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AN OBJECTIVE TEST OF TRANSFERS IN CONTEMPLATION OF DEATH

BY CHARLES L. B. LOWNDES AND IVAN C. RUTLEDGE*

The weakest spot in the administration of the federal estate tax is the tax on transfers in contemplation of death. In the words of Mr. Randolph Paul, "As things now stand in the statute, there are no effective means of combatting the use of substitutes for testamentary dispositions by taxpayers who have reached reasonably advanced years."1 Certainly that is no overstatement, nor is the further soft impeachment that, "On the whole the courts have not dealt successfully with the contemplation of death provision; the practical failure of the provision is clear."2 However, the suggestion that "As a matter of fact, too much should not be expected of the courts, for they are presented in most cases with carefully assembled evidence in proof of motive, which is a highly elusive, subjective test of taxability"3 calls for more critical consideration. It is true that the reason for the failure of the tax on transfers in contemplation of death lies in the test which the courts have applied to determine the existence of such transfers. Possibly they have done as well as they could in view of the current criterion of transfers in contemplation of death. But where did this test originate? The statutory phrase "transfers in contemplation of death" is meaningless. Content has been read into it by the courts, not by Congress. The courts must accept full responsibility for the test itself, as well as the way in which they have applied it.

The facts of the case are these. The tax on transfers in contemplation of death works very badly,—just about as badly as a tax can function.4 It is unequal, discriminatory and an open invitation to

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1 PAUL, FEDERAL ESTATE AND GIFT TAXATION (1942) 279.
2 Ibid.
3 Ibid.
4 See Mr. Justice Stone's dissent in Heiner v. Donnan, 285 U.S. 312, 342 (1932); 1 PAUL op. cit. supra note 1, at 248, 280; H. R. REP. No. 1, 69th Cong., 1st Sess. (1925) 15. For a recent statistical survey see Atlas, Gifts in Contemplation of Death (1945) 23 TAXES 421. Suggestions for revision have not been lacking: Altman, Integration of the Estate and Gift Taxes (1940) 7 LAW AND CONTEMP. PROB. 331;
"carefully assembled evidence" in the discreet phrase of Mr. Paul. It is, of course, conceivable that it is intrinsically impossible to define a transfer in contemplation of death in any certain and workable fashion. It is possible, however, that this can be done and current difficulties dispelled by a different approach to the problem. Before commiserating with the courts on their hard lot in having to apply a really abominable test of taxability in the contemplation of death cases, it will be well to inquire whether they could not evolve a more feasible formula.

Two criticisms may be leveled legitimately at the current judicial definition of a transfer in contemplation of death. One is that it is not at all clear just what that definition is. The other is that it is painfully clear that whatever it is, it does not work.

The classic discussion of transfers in contemplation of death is found in Chief Justice Hughes' opinion in United States v. Wells. The former Chief Justice has more lucid pieces of legal analysis to his credit. Proceeding from the somewhat dubious premise that the "dominant purpose" of the provision taxing transfers in contemplation of death "is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax," the Chief Justice pointed out that a transfer in contemplation of death may be "fully executed, . . . irrevocable, and indefeasible" and "have all the indicia of a valid gift inter vivos." The differentiating factor" between an ordinary gift inter vivos and a transfer in contemplation of death must, therefore, "be found in the transferor's motive." Since the Chief Justice believed that the purpose of the provision taxing transfers in contemplation of death was to reach substitutes for testamentary dispositions, he reasoned that the characteristic motive of such a transfer must be the same as that which actuates a testamentary disposition, that is, "the motive which induces a transfer must be of a sort which leads to testamentary disposition. . . ." Transfers "found to be related to purposes associated with life, rather than with the distribution of property in anticipation of death" are not taxable.

Eisenstein, Are We Ready for Estate and Gift Tax Revision? (1945) 23 Taxes 317, 319; Pavenstedt, Taxation of Transfers in Contemplation of Death: A Proposal for Abolition (1944) 54 Yale L. J. 70.
283 U.S. 102 (1931).
Id. at 116, 117.
Id. at 117.
Ibid.
Id. at 118.
Although the state of mind which differentiates a transfer in contemplation of death is akin to that which actuates a man in making a will, it is not identical. Chief Justice Hughes was careful to point this out. While he repudiated the notion that transfers in contemplation of death are limited to transfers in expectation of imminent death, or gifts *causa mortis*, he explicitly affirmed the necessity for an apprehension of death more intense than the "general expectation of death which all entertain," which is all that the prudent man needs to move him to make a will. In addition to a desire to care for the transferee after the transferor's death, a transfer in contemplation of death must be influenced by a special expectation of death, which is some mysterious median between an apprehension of immediate death and the general expectation of death which all entertain. Both of these elements are required by *United States v. Wells*, despite a good deal of ambiguous language in the case which may seem to require only one ultimate fact to be found.

Parts of Chief Justice Hughes' reasoning seem to indicate that testamentary motive alone is sufficient for a transfer in contemplation of death. There are other portions of the opinion which might be construed to mean that consciousness of death alone is enough for such a transfer. If the opinion does make such assertions, however,

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10 *Id.* at 115.
11 283 U.S. 102 (1931).
12 *Id.* at 116, 117. However, when Chief Justice Hughes said, "As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent" (*id.* at 117), he did not mean that consciousness of death is not a requisite for a transfer in contemplation of death, but that a consciousness of imminent death is not so requisite. In other words, he simply meant that transfers in contemplation of death are not limited to gifts *causa mortis*.
13 "If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive." *Id.* at 118. The reason that Chief Justice Hughes tends in parts of his opinion to identify the distinct and independent elements of testamentary intent and consciousness of death is, as the quoted sentence shows, due to the fact that he confused motive with motivation. The thought of death is not the motive for a transfer in contemplation of death in the sense of the purpose of, or the end sought in, making the transfer. It may, however, be part of the motivation of the transfer in the sense of the sum total of forces in any way contributing to or affecting the transfer, since it may stimulate or precipitate the transfer. Due apparently to the failure to distinguish clearly between motive and motivation, the Chief Justice assumed that testamentary motive necessarily includes a consciousness of death, and he may have assumed that consciousness of death necessarily includes a testamentary motive. When he speaks of testamentary motive, therefore, he means not merely a desire to provide for someone after death, but such a desire stimulated by a consciousness of death more acute than the general conviction of ultimate death. On the other hand, when he speaks of "the thought of death" as a
they are premised upon the obvious fallacy that there is a necessary connection between a testamentary motive and a consciousness of death and that the presence of one implies the presence of the other. This is not true. There is no necessary connection between testamentary motive and apprehension of death, and either one can exist independently of the other. A man frequently takes steps to provide for his loved ones after his death, when he has no apprehension of death apart from the general expectation which all entertain. Thus, young and vigorous men make wills and insure their lives in their prime. On the other hand, a consciousness of death, even of imminent death, is perfectly consistent with a motive associated with life as well as one connected with death. For example, a man who felt that he was about to die might transfer property to one whom he had wronged, not with the idea of providing for the transferee after the transferor's death, but in order to experience the satisfaction of restitution during his lifetime. Since Chief Justice Hughes explicitly stated that in order to have a transfer in contemplation of death there must be a motive of a sort which leads to testamentary disposition and an apprehension of death more intense than that which all entertain; and, since there is no necessary connection between these elements, it follows that both are really requisite.

The language in United States v. Wells\(^{14}\) is consistent with this dual requirement, when it is properly interpreted. Any intimation that a testamentary motive alone is enough for a transfer in contemplation of death clearly appears from the whole context of the opinion to be based upon the assumption that testamentary motive necessarily includes a consciousness of death more intense than the general expectation of ultimate death. Moreover, any intimation that consciousness of death alone is enough for a transfer in contemplation of death rests upon the postulate that consciousness of death necessarily includes a testamentary motive.\(^{15}\) Although it is obvious that neither assumption is warranted, it is equally manifest that they were present in the mind of the court and that, therefore, the test of contempla-

\(^{14}\)United States v. Wells, 283 U.S. 102 (1931).

\(^{15}\)Chief Justice Hughes after speaking of transfers motivated by purposes associated with life said: "The gratification of such desires may be thought a more compelling motive than any thought of death." The idea seems to be that consciousness of death is inconsistent with a motive associated with life. This, of course, is not true. It argues, moreover, that the converse fallacy, that consciousness of death necessarily implies a testamentary motive, may also have been present in the mind of the Chief Justice. Id. at 119.
tion of death laid down by United States v. Wells16 embraces both the element of testamentary purpose and that of apprehension of death.17

The ambiguity of the language in United States v. Wells18 has led to misinterpretation of the case, however, by those who have taken isolated phrases in the opinion at their face value. Thus, there is a tendency in some of the cases to test a transfer in contemplation of death by a death connected purpose, defined in such a way as to exclude any apprehension of death.19 This, for example, is the basis of the position of the Regulations20 and the decisions holding that a transfer to avoid death taxes is necessarily in contemplation of death, regardless of the life expectancy of the transferor.21 The only ground for taxing such a transfer as a transfer in contemplation of death is that it is actuated by a desire to provide, or to make better provision, for the transferee after the transferor's death. It may be that testamentary motive alone is the correct test of a transfer in contemplation of death. It certainly is not the test, however, which was laid down in United States v. Wells.22

Although it may make a marked difference in a specific case whether the correct test of a transfer in contemplation of death is a desire to provide for the transferee after the transferor's death alone, or such a desire plus a consciousness of nearing death, this is not particularly material in a critical evaluation of these criteria. One is as unrealistic and unworkable as the other.

This is amply evidenced by the course of decision on contemplation of death. No one reading the cases can escape the conviction that the taxation of transfers in contemplation of death operates in an utterly haphazard fashion with results much more apt to be dictated by "carefully assembled evidence" and the plausibility of counsel, than any.

16283 U.S. 102 (1931).
18283 U.S. 102 (1931).
19It is conceivable that the Supreme Court is swinging around to this view. See the curious case of City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594, 598 (1945).
20U. S. Treas. Reg. 105 §81.16.
22283 U.S. 102 (1931).
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definite legal principle. The reasons are obvious. From a practical point of view the requirement of a testamentary motive is meaningless, since it assumes proof of an unprovable fact. At the very best, of course, the motive in the mind of another can be the subject of no more than an intelligent guess. It is not susceptible of exact knowledge. But even intelligent guessing must have some basis from which to start, and overt manifestations to determine whether a man in making a transfer was actuated by a purpose to serve an interest after his death rather than during his life are so meager as to be virtually non-existent. There are some actions which are so characteristic of certain states of mind that we are able to infer the state of mind which dictated them. If a man shakes his fist in your face, it is a logical inference that he is not pleased with you. There is, however, nothing about a transfer, even in the face of nearing death, which indicates whether or not it springs from a testamentary motive. Suppose for example, that a man of

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23Actual results in the following cases can scarcely be rationalized in terms of ascertainable external facts. Compare: McCaughn v. Real Estate Co., 297 U.S. 806 (1936) (donor 78, in vigorous health, 98% of estate, taxed) with Commissioner v. Nevin, 47 F.(2d) 478 (C.C.A. 3d, 1931), cert. denied sub nom. Burnet v. Nevin, 283 U.S. 835 (1931) (donor 82, optimistic and active, proportion of estate not mentioned, not taxed); Smalls v. O'Malley, 127 F.(2d) 410 (C.C.A. 8th, 1942) (donor 76, good health, 30% of estate, taxed) with Wishard v. United States, 143 F.(2d) 704 (C.C.A. 7th, 1944) (donor 82, active, a little less than 30% of estate, not taxed); Worcester County Trust Co. v. United States, 35 F.Supp. 970 (D.Mass., 1940) (donor 72, afflicted with heart disease, taxed) with Bradley v. Smith, 114 F.(2d) 161 (C.C.A. 7th, 1940) (donor 85, under care of doctor because of heart trouble, not taxed); Estate of Lester Hofheimer, 2 T.C. 773 (1943) (donor 56, in good health, released reserved power, taxed) with Allen v. Trust Co. of Georgia, 149 F.(2d) 120 (C.C.A. 5th, 1945) (donor 81, in good health, released reserved power, not taxed); Estate of Sallie E. Walton, 42 B.T.A. 300 (1940) (donor 73, suffering from high blood pressure, 25% of estate, taxed) with Estate of Josephine K. Wilson, 18 B.T.A. 377 (1929) (donor 75, with diseased kidneys, 15% of estate, not taxed); and First Deposit & Trust Co. v. Shaughnessy, 134 F.(2d) 940 (C.C.A. 2d, 1943) (donor 64, in good health, taxed) with Colorado National Bank v. Commissioner, 305 U.S. 23 (1938) (donor 80, in good health, not taxed).

24Perhaps the only situation where the circumstances of a gift can be said to fairly indicate that it was dictated by a desire to provide for the donee after the donor's death is a case where the donor establishes an inter vivos trust for the donee with the provision that the income is to be accumulated until the donor's death. Yet such a transfer was held not to be in contemplation of death in Colorado National Bank v. Comm'r, 305 U.S. 23 (1938) on the ground that the motive of the donor was to protect the property against the donor's speculation during his life! Compare with the Colorado National Bank case, First Deposit & Trust Co. v. Shaughnessy, 134 F.(2d) 940 (C.C.A. 2d, 1943) where the court held that a gift of insurance policies by a husband to his wife was in contemplation of death, regardless of the fact that the husband had no apprehension of death, since the wife was not intended to get the benefit of the property until after the husband's death, and there was, therefore, a testamentary motive.
advanced years and in feeble health transfers his business to his son. Does this indicate a desire to provide for his son after the transferor's death, or to be rid of the cares of the business, and to see the son gain business experience during the transferor's life? It is consistent with both. A man feeling the approach of death may be moved to make a transfer to provide for the transferee after his death, or to achieve something by the transfer during the short span of life remaining to him. The transfer itself is a neutral act as far as indicating the color of the state of mind motivating it. About the only kind of transfer which indicates whether the donor was moved by a desire to achieve something during his life or after his death is one where enjoyment of the property is withheld from the transferee during the transferor's life, which would seem to indicate that a death benefit was intended. Of course, in many cases the question of whether the donor desired to achieve a result during his life or after his death is illusory because even the transferor does not analyse his motives this critically. If a man transferred property to his son, he would be a strange father indeed who would not hope to see his son enjoy the property during his life as well as after his death. The cases recognize the difficulty of mixed motives, but they recognize it in the same unrealistic fashion in which they approach the whole problem. Where the donor's motives are mixed—that is, where he is moved by purposes to be served during life as well as after death—the "dominant" motive according to United States v. Wells, controls. According to other authority, the gift is in contemplation of death if the death motive is "substantial." Now, of course, the practical absurdity of all this is that you cannot measure motives in this way. This was beautifully illustrated by the instruction

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27 See, however, note 24 supra.

28 Motives may have an integrity of their own independent of any connection with death. For example, a man might create a trust during his life for his dependents without any thought other than the desire to benefit them, and without undertaking to analyze in his own mind whether he wished the satisfaction of seeing them enjoy the property during life, or the assurance of their protection after his death.

29283 U.S. 102 (1931).

of a trial court, upheld on appeal, which measured the competing motives in percentages. This whole business of testamentary motive is a pure fiction. It is based upon the utterly false assumption that you can determine a dead man's motives precisely and measure them with accuracy. The truth about the test of testamentary intent for a transfer in contemplation of death is that the courts have seized on a subjective fact, which cannot be surely inferred from any objective evidence, and they are, therefore, at the mercy of the self-serving declarations of the decedent and the interested recollections of the beneficiaries of his bounty and the family solicitor.

Coupling a consciousness of death with a testamentary motive as the criterion of a transfer in contemplation of death does nothing to facilitate the administration of the tax. It is true that there is a more pertinent connection between a man's age and the state of his health and his consciousness of nearing death, than there is between these factors and a testamentary motive. Advanced age and ill health and the fact that a decedent took steps to combat them obviously raise an inference of a consciousness of nearing death. However, any assistance which might be derived from the consciousness of death requirement in determining whether there is a transfer in contemplation of death in a concrete case is marred by two aspects of the test. Consciousness of death is not the sole element in determining whether a gift is made in contemplation of death, but is only part of a subjective standard which also requires a testamentary motive. A decedent may still escape a tax, therefore, even though it is manifest that he lived in momentary apprehension of death, if it can be shown that he had a life motive rather than a death motive in making a transfer. Moreover, consciousness of death is not very meaningful unless there is some definition of how intense this consciousness must be and the courts have never attempted to supply this. United States v. Wells pointed out that the consciousness of death must be more intense than the general expectation of death which all entertain and less intense than an apprehension of "impending death." But when it came to defining the point between these two extremes at which consciousness of death becomes sufficiently intense to be legally significant, Chief Justice Hughes had nothing more forthright to offer than the enigmatic thought that "It must be a particular concern, giving rise to a definite motive."

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31 Ibid.
32 283 U.S. 102 (1931).
33 Id. at 117.
34 Id. at 115.
The consciousness of death requirement is, therefore, more of an administrative hindrance than an aid to the application of the tax on transfers in contemplation of death.

The courts define a transfer in contemplation of death either as a transfer made with a testamentary intent alone, or as a transfer made with a testamentary intent, plus a consciousness of nearing death. A good deal of the trouble in applying the tax on transfers in contemplation of death, therefore, arises from the requirement of testamentary intent. It is well, therefore, to scrutinize the statutory foundation for it. A testamentary intent does not directly involve consideration of the fact of death itself but of contingencies arising after death. When a man makes a will, he thinks but incidentally of the fact that he is going to die. His primary concern is with what is going to happen after his death. But the statute taxes transfers in contemplation of death, not in contemplation of contingencies arising after death. On its face it would seem to indicate a transfer stimulated by the thought of approaching death, regardless of whether the motive behind the transfer was testamentary or not. As a mere matter of language a man who thought he was about to die and transferred property to one whom he had wronged in order to have the satisfaction of making restitution for the wrong while he was living, would certainly make a transfer in contemplation of death, although he was actuated by a motive associated with life. As far as the words of the statute are concerned, therefore, there is nothing to indicate any necessity for a testamentary motive. Any transfer stimulated by the thought of nearing death is in contemplation of death, regardless of the purpose sought in making the gift. Chief Justice Hughes in *United States v. Wells* derived the test of testamentary intent from the premise that the purpose of the tax on transfers in contemplation of death was to strike substitutes for testamentary transfers. Since the purpose of the tax was to tax substitutes for dispositions by will, he reasoned that one of the necessary differentiating characteristics of a transfer in contemplation of death was a state of mind akin to that actuating a man when he makes a will.

Frequently a court in construing a statute construes not the statute, but its own theory of the statute. Did Chief Justice Hughes fall into this fallacy when he said that the purpose of the tax on transfers in contemplation of death was to reach substitutes for testamentary disposition? The orthodox theory of the estate tax is that it is an excise

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35 *Id.* at 116, 117.
imposed upon the privilege of passing on property at death.\textsuperscript{38} As far as the language of the statute is concerned, however, it is equally consistent with an intent to tax the privilege of retaining inheritable property until death. Section 811(a),\textsuperscript{37} which imposes what might be called the primary tax under the estate tax, does not refer to either testate or intestate succession, but simply taxes the property which a man owns at his death. The tax itself is in no way dependent upon how a decedent disposes of his property,—whether he divides it among worthy objects or leaves it in a lump sum to an unworthy one. If the real basis of the tax is the transfer of property, it is a little odd that the character of the transferees is a matter of such complete indifference. The remaining subsections of section 811 are designed to prevent avoidance of the primary tax imposed by section 811(a). Although among other things they purport to tax various kinds of inter vivos transfers, the basis of tax in each case is the retention until death of substantial incidents of property, which do not amount to technical ownership. In some of the situations covered by these subsections the retained incident which is taxed takes the form of a power to affect the disposition of the property at the decedent's death,\textsuperscript{38} which lends color, of course, to the contention that the tax is imposed on some transfer at death. There are a number of situations, however, where a tax is imposed even though the decedent retains no power to dispose of his property at death and the only basis for the tax is his retention of enjoyment during his life. A typical instance is the tax upon a transfer with a reservation of a life estate.\textsuperscript{39} If a man gives away his property during his life, reserving a life estate, he has, assuming that the remainder after the life estate is vested, entirely disposed of all interest in the property beyond his life. Nothing passes at death. The tax is obviously imposed, not upon the privilege of passing the property at his death, but upon the privilege of retaining its enjoyment until his death.\textsuperscript{40} Less obvious but scarcely less genuine illustrations of the same


\textsuperscript{39}Int. Rev. Code, §811 (a) (1939).

\textsuperscript{38}Even though the decedent cannot regain the property for himself or his estate, if he retains power to change the beneficiaries of a trust created during his life, the trust property is taxable as part of his estate. Porter v. Comm'r, 288 U.S. 436 (1933).

\textsuperscript{38}Int. Rev. Code, §811 (c) (1939).

\textsuperscript{40}Prior to the amendment of the statute (Jt. Res. Mar. 3, 1931, c. 454, 46 Stat. 1516) such transfers were not taxed, on the theory that there was no testamentary transfer. May v. Heiner, 281 U.S. 238 (1930). Could it be argued that the Joint Resolution of March 3, 1931, was a legislative abrogation of the theory that the basis of the tax is the privilege of passing on property at death?
thing occur in connection with the taxation of tenancies by the entirety and dower in a jurisdiction where common law theories of the indestructibility of dower persist.

If we could say that the purpose of the estate tax is to tax a man upon the privilege of retaining property until his death, it would seem to follow that the purpose of the provision taxing transfers in contemplation of death is to reach a situation where a man retains property until he no longer has any substantial life expectancy and then disposes of it. From this point of view the statutory plan looks something like this: First, all of the property which a man owns at his death is taxed. Then, to prevent avoidance of the primary tax, situations where a man retains substantial but not technical ownership until his death are taxed. Broadly, these situations fall into two categories: (1) transfers where a man disposes of some of the incidents of ownership, but retains others. These transfers are marked by objective property strings which are not severed until death. (2) Absolute inter vivos transfers made by a man when he no longer has any substantial life expectancy, so that factually, if not legally he owns the property up until his death. These are transfers in contemplation of death.

Since the transfers falling into the second category are complete and indefeasible, they cannot be identified by any objective property string severed by death. Their distinguishing characteristic must be sought either in their effect, that is, in the way in which they actually operate or in some significant state of mind of the transferor. Tested by effect, the existence of a taxable transfer would be determined by the nearness in time between the transfer and the death of the transferor. If they were so close together that it could be said that as a matter of substance the transferor retained the property until his death, the transfer would be taxable. An obvious difficulty with the effect test, however, is that it ignores the word "contemplation," which seems to envision some pertinent mental element on the part of the transferor as the crux of taxability. It is true that the same section which taxes transfers in "contemplation" of death also taxes transfers "intended" to take effect upon death and the courts have ignored the word "intended" by making the taxability of such transfers turn upon their objective operation.

\[\text{INT. REV. CODE } \S 811 \text{ (a) (1939).}\]

\[\text{Id. } \S 811 \text{ (b).}\]

\[\text{In Heiner v. Donnan, 285 U.S. 312 (1932), the Supreme Court held that a conclusive legislative presumption that gifts made within two years of death were in contemplation of death was unconstitutional. Although probably not representative of the law today, Heiner v. Donnan has never been explicitly overruled.}\]

\[\text{INT. REV. CODE } \S 811 \text{ (c) (1939).}\]
rather than the state of mind of the transferor. It could be argued that by a parallel process the word "contemplation" should be read out of the statute and the existence of a transfer in contemplation of death determined by whether the transferor disposed of the property at the approximate end of his life, rather than by the state of mind accompanying the transfer.

It must be borne in mind, however, that the purpose of both the tax on transfers taking effect at death and the tax on transfers in contemplation of death is to prevent avoidance of the estate tax. They must be construed from this angle. The reason the courts have ignored "intended" in construing the tax on transfers taking effect upon death is that the existence of such transfers can be determined by the presence of objective property facts which have a legitimate relation to tax avoidance. There is no need to resort to the subjective intent of the transferor. In the case of a transfer in contemplation of death, however, the only fact, apart from the transferor's state of mind, which could be used to determine the presence of such a transfer is the proximity in time between the transfer and the transferor's death. Since a young and vigorous person might die suddenly after making a transfer which was in no sense testamentary, the temporal relation between a transfer and the transferor's death is obviously accidental and has no connection with tax avoidance and the purpose of the tax on transfers in contemplation of death. A transfer in contemplation of death, manifestly must be determined by "contemplation" of death because there is no other sensible way to determine it.

If transfers in contemplation of death are to be differentiated by the state of mind of the transferor, what is the significant state of mind? The answer might well be that he must merely contemplate death, not contingencies after death. That is, a transfer made with the consciousness that death is not far away—that the transferor no longer has any substantial life expectancy—is a gift in contemplation of death, regardless of whether or not the motive of the gift is a purpose associated with life or with death. In other words, the correct criterion of a transfer in contemplation of death is not testamentary motive, nor testamentary

45Because of this fact, it is possible that the decision, if not the reasoning of Heiner v. Donnan, 285 U.S. 312 (1931), to the effect that a conclusive presumption that gifts within two years of death are in contemplation of death was unconstitutional might stand. A conclusive presumption that gifts made by persons at a specified advanced age would seem to be all right in spite of Heiner v. Donnan, however, because the fact upon which the presumption is premised has a clear connection with estate tax avoidance. See 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION 279 et seq.
motive coupled with a consciousness of death, but consciousness of death alone. This follows logically from the theory that the genuine purpose of the estate tax is to tax the privilege of retaining property until death, rather than the privilege of passing on property at death. From this point of view, a transfer made with the realization that the transferor no longer has any substantial life expectancy involves the conscious doing of an act which defeats the purpose of the tax, and is properly taxable as a transfer in contemplation of death.

Even proceeding from the conventional premise that the purpose of the estate tax is to tax the privilege of passing on property at death, it still appears that the correct criterion of a transfer in contemplation of death is consciousness of death, rather than testamentary motive. The assumption of United States v. Wells\(^4^6\) that the purpose of the tax upon transfers in contemplation of death is to reach substitutes for testamentary dispositions and that, therefore, a testamentary state of mind is required, is purely gratuitous and unwarranted by anything in the statute. The primary purpose of the statute is to tax intestate as well as testate succession. Why should one assume that the tax on transfers in contemplation of death is directed exclusively at preventing evasion of the tax on testamentary dispositions? A more logical inference would be that it was intended to prevent the frustration of the tax on either testamentary or intestate dispositions, and that what Congress intended to reach was a transaction by which a man shortly before his anticipated death disposed of his property, so as to defeat the tax on either testate or intestate succession. From this angle, it is not a testamentary intent, but a conscious realization of nearing death, which differentiates a transfer in contemplation of death.

It would appear that the correct definition of a transfer in contemplation of death is a transfer made with the realization that the transferor no longer has any substantial life expectancy, rather than a transfer actuated by a testamentary motive, or a testamentary motive plus a consciousness of approaching death. This follows the language of the statute. The choice of competing constructions, however, may often be best determined not merely by the literal language and context of a statute, but by the pragmatic criterion of how well a particular construction works. From the point of view of practical administration of the estate tax, is the consciousness of death test preferable to the testamentary motive test of a transfer in contemplation of death? It would appear to be, although the effectiveness of the consciousness of

\(^{4^6}\)283 U.S. 102 (1931).
death test will be conditioned by the degree of objectivity which is introduced into it. Even upon a purely subjective level, however, it offers more promising possibilities than the motivation test.

The practical fallacy in any attempt to define transfers in contemplation of death in terms of motives associated with death and life proceeds from the fact that not only is the test subjective, but it is a subjective test for which it is virtually impossible to adduce any objective proof. Nothing in the fact of a gift indicates whether it proceeds from a motive identified with death rather than with life. Moreover, any inference that the gift is inspired by a testamentary motive from the age, health or habits of the donor is quite tenuous and easily overcome by the self-serving declarations of the donor as to his intentions. The customary procedure in a contemplation of death case is for the government to argue from the advanced age, poor health and retired habits of the donor to a consciousness of death. From this consciousness of death a secondary inference is made to testamentary intent. This secondary inference is the weakest link in the practical administration of the tax, because there is no necessary connection between consciousness of death and testamentary motive. As we have already seen, a man may be moved by the realization of approaching death either to provide against the contingencies he anticipates after death, or to make a final gesture in his remaining life span. A purpose to be served during life is just as easily reconciled with an awareness of nearing death as a testamentary motive. To the extent that a straight consciousness of death test dispenses with the illusion of testamentary motive, the consciousness of death test is a distinct advance, even on a purely subjective level, over the current criteria of transfers in contemplation of death.

But why in determining whether a transfer is in contemplation of death should we apply a subjective test? Why judge contemplation of death by what was actually in the mind of the particular decedent, rather than what would have been in the mind of a reasonable man under the same circumstances? It is obvious, of course, that if we are confined by the testamentary motive, purposes associated with life and death test, there is no escape from a subjective test. Men's motives are too diverse to standardize them under the pattern of a reasonable man and say that in a given situation a reasonable man would have had one motive rather than another. It is quite feasible, however, to apply an objective technique in testing contemplation of death by consciousness of death. Constructive notice is a familiar concept to
lawyers. Because of the difficulty in determining what a man actually knows, and, perhaps, because the law hesitates to put a premium on dullness, people are treated as knowing what a reasonable man would know under the circumstances. Is there any reason why we should hesitate to treat a decedent as knowing that death is approaching if a reasonable man in his situation would have been aware of this fact?

An objective test of consciousness of death would, of course, strike some transfers where there was no actual consciousness of death. Is this, however, manifestly unjust? Should there be a tax bonus for blind optimism susceptible of being inspired by legal advice? If a man transfers his property when everyone, except himself, realizes that he is nearing death, should he go tax free, while a more alert donor, who realized his condition, is taxed? For that matter where does the injustice lie in subjecting a man who has lived out his expected life span to a death tax?

There are two obvious difficulties, of course, in saying that a transfer in contemplation of death occurs whenever a reasonable person in the position of the transferor would have realized that he had no substantial life expectancy. One is on a theoretical and the other on a practical level. Contemplation of death connotes more than consciousness of death. On any fair construction of the phrase, it seems to mean not merely a consciousness of death, but a consciousness which influences the transfer. Conceivably a man might be acutely aware of the approach of death and still make a transfer which was not affected by that awareness. Even though the consciousness of death test does not require proof of a testamentary motive, if it is to reflect fairly what the statute means by contemplation of death, it would seem to require a transfer influenced by consciousness of death. Does this mean that the application of the consciousness of death test to a concrete case involves actually proving not only a reasonable awareness of approaching death, but that this awareness influenced the transfer? It does not. The situation is no different here than in many problems of causation which are solved on the basis of probability. Suppose, for example, that a woman falls down an unlighted stairway in a railroad station and is injured. It is possible that the absence of light had nothing to do with her fall. She might have tumbled, if the stairway had been illuminated. Since, however, it is highly probable that the absence of a light contributed to the accident, and it is impossible to prove whether it did or not, the law assumes that it did.47

By a parallel line of reasoning, it can be fairly assumed that a transfer of a substantial part of a man's property made with a consciousness of approaching death is influenced by that apprehension, since the fact that it was not so influenced is not only impossible to prove, but extremely improbable.

A more serious difficulty with the objective test lies in the fact that like the subjective test it has a delusive appearance of greater certainty than it really possesses. There is, of course, no reasonably prudent man whose reactions can be scrutinized in a judicial laboratory to determine the precise circumstances necessary to induce an apprehension of approaching death. Actually the trier of the facts can only pass a moral judgment on what facts should reasonably have induced such a realization. The elusive character of the objective test is heightened, moreover, by the fact that like the subjective test it offers no precise definition of how intense an apprehension of death must be in order to have a consciousness of nearing death. Rephrasing this requirement in terms of a reasonable realization that the donor has no substantial life expectancy restates the problem. It does not solve it, although it may bring it into sharper focus than the conventional talk about an apprehension of death somewhere between an apprehension of impending death and the general expectation of ultimate death.

The conclusion seems inescapable, however, that although the objective test of consciousness of death offers possibilities for better administration of the tax on transfers in contemplation of death than the subjective test of testamentary intent, it still does not afford a clear and definite rule of thumb for measuring transfers in contemplation of death. Is it possible to make the objective test more definite and certain? The analogy of constructive notice, which furnished the basis of the objective test may be of further assistance. Although constructive notice rests basically upon the idea that a man knows what a reasonable man in his position would have known, definiteness has been imparted to this concept by holding as a matter of law that constructive notice exists in certain standardized situations. A familiar example is the rule that the purchaser of land in the possession of another has constructive notice of a possible adverse claim on the part of the possessor.48 Since life expectancy has a relation to age, it might be possible to lay down a rule that a man at a stated age has no substantial life expectancy,—that is, that a reasonable man would realize

that at a certain age there is no substantial life expectancy. Conceivably the critical age might be determined by reference to mortality tables (with which the reasonable man is, of course, familiar) or the Biblical age of three score and ten (the reasonable man certainly peruses the Scriptures), or the age at which social security payments start. The selection of an age at which the reasonably prudent man would know that there was no substantial life expectancy would, in the case of transfers made at or after that age eliminate any problem of what the reasonably prudent man does know and how intense the apprehension of death must be for a consciousness of death to exist.

It would not, on the other hand, mean that transfers by persons before reaching the critical age, who, because of ill-health or general debility, had less than an average life expectancy, were not in contemplation of death. The arbitrary age would operate as a rule of inclusion—not of exclusion. In the case of a transfer by person prior to

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49 A comparison of the American Experience Table of Mortality with a life table constructed from the 1930 census shows increases in the modal year of death from 73 to 76, in the median year of death from 64 to 68, and in life expectancy at birth from 41.45 years to 59.49 years. DUBLIN AND LOTKA, LENGTH OF LIFE (1936) 14–17, 376. Therefore, at the outset, it would be difficult to select appropriate mortality rates, even if the well-known variation between life expectancy of men and women were ignored. Assuming, however, that the American Experience Table is arbitrarily chosen because of its general recognition and use, especially in the insurance field, selection of a particular point on the survivorship curve seems to be a matter of intuition and taste rather than objective necessity. Mathematically, the life curve is made up of several components. PEARSON, THE CHANCES OF DEATH (1897) 28. But ignoring mathematical refinements and viewing the life curve as a single entity, without considering skewness, standard deviation, etc., there still remain the three statistically elementary points mentioned above. Average length of life is unsatisfactory because no one makes a gift at birth, and life expectancy at any given age until around 90 is in excess of two years. As between the median and the mode, possibly the median has more to recommend it, since the mode is in part a function of mortality in preceding years. Yet when it is recalled that at the median year of 64 there remains an average of over eleven years of life to those who survive to that age, the question resolves itself in the form of a subjective judgment as to what is a substantial life expectancy. This problem is one of expediency and fairness, and is probably appropriately a legislative responsibility. The considerations are to set an age at which healthy donors by and large are not entitled to the benefit of the lower gift tax rates because no real sacrifice is involved in dispositions of property at that age and to provide for healthy donors who have not attained such an age an opportunity to make a clear-cut election of the lower gift tax rates.

50 Mr. Paul advocates as a legislative solution for the problem of taxing transfers in contemplation of death a conclusive presumption that transfers made within two years of death by decedents sixty-five years of age and older are in contemplation of death. 1 PAUL, op. cit. supra note 45 at 281. The critical age of sixty-five is advanced by Mr. Paul merely as a suggestion. It does not appear whether or not he derived it by analogy from the age when social security payments start:
the selected age taxability would still have to be determined by the
general formula of whether a reasonable man in his position would
have realized that he had no substantial life expectancy. Some element
of certainty might be introduced into the general test in such a situa-
tion, however, by reference to the selected age at which there is no
substantial life expectancy. If this were, say seventy, and the transfer
were made by a man of fifty who was in poor health, the test of whether
a reasonable man in the situation of the donor would have realized
that he had no substantial life expectancy might be made more intel-
ligible by phrasing it in the form of an inquiry as to whether or not the
reasonable life expectancy of the particular donor was greater or less
than that of the average man at seventy.

Assuming for the moment that the correct test of a transfer in con-
templation of death is the objective test of a transfer made under
circumstances where a reasonable man would realize that he had no
substantial life expectancy, consider how this test may be expected to
work in practice and how the results achieved under it will square
with those reached under the subjective test of testamentary intent.

Transfers by persons of advanced years will ordinarily be taxed. If
an arbitrary age can be set at which a reasonable person would realize
that he no longer has any substantial life expectancy, transfers by
persons after that age will automatically be subject to a death tax,
regardless of the actual state of their health. All the puzzling prob-
lems of whether a decrepit oldster teetering on the brink of the grave
really did not recognize his condition, but was convinced that he would
live another quarter century, and whether a donor had a testamentary
motive—questions which make a crazy quilt of the pattern of de-
cision—§5 will be outlawed. "Carefully assembled evidence" will go
by the board and the bulk of the contemplation of death cases, which
are age cases, will be administered with equity and certainty.

Gifts by persons who have not reached an advanced age, but are
suffering from some apparent incurable ailment, which makes death
as proximate and certain as old age will be subject to tax under the
objective test, since the fact that they have not reached the prescribed
age at which there is no substantial life expectancy does not preclude
the tax. We have already seen that the critical age will operate as a
rule of inclusion, but not as a rule of exclusion. The difference be-
tween applying the objective and the subjective tests here lies in the
fact that under the objective test it is not necessary to show that the

§5 See note 23 supra.
donor was actually conscious of his condition, nor that he was actuated by a testamentary motive.

A more perplexing problem as to whether or not there is a transfer in contemplation of death may occur where a young and normally vigorous person, who is facing a critical illness, which may or may not prove fatal, transfers his property. For example, a young man contracts pneumonia. While he is critically ill he transfers his property. Is this a transfer in contemplation of death?

If the transfer falls into the pattern of a gift *causa mortis*, there is no difficulty on the score of a transfer in contemplation of death. Since a gift *causa mortis* is revoked by the recovery of the donor, the gift is incomplete, and if the donor dies the transfer may be taxed as a transfer taking effect upon death, without reference to whether or not it was in contemplation of death, analogously to *Helvering v. Hallock*.\(^5\)

If, on the other hand, the donor recovers and the transfer is revoked, there is no basis for a tax on a transfer in contemplation of death. The revocation of the transfer wipes it out for tax purposes, since it brings the property back into the donor's estate, where it can be taxed as property which he owns. Any other result would lead to the manifest absurdity of a double tax on the same property, on the mutually contradictory theories that the property was owned by the donor at his death, and that the property was transferred by the donor during his life by a gift in contemplation of death.\(^6\)

Presumably, however, a man can make a gift when he is suffering from a critical illness and stipulate expressly or by implication that it

\(^5\)309 U.S. 106 (1940). It might appear that the correct analogy is that of a revocable transfer which is taxed as part of the decedent grantor's estate. *Int. Rev. Code*, §811 (d) (1939). A gift *causa mortis* is not revocable, however, at the will of the donor. It is revoked by an event over which he has no control—his recovery from the illness in view of which the gift is made. Although this may not be strictly a possibility of a reverter, it is sufficiently analogous thereto to justify a tax under the pattern of *Helvering v. Hallock*, *supra*, or *Klein v. United States*. 283 U.S. 231 (1931), since the death of the donor is "the indispensable and intended event which (brings) the large estate into being for the grantee." *Id.* at 234.

\(^6\)A similar situation may be imagined in connection with *Helvering v. Hallock*, 309 U.S. 106 (1940). Suppose, for example, that A transfers property in trust for B with a proviso that the property shall revert to A, if he outlives B. Assuming further that A does outlive B and regains the property, it might be taxed on A's death as part of the property he owned at death. It would not, however, be taxed again on the theory that it had been transferred by A during his life by a transfer intended to take effect in possession or enjoyment at or after his death.
shall not be revoked if he recovers. Since such a transfer is complete and irrevocable, it must be taxed, if at all, as a transfer in contemplation of death. The problem of taxability here does not turn directly upon whether the objective or the subjective tests are applied, since a tax might be imposed under either test. Rather it turns upon the more fundamental question of whether contemplation of death means contemplation of inevitable death or the possibility of death. There is a factual difference between a transfer by a person facing a critical, but not incurable illness, and a transfer by a person facing death due to old age or some incurable ailment, which may or may not be legally significant. Strictly speaking, the person who makes a transfer in view of a serious, but not incurable, illness is not making a transfer in contemplation of death, but in contemplation of a possibility of death. He may die or he may recover. His state of mind is, therefore, necessarily somewhat different from that of the person contemplating inevitable death from old age or an incurable ailment. It is easy to see, moreover, why this factual distinction should make a difference tax-wise. The donor who transfers his property when he faces inevitable dissolution sacrifices little. He has had the substantial enjoyment of his property during his life and it is fair, therefore, to make him pay a death tax. But, the donor who transfers his property when he is critically, but not incurably ill, does make a sacrifice, since he relinquishes the opportunity of enjoying the property, if he recovers. There seems to be no authority covering a case of this kind. Lacking judicial illumination, about all that one can do is to point out some of the competing considerations.

It is reasonably clear that the question of taxability will ultimately turn upon the question of whether contemplation of the possibility of death is contemplation of death within the meaning of the statute, or whether this phrase requires contemplation of inevitable death. If it should be held that the statute is met by a contemplation of the possibility of death, then it would seem that whether or not there was such an apprehension of death could be more fairly and certainly tested in a concrete case by applying the objective rather than the subjective test.

Expression, or conduct impelling the inference, that an absolute and unconditional gift is intended will negative the implication that one who makes a gift in the face of impending death makes it causa mortis and subject to revocation if he survives. Newell v. National Bank of Norwich, 214 App.Div. 331, 212 N.Y.Suppr. 158 (3d Dept., 1925). See Hatcher v. Buford, 60 Ark. 169, 173, 29 S.W. 641, 642 (1895).
Under either test there will be the subsidiary question of how strong the possibility of death must appear for the necessary apprehension of death to exist. This is analogous to the problem of how proximate the expectation of death must be in the contemplation of inevitable death cases. Under the objective test this question resolves itself into the inquiry of how serious the possibility of death would have appeared to a reasonable man in the donor's situation. This is certainly not a problem which is free from difficulty, but it is less insoluble than the corresponding question under the subjective test, which, unlike the objective test which involves merely a consciousness of death, entails inquiry into whether or not the donor had a testamentary motive. The actual motive of the donor would be no easier to discover in a possibility of death case than it is in an inevitable death case.

The intuitive reaction of most persons to this problem seems to be that a tax should be imposed if the donor dies, but not if he recovers. This is, of course, an unconscious application of an effect test,—that is, since the state of mind of the donor at the time he makes the transfer is precisely the same whether he later dies or recovers, taxability is tested by the fact that death does or does not follow on the heels of the transfer, rather than by the state of mind of the transferor. It is true, that the effect test does seem to achieve a fair result here. This feeling, however, may be due to the fact that if, instead of making an irrevocable gift, the donor had made a gift *causa mortis*, no tax would have been imposed if he had recovered. The two situations are not precisely similar. In the case of the gift *causa mortis*, the transfer is revoked by the transferor's recovery, so that the transferred property becomes taxable again as property which he owns. In the case of the irrevocable transfer, the only chance of taxing the property transferred is by a tax on a transfer in contemplation of death.

The cases which have raised the question of a transfer in contemplation of death all seem to have been cases where the donor anticipated death because of some internal condition like old age or ill health. An apprehension of death may arise, however, from external circumstances. Thus the condemned criminal awaiting execution in his cell has an apprehension of death. With diminished intensity he probably had this expectation when his trial started, or even when he committed a capital crime. A soldier facing combat may have an apprehension of death, although he has never been in better physical condition. The same thing is true of a man embarking upon any hazardous adventure. The anticipation of death from external circumstances, moreover, like
the apprehension of death from internal causes, may be an anticipation of inevitable death, such as would exist in the case of the condemned criminal when all hope of reprieve had gone, or an apprehension of the possibility of death such as would be experienced by a soldier going into combat. It is conceivable that some policy factor might lead to holding that a transfer by a soldier going into combat or a scientist engaging in a dangerous experiment should not be taxed as a transfer in contemplation of death. Apart from such considerations, however, it is difficult to see any distinction between a transfer in contemplation of death due to some internal condition of the transferor and a transfer in contemplation of death due to external hazards. Usually, it is true, the threat of death from external hazards will be a possibility or probability of death, rather than a virtual certainty, but this corresponds to the situation in connection with contemplation of death from internal causes where a person faces a critical but not incurable illness. Without undertaking in the absence of judicial guidance to pass upon the problem of whether or not a transfer in contemplation of death from external hazards should be taxed, it seems reasonably clear that if it should, more just and equitable results can be achieved by the application of the objective than the subjective test. There is nothing about the fact of a transfer in the face of external hazards, which has any real probative value on the question of whether the donor was motivated by purposes associated with life or with death. The subjective test with its reliance on testamentary motive is as unreliable here as it is in other situations. Moreover, difficult as the inquiry may be, it is easier to determine whether a reasonable man in the position of the donor would have felt that inevitable death was near, or that there was a substantial probability that he was about to die, than it is to fathom what was actually in the mind of the particular donor.

A transfer made by a young person with a substantial life expectancy should not be taxed as a transfer in contemplation of death, because the donor happens to be a hypochondriac suffering from a delusion of imminent death. This would, of course, be the result of the objective test, because the donor has no reasonable anticipation of death. Logic would seem to compel a contrary result under the subjective test. This seems patently absurd. Although the hypochondriac may have had a testamentary intent, coupled with a completely fallacious consciousness of imminent death, he has not made the kind of transfer which the statute was designed to reach. The statute seeks to tax transfers made by a man when he no longer has any substantial life expectancy.
Here the donor has a substantial life expectancy and he has made a transfer which has no real relation to his death. It is the kind of transfer which is properly subject to the gift tax rather than the estate tax. The situation is analogous to that of a man who shoots at a stump, mistaking it for a human being he intends to kill. He is not guilty of attempted murder because he has done no guilty act, although he may have overflowed with murderous intent.\footnote{See Beale, Criminal Attempts (1903) 16 Harv. L. Rev. 491 and cases cited. Id. at 494, 495. "It is immaterial that his ultimate purpose is to have his enemy die. . . . If the act of contact with the body shot is not an act of homicide, there is no crime in the attempt, and the desired ultimate result of the contact is immaterial." Id. at 494.}

The subjective test of a transfer in contemplation of death, which was laid down in United States v. Wells,\footnote{283 U.S. 102 (1931).} does not justify a tax upon a transfer with no greater apprehension of death than the general expectation of death which all entertain, even though the motive behind the transfer is to avoid death taxes. United States v. Wells\footnote{Ibid.} required not merely testamentary intent, but a consciousness of approaching death, for a transfer in contemplation of death. There is, however, rather substantial support for the view which holds that a transfer to avoid death taxes is taxable upon the basis of testamentary motive alone, apart from any consciousness of death.\footnote{See notes 20, 21 supra.} Although it may well be argued that this represents a perversion rather than an application of the subjective test, it is possible that it represents a final evolution of the subjective test, as a test determined by motive alone.\footnote{See City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594 (1945). But see note 13 supra.} If this is true, it is certainly a convincing argument for the objective consciousness of death test under which such a result would be impossible.

Although the notion of taxing a person because he is seeking to avoid a tax has a certain meretricious appeal, it is clearly unjust to tax a complete inter vivos transfer as a transfer in contemplation of death, merely because the transfer was motivated by a desire to avoid death taxes. Applied honestly this conception would mean that practically every substantial gift made today would be taxed as a transfer in contemplation of death. With taxes in their present brackets, it is almost inconceivable that a man would make a significant disposition of his property without recurring to its effect on death taxes, and that this would not at least be a “substantial” part of the motivation behind
the transfer. This is not only a patently absurd, but a patently unjust result, in view of the relation of the gift tax to the estate tax. Taken together they evince a clear legislative intention to encourage a man to part with his property during his life, rather than waiting until death, through the inducement of the lower rates of the gift tax. To offer a man this election and then to penalize him for exercising it is a unique type of tax trap which Congress could never have intended. The effect of motive on tax avoidance is an obscure and difficult subject. This much, however, is clear. The law does not tax a transaction because it is motivated by a desire to avoid a tax, unless the motive is such an essential component of the transaction itself that it fixes its character as a taxable transaction. The gift and estate taxes evince a clear Congressional intention to tax two distinct types of gifts: a gift made while the donor has a substantial life expectancy, which entails a surrender of the opportunity of enjoying the donated property, and is genuinely inter vivos; and, a gift made when the donor has no such life expectancy, which is substantially testamentary. The genuine inter vivos gift is taxed under the gift tax; the gift which is testamentary in character is subject to the estate tax. The line of distinction between the two lies, however, in what the donor does, not in what he thinks. If he is willing to sacrifice substantial life enjoyment of his property he is entitled to be taxed under the gift tax. The fact that he is motivated by a desire to avoid death taxes means nothing more than that he is consciously exercising the option which the law gives him to dispose of his property inter vivos and incur a gift tax, rather than to retain that enjoyment and encounter an estate tax.

A transfer by a young and vigorous person which is motivated by a desire to provide for the transferee after the transferor's death is clearly not taxable as a transfer in contemplation of death, either under the objective test or under the subjective test laid down in *United States v. Wells*. There may be a testamentary intent, but there is not the consciousness of death which is the sole criterion of taxability under the objective test, or an essential component of the criterion of taxability laid down by *United States v. Wells*. It is conceivable that one might argue from the cases which impose a tax on the basis of a motive to avoid death taxes, that the correct test of a transfer in contemplation of death is testamentary motive alone, and that, therefore, the transfer in the hypothetical case under

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60283 U.S. 102 (1931).

61Ibid.
consideration is taxable.\textsuperscript{62} If the cases holding that a transfer to avoid death taxes is necessarily in contemplation of death finally prevail, however, it is probable that this will be because of the misconception that this involves some illegitimate type of tax avoidance, which the law should penalize, rather than because testamentary intent without any consciousness of death is regarded as the correct test of taxability. It seems extremely doubtful, therefore, whether the cases taxing transfers to avoid death taxes as transfers in contemplation of death can be stretched to cover a transfer unaccompanied by any expectation of death more intense than the general expectation which all entertain, even though the transferor's motive is to provide for the transferee after the transferor's death.\textsuperscript{63} If the subjective test can be distorted to accomplish such a result, the need for more discriminating construction of the statute becomes the more urgent.

\textbf{CONCLUSION}

The present subjective test of transfers in contemplation of death works abominably, or to be precise, it does not work at all. Relief might be sought in legislation. In advance of legislation, however, since the courts invented the definition which has caused the trouble, it does not seem unfair to call for immediate judicial reconsideration. This is particularly true since there appears to be such an obvious judicial solution.

The basic difficulty with the contemporary criterion of transfers in contemplation of death springs from the fact that it is premised in large part upon an unprovable fact, the secret motive of a dead man. The solution is to substitute a test based upon a provable fact: whether or not a reasonable man in the position of the deceased donor

\textsuperscript{62}In First Deposit & Trust Co. v. Shaughnessy, 134 F.(2d) 940 (C.C.A. 2d, 1943) a man transferred insurance policies to his wife who put them in trust for her benefit. At the time of the transfer the transferor was 64 years old, active in business and the doctors had pronounced him in good health. He had a life expectancy of over eleven years. The court held that the transfer was in contemplation of death. The basis of the holding was that the transferor did not intend that his wife should enjoy the property until after his death and therefore the transfer was actuated by a testamentary motive. Testamentary motive alone, unaccompanied by any consciousness of death, in the view of the court, is all that is necessary to establish a transfer in contemplation of death. Oddly enough, the court purported to be following United States v. Wells, 283 U.S. 102 (1931). It is conceivable since the Shaughnessy case noted the fact that the transferor was interested in avoiding death taxes, that the case might be explained on this ground.

\textsuperscript{63}But see First Deposit & Trust Co. v. Shaughnessy, 134 F.(2d) 940 (C.C.A. 2d, 1943).
when he made the gift would have realized that he had no substantial life expectancy.

Literally the statute taxes transfers in contemplation of death. Death in the ordinary meaning of the term means the fact of death, rather than the contingencies anticipated after death. A man is contemplating death or thinking of dying when his attention is fixed upon dying, regardless of whether or not he is concerned with the collateral considerations of what is going to happen after his death. The only justification for construing contemplation of death as requiring a testamentary motive is that the context or spirit of the statute requires it. Obviously it does not. Contrary to the tacit assumption of Chief Justice Hughes the federal estate tax is not limited to testamentary dispositions and substitutes for testamentary dispositions. It aims to tax both testamentary and intestate succession and their factual equivalents. You can rationalize the statute in terms of a tax on the privilege of passing on property at death, or in more realistic terms of a tax on the privilege of retaining property until death. The fact remains, however, that the tax on transfers in contemplation of death was obviously designed to meet a situation where a man holds on to his property until he realizes death is near and then gives it away to get it out of his estate so that he will not have to pay a tax. The operative fact in a transfer in contemplation of death is that the donor retains the property for the apparent duration of his life and disposes of it when he has reason to believe that it will shortly pass as part of his estate, rather than that he is motivated by a purpose associated with death rather than with life. The testamentary intent theory leads to the absurd result of making taxability turn upon what a man thinks, rather than upon what he does.

Conceding that consciousness of death is a more natural and sensible rendering of the statutory phrase "contemplation of death" than testamentary intent, either alone or coupled with a consciousness of death, the problem still remains as to whether this consciousness is to be judged objectively or subjectively. That is, is the test of a transfer in contemplation of death the actual consciousness of the decedent that he had no substantial life expectancy, or circumstances from which a reasonable man in his position would have concluded that there was no substantial life expectancy? Is taxability to turn upon objective facts and circumstances or upon a subjective state of mind? Statutes are legal phenomena read against a legal background. Ordinarily the law treats knowledge objectively. A man is deemed to know what a reasonable man in his situation would know. From this
point of view the legal analogies favor an objective construction of contemplation of death to mean not what the particular decedent actually knew, but what a reasonable man in his position would have known. If practical considerations of administrative convenience also favor it, it would seem to be conclusive.

Practical considerations do favor it. Testing contemplation of death by a reasonable man's consciousness of death means that a man who has outlived what appears to be a normal life expectancy will be subject to a death tax on any gift he makes. There seems to be no obvious injustice in such a tax, at least, where collection is deferred, as it will be, until the donor's death. Testing the taxability of transfers in contemplation of death by the actual subjective consciousness of the particular decedent not only puts a premium on dullness and self-deceit, since only the man who candidly and courageously faces the fact of death will be taxed, but it also encourages perjury and "carefully assembled evidence." With the natural temptation to avoid taxes, which is increased by the pressure of present-day tax brackets, it is very unlikely that donors in making transfers in contemplation of death will candidly confess their awareness of approaching dissolution. It seems extremely probable, considering the overall situation, that the objective test of whether a reasonable man would have been conscious of the approach of death will come closer to approximating what was actually in the mind of a decedent in most cases than a subjective test based upon self-serving and interested evidence.