The weighing of probabilities to determine taxability or non-taxability seems highly undesirable. Therefore, if the approach were from the standpoint of the transferee, it would seem preferable to conclude that, regardless of present enjoyment, such a transfer is within the statute because of the possibility of total divestment, and that the result should be the same, even though others than the settlor must

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1929); *Home Trust Co. v. Edwards*, 30 F. (2d) 976 (S. D. N. Y. 1929); *Burnet v. Pacific Southwest Trust & Savings Bank*, 45 F. (2d) 773 (C. C. A. 9th, 1930), *cert. denied*, 283 U. S. 825 (1931).

“The power of revocation, unexercised by the donor, leaves the transfer as to him incomplete, and gives him a legal interest which is subject to the tax, whether it be one of succession or transfer. *Bullen v. Wisconsin*, 240 U. S. 625 . . . ; *Saltonstall v. Saltonstall*, 276 U. S. 260 . . .” *McCaughn v. Fidelity Trust Co.*, 34 F. (2d) 443, 444 (C. C. A. 3rd, 1929).

The decisions under the state inheritance tax statutes are now in accord. *Note* (1930) 67 A. L. R. 1247.

<sup>34</sup>*Reinecke v. Northern Trust Co.*, 278 U. S. 339, 346 (1929); *Helvering v. Helmholtz*, 296 U. S. 93 (1935).

concur in the exercise of the power.

Since 1924, however, the estate tax statute has contained a specific provision regarding powers of revocation which accomplishes the result just stated.<sup>35</sup> At the present time, therefore, the "possession or enjoyment" provision will seldom have application to the situation here considered. The *Reinecke* case, however, has had an important effect upon the formulation of the rules of construction applicable to the "possession or enjoyment" provision.

(c) *Power to Designate Who Shall Enjoy.*

Closely related to the revocable transfer is that whereunder the transferor has retained the power to designate the persons who shall possess or enjoy the property or the income therefrom. There are two types of cases to be here considered. The first is that of a trust whereunder the settlor retains a testamentary power of appointment. The other is the case of a trust wherein the settlor reserves the power to change the beneficiaries during his lifetime.

Where the settlor has retained a testamentary power of appointment the situation is analagous to that in which he has reserved a power of revocation in himself alone. While he cannot obtain the benefits for himself by exercising a testamentary power he does enjoy dispositive powers over the subject matter until the time of his death. Stressing this factor, the lower courts have held that the statute is applicable to a conveyance in trust under the terms of which the settlor reserved a power to dispose of the corpus by will. The death of the settlor was deemed to be "the source of valuable assurance passing from the dead to the living".<sup>36</sup>

The Supreme Court used the same reasoning in *Porter v. Commissioner*<sup>37</sup> involving the application of the revocable trust provision of

<sup>35</sup>The statute now reads: "To the extent of any interest therein of which the decedent has at any time made a transfer . . . , by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death; . . ." Internal Revenue Code § 811 (d) (1), 53 STAT. 121 (1939), 26 U. S. C. A. § 811 (d) (1) (Cur. Ser. Pamph. No. 1, 1939). The constitutionality of this provision was upheld in *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85 (1935). For a discussion of the general problem of the taxation of revocable trusts, see Stimson, *When Revocable Trusts Are Subject to an Inheritance Tax* (1927) 25 MICH. L. REV. 839.

<sup>36</sup>Day Kimball, 29 B. T. A. 60 (1933), *aff'd*, Kimball v. Commissioner, 71 F. (2d) 1011 (C. C. A. 2d, 1934). See also Gaither v. Miles, 268 Fed. 692 (D. Md. 1930); Louis James Phelps, 27 B. T. A. 1224 (1933); Mary A. B. DuPont Laird, 29 B. T. A. 196 (1933); Kate Allerton Johnstone, 29 B. T. A. 957 (1934).

<sup>37</sup>288 U. S. 436 (1933), (1933) 8 WIS. L. REV. 387, (1933) 8 ST. JOHN'S L. REV. 183, (1934) 18 MINN. L. REV. 235, (1934) 32 MICH. L. REV. 563, *aff'g*, Porter v. Commissioner, 60 F. (2d) 673 (C. C. A. 2d, 1932).

the estate tax.<sup>38</sup> The conveyance in trust subject to a power of revocation was held taxable even though the settlor could not exercise the power in favor of himself or his estate.<sup>39</sup>

In the lower courts, however, it has been held that when the power of testamentary disposition is a substantially restricted one, the existence of the power will not, in itself, render the transfer taxable.<sup>40</sup>

#### IV. RETENTION OF LEGAL INTERESTS BY THE TRANSFEROR

In the preceding discussion, attention has been focused upon cases in which the transferor has retained for himself either an equitable interest in the subject matter of the transfer or a bare power over it. The cases now to be considered are those in which the transferor has retained for himself a legal interest of some kind in the subject matter of the transfer.

##### (a) *Legal Life Estate.*

In *May v. Heiner* and the following cases the Supreme Court was dealing with situations in which the transferor had retained only an equitable life estate. The reasoning in *May v. Heiner* logically applies as well to the retention of a *legal* life estate by the transferor as to that in which a trustee has the legal estate and the transferor an equitable interest for his life. Though it were a legal life estate that was reserved, rather than an equitable life estate, the fact would remain that "the transfer was beyond recall by the decedent", the remainderman's title would likewise have "been definitely fixed by the . . . deed", and the only effect of the transferor's death would be, as in the *May* case, that "the interest . . . possessed immediately prior to death was obliterated by that event". And it was so held in a district court case,<sup>41</sup> and by the Board of Tax Appeals,<sup>42</sup> both decisions being based on *May v. Heiner*.<sup>43</sup> Since the retention of a legal

<sup>38</sup>53 STAT. 121 (1939), 26 U. S. C. § 411 (d) (1934). See note 35, *supra*.

<sup>39</sup>Contrary results in two prior lower court decisions were expressly disproved: *Brady v. Ham*, 45 F. (2d) 454 (C. C. A. 1st, 1930), (1931) 44 HARV. L. REV. 653 (where settlor had reserved the right to name new beneficiaries but had accepted herself as a substitute beneficiary); *Cover v. Burnet*, 53 F. (2d) 915 (App. D. C. 1931).

<sup>40</sup>*Farmers' Loan & Trust Co. v. Bowers*, 29 F. (2d) 14 (C. C. A. 2d, 1928) (settlor reserved the power to appoint the corpus by will among his issue); *Burnet v. Pacific Southwest Trust & Savings Bank*, 45 F. (2d) 773 (C. C. A. 9th, 1930), *cert. denied*, 283 U. S. 825 (1931) (irrevocable trust for twelve years, the corpus then to go to his son, but if the son died before the trust terminated, settlor retained power to dispose of the corpus by will); *Equitable Trust Co. of N. Y.*, 31 B. T. A. 329 (1934) (settlor reserved power to appoint the corpus by will among her descendants); *Robert A. Taft*, 33 B. T. A. 671 (1935) (settlor reserved a right to substitute beneficiaries in case any beneficiary predeceased her).

<sup>41</sup>*Citizens' & Southern National Bank v. United States*, 4 F. Supp. 408 (S. D. Ga. 1933).

<sup>42</sup>*Frederic Ullman, et al., Executors*, 20 B. T. A. 782 (1930).

<sup>43</sup>*Statements in Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347-348 (1929), quoted approvingly in *May v. Heiner*, point the same way although the facts in the *Reinecke* case were different. There the decedent had

life estate by the transferor after the 1931 amendment is under that amendment, the Court will not be called upon to decide this point except with respect to transfers made before March 3, 1931.<sup>44</sup>

(b) *Reversionary Interests.*

The last group of cases to be here considered are those in which the transferor has retained some reversionary legal interest in the thing transferred. When the owner of a thing, whether it be land or chattel, transfers less than the whole of his interest therein to another or others, there continues in the transferor, according to the rules of property law, a residue which is known as a reversionary interest. The common law recognizes two types of such interests, reversions and possibilities of reverter. In light of the manner in which the courts have dealt with the problem of applying the "possession or enjoyment" clause, it seems advisable to so group the cases for the purposes of this discussion.

1. *Reversion.*

When the owner of land or chattels creates a life estate—whether it be for the life of the transferor, the transferee or a third person or persons—or a term of years, either legal or equitable, there is, in the absence of specific grant of a vested remainder, a reversion in the transferor. In such a case when the transferor dies, he is possessed of this reversionary interest—which may be either possessory or non-possessory (a future interest), depending upon the duration of the life estate or term originally created—and it is a part of his property, passing either by will or by the laws of descent. In such case there is no cause for the application of § 302 (c), but the value of the reversionary interest is included in the gross estate under clause (a)<sup>45</sup> of this same section.<sup>46</sup>

The distinction between the cases to which the language of § 302 (a) is applicable and that to which the "possession or enjoyment" clause of § 302 (c) is applicable seems not to have been always clear to the courts. The provisions of § 302 (a) apply whenever the decedent has

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made certain transfers under which he retained no interest whatever himself but created various life interests, measured with respect to the time of his own death or the life of the first taker, remainder over to C in fee.

<sup>44</sup>For language of amendment see note 1, *supra*.

<sup>45</sup>"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 . . . (a) To the extent of the interest therein of the decedent at the time of his death; . . ." Internal Revenue Code § 811, 53 STAT. 120 (1939), 26 U. S. C. § 411 (1934). There has been an identical provision in all of the previous revenue acts.

<sup>46</sup>The result reached in *Fidelity-Philadelphia Trust Co.*, 27 B. T. A. 972 (1933), is explicable on this basis, although the case was complicated by a stipulation that transferor reserved the right to appoint by will if he predeceased the grantee of the life interest—a power which he would have had without express reservation. But see *Nichols v. Bradley*, 27 F. (2d) 47 (C. C. A. 1st, 1928).

a reversion in him by reason of a transfer previously made by him. The reversion is a property interest of the decedent which passes either by will or by the laws of intestate succession, because it is an interest which continues after his death. Subdivision (a) requires that the value of *such interest* be included in his gross estate. Thus whether the reversion in the decedent is dependent upon the expiration of a term of one year or upon the failure of a number of alternative limitations, each of which is contingent, is a factor which affects only the value of the reversion, not whether that reversion is to be included in his gross estate. This value is determined by taking into consideration the probabilities of the reversion ever being realized as a possessory interest by the heirs or devisees of the decedent. In at least one federal court case,<sup>47</sup> and in two Board of Tax Appeals decisions,<sup>48</sup> cases properly falling under § 302 (a) have been dealt with as though they were to be decided under the "possession or enjoyment" clause of § 302 (c), with not altogether satisfactory results.

The cases involving the retention of a legal reversion by the transferor to which the language of § 302 (c) may be applied are those in which, by the *inter vivos* instrument, there has been created (1) a present possessory estate for life or years in a named grantee, (2) a reversion in the transferor, and (3) a transfer of this reversion to a named person *if*, but only *if*, the named person survives the transferor. In this type of situation the transfer of the reversion is conditioned upon the death of the transferor prior to that of the named grantee (or some other person) and takes effect, if at all, only at the time of the transferor's death. Upon this basis it may be said, then, that as to the reversion it is a transfer intended to take effect in possession or enjoyment at the death of the transferor. In contrast with the situation considered in the preceding paragraph this is one in which the reversion shifts from the decedent by virtue of the terms of the *inter vivos* conveyance; there is nothing upon which decedent's will can operate and nothing which goes to his heirs under the intestate laws. The grantee of the reversion here takes "by purchase" under the *inter vivos* conveyance, rather than as devisee or by descent.

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<sup>47</sup>Tait v. Safe Deposit & Trust Co., 74 F. (2nd) 851 (C. C. A. 4th, 1935). Here there was a settlement in trust with limitation of remainders to numerous relatives of the settlor, the gifts in each case, however, being contingent upon survivorship by the donees of the persons entitled to the present interests created, thus leaving a reversion in the settlor and his heirs. The Court held that the value of the property transferred should not be included in the estate of the decedent, saying that the "possibility was too remote" and citing cases involving § 302 (c). While the result is proper in so far as § 302 (c) is concerned, it seems to overlook the fact that the *value of the reversion itself*, however negligible in amount that value actually is, is includible under § 302 (a).

<sup>48</sup>Frederick Davis Van Sicklen, 35 B. T. A. 306 (1937); Estate of Waldo C. Bryant, 36 B. T. A. 669 (1937).

The effect of such a transfer is to create, first, a legal life estate or term of years—an interest which is unimportant for the question now considered; second, a reversion in the transferor, vested but subject to be divested upon failure of the transferor to survive the named grantee, *i. e.*, a reversion subject to an executory limitation over; third, in the named grantee, an executory interest in the reversion by way of a springing interest. The question, then, is whether a transfer by which there is created an executory interest in the transferor's reversion, the condition of which must occur at the time of the transferor's death, is a transfer within the meaning of the "possession or enjoyment" clause.

When the terms of the transferring instrument are construed to have this legal effect it has been held by the Board of Tax Appeals,<sup>49</sup> by the lower and intermediate federal courts,<sup>50</sup> and by the United States Supreme Court<sup>51</sup> that the value of the reversion is to be included in the gross estate of the decedent. As all of the cases in this group, except one,<sup>52</sup> were decided after *Klein v. United States*,<sup>53</sup> that case has chiefly been relied upon to sustain the holdings and other cases herein discussed have been distinguished on their facts.

In the *Klein* case the decedent had conveyed a life estate to his wife with provision that if she predeceased him the reversion should remain vested in him, but that if she survived him "then and in that case only", his wife should take a fee simple. The decedent died during the lifetime of his wife. In holding that the value of the reversion should be included in the gross estate of the decedent-transferor, the Court, through Sutherland, J., said:

"The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder. The life estate is granted with an express reservation of the fee, which is to 'remain vested in said grantor' in the event that the grantee 'shall die prior to the decease of said grantor'. By the second clause the grantee takes the fee in the event—'and in that case only'—that she survive the grantor. It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee. The grant of the remainder, therefore, was contingent. . . .

". . . Nothing is to be gained by multiplying words in re-

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<sup>49</sup>Union Guardian Trust Co., 26 B. T. A. 1321 (1932); Fidelity-Philadelphia Trust Co., 27 B. T. A. 972 (1933); Frances A. Krause, 32 B. T. A. 254 (1935); Estate of Waldo C. Bryant, 36 B. T. A. 669 (1937).

<sup>50</sup>Dean v. Willcuts, 32 F. (2nd) 374 (D. Minn. 1929); Sargent v. White, 50 F. (2nd) 410 (C. C. A. 1st, 1931); Commissioner v. Schwarz, 74 F. (2nd) 712 (C. C. A. 2nd, 1935).

<sup>51</sup>Klein v. United States, 283 U. S. 231 (1931).

<sup>52</sup>Dean v. Willcuts, 32 F. (2d) 374 (D. Minn. 1929).

<sup>53</sup>283 U. S. 231 (1931).



spect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed."

In attempting to ascertain the rationale of this decision it must be noticed that the opinion in the *Klein* case was rendered almost one year after *May v. Heiner* and about six weeks after the *McCormick*, *Morsman* and *Northern Trust Co.* cases,<sup>54</sup> in which the retention by the transferor of an equitable life interest was held not to bring the case within the statutory language and in which the court had stressed<sup>55</sup> that the transfer was beyond recall and that *title* had been definitely fixed by the trust deed. In the *Klein* case the Court stressed the fact that the "remainder" granted to the transferor's wife was contingent; that "the death of the grantor . . . brought the larger estate *into being* for the grantee . . ." In the latter case the transfer was likewise beyond recall—in the sense that nothing which the transferor could thereafter do might alter the course of title—but no reference is made to this fact. While *May v. Heiner* indicated that retention of a power comparable to that of testamentary disposition was essential to the applicability of the statute, the *Klein* case, on the other hand, showed that the statute would be applied even though no such power was retained. The divergence in results in the cases is explicable, then, only upon the basis that some other test was used. Is there a "shifting of the economic benefits" of the property in the *Klein* case but not in *May v. Heiner*? In both cases the death of the transferor is the occasion for a substantial enlargement in the transferee's rights. In *May v. Heiner* he becomes entitled to present enjoyment; in the *Klein* case his uncertain interest becomes certain of enjoyment. There is, thus, no real difference in the cases if "shifting of economic benefits" covers all cases in which there is a substantial enlargement of the transferee's interest. But, this difference does exist: In *May v. Heiner* the transferor had a life estate which terminated at his death and the transferee's vested remainder in fee then became possessory; in the *Klein* case the transferee had a contingent interest in fee which, upon vesting, supplanted the reversion in fee which the transferor retained until that time. If "shifting of economic benefits" covers only the case in which the transferee acquires, and the transferor loses, a vested estate of like quality, the results in the two cases can be reconciled by applying this test. Again, the interest of the transferee in *May v. Heiner*, apparently, was vested

<sup>54</sup>*McCormick v. Burnet*, 283 U. S. 784 (1931); *Morsman v. Burnet*, 283 U. S. 783 (1931); *Burnet v. Northern Trust Co.*, 283 U. S. 782 (1931), cited *supra* note 23.

<sup>55</sup>By relying upon *May v. Heiner*, 281 U. S. 238, 243 (1930).

at all times, while his interest in the *Klein* case was contingent until the transferor died. This, also, might serve as the differentiating factor. As both bases of differentiating the cases involves contingency of the transferee's interest until the time of the transferor's death it is not surprising that commentators<sup>56</sup> and courts<sup>57</sup> were led to the conclusion that the Court had made this factor govern the application of the "possession or enjoyment" clause.

### 2. Possibility of Reverter.

The other type of legal reversionary interest is the possibility of reverter. The most simple case of this type is that in which *A*, owner in fee simple absolute, conveys to *B* in fee, upon condition that if event *X* happens *B*'s estate is to terminate and the interest is to revert to *A*. Immediately after the conveyance *B* has a fee simple subject to be divested in favor of *A* upon the happening of event *X*, and *A* has a possibility of reverter. The same types of interests, of course, may be created where the conveyance is in trust, the legal estates of the trustee and of the remaindermen and the equitable interests of the beneficiaries each being likewise defeasible, and *A*'s interest still being a possibility of reverter.

Before undertaking to examine the cases three different forms of limitation and the types of interests usually recognized as created thereby should be noted.

#### *Type I.*

<i>A</i> transfers (1) to <i>B</i> , as trustee	Legal life estate
(2) to pay income to <i>C</i> for life	Equitable life estate
(3) remainder in fee to <i>D</i>	Remainder upon special limitation
(4) but if <i>C</i> predeceases <i>A</i> , the corpus to revert to <i>A</i> in fee	Possibility of Reverter

#### *Type II.*

<i>A</i> transfers (1) to <i>B</i> , as trustee	Legal life estate
(2) to pay income to <i>C</i> for life	Equitable life estate
(3) remainder in fee to <i>A</i>	Reversion
(4) but if <i>A</i> predeceases <i>C</i> , remainder in fee to <i>D</i>	Executory interest in fee

#### *Type III.*

<i>A</i> transfers (1) to <i>B</i> , as trustee	Legal life estate
(2) to pay income to <i>C</i> for life	Equitable life estate
(3) if <i>A</i> predecease <i>C</i> , remainder to <i>D</i> in fee,	?
(4) but if <i>C</i> predecease <i>A</i> , remainder to <i>A</i> in fee	?

<sup>56</sup>See for instance *Surrey & Aronson, Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 Col. L. Rev. 1332.

<sup>57</sup>See *Sargent v. White*, 50 F. (2d) 410 (C. C. A. 1st, 1931); *Commissioner v. Schwarz*, 74 F. (2d) 712 (C. C. A. 2nd, 1935); *Louis C. Raegner*, 29 B. T. A. 1243 (1934); *Frances A. Krause*, 32 B. T. A. 254 (1935); *Stephen Peabody*,

- or
- (3) if *C* predecease *A*, remainder ?  
to *A* in fee
- (4) but if *A* predecease *C*, re- ?  
mainder to *D* in fee

In each of the foregoing cases it is possible to assert that as to the grant of the remainder after the equitable life estate created in *C* there is a transfer "intended to take effect in possession or enjoyment" at the death of *A*, the decedent-transferor. In each case *D*'s remainder is certain to be enjoyed in possession by him if, and only if, *C* survives *A*. In each case the uncertainty which exists as to *D*'s ultimate enjoyment continues until *A* dies. Prior to that time the uncertainty as to the event of survivorship makes *D*'s interest one of uncertain value and, consequently, of limited marketability. *A*'s death removes that uncertainty and for practical purposes there is definitely a shifting of economic benefits, because thereafter *D*'s estate is certain to come into possession upon the termination of the still outstanding life estate in *C*.

On the other hand in each of the type cases the interests of the parties are determined by the *inter vivos* instrument. The settlor has no power to recall or otherwise alter the enjoyment; who shall enjoy, including possession or enjoyment by the transferor, depends upon circumstances over which the transferor has no control.

The only differences between the cases put is in the character of the interests had by *A* and by *D* prior to the determination of the event of survivorship according to the technical rules of property law, and the construction put upon the limitation by the board or the court which undertakes to determine taxability.

Under the rules of property law a limitation in the form of type I operates to create in *D* a remainder in fee vested subject to total defeasance if *A* survives *C*. It creates a possibility of reverter in *A*.

A limitation in the form of type II gives to *A* a reversion, subject to an executory limitation over upon *A* predeceasing *C*. Thus, here *A* has a vested interest subject to be wholly divested, and *D* has an executory interest—a contingent interest which becomes vested if the condition which divests *A*'s interest occurs.

A limitation in the form of type III must be construed, and it is susceptible of construction in either of two ways: First, as creating in *A* and *D* the same types of interests as a limitation in the form of type I; second, as creating in *A* and *D* the same types of interests as a limitation in the form of type II. The next inquiry is as to how the courts

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24 B. T. A. 787 (1931); Elizabeth B. Wallace, 27 B. T. A. 902 (1933); Old National Bank in Evansville, 31 B. T. A. 379 (1934). But see *Tait v. Safe Deposit & Trust Co.*, 74 F. (2d) 851 (C. C. A. 4th, 1935), and *Mary Q. Hallock*, 34 B. T. A. 575 (1936), which reject vestedness as the test.

have handled these various types of limitations.

When confronted with the problem as to the applicability of the "possession or enjoyment" clause to limitations in the form of type I, the Board of Tax Appeals,<sup>58</sup> a federal district court,<sup>59</sup> and the Supreme Court<sup>60</sup> have held that the value of the corpus of the trust is not to be included in the transferor's gross estate when he has a "mere possibility of reverter".

As the Court has held that a limitation in the form of type II is one which calls for the application of the statute<sup>61</sup> and in view of the lack of difference in practical effect so far as the grantee is concerned of the two types of limitations, the criterion by which the type I form of limitation is taken out of the statute is of much interest.

As the death of the grantor appears to operate in both types of cases to enlarge the interest of the grantee, *D*; the use of the "shifting of economic benefits" test fails to differentiate the cases. In the majority opinion in *Helvering v. St. Louis Union Trust Co.*<sup>62</sup> it seems to be denied, however, that there is any shifting of economic benefits where the transferor retains a possibility of reverter.<sup>63</sup> The inference is that unless the interest created is an absolutely contingent one there can be no shifting of economic benefits.

The majority places the major stress upon the fact that the transfer is not testamentary in character.

"The grantor here, by the trust instrument, left in himself no power to resume ownership, possession, or enjoyment, except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design, or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it; that is to say, by converting what was merely possible

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<sup>58</sup>Stephen Peabody, 24 B. T. A. 787 (1931); Lucy Belle Dunham, 26 B. T. A. 286 (1932).

<sup>59</sup>Amoskeag Trust Co. v. Field, 10 F. Supp. 635 (D. N. H. 1935).

<sup>60</sup>McCormick v. Burnet, 283 U. S. 784 (1931) (no discussion; "affirmed on authority of *May v. Heiner*."); *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 (1935).

<sup>61</sup>Klein v. United States, 283 U. S. 231 (1931), and cases cited *supra* notes 49 and 50.

<sup>62</sup>296 U. S. 39 (1935).

<sup>63</sup>The Court quotes at length from *Heiner v. Donnan*, 285 U. S. 312, 323 (1932), in which the statutory inclusion of all transfers made within two years prior to death was held unconstitutional. The language quoted includes "... the death does not result in a shifting, or in the completion of a shifting to the donee of any economic benefit of property, which is the subject of a death tax . . ." The text statement is based upon the inclusion of this quoted language.

into an utter impossibility.”

But the foregoing does not serve to differentiate this case from *Klein v. United States*, because there also the grantor “left in himself no power” to defeat the interest of the grantee; there, too, it was “entirely fortuitous so far as any control, design or volition on his part was concerned.” The only rational basis of distinction between the two cases seems to be that in the *Klein* type of case the interest of the transferee is absolutely contingent, whereas here that interest is a vested one. Upon this analysis the fact of taxability is made to depend upon the highly technical concepts of the law of real property, upon the differences between interests which are contingent and those which are vested; and, further, upon the difference between an interest which is absolutely contingent and one which is vested subject to be wholly divested.

The four dissenting judges recognize the highly technical character of the test employed by the majority. Stone, J., said:

“It seems plain that the gift here was not complete until the decedent’s death. . . . *Klein v. United States, supra*, [would have made the gift taxable] if he had reserved a remainder in himself with gift over, if he did not survive his daughter. Instead, by using a different form of words, he attained the same end and has escaped the tax.

“Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers’ device, what particular string, the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form.”

Accepting the highly technical test which operates to bring about differing results under limitations of the form of type I and type II, there still remains for consideration the effect which is to be given to limitations of the form of type III, above. As has been pointed out above, limitations in this form must be construed to determine the character of interests created. At least two different constructions are possible. Such a limitation may be construed to have the same effect as a type I limitation or it may be construed as having the same effect as a limitation of the type II form. This process of construction involves a determination of whether the remainder interest limited to *D* is a vested remainder in the highly conceptual sense of real property law. Even to the expert in property law there is no problem in the field which is more baffling. In final analysis the problem is one which involves consideration of many factors in each case, an area wherein standards of definite and certain applicability simply do not exist.<sup>64</sup>

<sup>64</sup>See generally RESTATEMENT, PROPERTY (Tent. Draft No. 8, 9, 1938) cc. 18-21, inc.; especially §§ 276, 277 and RESTATEMENT, PROPERTY, EXPLANATORY

While problems of this type must come before the courts in the settlement of titles to land and chattels, no one can dispute the fact that determination of the fact of taxability or nontaxability should not depend upon such technical considerations.

An examination of the cases involving type III limitations illustrates the dilemma of the courts, the taxpayer and the government. When confronted with limitations of this type they have been construed as having the effect of type II limitations in some cases,<sup>65</sup> with consequent tax liability. On the other hand limitations of this type, in their essence indistinguishable from the ones previously mentioned, have been given effect as type I limitations by the Board of Tax Appeals,<sup>66</sup> by the lower federal courts,<sup>67</sup> and by the United States Supreme Court,<sup>68</sup> with consequent nontaxability.

In *Becker v. St. Louis Union Trust Co.*<sup>69</sup> the final clause of the declaration of trust read:

"If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or . . . if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her, and in either case this trust shall cease."

The limitation is clearly of the type III form. Seizing upon the word "revert" the majority of the Court said that the transferor had retained a "mere possibility of reverter", thus classifying the limitation as being of the same effect as type I, and held that there was no transfer intended to take effect in possession or enjoyment at or after death. It is submitted that the Court could just as properly have reached the opposite result by placing the same emphasis on the words "if I should die before her death, then this property shall thereupon become hers".

In his dissent to *Helvering v. St. Louis Union Trust Co.* Justice Stone deprecated the difference in results under limitations in the

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NOTES (Tent. Draft No. 9, 1938) 202.

<sup>65</sup>*Sargent v. White*, 50 F. (2d) 410 (C. C. A. 1st, 1931); *Commissioner v. Schwarz*, 74 F. (2d) 712 (C. C. A. 2nd, 1935); *Union Guardian Trust Co.*, 26 B. T. A. 1321 (1932). Note that all three were decided after the *Klein* case and before *Helvering v. St. Louis Union Trust Co.*

<sup>66</sup>*Nanaline H. Duke*, 23 B. T. A. 1104 (1931), *aff'd sub nom.*, *Commissioner v. Duke*, 62 F. (2d) 1057 (C. C. A. 3rd, 1933), *aff'd by divided court sub nom.*, *Helvering v. Duke*, 290 U. S. 591 (1933); *Elizabeth B. Wallace*, 27 B. T. A. 902 (1933), *aff'd sub nom.*, *Commissioner v. Wallace*, 71 F. (2d) 1002 (C. C. A. 2d, 1934), *cert. denied sub nom.*, *Helvering v. Wallace*, 293 U. S. 600 (1934); *Old National Bank in Evansville*, 31 B. T. A. 379 (1934); *Mary Q. Hallock*, 34 B. T. A. 575 (1936); *Anna B. Kneeland*, 34 B. T. A. 816 (1936); *Waldo C. Bryant*, 36 B. T. A. 669 (1937).

<sup>67</sup>*Safe Deposit & Trust Co. v. Tait*, 8 F. Supp. 634 (D. Md. 1934). See also C. C. A. decisions affirming B. T. A. cited *supra* note 66.

<sup>68</sup>*Becker v. St. Louis Union Trust Co.*, 296 U. S. 48 (1935), decided on the same day as *Helvering v. St. Louis Union Trust Co.*, hereinabove discussed.

<sup>69</sup>296 U. S. 48 (1935).

form of type I and type II, saying, "by using a different form of words, he attained the same end and has escaped the tax." As to the *Becker* case it may be said, by using *both* forms of words he attained the same end and has escaped the tax because a majority of the tribunal finally "construing" the words saw fit to put emphasis upon one portion of them and disregard the other portion.

While appreciative of the difficulties under which the Court labors in applying its own formula, the fact that such a formula has been evolved through the medium of statutory construction seems, to use the language of the *Reinecke* case<sup>70</sup> wherein its foundations were laid, "incongruous".

#### V. TESTS FOR DETERMINING APPLICATION OF THE STATUTE

While the present significance of the "possession or enjoyment" clause has been lessened by amendments specifically applicable to some of the situations herein discussed<sup>71</sup> several types of situations still remain to which no other provision than the "possession or enjoyment" clause is applicable. It is, therefore, important to determine what test the Court uses in construing and applying this clause.

One test for determining the applicability of the clause would take into consideration only the character of the transferee's interest as vested or contingent, the transfer being nontaxable whenever the transferee's interest is vested in the technical property sense. While the employment of a test which involves manipulation of highly technical concepts of the property law seems utterly unsuited to tax cases<sup>72</sup> it is impossible to reconcile the results in the *Klein* and *Helvering v. St. Louis Union Trust Co.* cases on any other basis.<sup>73</sup> On the other hand this test wholly fails to reconcile the holdings in two types of situations<sup>74</sup> with the results in three other types.<sup>75</sup> In all five the interest of the transferee is vested but subject to total defeasance. Yet, in the first two the statutory language has been held applicable and in the latter three it has been held inapplicable. In the remaining situations<sup>76</sup> application of the "vestedness" test would bring the result

<sup>70</sup>*Reinecke v. Northern Trust Co.*, 278 U. S. 339 (1929).

<sup>71</sup>See II (b), III (b), III (c) and IV (a), *supra*.

<sup>72</sup>See IV (b) 2, *supra*, for discussion.

<sup>73</sup>See IV (b) 2, *supra*.

<sup>74</sup>Cases involving retention by the transferor of an unrestricted power of revocation—III (b), *supra*; and an unrestricted power of testamentary disposition—III (c), *supra*.

<sup>75</sup>Cases involving restricted power of revocation—III (b), *supra*; restricted power of testamentary disposition—III (c), *supra*; and the possibility of reverter—IV (b) 2, *supra*.

<sup>76</sup>Cases involving retention by the transferor of: equitable life estate—II (b), *supra*; legal life estate—IV (a), *supra*; a power to direct who shall enjoy the income during the transferor's lifetime—III (c), *supra*; and powers of management—III (a), *supra*. All are cases in which (1) the interest of the transferee is, normally, a vested one and (2) the statute has been held not to apply.

actually reached but the opinions in those cases stress the factor of irrevocability and loss of control by the transferor rather than the vested or contingent character of the transferee's interest.

Thus, while the difference in results in certain of the cases seems explicable only on the basis that this test has been applied, and while the results reached in other types of cases are consonant with its application, the results which the Court has reached in the balance of the cases are utterly incompatible with the application of the "vestedness" test; and regardless of the frequency of judicial reference to the character of the transferee's interest in this technical sense, it is impossible to point to it as the unfailing criterion of the applicability of the statutory language.

A second and more widely used test may be stated thus: Unless the transferor has retained until the time of his death a power, substantially unrestricted, to recall the transfer and designate a new grantee—a power of disposition similar to that retained by a man who has made a will—the transfer is not within the scope of the "possession or enjoyment" clause. This test has been repeated in case after case, beginning with the *Reinecke* case<sup>77</sup> and culminating in the following language in *Helvering v. St. Louis Union Trust Co.*:

"The grantor here, by the trust instrument, left in himself no power to resume ownership, possession, or enjoyment, except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design, or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition."<sup>78</sup>

All except one of the cases involving the "possession or enjoyment" clause decided by the Supreme Court have been consistent with the application of this test. The one exception is *Klein v. United States*.<sup>79</sup> The interests of the transferee and of the transferor were as irrevocably fixed in the *Klein* case as in *Helvering v. St. Louis Union Trust Co.* The only difference was that in the *Klein* case the interest created in the transferee would vest, and in the other case the interest of the transferor would re-vest, upon the happening of the condition survivorship, which is not subject to the transferor's control. Here, too, then we find a rationale of interpretation of the statutory language which has been applied to some but not all of the situations. That it fits with

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<sup>77</sup>"... the trust, for all practical purposes, had passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute . . . His power to recall the property and of control over it for his own benefit then ceased . . ." *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 346, 347 (1929).

<sup>78</sup>296 U. S. 39, 43 (1935).

<sup>79</sup>283 U. S. 231 (1931).



all but one decision and was strongly reiterated by the majority of the Court in the latest decision construing this clause indicates its present importance.

The third test which has been suggested is that the statutory language applies whenever there is a "shifting of the economic benefits of property". There seems, however, to be a difference of opinion as to what this phrase means. To some this phrase denotes the shift of a legal estate from the transferor to the transferee. This meaning was ascribed to the phrase in *May v. Heiner*, where the Court denied application of the "possession or enjoyment" clause to the case wherein the death of the transferor operated to terminate a life estate and make possessory a vested remainder, as well as in *Helvering v. St. Louis Union Trust Co.*, where the majority denied that there was any "shifting of the economic benefits", saying that the death of the transferor merely extinguished a possibility of reverter and passed no estate to the transferee. By using this definition of the phrase the results in all but two of the situations are consistent. The unrestricted power of revocation and the unrestricted power of testamentary disposition cases must be explained upon some other basis, however, because the transferor's power of revocation or testamentary disposition does not pass to the transferee. These, too, are merely extinguished when the transferor dies without having exercised them.

Another meaning of the phrase, "shifting of economic benefits", is that such occurs whenever there is an accession, by the transferee, of property rights not theretofore enjoyed by him.<sup>80</sup> Under such a definition not only the acquisition of the right of present possession or enjoyment—which the statute specifically mentions—but the vesting of an interest in the technical sense or the freeing of an already-created interest (vested in the property sense) from the possibility of defeasance would be comprehended. This would seem to be the meaning which the dissenting judges in *Helvering v. St. Louis Union Trust Co.* had in mind when they said that this section of the statute operates upon

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<sup>80</sup>This idea seems to be best expressed in *Tyler v. United States*, 281 U. S. 497, 503 (1930) (involving applicability of the estate tax to an estate by the entireties), where it was said: "The question, here, then, is not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result . . ."

"At his [the co-tenant's] death, however, and because of it, she [the survivor], for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; . . . Thus the death of one of the parties . . . became the 'generating source' of important and definite accessions to the property rights of the other."

gifts which are not complete until the time of the transferor's death and took the position that the statute applies where there is a transfer upon special limitation, the condition of which is survivorship. As with the tests previously discussed, this test likewise fails to explain the results reached in several types of situations.<sup>81</sup>

The conclusion to be drawn from this survey is that the court has made use of three different tests in determining the applicability of the "possession or enjoyment" clause and that no one of the three has been consistently employed. That this state of the decisions has caused confusion in the lower court and board decisions is to be expected. An examination of the opinions involving retained reversionary interests shows how great that confusion has been. In a number of opinions the vested or contingent character of the transferee's interest has been thought controlling,<sup>82</sup> while in some it is said to be immaterial.<sup>83</sup> In others retention by the transferor of power, by the exercise of his own volition, to recall the disposition, so that the same may inure to his own benefit, is said to be the significant factor,<sup>84</sup> and in a few opinions the shifting of economic benefits is referred to as the ultimate rationale.<sup>85</sup>

While the second test here stated is the one with which the highest percentage of the Supreme Court holdings conforms, the test itself

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<sup>81</sup>Thus, where the transferor retains an equitable or legal estate for his own life, with remainder over and where the transferor retains a restricted power of revocation or a restricted power of testamentary appointment or a possibility of reverter, the application of this test would fail to bring the results actually reached. While all are situations in which there is a shift in economic benefits at the time of the transferor's death as here defined, the statute has been held not to apply. The results in the cases of unrestricted power of revocation, of unrestricted power of testamentary disposition and of reversion granted upon condition, however, are consistent with the application of this test.

<sup>82</sup>Stephen Peabody, 24 B. T. A. 787 (1931); Elizabeth B. Wallace, 27 B. T. A. 902 (1933); Old National Bank in Evansville, 31 B. T. A. 379 (1934); Louis C. Raegner, 29 B. T. A. 1243 (1934); Frances A. Krause, 32 B. T. A. 254 (1935); Estate of Waldo C. Bryant, 36 B. T. A. 669 (1937) (in distinguishing F. D. Van Sicklen, 35 B. T. A. 306 (1937)); Dean v. Willcuts, 32 F. (2d) 374 (D. Minn. 1929); Sargent v. White, 50 F. (2d) 410 (C. C. A. 1st, 1931); Commissioner v. Schwarz, 74 F. (2d) 712 (C. C. A. 2d, 1935).

The extent to which the language of the statute itself has been disregarded in the attempts by lower tribunals to use the supposed judicial formula of construction is strikingly illustrated in Elizabeth B. Wallace, *supra*, and in Hodgkins v. Commissioner, 44 F. (2d) 43 (C. C. A. 7th, 1930).

<sup>83</sup>Mary Q. Hallock, 34 B. T. A. 575 (1936); Tait v. Safe Deposit & Trust Co., 74 F. (2d) 851 (C. C. A. 4th, 1935).

<sup>84</sup>Nanaline H. Duke, 23 B. T. A. 1104 (1931); Mary Q. Hallock, 34 B. T. A. 575 (1936); Anna B. Kneeland, 34 B. T. A. 816 (1936); Frederick D. Van Sicklen, 35 B. T. A. 306 (1937); Estate of Waldo C. Bryant, 36 B. T. A. 669 (1937) (as to 1902 trust). Cf. Tait v. Safe Deposit & Trust Co., 74 F. (2d) 851 (C. C. A. 4th, 1935) where it is said the grantor must divest himself of "title".

<sup>85</sup>Dean v. Willcuts, 32 F. (2d) 374 (D. Minn. 1929); Amoskeag Trust Co. v. Field, 10 F. Supp. 635 (D. N. H. 1935) (possibility of reverter, enlargement of transferee's interest denied); Union Guardian Trust Co., 26 B. T. A. 1321 (1932); Mary Q. Hallock, 34 B. T. A. 575 (1936).

is an unsatisfactory one. In the *Reinecke* case the Court, in exercising its power to "construe" the statutory language, added to the words of the statute the element of "control" by the transferor over the subject matter until the time of his death.<sup>86</sup> By reason of the judicial interpolation of this factor, the attention of the Court has been focused primarily upon the character of the interest which remains in the transferor after the *inter vivos* instrument has been executed and until the time of his death. While the estate tax is upon the power to transmit, that is, upon transfers *from* the decedent, rather than upon the right of transferees to receive, it is submitted, nevertheless, that this clause calls for consideration of that which has been withheld from the transferee as much as, if not more than, it does for consideration of that which continues in the transferor until the time of his death. The purpose is to include within the ambit of the estate tax all of those transfers, even though made *inter vivos*, which may be employed as satisfactory substitutes for testamentary disposition.

If *A* grants Blackacre to *B* in fee, to be effective when *A* dies, there is an *inter vivos* transfer which operates as a reasonably satisfactory substitute for testamentary disposition. The case should be within the statute,<sup>87</sup> not because *B*'s interest is a technically contingent executory interest, nor because *A* has retained the right to possession for his life, but because "possession" and "enjoyment" have been withheld from *B* until *A* dies. The same is true of the case in which *A* grants to *B* in fee upon condition that if *B* predeceases *A* the land shall revert to *A*. This should be within the statute,<sup>88</sup> neither because *B*'s interest is contingent (it is not technically so) nor because of the interest which *A* has retained, but because *B*'s interest is a defeasible one and remains thus restricted until *A* dies. Regardless of the denial of the fact in the majority opinion in *Helvering v. St. Louis Union Trust Co.*,<sup>89</sup> *A*'s death does have the effect of substantially enlarging *B*'s interest, both technically and practically.<sup>90</sup> Still, it can be argued that practically so

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<sup>86</sup>See *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 348-9 (1929), where the Court examined the other four subdivisions of § 301 and added the word "control" to the words "possession or enjoyment" in stating what congress intended subdivision (c) to mean, expressing constitutional doubts if the subdivision were not so construed. Such constitutional doubt was removed by *Helvering v. Bullard*, 303 U. S. 297 (1938), cited *supra* note 26, which upholds the constitutionality of the amendatory act of March 3, 1931, in which congress specifically subjected to the tax transfers in which there was no retention of "control" in the sense here used.

<sup>87</sup>Cf. *Klein v. United States*, 283 U. S. 231 (1931), discussed IV (b), *infra*.

<sup>88</sup>But it is not, *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 (1935).

<sup>89</sup>The following statement from the lower court's opinion is quoted approvingly: "In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert to him into an impossibility." 296 U. S. 39, 43 (1935).

<sup>90</sup>Upon *A*'s death before *B*, *B*'s interest not only loses its characteristic

little has been withheld from *B*, and *A*'s possibilities of ever realizing the estate in possession are so slight, it is inequitable to include the whole value<sup>91</sup> of that which has been transferred *inter vivos* in the gross estate. To this there are several answers: First, the probabilities of *A* retaining the fee and of *B* not realizing the estate in possession are identical in the two situations. If the probability factor is to be controlling, it should affect both cases alike. Second, as has been suggested elsewhere,<sup>92</sup> if the transferor desires to retain such a hold, slight though it may be, upon the property he has transferred, it may be desirable to subject the transfer to tax. Whether to do so or not is a question of policy which Congress, not the Court, should determine. Unless Congress has shown an intent to treat the practically identical cases differently, certainly the Court is not justified in giving effect to the probability factor in one case and not in the other.

In *Helvering v. St. Louis Union Trust Co.* the minority, in asserting that the case is within the statute, relied largely upon the *Klein* case and did not explicitly state the test which it applied. Stress was placed, however, upon the fact that the transferor retained an interest which was terminable only by his death and that the gift was "incomplete" until that time. Clearly the character of the transferee's interest as vested or contingent was not controlling; if it had been they would have concurred with the majority in result at least. Nor do they employ the quasi-testamentary control test; that was used by the majority. As the character of the interest which the transferor retained cannot well be deemed alone controlling<sup>93</sup> it must be that to the dissenters the nature of the interest acquired by the transferee is of the most significance. Reference to the fact that the transfer was "incomplete" points in this direction. The test which they apply seems,

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of defeasibility but *B*'s legal relations with respect to the land are altered. As owner in fee simple absolute he is freed of some legal duties owed to *A* as long as *A* lives. RESTATEMENT, PROPERTY (1936) Scope Note, pp. 167-169 and §§ 49-58. And, from the practical standpoint, upon *A*'s death *B* has a marketable title, which he did not have so long as *A* lived.

<sup>91</sup>Here, query whether Stone, J., is suggesting that only the value of the interest withheld should be included in the gross estate when he says at the close of his dissenting opinion in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 47 (1935): "The extent to which it is incomplete marks the extent of the 'interest' passing at death, which the statute taxes." As to this suggestion, see Surrey & Aronson, *Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 COL. L. REV. 1332, 1336-7.

<sup>92</sup>See Surrey & Aronson, *op. cit. supra* note 91, at 1336. See also Justice Stone's remarks in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 45-49 (1935).

<sup>93</sup>Three of the dissenting judges—Hughes, C. J., Stone and Brandeis, JJ.—concurred in *May v. Heimer* where the statute was held inapplicable although the transferor had retained an estate for his own life. That retention of a "mere" possibility of reverter makes the statute applicable when retention of a present estate for life does not, would seem to be rather illogical.

therefore, to be whether there is a shifting of the economic benefits of the property, by way of enlargement of the transferee's rights, which occurs at the time of the transferor's death. The advantages of this test over the others discussed, especially in that it permits of resort to practical rather than technical distinctions, have been previously indicated.<sup>94</sup>

This survey of the construction of the "possession or enjoyment" clause of the federal estate tax reveals that in the few remaining types of situations to which this language is solely applicable the results are governed by technical niceties in the art of conveyancing and by the exercise of wide administrative or judicial discretion in "interpreting" complex limitations in deeds and trust settlements. Presented by the Court with at least three, and probably four, different standards for construction of the statutory language, the lower tribunals have been signally unsuccessful in attaining uniformity in its application. Even though the number of cases affected may not be great, lack of uniformity in its application is a serious charge against any taxing statute. The suggestion, therefore, seems warranted that the Court should re-examine its position and adopt a construction of the clause which avoids the highly technical considerations now governing its application.<sup>95</sup>

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<sup>94</sup>Whether the shift must operate to cut off still-existing rights of the transferor is an open question. The amendments to §302 (c) do not apply to this case: A transfers to B for A's life, remainder to C in fee. Under the vestedness theory and the retention of testamentary control theory this transfer is not within the statute. Is it within the statute under the shift in economic benefits theory? That there is a shift in economic benefits at the time of A's death is apparent, because C's rights are definitely changed and enlarged. Looked at solely from C's standpoint the case would be within the statute. But, query whether the admitted shift of economic benefits must be one which not only enlarges C's rights but diminishes A's? If an affirmative answer is given, the statute does not apply.

<sup>95</sup>After this article was in type the Court handed down its opinion in *Helvering v. Hallock*, 308 U. S. —, C. C. H., U. S. Sup. Ct. Serv., Oct. Term 1939, Opin. Vol. 8417 (Jan. 29, 1940), holding that the "possession or enjoyment" clause applies to the possibility of reverter case and expressly overruling the two *St. Louis Union Trust Co.* cases herein discussed.