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TAXATION-TECHNICAL CHANGES ACT OF 1949-"POSSESSION OR ENJOYMENT" CLAUSE OF I.R.C. 811 (c)

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TAXATION—TECHNICAL CHANGES ACT OF 1949—"POSSESSION OR ENJOYMENT" CLAUSE OF I.R.C. 811(c)—For the past decade Congress has been urged to define specifically the scope of I.R.C. 811(c),[1] which subjects to the estate tax an inter vivos transfer intended to take effect in possession or enjoyment at or after the donor's death. Until 1949 proposed amendments[2] were largely directed at legislative rejection of the doctrine of *Helvering v. Hallock,*[3] but with the decisions in the *Church*[4] and *Spiegel*[5] cases last year, it became apparent that more extensive revision and clarification was needed.[6] Sections 7 and 8 of the Technical Changes Act of 1949,[7] which became law on October 25, 1949, represent the attempt of Congress to meet this need. The application of these sections to specific types of transfers forms the basis of the discussion which follows.

[1] Int. Rev. Code, 26 U.S.C.A. §811(c) (1948).

[2] The American Bar Association in 1945 proposed that a transfer taxable under §811(c) because of the retention of a possibility of reverter should be taxed only to the extent of the value of the reversionary interest. 70 A.B.A. REP. 138 (1945). Similar recommendations were advanced in REPORT OF THE COMMITTEE ON FEDERAL FINANCE (Chamber of Commerce) 19-20 (Dec. 1946) and REPORT PROPOSING AMENDMENTS TO FEDERAL INCOME, ESTATE AND GIFT TAX LAWS (Committee on Taxation, Trust Div., Am. Bankers' Assn.) 27-33 (Jan. 1946).

[3] 309 U.S. 106, 60 S.Ct. 444 (1940). The Hallock doctrine is discussed below, at p. 673. See also, Eisenstein, "The Hallock Problem," 58 HARV. L. REV. 1141 (1945); MONTGOMERY, FEDERAL TAXES 560, 561 (1948-9).

[4] Comr. v. Church, 335 U.S. 632, 69 S.Ct. 322 (1949).

[5] Spiegel v. Comr., 335 U.S. 701, 69 S.Ct. 301 (1949).

[6] The problems raised by the Church and Spiegel cases are discussed by Schrenk and Wellman in "The Church and Spiegel Cases," 47 MICH. L. REV. 655 (1949). Rejection of the Church case was proposed in "Program and Committee Reports to be Presented at the Tenth Annual Meeting," Section of Taxation, A.B.A. 19-21 (1949).

[7] P.L. 378, 81st Cong., 1st sess. (1949). The Technical Changes Act made its first appearance in Congress as H.R. 5268.

I

Reservation of an Interest in, or Control Over, Income

Section 302(c) of the Revenue Act of 1926,[8] following earlier estate tax legislation, provided that transfers "intended to take effect in possession or enjoyment at or after [the donor's] death," should be included in his gross estate. In *May v. Heiner,*[9] the Supreme Court held that the statute did not cover a transfer by which the donor had divested himself of all the incidents of ownership except the right to enjoy the income for his life. A year later the Supreme Court reaffirmed the doctrine of *May v. Heiner* in three per curiam opinions.[10] These decisions spurred Congress to enact the Joint Resolution of March 3, 1931,[11] in order to define more precisely the scope of section 302(c). The joint resolution made taxable any transfer made by a donor during his life under which he retained for his life or for any period not in fact ending before his death, the possession or enjoyment of the property, or the right to designate the persons who should enjoy the property or income. In 1932 section 302(c) was further amended to include any transfer under which the donor reserved any of the enumerated interests for any period not ascertainable without reference to his death.[12] In *Hasset v. Welch*[13] it was held that these various amendments were not intended to be applied retroactively. Thus the rule of *May v. Heiner* was permitted to stand with respect to transfers made prior to March 4, 1931, or in certain cases to transfers before June 7, 1932. In the early years of this decade, the Supreme Court tended to restrict the doctrine of *May v. Heiner.* Thus it was thought that *Helvering v. Hallock*[14] was "a complete rejection of the rationale of *May v. Heiner.*"[15] Following this reasoning, the Board of Tax Appeals reached a result contrary to *May v. Heiner* in two reported cases.[16] Also, one interpretation of the later *Fidelity Trust Co.*[17] case was that a transfer

[8] 44 Stat. L. 70 (1926).

[9] 281 U.S. 238, 50 S.Ct. 286 (1930); 67 A.L.R. 1244 (1930).

[10] Burnet v. Northern Trust Co., 283 U.S. 782, 51 S.Ct. 342 (1931); Morsman v. Burnet, 283 U.S. 783, 51 S.Ct. 343 (1931); McCormick v. Burnet, 283 U.S. 784, 51 S.Ct. 343 (1931).

[11] 46 Stat. L. 1516 (1931).

[12] Revenue Act of 1932, §803(a), 47 Stat. L. 279 (1932).

[13] 303 U.S. 303, 58 S.Ct. 559 (1938).

[14] 309 U.S. 106, 60 S.Ct. 444 (1940); 125 A.L.R. 1368 (1940).

[15] Comr. v. Church, 335 U.S. 632 at 645, 69 S.Ct. 322 (1949).

[16] Estate of M. H. Hughes, 44 B.T.A. 1196 (1941); Estate of H. A. Worcester, 47 B.T.A. 909 (1942).

[17] The Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U.S. 108, 65 S.Ct. 508 (1945); 159 A.L.R. 227 (1945). See Schrenk and Wellman, "The Church and Spiegel Cases," 47 MICH. L. REV. 655 at 659-660 (1949).

was taxable under section 811(c) of the code if the donor reserved any type of reversionary interest in addition to a life interest. Finally, in 1949, the Supreme Court overruled *May v. Heiner* in the case of *Commissioner v. Church.*[18] Thus pre-1931 trusts[19] were held taxable under the original language of section 402(c) of the 1926 act. To cushion the effect of the *Church* decision, Treasury Decision 5741 was issued to exempt pre-1931 trusts which had been created by donors who died before January 17, 1949, the date of the *Church* case.

One of the reasons the Senate Finance Committee amended the original House bill was to abrogate the *Church* case and thereby restore the rule of *May v. Heiner.*[20] However, under Treasury pressure, the conference committee of the Senate and House diluted the Senate objective to arrive at the form of the bill as finally adopted.[21] Section 7(a) of the Technical Changes Act reincorporated the language of section 811(c) with respect to the life interests to which tax liability is keyed.[22] For that reason the amended 811(c) should not reach any new types of transfers under which the donor reserves life or income interests.

[18] 335 U.S. 632, 69 S.Ct. 322 (1949).

[19] For the sake of convenience the term, "pre-1931 trusts" will be used to refer to transfers made prior to March 4, 1931, in which an interest was retained for the life of the donor or for any period not in fact ending before his death. It will also cover pre-June 7, 1932, transfers reserving an interest in the donor for a period not ascertainable without reference to his death.

[20] "Section 7 of the bill was added by your committee. It is designed to overcome the decision of the Supreme Court in the case of Commissioner v. Church.... It is the opinion of your committee that after all these years, persons are entitled to rely on the long standing interpretation of May against Heiner as to these old trusts, and section 7 is designed to accomplish that result." Statement on the floor of the Senate by Senator George on September 16, 1949: 95 CONG. REC. 13234 (1949). Accord, S. Rep. 831, 81st Cong., 1st sess., p. 7 (1949).

[21] "The Senate amendment has the effect of overruling the Church decision.... regardless of the date when the decedent died. The Senate amendment was vigorously opposed by the Treasury, and the conferees were able to work out a satisfactory compromise which provides substantial relief in hardship cases." Statement of Representative Lynch on the floor of the House, October 13, 1949, 95 CONG. REC. 14730 (1949).

[22] Section 7(a) of P.L. No. 378, 81st Cong., 1st sess. (1949) provides: "To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—(B) 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 (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) 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."

Section 7(b)[23] of the bill expressly excepts from the operation of the amended section 811(c) any pre-1931 trusts created by donors who die before January 1, 1950. For those donors the rule of *May v. Heiner* is reinstated.[24] But for all who die after December 31, 1949, the rule of the *Church* case is applicable.[25] To cushion the tax effects of this amendment the bill permits the donors of pre-1931 trusts to release any life interests they may have retained in those trusts, without incurring gift tax or estate tax liability for such action.[26] Thus if a donor is willing to give up his enjoyment of retained life interests he may escape the *Church* doctrine if he acts in the years 1949 and 1950.[27] The privilege was made to cover the entire year of 1949 to benefit donors who had acted immediately after the *Church* case to avoid its consequences. No special provisions are made for donors of

[23] Section 7(b) of P.L. 378, 81st Cong., 1st sess. (1949) provides: "The provisions of Section 811(c)(1)(B) of such code [see note 22, supra] shall not, in the case of a decedent dying prior to January 1, 1950, apply to—(1) a transfer made prior to March 4, 1931; or (2) a transfer made after March 3, 1831, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

[24] "[I]f a decedent dies before January 1, 1950, holding a life estate in one of these old trusts, the trust is not required to be reported by him for estate tax purposes by reason of the life estate he retained. This same rule is applied to certain trusts which were created between March 3, 1931, and the date of the Revenue Act of 1932 which were first made taxable by the provisions of the 1932 act." Statement of Representative Lynch on the floor of the House, October 13, 1949, 95 CONG. REC. 14730 (1949).

[25] "If the transferor dies after December 31, 1949, the property will be includible, under the conference amendments, in his gross estate under subparagraph (B) of section 811(c)(1) of the code." Id., p. 14567. "The principle of the Church decision is, however, retained for the future." Id., p. 14730.

[26] Section 8 of P.L. 378, 81st Cong., 1st sess. (1949) provides: "In the case of a transfer of property made prior to June 7, 1932, under which the grantor retained (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, then an assignment by the grantor of such possession, enjoyment, or the right to income, or a relinquishment by him of such right of designation, shall, if made in 1949 or 1950, not be deemed a transfer of property for the purposes of Chapter 4 of the Internal Revenue Code, and shall, if made prior to 1951, not be deemed to have been made in contemplation of death within the meaning of Chapter 3 of such code. The foregoing provisions shall not apply—(A) if the transfer was made after March 3, 1931, and prior to June 7, 1932, and if the property transferred would have been includible in the grantor's gross estate upon his death by reason of the amendatory language of the Joint Resolution of March 3, 1931 (45 [sic] Stat. 1516); or (B) if the property transferred would have been includible in the grantor's gross estate under section 811(d) of the Internal Revenue Code had he died on October 7, 1949."

[27] "On the other hand, a living grantor of one of these old trusts is given until the end of 1951[0?] to dispose of his life estate in such trust without gift or estate tax consequences. If he does not dispose of his interest prior to that date, the conference amendments do not grant him any relief from the effects of the Church decision." Statement of Representative Lynch on the floor of the House, October 13, 1949, 95 CONG. REC. 14730 (1949)

pre-1931 trusts who are under a disability preventing them from relinquishing retained life interests during 1949 and 1950. The release is available to donors regardless of the presence or absence of reversionary interests they may have reserved. It is expressly provided, however, that if the transfer would have fallen under the provisions of section 811(d) of the code on October 7, 1949, then the donor may not make a tax-free release.[28] This proviso preserves the effectiveness of section 811(d) which deals with powers retained over the corpus of the trust. The discrepancy in dates picked for the application of the amendment (January 1, 1950) and the availability of the tax-free release (December 31, 1950) may cause hardship in the case of a donor who lives to the end of 1949, but dies in 1950 before releasing his life estate.

The bill contains no suspension of the statute of limitations with respect to transfers taxed under the *Church* doctrine before the passage of this amendment.[29] Thus an executor's right to apply for a refund is subject to the usual restrictions and limitations imposed by the code.

II

Transfers Made Prior to October 8, 1949—Without Retention of a Reversionary Interest

In overruling *May v. Heiner,* the Court in the *Church* case attempted to re-interpret the meaning of the "possession or enjoyment" clause of section 811(c). The Supreme Court, speaking through Justice Black, redefined the phrase in language much broader than was

28 "[B]ut such a transferor is given certain tax-free privileges if he disposes of his income interest prior to 1951. Specifically, the conference amendments provide that persons who make such transfers prior to March 4, 1931, may assign or relinquish their income interests during 1949 and 1950 free of gift tax, and also provide that such assignments or relinquishments shall, if made at any time prior to 1951, not be deemed to have been made in contemplation of death. This privilege of tax-free assignment or relinquishment is available without regard to whether the transferor also has a reversionary interest in the property, but is not available where the transferor had on October 7, 1949, a power over the transferred property, and not over the income interest only, which would require the inclusion of the property under section 811(d) of the code." H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 32.

29 Section 7(c) of P.L. 378 expressly excludes *Church*-type transfers from its provisions relating to the suspension of the statute of limitations. Statements on the floor of the House, October 13, 1949; 95 CONG. REC. 14731 (1949): "Mr. Byrnes of Wisconsin. But that in the case of the Church decision relating to life estates, no provision is made to reopen those cases barred by res adjudicata or by the statute of limitations; is that correct? Mr. Lynch. That is correct.... Mr. Harris. In other words, those cases affected by the Church case would not be opened up if the statute of limitations barred them. Mr. Lynch. That is right. Mr. Harris. But if the statute of limitations has not run, then by application for a refund, it would be repaid? Mr. Lynch. That is correct."

necessary to overrule *May v. Heiner*. It was said, to be tax free, "... such a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies."[30] This broad dictum of Justice Black was open to many interpretations.[31] Would the fact that a donor had retained the powers of a trustee over the transferred property suffice to include it within his gross estate? And even in the absence of any retained interest was "possession or enjoyment" now to be viewed exclusively from the position of the beneficiaries of the transfer? In other words, if a beneficiary's economic use of the transferred property were postponed until the donor's death, would it be taxable? If so, both the *Northern Trust Co.*[32] and *Shukert v. Allen*[33] cases would be in jeopardy, for in neither case could the beneficiaries get the present use of their interests until after the death of the donor.

Section 7(a) of the Technical Changes Act resolved these questions with respect to the interpretation of the words, "possession or enjoyment" with respect to transfers made before October 8, 1949. The amended section 811(c) is expressly qualified in subsection (2) to include only those transfers under which the donor retained a reversionary interest. Thus a transfer under which the income is to be accumulated for the life of the donor and then distributed with the corpus at his death to named beneficiaries is not within the terms of the statute. Nor are other types of transfers taxable although the death of the donor is made a critical factor in determining the identity of the ultimate beneficiaries. For instance if *S* conveys to *A* and his heirs for the life of *S* remainder to *B* and his heirs, but if *B* die before *S* then to C and his heirs, nothing is includible in *S*'s gross estate under 811(c). In effect the Technical Changes Act has reaffirmed the doctrine of the *Northern Trust Co.* case, so that if a donor has parted with all the attributes of ownership during his life nothing will be includible in his gross estate. Nor would the reservation of the powers of a trustee over the transferred property by the donor be sufficient

30 Comr. v. Church, 335 U.S. 632 at 646, 69 S.Ct. 322 (1949).

31 For a discussion of the possible consequences, see Schrenk and Wellman, "The Church and Spiegel Cases," 47 MICH. L. REV. 655 at 670-672 (1949).

32 Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123 (1929). There the transfer of an interest to *A* for the life of the donor, remainder over, was held to be not taxable under I.R.C. §811(c) because the donor, during his lifetime, had parted with all the attributes of ownership. In dissenting to the Church case, Justice Reed suggests that the majority opinion in effect had overruled the Reinecke case. Comr. v. Church, 335 U.S. 632, 69 S.Ct. 322 (1949).

33 273 U.S. 545, 47 S.Ct. 461 (1927) involved a transfer under which the income was to be accumulated for a period not in fact ending upon the donor's death. The transfer was not taxable.

to subject the transfer to estate tax liability. With respect to transfers made prior to October 8, 1949, the "possession or enjoyment" clause of section 811(c) is effective only if the donor has retained a reversionary interest.

III

Transfers Made Prior to October 8, 1949—With Retention of a Reversionary Interest

Although provisions of the federal estate tax have sought since 1916[34] to reach inter vivos transfers intended to take effect in possession or enjoyment at or after the death of the donor, Congress has left to the courts the ultimate task of determining the particular types of transfers which fall within this classification. In *Reinecke v. Northern Trust Co.*[35] the rule was enunciated that a transfer could not be classified as intended to take effect in possession or enjoyment at or after the donor's death unless some interest in the property transferred passed from him at that time.[36] This decision, by emphasizing the effect of death on the donor's relation to the property transferred, set the pattern for a series of cases in which the Supreme Court struggled to give respect to that emphasis without permitting tax evasion through transfers "too much akin to testamentary dispositions not to be subjected to the same excise." These cases dealt with transfers which may be roughly divided into two groups: those by which the donor reserved a life estate in the property, and those by which the donor retained until his death a chance to recapture the property. Since the tax consequences of the reservation of a life estate are specifically dealt with elsewhere in this paper,[37] the first group is passed here with the observation that in the *Church*[38] case the Supreme Court recognized the retention of a life income interest as a sufficient basis for tax liability on the ground that "possession or enjoyment" of the property, in the connotation of actual use, accrued to the donee only at the donor's death, the donor having retained it until that time. The discussion which follows deals with transfers of the second group, those of the

[34] For a history of these provisions, see 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION §7.06 (1942).

[35] 278 U.S. 339, 49 S.Ct. 123 (1929).

[36] Two years earlier the Supreme Court had indicated its probable approval of this rule in Shukert v. Allen, 273 U.S. 545, 47 S.Ct. 461 (1927), where it held that an inter vivos transfer which was "immediate and out and out, leaving no interest in the testator" was not intended to take effect in possession or enjoyment at or after death.

[37] See Section I, supra.

[38] Comr. v. Church, 335 U.S. 632, 69 S.Ct. 322 (1949).

"Hallock" type, where, although the interest transferred to the donee vested inter vivos, the donor had stipulated that the property should return to him if he survived the donee. The *Hallock*[39] decision, framed against the background of the rule of *Reinecke v. Northern Trust Co.*, requiring the transmission of some interest in the property at the donor's death, sets forth the test by which a "Hallock-type" transfer is equated with a testamentary disposition and taxed as a transfer intended to take effect in possession or enjoyment at or after the donor's death. The requisite equation is satisfied if two interdependent conditions are met: (1) the donee's interest in the property was not freed from possible defeasance until the donor's death, because (2) the donor retained until his death a chance to recapture the property. Under this test "possession or enjoyment" is interpreted as referring not to the actual use of the property, but to that point at which the donee's ownership of the interest transferred becomes absolute, the reference point being the donor's death. Even though the concepts of property law require the conclusion that the legal interest passed inter vivos, the requirement of a transmission of some interest in the property at the donor's death is deemed satisfied by the donor's retention until that time of a chance to recapture the property.[40] From the interdependence of the conditions of the test it follows that the donor's chance of recapturing the property is as important as the fact that the donee's interest in the property is made secure only at the donor's death. In practice, however, the Supreme Court gradually minimized the importance of this element of the test, disregarding the actual probability of recapture and looking only to the form of the transfer to determine if recapture would in terms be possible.[41] With the decision in the *Spiegel*[42] case last year, in which the possibility of the donor's recapturing the property was created only by operation of law and was worth but .007% of the value of the property transferred,[43] the Supreme Court finally arrived at the point where its classification of transfers bore only a formal relation to the classification as conceived in the *Hallock* case. The position of the taxpayer was not enviable; the decisions warned him that transfers bearing too close a resemblance to testamentary dispositions would be taxed as such, but grew progressively less helpful in defining that resemblance.

[39] 309 U.S. 106, 60 S.Ct. 444 (1940).

[40] Id. at 112.

[41] Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U.S. 108 at 111-112, 65 S.Ct. 508 (1945); Goldstone v. United States, 325 U.S. 687 at 692-693, 65 S.Ct. 1323 (1945).

[42] Spiegel v. Comr., 335 U.S. 701, 69 S.Ct. 301 (1949).

[43] S. Rep. 831, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 24 at 30.

By section 7(a) of the Technical Changes Act, Congress has sought to eliminate the disparity between the theory and the tax consequences of the test when applied in determining whether transfers were intended to take effect in possession or enjoyment at or after death. For transfers made after October 7, 1949 a new test has been established, but with respect to transfers made before October 8, 1949 the legislative solution takes the form of a system of provisos, contained in a new paragraph of the Internal Revenue Code, 811(c)(2).[44] These provisos attempt to bridge the gap between theory and practice by prohibiting the inclusion of an interest in property in a decedent's gross estate, even though it was the subject of a transfer intended to take effect in possession or enjoyment at or after his death, unless the decedent retained a reversionary interest meeting definite statutory requirements. A reversionary interest is defined, for the purposes of section 811(c)(2), as a "possibility that the property transferred by the decedent (A) may return to him or his estate, or (B) may be subject to a power of disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him."[45] By treating a possible power of disposition as the equivalent of a possibility of recapturing the property, section 811(c)(2) carries through the equating of these possibilities that the Supreme Court established in applying the *Hallock* doctrine.[46] The withdrawal of all transfers from the effective scope of the "possession or enjoyment" clause of section 811(c),

[44] Section 7(a) of P.L. 378, 81st Cong., 1st sess. (1949). "Technical Changes Act" creates §811(c)(2), which reads: "(2) TRANSFERS TAKING EFFECT AT DEATH—TRANSFERS PRIOR TO OCTOBER 8, 1949.—An interest in property of which the decedent made a transfer, or on before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1)(C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property. For the purposes of this paragraph, the term 'reversionary interest' includes a possibility that property transferred by the decedent (A) may return to him or his estate, or (B) may be subject to a power of disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the commissioner with the approval of the secretary. In determining the value of a possibility that the property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate."

[45] See note 11, supra.

[46] Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U.S. 108 at 110-111, 65 S.Ct. 508 (1945).

with the exception of those in which a chance to recapture the property has been retained, has the direct effect of determining the meaning of "possession or enjoyment" by reference to the point at which the donee's ownership of the transferred property becomes absolute. In view of the exclusion of a life estate, vested or contingent, from the statutory definition of a "reversionary interest,"[47] the interpretation of possession or enjoyment in the lay sense, which the Supreme Court advanced in the *Church*[48] case in taxing a transfer by which the decedent had retained only a life estate, is rejected with respect to past transfers. The Technical Changes Act thus establishes the *Hallock* doctrine as the test applicable to all transfers made before October 8, 1949 in determining whether they were intended to take effect in possession or enjoyment at or after death,[49] retaining the *Hallock* conception of a transmission of an interest in the property at the donor's death, as required by the *Northern Trust Co.*[50] case. The legislative solution seems basically sound, for it retains the test upon which taxpayers have in the past relied in avoiding transfers which may be taxed as testamentary dispositions, but gives the taxpayer an element of security in his reliance through the restrictions on "reversionary interests" discussed in the succeeding paragraphs.

Unless the value of the reversionary interest immediately before the donor's death exceeds 5% of the value of the property transferred, no part of such property is includible in his gross estate under the "possession or enjoyment" clause of section 811(c).[51] This provision represents a substantial victory for the taxpayer. It overthrows the position of the Supreme Court, assumed first in the *Fidelity*[52] case and later in the *Goldstone*[53] and *Spiegel*[54] cases, that the remoteness of a reversionary interest is of no consequence in determining whether a transfer is inherently testamentary in character. It gives a new vitality

[47] Note 44, supra.

[48] Discussed in section II, supra.

[49] This statement assumes that the "at or after" language of the statute does not permit taxation of a transfer which is not conditioned upon survivorship, such condition being essential under the Hallock doctrine. This assumption is justified on the basis of the intent of those who drafted the Technical Changes Act (see note 75, infra), although a question of its validity is raised by the language of §811(c)(2). The problem is discussed at page 678, infra.

[50] Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123 (1929).

[51] Note 44, supra.

[52] Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U.S. 108 at 111-112, 65 S.Ct. 508 (1945).

[53] Goldstone v. United States, 325 U.S. 687 at 692-693, 65 S.Ct. 1323 (1945).

[54] Spiegel v. Comr., 335 U.S. 701 at 707, 69 S.Ct. 301 (1949).

to the rationale of the *Klein*[55] decision, as interpreted by Justice Frankfurter in the *Hallock*[56] case, by directing that inquiry be made in each case to determine whether the transfer being classified is in fact akin to a testamentary disposition. It may be argued that the selection of a reversionary interest worth 5% of the value of the property transferred as a dividing line between transfers which may and may not be taxed is wholly arbitrary. By what standard was it determined that at that particular point an inter vivos transfer can be realistically equated with a transfer by will? The answer must be that there is no definitive standard; the ultimate merit of the dividing line lies not in its inherent accuracy, but in its existence. It represents a compromise, worked out in conference, between the amendment to section 811(c) proposed by the Senate and the vigorous opposition of the Treasury to that amendment.[57] The Senate would have discarded the judicial meaning of the words "intended to take effect in possession or enjoyment at or after death" and permitted only the value of the retained reversionary interest to be included in a decedent's gross estate.[58] This amendment ignored the reasoning which likens an inter vivos transfer to a testamentary disposition. The reasoning was retained, but the need for some restraint had been firmly impressed upon the Senate,[59] and the 5% limitation represents the conference committee's attempt to provide a workable solution.[60] A more substantial criticism may be aimed at the difficulty of determining the value of the reversionary interest in proportion to the value of the property transferred.[61] In the area of valuation, black and white are rare shades,

[55] Klein v. United States, 283 U.S. 231, 51 S.Ct. 398 (1931).

[56] Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444 (1940). Justice Frankfurter said, at 112: "The inescapable rationale of... [the Klein] decision, rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to the refined technicalities of the law of property. It also taxes inter vivos transfers that are too much akin to testamentary dispositions not to be subjected to the same excise."

[57] Statement by Rep. Lynch at p. 14730 of the *Congressional Record*, October 13, 1949.

[58] For a discussion of the Senate amendment, see S. Rep. 831, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 24 at 32.

[59] Ibid.

[60] It is interesting to note the similarity of the legislative solution to the judicial limitations developed by the lower courts, which held the Hallock doctrine inapplicable where the reversionary interest was very remote or arose by operation of law. See Spencer, "A Common Sense Rule for Hallock Cases," 59 HARV. L. REV. 43 at 65 (1945) for a collection of cases. Cf. Comr. v. Bank of Calif., (C.C.A. 9th, 1946) 155 F. (2d) 1 and Comr. v. Bayne's Estate, (C.C.A. 2d, 1946) 155 F. (2d) 475, both decided after the Fidelity case, note 52, supra.

[61] In this connection the conference committee has taken the position that in ascertaining the proportionate value of the reversion it is to be compared with the entire value of the transferred property, including interests not dependent upon survivorship of the decedent.

and a line drawn on a mathematical basis would seem to involve what has been termed "delusive exactness."[62] Responsibility for ascertaining this value has been placed upon the commissioner, who is required to provide regulations which accord with "usual methods of valuation, including the use of tables of mortality and actuarial principles."[63] The commissioner may now be embarrassed by his practice, approved by the Supreme Court,[64] of assigning a value of zero to reversions incapable of valuation under recognized actuarial principles. Although this practice has eliminated tax-savings otherwise available under the gift tax,[65] it will result in a loss of revenue rather than a gain under the new estate tax provisions.[66] This disadvantage accruing to the commissioner may be more than offset, however, by the rule which gives to his determinations the benefit of presumptive accuracy[67] and places the burden of proof on the taxpayer when they are disputed.[68]

It is further provided in section 811(c)(2) that the reversionary interest must arise by the express terms of the instrument of transfer and not by operation of law.[69] The effect of this provision is to emasculate the *Spiegel* case, where it was held that whether the donor's chance of recapturing the property was created expressly or by operation of law is immaterial in determining whether the transfer was intended to take effect in possession or enjoyment at the donor's death.[70] The

Included, for example, would be the value of outstanding life estates. Valuation is also to be made without regard to whether the decedent's executor elects to have the gross estate valued as provided under §811(J). See H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 33.

[62] Martin v. Dist. of Columbia, 205 U.S. 135 at 139, 27 S.Ct. 440 (1907). See also, 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION §18.04 (1942): "Valuation as a Compromise Process."

[63] Note 44, supra.

[64] Robinette v. Helvering, 318 U.S. 184, 63 S.Ct. 540 (1943).

[65] Id. at 188.

[66] H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31, which states, at 33: "The value [of the reversionary interest] shall be ascertained as though the decedent were, immediately before his death, making a gift of the property and retaining the reversionary interest. The rule of Robinette v. Helvering..., under which a reversionary interest not having an ascertainable value under recognized valuation principles is considered to have a value of zero, is to apply."

[67] Welch v. Helvering, 290 U.S. 111, 54 S.Ct. 8 (1933); see also, Cerf v. Comr., 1 T.C. 1087 at 1097 (1943); DuPont v. Comr., 2 T.C. 246 at 260 (1943). This presumption, however, is limited in that the commissioner's valuation will be rejected by the court if found to be arbitrary and excessive, Helvering v. Taylor, 293 U.S. 507, 55 S.Ct. 287 (1935).

[68] Forbes v. Hasset, (C.C.A. 1st, 1942) 124 F. (2d) 925; PAUL, FEDERAL ESTATE AND GIFT TAXATION (1946 Supp.) §18.03.

[69] Note 44, supra.

[70] Spiegel v. Comr., 335 U.S. 701 at 705, 69 S.Ct. 301 (1949).

criticism may be made that the exclusion of all reversionary interests created by operation of law is too broad and opens the door to an ingenious transfer so framed as to give rise to a substantial chance of recapturing the property. This criticism is unrealistic; section 811(c)(2) applies only to transfers made prior to October 8, 1949, when there was no incentive to avoid the estate tax in this manner.[71]

Whether the retention of a reversionary interest not conditioned on survivorship will subject the value of the property transferred to the estate tax under the "possession or enjoyment" clause of section 811(c) remains in some doubt. Although this question was expressly determined in favor of the taxpayer six years ago in *Lloyd's Estate v. Commissioner*,[72] the *Fidelity* case, as reinterpreted in the *Goldstone*[73] decision, and the dicta of Justice Black in the *Spiegel*[74] case indicate that a reversal could be expected, if the question were again presented. Despite the clear intent of the conference committee that a condition of survivorship is essential,[75] a contrary result is invited by the language of section 811(c)(2) defining a reversionary interest as a possibility that the transferred property may return to the decedent "or his estate."[76] By this definition ample room is provided for a decision taxing a transfer in which the donor's chance to recapture the property was not conditioned upon his survival on the theory that the transfer was intended to take effect in possession or enjoyment at *or after* death.[77] For the present, however, the Treasury has taken the position

[71] The selection of October 8, 1949, the date of adoption of the bill in conference, as the critical date, rather than October 25, 1949, the date on which the President signed the bill, may have been made purposely to forestall interim transfers designed to evade the estate tax.

[72] (C.C.A. 3d, 1944) 141 F. (2d) 758.

[73] Goldstone v. United States, 325 U.S. 687, 65 S.Ct. 1323 (1945). At 693, in a footnote by the Court, the transfer in the Fidelity case is interpreted as creating a remainder not dependent upon survivorship of the grantor. For a full discussion of the possible interpretations of the Fidelity case, see Schrenk and Wellman, "The Church and Spiegel Cases," 47 MICH. L. REV. 655 at 658-660 (1949).

[74] Spiegel v. Comr., 335 U.S. 701 at 705, 69 S.Ct. 301 (1949), where Justice Black states that "a trust transaction cannot be held to alienate all of a settlor's 'possession or enjoyment' under §811(c) unless it effects a 'bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. . . . [The] settlor must be left with no . . . possible reversionary interest in that title. . . .' "

[75] See H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 33, where it is stated: "The existing rule that a transfer of a property interest is not intended to take effect in possession or enjoyment at or after the decedent's death unless the beneficiaries must survive the decedent to obtain possession or enjoyment is not disturbed." This statement immediately precedes an example of a transfer not taxable although a reversionary interest not conditioned on survivorship was retained by the decedent.

[76] Note 44, supra.

[77] It has been pointed out that such a decision would require examination of the transfer at the time of the donor's death in determining its effect. Schrenk and Wellman, "The Church

that it will not attempt to reach this type of transfer. Regulation 105, section 81.17 was amended after the *Spiegel* case was decided, and example (2), which is in accord with the *Lloyd* case, was left intact.[78] However, even if the Treasury should reverse its position, and the Supreme Court were willing to overrule the *Lloyd* case, the reversionary interest, falling within the provisos of section 811(c)(2), would have to exceed 5% of the value of the property transferred as a prerequisite to the inclusion of the transferred property in the donor's gross estate.[79]

Section 811(c)(2) applies to the estates of persons dying after February 10, 1939.[80] Refund or credit for overpayments made prior to the date of enactment, and resulting from the application of section 811(c)(2), is allowed without interest,[81] provided a claim is filed within one year from this date, i.e., October 25, 1949.[82] Such refund or credit will be allowed even though the claim was barred by the statute of limitations or the doctrine of res judicata on October 25, 1949, or becomes barred within one year after that date.[83] If a claim for refund or credit has been barred by a closing agreement[84] or compromise,[85] however, it is not reinstated.[86]

IV

Transfers Made After October 7, 1949

Whether a transfer made after October 7, 1949 is intended to take effect in possession or enjoyment at or after the donor's death is to be

and Spiegel Cases," 47 MICH. L. REV. 655 at 670 (1949). If the transfer were examined in the light of events at the time it was created, no reference point would exist for the purpose of determining when the donee's ownership of the transferred interest becomes absolute, for it would be impossible to ascertain whether the donor's reversionary interest would be determined before or after his death.

78 See T.D. 5741, 1949-20 I.R.B. 10 (September 6, 1949) where the commissioner states: "No amendments are required as a result of the decision in Estate of Sidney M. Spiegel v. Commissioner. . . ."

79 The value of a reversionary interest not conditioned on survivorship and worth less than 5% of the value of the transferred property would be includible in the decedent's estate under §811(a), however, as an interest in property owned by the decedent at the time of his death. See Treas. Reg. 105, §81.13.

80 Technical Changes Act, §7(b).

81 Ibid.

82 Id., §7(c).

83 Ibid. The refund provision is discussed in H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 36.

84 Int. Rev. Code, 26 U.S.C.A. 3760 (1939).

85 Int. Rev. Code, 26 U.S.C.A. 3761 (1939).

86 Technical Changes Act, §7(c).

determined by a new test. It is no longer essential to such classification that the property pass from the possession or control of the donor at his death.[87] By eliminating this requirement, established in the *Northern Trust Co.*[88] case and preserved under the *Hallock* doctrine,[89] Congress has shifted the basis of tax liability. Transfers are to be examined not to determine the effect of death on the donor's interest in the property, but to determine its effect on the interests of his beneficiaries. This shift in emphasis has been accomplished through amendment to I.R.C. 811(c), creating paragraph (3).[90] By this paragraph Congress has fastened on the necessity of the donee's surviving the donor as the factor controlling tax liability, "whether or not the decedent retained any right or interest in the property transferred."[91]

Section 811(c)(3) establishes two broad categories,[92] under either of which a transfer may be classified as intended to take effect in possession or enjoyment at or after the donor's death. The first of these reaches a transfer by which possession or enjoyment of the property, through ownership of the transferred interests, can be obtained only by surviving the donor. The second reaches a transfer by which possession or enjoyment of the property can be obtained, through ownership of the transferred interest, only by surviving the first to occur

[87] "The taxability of . . . [transfers made after October 7, 1949] is, however, not dependent upon the retention by the transferor of an interest in the property, thus rendering inapplicable the contrary rule enunciated by the Supreme Court in Reinecke v. Northern Trust Co. . . that the property must pass from the possession or control of the transferor at his death." H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 34.

[88] Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123 (1929).

[89] See page 673, supra.

[90] Section 7(a) of P.L. 378, 81st Cong., 1st sess. (1949), "Technical Changes Act" creates §811(c)(3), which reads: "(3) TRANSFERS TAKING EFFECT AT DEATH—TRANSFERS AFTER OCTOBER 7, 1949.—An interest in property transferred by the decedent after October 7, 1949, shall be included in his gross estate under paragraph (1)(C) of this subsection (whether or not the decedent retained any right or interest in the property transferred) if and only if—

"(A) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent; or

"(B) under alternative contingencies provided by the terms of the transfer, possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the earlier to occur of (i) the decedent's death or (ii) some other event; and such other event did not in fact occur during the decedent's life.

"Notwithstanding the foregoing sentence, an interest so transferred shall not be included in the decedent's gross estate under paragraph (1)(C) of this subsection if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a power of appointment as defined in Section 811(f)(2) which in fact was exercisable immediately prior to the decedent's death."

[91] Note 90, supra.

[92] These categories are set forth under (A) and (B) of the statute quoted in note 90, supra.

of two stated events, one of which is the donor's death. If the alternative event does not in fact occur during the donor's lifetime, the transfer is taxable. With respect to both classes of transfers it is provided that, "if possession or enjoyment of the property transferred could have been obtained by any beneficiary during the decedent's life through the exercise of a power of appointment as defined in Section 811(f)(2) which in fact was exercisable immediately prior to the decedent's death,"[93] the interest transferred is not includible in the decedent's gross estate.

Although it is not expressly defined, the meaning of "possession or enjoyment" may be fairly inferred from the language of the statute. By reference to the acquisition of possession or enjoyment "through ownership of (the transferred) interest,"[94] a distinction is drawn between the legal ownership of property and a present right to its use. The *Hallock* interpretation of possession or enjoyment, as referring to that point where the donee's ownership of the transferred interest becomes absolute, is rejected. Even though the donee's ownership is not subject to defeasance, the transfer is taxable if ownership of the transferred interest enables the donee to obtain the actual use of the property only by surviving the donor.

The scope of section 811(c)(3) is broad enough to reach the proceeds of insurance taken out by a decedent upon his own life and payable to a beneficiary other than himself. Since the beneficiary cannot obtain the face value of the policy unless he survives the insured, the creation of his right thereto could be taxed under section 811(c) as a transfer intended to take effect in possession or enjoyment at the donor's death. That Congress intended section 811(c)(3) to have this effect is unlikely, since life insurance is specifically treated under section 811(g). Under existing regulations,[95] however, the Treasury has taken the position that the proceeds of life insurance which escape the incidence of the estate tax under section 811(g) may, under proper circumstances, be reached under section 811(c).[96] Such a case would be presented where a policy insured the decedent's life and named a beneficiary other than the insured. If the decedent paid no premiums and possessed only the right to change the benefici-

[93] Note 90, supra.
[94] Ibid.
[95] Treas. Reg. 105, §81.25.
[96] PAUL, FEDERAL ESTATE AND GIFT TAXATION (1946 Supp.) §10.39, where the applicability of subsections of §811, other than (g), to life insurance is discussed.

ary, his assignment of that right would remove the proceeds of the policy from the scope of section 811(g).[97] Since the assignee, through ownership of the transferred interest, could obtain possession or enjoyment of the proceeds only by surviving the decedent, the assignment would fall within section 811(c).

In applying the provisions of section 811(c)(3) to specific transfers, it is first necessary to determine whether, under the terms of the transfer, the beneficiary must survive the donor in order to obtain present enjoyment of the property. As an illustration, consider the typical transfer of a life estate by the donor to another with remainder over. Even though the remainderman does not in fact take possession of his interest during the life of the donor, the transfer would not be taxed because it was possible for the remainderman to have obtained present possession while the donor lived.[98] Section 811(c)(3) reaches only those transfers under which possession or enjoyment can be obtained "if and only if" the beneficiary survives the donor.

Under the amended section, the transfer held taxable in *Klein v. United States*[99] will still be taxable. There the donor transferred a life estate with remainder to the life tenant if he survived the donor. The fact that the donor has a reversion is immaterial. However because the beneficiary's remainder interest is contingent upon his survival of the donor, the value of his interest is included in the donor's gross estate. Under the transfer, if the beneficiary ever takes possession or enjoyment of his transferred interest, it will be only because he has survived the donor. For that reason the *Klein* case transfer will be taxable in the future.

Somewhat of a problem is presented by a transfer under which a beneficiary is given a vested remainder subject to defeasance if he predecease the donor. Take the transfer, to *W* for life and remainder to *A*, but if *A* dies before the donor, remainder to *B* and his heirs. It is clear that on the death of *W*, *A* if living, will get present use of the property, even if the donor is still living. Consequently, it is not necessary that *A* survive the donor in order to obtain possession or

[97] Treas. Reg. 105, §81.27.

[98] "Example (1): The decedent, after October 7, 1949, transferred property in trust, providing for an estate for life in his daughter, and a remainder to the children of the daughter. No part of the property is includible. The daughter can possess and enjoy the property through ownership of the life estate without surviving the decedent. The same is true of the daughter's children with respect to their remainder interest." Statement of the House Managers, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 34.

[99] 283 U.S. 231, 51 S.Ct. 398 (1931).

enjoyment of the property in the first instance; but because it is necessary that *A* survive him to obtain *continued* possession or enjoyment *after the donor's death,* the transfer ought to be taxable. Thus, if *A* does not survive the donor, the economic enjoyment of the property will shift over to *B* and his heirs. Under analysis this transfer has the same effect as a transfer giving *A* a remainder contingent on surviving the donor, as under the *Klein* case. Under the transfer outlined above, assume that *W* dies first, then the donor, with *A* surviving. At the death of *W*, the life tenant, *A* gets the present use of the property, but only for the life of the donor. When the donor dies, *A* gets the right to continued possession and enjoyment of the property—a right which makes his interest in the property worth much more than before the contingency was determined. The only difference, apart from property refinements, between this transfer and that of the *Klein* case is that in the latter the donor is entitled to the present use of the property from the time of the life tenant's death to the date of his death with *A* surviving, whereas in the former, *A* is entitled to that period of enjoyment of the property. In both cases the tax consequences should be the same. Only the value of *A*'s remainder interest as of the donor's death would be reached, whether *A* has a contingent remainder or a vested remainder subject to defeasance. It is questionable whether tax consequences should hinge upon distinctions drawn between types of remainder interests. The Supreme Court has stated, "Nothing is to be gained by multiplying words in respect 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. . . ."[100]

The transfer in the paragraph above presents another problem. Because each transferred interest is to be regarded separately for the purpose of applying the tests of survivorship,[101] *A*'s remainder interest

100 Id. at 234. A similar sentiment was indicated by Justice Frankfurter in Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444 (1940): "Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth."

101 "Where separate interests are transferred to each of several beneficiaries the above rule [§811(c)(3)(A)] is to be separately applied to each interest. Thus, if beneficiary A receives an interest which enables him to obtain possession or enjoyment of the property without surviving the decedent and beneficiary B obtains an interest which enables him to obtain possession or enjoyment of the property only by surviving the decedent, it is only the transfer of the interest to beneficiary B which is intended to take effect in possession or enjoyment at or after the decedent's death." Statement of the House Managers, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 34.

will be included in the donor's gross estate, but *B*'s executory interest will not be included. The interest of *B* and his heirs is not conditioned upon survivorship of the donor, but upon *A* not surviving the donor. Consequently, it is possible for *B* and his heirs to obtain present possession of the property although the donor is still living. Because the interests transferred are to be viewed separately, only *A*'s interest is taxed on the donor's death.[102] Thus the commissioner will be presented with new and difficult problems of valuation of future interests for determining tax consequences of transfers after October 7, 1949.

Clearly, the *Lloyd's Estate*[103] type of transfer is not taxable in the future under section 811(c). There the donor gave an outstanding life estate with remainder over to descendants of the life tenant, but if none survived the life tenant, then back to the donor or his heirs. Assuming that the donor dies before the life tenant, the vested remainder in the descendants of the life tenant is not taxable to the donor because it is subject to divestment not upon failure to survive the donor, but upon failure to survive the life tenant. Whether the donor lives or dies is immaterial to the time at which the descendants of the life tenant obtain present possession of the property transferred.

Several well-known transfers are taxable if created after October 7, 1949, simply because the donor's life was utilized to measure the postponement of economic enjoyment of the transferred property by the beneficiaries. For instance, any transfer which amounts to giving a life estate to a beneficiary for the life of the donor, remainder over, is taxable to the extent of the value of the remainder interests.[104] Thus the *Reinecke*[105] transfer—income to *A* for five years after the

[102] "Example (4): The decedent, after October 7, 1949, transferred property in trust providing for payment of the income to his wife until her death, at which time the son would receive the corpus. If the son predeceased the wife the corpus was to revert to the decedent if living at his wife's death; and if the decedent was not then living, it was to pass to X or X's estate. The decedent was survived by his wife, his son, and X. Neither the interest transferred to the wife nor to the son is includible in the decedent's gross estate since each could, through ownership of his interest, obtain possession or enjoyment of the property even though the decedent was living. The interest transferred to X, however, is includible under section 811(c)(3)(A) (to the extent of the value of X's interest immediately after the decedent's death) since X's possession or enjoyment of the property, if it materializes could be obtained only by surviving the decedent. Section 811(c)(3)(B) has no application to this example." Statement of the House Managers, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 35.

[103] Lloyd's Estate v. Comr., (C.C.A. 3d, 1944) 141 F. (2d) 758.

[104] Spiegel v. Comr., 335 U.S. 701, 69 S.Ct. 301 (1949).

[105] Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123 (1929).

donor's life, remainder over—is taxable.[106] The remainderman cannot take possession of the transferred property until after the death of the donor. The *Hallock* case[107] involved a transfer of a life estate to *W*, remainder to *A*, but if the donor survived *W*, then the property should revert to him. This transfer is taxable[108] although (1) there is no necessity that *A* himself survive the donor to take, for if *A* is dead his heirs may still take the property if the donor dies before *W*, and (2) there is no possibility of defeasance of *A*'s possession or enjoyment if he once takes it. Taxability depends merely upon the fact that under no circumstances can *A* or his heirs obtain present possession of the property until after the death of the donor. Thus the condition of survivorship in the statute cannot refer to more than postponement in time of a beneficiary's actual present possession and enjoyment of the property. The terms, "only by surviving the decedent" do not connote that survivorship is a condition precedent to the vesting of an interest or condition subsequent to defeat an interest. It means nothing more than the mere postponement of enjoyment until the death of the donor.

Various types of accumulation transfers are made taxable if the date of distribution of the accumulated income and corpus is postponed until the donor's death.[109] However, the transfer in *Shukert v. Allen*[110] is not taxable in the future. In that case the donor had transferred property in trust to accumulate the income for thirty years, at which time the accumulated income and corpus were to be distributed to his children. Although this distribution was not in fact

106 "[I]f the transferor gives his son the immediate right to receive the income from the property until 5 years after the transferor's death, and the right to the corpus upon the expiration of such term, it is only the transfer of the latter interest which is intended to take effect in possession or enjoyment at or after the transferor's death." Statement of the House Managers, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 34.

107 Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444 (1940); 125 A.L.R. 1368 (1940).

108 "Example (2): The decedent, after October 7, 1949, transferred property in trust, to pay the income to his wife during her life, and at her death to pay the corpus to the decedent if living, and if not, to his children. The decedent was survived by his wife. The transferred property, less the outstanding life estate in the wife, is includible in the decedent's gross estate since the children cannot obtain possession or enjoyment of the property, through ownership of their interests, except by surviving the decedent." Statement of the House Managers, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 34-35.

109 "Example (3): The decedent, after October 7, 1949, transferred property in trust to accumulate the income during his life and at his death to distribute the principal and accumulated income to his son or the son's estate. While the decedent has retained no right or interest in the property, the transfer is taxable since possession or enjoyment of the property cannot be obtained except by surviving the decedent." Statement of the House Managers, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 35.

110 273 U.S. 545, 47 S.Ct. 461 (1927).

made until after the donor's death, it is not taxable for there was a possibility that the beneficiaries could get possession or enjoyment with the donor still living, if he survived the thirty year accumulation period. Under the language, "if and only if," this possibility, however remote, bars tax liability under section 811(c)(3). The house managers of the conference committee give the example: "The decedent, after October 7, 1949, transferred property in trust, to accumulate the income until his son reached the age of 30, or until the decedent's prior death. Upon the first to occur of these events the son was to receive the corpus. The decedent's death in fact occurred before his son attained the age of 30. The transfer is taxable under section 811(c)(3)(B) since the son could obtain possession or enjoyment only by surviving the earlier to occur of the decedent's death or the son's attaining the age of 30, and since the decedent's death in fact occurred first."[111] This example, besides indicating a type of accumulation transfer taxable in the future, shows that the phrase, "alternative contingencies provided by the terms of the transfer," refers not to alternative lines of beneficiaries who may take, but rather to alternative methods by which a single line of beneficiaries may take possession or enjoyment of the transferred property.[112]

The type of transfer involved in *Goldstone v. United States*[113] raises an interesting problem. There the donor had made a transfer taxable under the *Hallock* doctrine except that he gave his wife the full power to alter, amend or revoke from the date of the transfer. The Supreme Court held that the transferred property was includible in the donor's gross estate because his wife had not in fact exercised her power before the donor's death. With respect to transfers made after October 7, 1949, the granting of a similar broad power over the corpus to a beneficiary will prevent taxability.[114] Section 811(c)(3)

[111] Example 5 in the statement of the House Managers, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 35.

[112] For additional proof that Congress was referring to alternative methods of obtaining present possession by one line of beneficiaries, see Example (4) of the House Managers, supra, note 102.

[113] 325 U.S. 687, 65 S.Ct. 1323 (1945).

[114] "Example (6): The decedent, after October 7, 1949, transferred property in trust providing for accumulation of the income during his life, and at his death to pay the entire fund to his children or their issue. His wife was given the unrestricted power to alter, amend, or revoke the trust. The wife survived the decedent and did not in fact exercise her power during the decedent's life. Under the last sentence of section 811(c)(3) the transfer is not taxable since possession or enjoyment of the property was obtainable during the decedent's life through the exercise of the wife's power, which was a power of appointment as defined in section 811(f)(2) of the code, and was in fact exercisable immediately prior to the decedent's death."

makes an exception for transfers under which "possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through exercise of a power of appointment as defined in section 811(f)(2) which in fact was exercisable immediately prior to the decedent's death." Section 811(f)(2) provides a definition of powers of appointment, but excludes "for the purposes of this subsection," a special power and a power to appoint to a restricted class.[115] Did Congress intend to make the same distinction with respect to the type of donative power which will prevent the incidence of tax liability under section 811(c)(3)? Although beneficiaries could obtain possession or enjoyment during the lifetime of the donor if either a general or special power were exercised in their favor, the conference committee house managers indicate that tax liability is to depend upon the distinction drawn in section 811(f)(2) between types of powers. The house managers state, in relation to section 811-(c)(3)(B): "The expression 'some other event' is intended to include the expiration of a term of years or the happening or failure to happen of a certain or uncertain event (including the possible exercise of a power which is not a taxable power of appointment as defined in section 811(f)(2) of the code)."[116] Thus if a special power or power to appoint to a restricted class be given a beneficiary under a transfer otherwise subject to section 811(c)(3), tax liability will hinge on whether or not the beneficiary exercises the power before the death of the donor. If he does not exercise the power, the interests transferred will be included in the gross estate of the donor for the same reason the *Goldstone* transfer was included.

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[115] Section 811(f)(2): "For the purposes of this subsection the term 'power of appointment' means any power to appoint exercisable by the decedent either alone or in conjunction with any person, except (A) a power to appoint within a class which does not include any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants (other than the decedent) of the creator of the power or his spouse, spouses of such descendants, donees described, in section 812(d), and donees described in section 861(a)(3). As used in this subparagraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouse; and (B) a power to appoint within a restricted class if the decedent did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of the decedent, his estate, his creditors, or the creditors of his estate."

[116] Statement of the Managers of the House on the Conference Committee Report, H. Rep. 1412, 81st Cong., 1st sess. (1949), reported in 1949-23 I.R.B. 31 at 34. See also Example (6) of the House Managers' Statement, supra, note 114, where it is specified that the wife had an "unrestricted" power.