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ANTICIPATION OF INCOME

PAUL A. TESCHNER†

An anticipatory assignment of income is an assignment of the assignor's right to receive amounts in the future which, absent the assignment, would constitute income to the assignor when received or otherwise accrued to him in due course of events. Properly extended and applied, it is a generic principle, one which can liberate our federal income tax system from pedestrian notions of "title" and "sale," of "earner," "earned" and "source," all of which have served only to twist pursuit of particular tax consequences into the dark-obscure runways of tax irrelevancies. The Commissioner himself must bear a goodly portion of blame for judicial enchantment with such disruptive trivia. We need no legislation to bar the close against those who would transmute what would be ordinary income in due course of events into capital gain by a "sale" of a "capital asset"; nor need we a statute to tax as "income" the spread between a decedent's adjusted basis in assets owned by him at the time of his death and a higher market value of such assets when he dies. Both seller and decedent are necessarily divested of rights to receive amounts in the future which, absent the divestment, would constitute income when received or otherwise accrued in due course of events. In one case and the other, we speak of anticipatory assignments of income.

"Full many a flow'r is born to blush unseen, And waste its sweetness on the desert air," wrote Thomas Gray, and though the context be

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1. A secondary purpose of this article is to suggest that the definition should be neutral taxwise; hitherto courts have invariably (1) determined that income taxes should or should not continue to be imposed upon a given taxpayer who had assigned away his right to receive income in the future and then (2) verbalized the result already reached by concluding that a given assignment in anticipation of income was (if the assignor continued to be taxable) or was not (if the assignor was not taxable upon future income) an "anticipatory assignment of income."

If words are to retain any meaning at all in federal income tax cases, the inquiry should be: "This case concerns the question whether a taxpayer who once made an anticipatory assignment of income should be taxed upon the future income he assigned away"; rather than the conclusion being: "Since we have determined that the taxpayer is not taxable upon income he once assigned away to others, he did not execute an anticipatory assignment of income when he assigned away his right to receive it."

2. Gray, Elegy Written in a Country Churchyard (1750). Lawyers have much to learn from poets. While we seek a general principle here, and properly so, we must first find its parts. A grain of sand must be a grain of sand before it may be a part of something else, and its identity is in its being a grain of sand, not in being a mote of the universe. The poet would express it better:

Speaking of contraries, see how the brook
In that wide wave runs counter to itself.
a bit less sublime this has been the fate of the anticipatory assignment principle thus far. It has largely "blushed unseen" in those remote byways of gifts of future income—and even there it has suffered from assumed differences in kind between earned and unearned income and in degree between an assignor's concomitant retention or disposition of the "source" of the income which is assigned.

Before unfencing the assignment principle so as to allow it to course the remotest ranges of federal income tax law, let us consider the metaphoric origin of its present timidities, the three distinct areas in which it should operate, and the critical invalidity of the premise that the "source" of income is of any proper concern in the first place. We should emerge with the most significant tax principle of all: the principle of tax equality.

I.

From the beginning, rationality has not been a touchstone for decision of questions concerning the tax consequences of anticipatory assignments of income. Time out of mind, courts have preferred to ground decisions upon the lightning rod of a metaphor once thundered from Olympus by Mr. Justice Holmes: "The fruit may not be attributed to a tree different from that on which it grew." The "fruit" is of course taken to be income while the source of the income is represented by the "tree." In its direct application, the metaphor proclaims that a tax upon income is properly to be assessed against the one who owns the source which produced the income. Its negative implication is presumed to be

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It is from that in water we were from
Long, long before we were from any creature.
Here we, in our impatience of the steps, get back to the beginning of beginnings,
The stream of everything that runs away.

—Robert Frost, West-Running Brook (1928).

3. The distinction is between income from personal services and income from "property." Pennsylvania Co. v. Philadelphia, 31 A.2d 137, 141 (Pa. 1943) ("[Earned income] implies that some labor, management or supervision must be involved in the production of that income. Income derived merely from the ownership of property would not satisfy the definition.")

Until 1943, an Earned Income Credit was allowed in computing liability for federal income taxes; the credit was irrational from the beginning. 5 Mertens Law of Federal Income Taxation § 32.07-32.09.

The only current statutory provision is § 911 of the 1954 Code which has occasion to define the concept for purposes of allowing an exclusion from gross income for "earned income from sources without the United States":

(b) . . . [T]he term 'earned income' means wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. . . .

of equal validity: one should not be taxed upon income if he has divested himself of ownership of the source of the income.

If either branch of the tree-fruit metaphor were valid as a statement of necessary tax consequences, then we could perhaps live with it as but announcing the concept that continued ownership of capital from which income is derived is usually the tax equivalent of ownership of the income itself. The metaphor would then be almost half true, rather good in the spectrum of tax conceptualism.

The metaphor is not even half true. A taxpayer who transfers ownership of a source of income does not necessarily free himself from income tax liability upon subsequently maturing income therefrom; and the mere fact that one owns a source of income is not a sufficient reason for subjecting him to income tax liability upon income derived from that source.

5. Commissioner v. Court Holding Co., 324 U.S. 331 (1945) (holding that a corporation was taxable as the “Seller” of its assets where it transferred those assets to its shareholders in the form of a “liquidating dividend” under such circumstances that the transfer was subject to an understanding that the corporate assets would subsequently be purchased by purchasers who had previously negotiated with the corporation); United States v. Joliet and Chicago R.R., 315 U.S. 44 (1942) (holding that even though the taxpayer corporation leased all of its assets in perpetuity, the earnings of those assets nonetheless continued to be taxed to the corporation); Helvering v. Leonard, 310 U.S. 30 (1940) (the grantor of a trust which is irrevocable will continue to be taxed upon income from it unless he can successfully bear the burden of proving that application of the income from the trust principal does not relieve him from a continuing obligation such as one arising from his guarantee as to trust principal and income); Douglas v. Willcuts, 296 U.S. 1 (1935) (it is not necessary that a taxpayer own the source of income to be taxable upon the income from it, at least where the income from the source is used to satisfy the taxpayer’s legal obligation and he at one time had owned the source which he transferred with directions that the income be used to satisfy his legal obligation); Burnet v. Wells, 289 U.S. 670 (1933) (an assignor of even an admitted property interest in a fund may continue to be taxed upon its earnings if he intentionally devoted the fund at some past time to a purpose he desired but was not legally obligated to effectuate); Sessell v. United States, 73 F. Supp. 957 (Cl. Cl. 1947) (a taxpayer’s transfer of stock to his wife did not relieve him of income tax liability upon subsequent dividends from that stock where the taxpayer continued to have control of the dividends; the court held irrelevant the fact that the wife, not the taxpayer, owned the stock).

6. Teschner v. Commissioner, 38 T.C. 1003 (1962) (an “earner” of amounts which he never had a right to receive himself was not taxable when the amounts derived from his efforts were paid to his designee); Commissioner v. Tower, 327 U.S. 280 (1946) (a capital investment in a partnership by a wife was not sufficient for partnership income to be attributed to her where the total income transaction indicated that her husband was the proper taxpayer, a factual question); Lusthaus v. Commissioner, 327 U.S. 293 (1946) (even though a wife in a husband-wife partnership really owned part of the capital of the partnership, the Supreme Court affirmed a holding of the Tax Court attributing all of the partnership income to the husband upon the basis that the question was one of “fact” notwithstanding the fact that the Tax Court had not inquired into the extent to which the total partnership earnings were attributable to services performed by the husband rather than to partnership capital); Pearce v. Commissioner, 315 U.S. 543 (1942) (even though the assignee of a source of income owns it absolutely, nevertheless he will not be taxable upon income from it if the source was transferred to him by virtue of an anticipatory assignment; and the determination of taxability will be subject to the same test as that applied to determine the continued taxability of the
Prove the metaphor for a bit. The owner of a source of income usually (but not always) has two distinct and severable rights: (1) rights of ownership of the source itself; (2) rights to receive in due course the income from the source. Under the negative implication of the metaphor, an owner of a "tree" (the income source) may assign with impunity his right to receive the income (the "fruit") so long as he concurrently transfers his ownership of the source. Yet if he owned only the right to receive the income, but did not own the source itself, he would be taxed on the identical assigned income since he was assigning away a naked right to receive the fruit. Such contrary results would want only in logical consistency, of course, an ingredient which has never been a primary component of federal income tax law.

Besides being irrational, however, the metaphor has frustrated an orderly evolution of a generic anticipatory assignment principle. Traditionally it has been used only in the area of gratuitous *inter vivos* assignments of rights to receive amounts in the future which, if received by the assignor in due course of events, would have constituted income to the assignor (hereinafter "gift assignments of income"); in such cases, the assignor has been subjected to income tax when his assignee receives the amounts at a future time. But there are two other major fields of fed-

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See also, Mallinkrodt v. Nunan, 146 F.2d 1 (8th Cir. 1945) (where the trustees of a grandfather trust were to pay income of the trust to the son of the grantor "upon his request"; held that even though the specific trust provision would have subjected the trustee rather than the son to income tax upon the trust earnings, the son was nevertheless the proper taxpayer "... because the power of the petitioner to receive this trust income each year, upon request, can be regarded as the equivalent of ownership of the income for purposes of taxation."); Fellows Sales Co. v. United States, 200 F. Supp. 347 (S.D. S.D. 1961) (holding that a corporation was not taxable upon the 5% of its profits which it collected in trust for a third party who did not own any portion of the corporate assets).

7. Hicks v. United States, 314 F.2d 180 (4th Cir. 1963) (holding that an employee who had in 1957 exercised a direction that some of his compensation income payable in 1958 should instead be paid directly into a profit sharing trust was liable, under the doctrine of constructive receipt, when the payments to the trustee were made in 1958). If an assignment is itself an economic benefit to the assignor, then income would be realized by the assignor at the time of assignment; the difficulty inherent in measuring the benefit should not compel a contrary result. But in the absence of a determinable economic benefit at the time of assignment, income is realized by the assignor when his assignee receives the amounts which would have been received by the assignor absent the assignment. The theory of deferred realization was first expressed at SM-3303, IV-1 Cum. Bull. 132, 134 (1925):

It is apparent from the foregoing authorities that a valid assignment of a portion of the income from a life estate does not vest present interest in such income in the assignee, but merely impresses the fund with a lien enforceable only when the income accrues. It is apparent from these authorities that such rights are enforceable only on the theory that the assignment is an agreement, or creates an obligation, to transfer when the right of the assignor becomes fixed.

Query (1) whether an accrual basis assignor would realize income at the time when the
eral income tax law where a properly defined assignment principle would be determinative of proper income tax consequences: (1) situations where taxpayers sell or otherwise transfer for a valuable consideration rights to receive amounts in the future which, if received by the transferor in due course of events, would have constituted income to him (hereinafter “sale assignments of income”); and (2) cases concerning transfers, by bequest, devise, or inheritance, of decedents' rights to receive amounts in the future, which, if received by the decedent in due course of events had he lived, would have constituted income to him (hereinafter “death assignments of income”).

The future will be writ largely within the bounds of a definitive, universal principle of anticipatory assignments of income. But a seemly regard for history extorts us to look first at gift assignments of income where the tree-fruit metaphor has enjoyed acceptance without study for many a year. Let us dissect the metaphor upon its own terms and in its own province.

II.

The typical gift assignment of income case arises where a high bracket taxpayer, anticipating the receipt of amounts in the future which will be taxable as income to him when received, assigns away his right to receive those amounts in the future. Human nature being what it is, the transfer is usually made to a natural object of the transferor's bounty and is gratuitous in the sense that no legal consideration is received. The most fabled such occurrence arose in the case of *Lucas v. Earl,* where Mr. Justice Holmes wrote:

rights transferred to his assignee "accrue" within the normal concepts of income tax accruability even if the assignee is on the cash basis, and (2) whether an assignor might realize income both at the time of assignment under the economic benefit theory and again (to the extent of any excess of amounts received by the assignee over the assignor's economic benefit at the time of assignment) when his assignee receives (or would normally accrue) the referent amounts?

8. 281 U.S. 111 (1930). A basic assumption of the *Earl* case was that, by definition, the end sought to be achieved by an anticipatory arranger of his tax affairs would be to prevent the income when paid from vesting in him "even for a second." The holding of the case, as distinguished from Holmes' dictum, is therefore clearly restricted to anticipatory arrangements to deflect income from the one who would, absent the arrangement, have received it in due course.

The anticipatory assignment principle, as distinguished from the metaphor, is valid but demands a rationale. Not the least important incident of the revisitation of the theory here attempted may be the disclosure that the Commissioner as well as specific courts have been inexcusably neglective in allowing taxpayers to free themselves from income tax upon what would have been income to them in due course of events absent an assignment of admitted rights to receive amounts. Perhaps the law should be that all taxpayers continue in perpetuity to be liable to pay income taxes upon incomes they would have received, absent anticipatory assignments, unless fairness dictates otherwise.

there is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.\footnote{9}

The Court held that an assignment of income of a law partnership to be earned in the future was not effectual to transfer from a lawyer-husband to his wife income tax liability upon those earnings.

The courts eagerly accepted the invitation that the inquiry they should make in gift assignment cases demands but a determination as to whether the assignor transferred only income fruit or also assigned a capital tree. In \textit{Leininger},\footnote{10} for example, the Supreme Court held that a husband could not relieve himself of income tax upon his distributive share of partnership earnings, averring that the unassigned tree which produced the income was not the husband's partnership interest but was rather the partnership entity itself. The \textit{Clifford} case\footnote{11} similarly taught that whether the grantor of a five-year trust should continue to be taxable upon its income was to be decided, not by reference to whether he had or could in due course have had sufficient ownership of the trust income to warrant a tax, but rather by an inquiry into whether he remained owner of the corpus of the trust itself. And to this very day statutory provisions controlling the taxability of trust grantors proceed on the \textit{Clifford} assumption that the tax is properly predicated only upon

\footnote{9. 281 U.S. 111, 114-15 (1930).}
\footnote{11. Helvering v. Clifford, 309 U.S. 331 (1940).}
the legal fiction that grantors retain an ownership interest in corpus.\textsuperscript{12}

The \textit{Blair} and \textit{Schaffner} cases\textsuperscript{19} perhaps most clearly illumine the discordant chords of the tree-fruit metaphor. In \textit{Blair},\textsuperscript{14} the taxpayer was the life beneficiary of all of the income from a trust and assigned the right to receive all of the income from a portion of the corpus for his lifetime to his children. Despite the fact that in due course the taxpayer would have received all of the trust income, except for the assignment, the Court held that the taxpayer was not taxable on the amounts he assigned since the assignment of portions of his beneficial interest for his lifetime were "not the assignment of a chose in action but of the right, title and estate in and to property. . . ."\textsuperscript{15}

\textit{Schaffner} differed from \textit{Blair} only in that Mrs. Schaffner, also a life beneficiary of trust income, assigned to her children specified amounts from the trust income for the year following the assignments. The taxpayer urged the applicability of the \textit{Blair} theory that an assignment of a right to receive income from a trust was really an assignment of a fractional "right, title and estate in and to property." The Court rejected the taxpayer's argument that she had assigned a property tree:

It is said that . . . each assignee in the present case is a donee of an interest in the trust property for the term of a year and is thus the recipient of income from his own property which is taxable to him rather than to the donor. . . .

\begin{footnotes}
\item[12] INT. REV. CODE of 1954 [hereinafter "1954 CODE"] \S 671 ("trust income, deductions, and credits attributable to grantors and others as substantial owners") states in part:

Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income . . . which are attributable to that portion of the trust to the extent that such items would be taken into account . . . in computing taxable income or credits against the tax of an individual. . . . And 1954 CODE \S 678 ("person other than grantor treated as substantial owner") provides:

(a) General Rule—A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:

(1) Such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or

(2) Such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 577, inclusive, subject a grantor of a trust to treatment as the owner thereof.


\item[14] Perhaps it was in the \textit{Blair} case where Mr. Chief Justice Hughes initiated the conceptual difficulty with the "earner" cases by remarking that "The tax here is not upon earnings which are taxed to the one who earns them." 300 U.S. at 11.

\item[15] 300 U.S. at 13-14.
\end{footnotes}
We think that the operation of the statutes taxing income is not dependent upon such "attenuated subtleties," but rather on the import and reasonable construction of the taxing Act. 16

The Blair-Schaffner dichotomy ostensibly licenses the courts to distinguish between horizontal and vertical assignments of rights to receive income: a vertical severance of the income source will effectually transfer a "title" to a portion of the source itself whereas a horizontal divestment of a right to receive the same total amounts would leave title to the entire source in the assignor. The distinction is legitimate only in direct ratio to the validity of the theory that ownership of the source of income correctly under-girds the anticipatory assignment philosophy. 17

The most famous anticipatory assignment case of all, Horst, 18 held that the donor of negotiable interest coupons which he had detached from bonds which he continued to own remained taxable upon the coupon interest when received by his donee. The holding is consonant with the tree-fruit metaphor approach to income assignments, of course, but closer attention to the Court's language reveals that it is really an incipient right to receive income in due course 19 rather than mere ownership of the source of the income which precludes an assignor from evading taxes on the assigned income:

Underlying the reasoning in these cases is the thought that income is "realized" by the assignor because he, who owns or controls the source of the income, also controls disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the

16. 312 U.S. at 581.
17. Any attempted distinction of the Schaffner and Blair cases would necessarily be sophistical. In both cases the taxpayers owned only naked rights to receive amounts which in due course, absent the assignments, would have constituted income to them when received. In neither case were the assigned portions of trust income "derived from" what the taxpayer owned. The Blair case cannot stand logical analysis; but perhaps even more interesting in the context of our discussion is the fact that both cases negatively imply that income derived from property may properly be taxed to a taxpayer even though the taxpayer does not own the property from which the income is derived.

19. "... here respondent, owner of the bonds, had acquired the legal right to demand payment at maturity of the interest specified by the coupons and the power to command its payment to others, which constituted an economic gain to him." 311 U.S. at 115.
satisfaction of his wants. The taxpayer has equally enjoyed the fruits of his labor or investments and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them.20

Because owners of income-producing assets almost invariably have the "right to receive" the income produced by those assets, chances are remote indeed that the tree-fruit metaphor ever would have been properly tested absent the Commissioner's usage of it in an earned income controversy.

The Commissioner has long reasoned, along with scores of others, that it is in the nature of things for taxability of gift assignments of income to be decided by the tree-fruit metaphor rather than under disturbing concepts like "ownership" and "control" of the future income itself. Since "earned" income by definition is income attributable to personal services, it is presumably apparent that the "tree" of the metaphor in a personal service controversy would be the services themselves. The Commissioner found it easy to define the person who renders services as an "earner" and to conclude, as conclude he has, that since an earner cannot possibly divest himself of the tree (that is, the personal services which were the source of the income) "... whenever A receives something of value attributable to services performed by B, B, the earner, is the proper taxpayer."21

For the first time anywhere, the tree-fruit metaphor had been challenged absolutely: is one to be taxed upon income from a source merely because he retains ownership of the source itself; or should the metaphor itself be rejected in favor of an inquiry into whether the taxpayer at one time had voluntarily divested himself of a right to receive in due course the income from the source?

The moment of truth had arrived. If the metaphor could stand its proving in an earned income context, its utility would continue and properly so. But if the metaphor could not survive its testing in that area, it would not merit continued vitality in any since it long had pretended to conclude all anticipatory assignment cases. The issue was impressive and perhaps it is unfortunate that its resolution did not arise from the proverbial "big, big case."

20. 311 U.S. at 116-17.  
III.

If it is true that "great cases make bad law," then it is equally precise to say that conventional cases can make great law. This might well be true of the Tax Court case of *Teschner et ux. v. Commissioner,*\(^2\) which arose from a contest situation where a taxpayer-father had entered an essay contest and, being unable to qualify for a prize under the rules of the contest, had designated his daughter to receive any prize which might subsequently have been awarded. A prize (an annuity policy) was in fact awarded to his daughter and the Commissioner sought to include in the father's income the full value of the prize. The stipulated and proven facts clearly disclosed that there had been no actual or constructive receipt by the taxpayer-father of any amount and that the relationship of the "earner" to the recipient of the prize was irrelevant.

The Petitioners, in their original brief, had relied upon three cases incidentally to support the proposition that a father's services from which his child receives income will not alone justify imposition of an income tax against the father.\(^2\) The Commissioner, observing that there was a


The subsequent history of the case is probably of more than casual interest to students of tax procedure. On December 27, 1962, the Commissioner filed a Petition for Review with the United States Court of Appeals for the Seventh Circuit. By stipulation, the time within which the Commissioner could transmit the record on review was extended to April 26, 1963, and on April 20 the record on review was in fact filed with the Seventh Circuit. On May 1, 1963, the Commissioner advised the taxpayers that he had decided not to pursue his appeal of the Tax Court's decision and submitted a Stipulation for Dismissal to them for signature.

The taxpayers refused to sign the Stipulation for Dismissal and on May 16, 1963, the Commissioner filed a Motion to Dismiss his appeal. The taxpayers filed an Answer which, *inter alia,* "... respectfully suggest[ed] that the Court, in ruling upon said Motion to Dismiss . . . consider whether this case presents important questions fundamental to a proper administration of the income tax laws of the United States . . . ." Notwithstanding the Suggestion, however, on May 21, 1963, the Commissioner's Petition for Review was summarily dismissed (Docket No. 14157) by the Seventh Circuit.

Case comments on the *Teschner* case have appeared at 48 MINN. L. REV. 815 (1964); 24 MONT. L. REV. 183 (1963); 1962 U. ILL. L.F. (1962); 18 J. TAXATION 5 (1963). The comments in the Minnesota and Montana Reviews concluded that the *Teschner* case had been correctly decided although concern was expressed in each instance as to the implications of the case for tax evasion schemes. It should be remembered, however, that the Commissioner always has a very strong presumption of regularity running in his favor in all of the cases and that the burden will always be on the taxpayer to prove that he never in fact had a "right to receive" the income in point.

The authors of the comment in the University of Illinois Law Forum, writing before it was known that the Commissioner would dismiss his appeal, concluded that there was "... little doubt that this issue will ultimately be decided in favor of the Commissioner in view of the broad sweep of the opinion of the Supreme Court on this subject and the ramifications of the Tax Court's decision if upheld." One may query whether the authors of such statements have been properly exposed to the general principles upon which our Western society is based.

23. *Visintainer v. Commissioner,* 187 F.2d 519, 523-24 (10th Cir. 1951):

To say that the gifts were ineffective for income tax purposes would be the equivalent of holding that a father is disenabled to make a gift to his minor
vital distinction between those cases and the taxpayer's case because while "... managerial and custodial services were rendered in each [of those cases] by the donor parent, the income was attributable to property, not personal services," explained to the taxpayers and the Tax Court that there was a vital, far-reaching, fundamental distinction between income from "property" and income from personal services:

Petitioners have completely failed to meet the issue here presented, that earned income must be taxed to its earner, notwithstanding any anticipatory arrangement. Although ... there appears at last a glimmer of recognition of the futility for tax purposes of the assignment merely of income itself, apart

child which is effective in point of tax consequences if he retains or subsequently exercises any control or management of the property or the fruits therefrom solely for the benefit of the estate of the child. Neither the letter nor the spirit of revenue legislation extends its reach that far. ...

See also, Alexander v. Commissioner, 190 F.2d 753, 755 (5th Cir. 1951): We find in the father's vicarious management of the property for his son nothing which justifies visiting the tax consequences of the enterprise upon the father as the 'owner' of the income. There is a distinction between managerial control over income producing property with the consent of the actual owner, and the absolute right of control over both the property and the income derived therefrom which inheres in a valid legal title. ...

See also the second Alexander case, Alexander v. Commissioner, 194 F.2d 921, 925 (5th Cir. 1952): To say that the profits derived from Frances' land and cattle ... were merely because in each instance the father helped his child by attending to necessary business details, attributable to the parent and not to the children, is completely specious reasoning. It is to deny the fundamental verities of the traditional parent and child, father and daughter, relationship existing in America....

See also Kohnstamm v. Pedrick, 153 F.2d 506 (2d Cir. 1945). In that case, the taxpayer had transferred certain assets to a trustee who was his wife, the trustee being directed to collect the income and to divide it into four equal parts, one part for the wife of the taxpayer and one for each of his three children. The Commissioner sought to tax the father upon the income from the children's shares upon the ground that the mother constantly consulted the father in the management of the children's affairs and that such a consultation, which presumably was followed by the mother-trustee, constituted income to the father. Learned Hand responded:

[W]e cannot understand on what conceivable theory the income from the investment made by the children's mother is to be taken as the plaintiff's [i.e., their father's]. The defendant suggests nothing to support this extraordinary position except that she uniformly consulted her husband about what she should do. It would indeed add terror to marital confidences, if, whenever a woman asked her husband's advice, sporadically or uniformly, about what to do with their children's money, she took the chance that their income would be added to his for purposes of taxation. It may be that for tax purposes the jural indissolubility of the family will in the end be restored to the position it occupied in Archaic law; but, so far, that has not happened. Id. at 510.

24. Reply Brief for Respondent, p. 8, Teschner v. Commissioner, 38 T.C. 1003 (1962). The Commissioner is a bit too cavalier in his distinction between income from "property" and income from personal services. Precise analysis of the source of any income will probably disclose that the income is attributable both to personal services and to "property" albeit perhaps not property owned by the taxpayer.
from any income-producing property or res, Petitioners have scrupulously failed throughout their brief to discuss the question of earned income. Respondent respectfully submits that this failure is not without good reason for any discussion must inevitably lead to the conclusion that such income must be taxed to the earner thereof. (Emphasis in Commissioner's original brief.)

The Commissioner urged that the result in the case had to be the same as if the law firm which employed the taxpayer had required the insertion of a provision in his contract of employment to the effect that in consideration of his services in 1957 he would receive a certain amount directly and an additional amount would be payable to his daughter.

The taxpayers responded by observing that the record in the case was barren of any factual evidence whatever of an anticipatory arrangement of any kind. The case had to be decided upon the record, not by

25. Reply Brief for Respondent, p. 8, Teschner v. Commissioner, 38 T.C. 1003 (1962). Before the Commissioner could utilize the anticipatory assignment "earner" cases, he found it necessary to classify the amounts paid to the taxpayer's daughter as "compensation" income. The 1954 Code had made academic, in the ordinary gift situation, a determination whether or not a prize or award would constitute "compensation," 1954 Code § 74, stating in part that "... gross income includes amounts received as prizes and awards."

The Commissioner, nevertheless, utilized three pre-1954 cases to establish the proposition that an amount paid as a prize or award would constitute income in the nature of compensation: Malcolm McDermott, 3 T.C. 929 (1944), reversed, 150 F.2d 585 (D.C. Cir. 1945) (holding that the Ross essay prize won by a lawyer was taxable; but the Court of Appeals reversed on the theory that the payment to the taxpayer had been donative in nature); Herbert Stein, 14 T.C. 494 (1950) (which held that a prize awarded an economist for his winning essay on an employment plan constituted taxable income which was "gain or compensation for labor"); and Robertson v. United States, 343 U.S. 711 (1952) (which held that a contest award for the submission of a musical composition was taxable income.) The Commissioner also relied upon the proposition enunciated by Robertson that the "discharge of legal obligations—the payment for services rendered or consideration paid pursuant to a contract—is in no sense a gift. Where the payment is in return for services rendered, it is irrelevant that the donor derived no economic benefit from it."

In their original brief, the taxpayers pointed out in reply to the Commissioner's "compensation" classification of the award that in each of the three cases the taxpayer had submitted a professional work-product in a commercial contest. In the case before the Tax Court, the fifty word essay had never been published nor circulated, the taxpayer had never been accorded any recognition, and even testified upon trial that he thought he was "being rather unfairly ignored by everyone involved."

26. The case had not been submitted as a completely stipulated case; rather the taxpayer had testified in some detail to sufficient basic facts clearly to justify a factual finding that there was nothing whatever which the taxpayer did to preclude the award from coming to him or which he could have done to have received the award in the first place. It is vital, in appraising the significance of the Teschner case, to remember that all anticipatory assignment cases are predicated upon the particular facts of each case and that it would be doubtful indeed that a normal employer-employee relationship would ever support an employee's argument that he could not have received the amounts attributable to his personal services in due course.
a general proposition, asserted the taxpayer; and simple dictionary definitions demanded that before there can be an "anticipatory assignment" a taxpayer must have been able to exercise both volition and choice as to the disposition of a right to receive future income which he himself could have received in due course. The Commissioner would have substituted for such volition and choice, and also for the existence of a right to receive future income in due course, the mere fact that one of the taxpayers voluntarily chose to write a fifty word essay when he knew that the contest rules precluded him from eligibility himself to receive a prize. But it was clear, concluded the taxpayers, that at least obiter dicta of the Commissioner's own rulings, the Tax Court decisions, and even

27. The Commissioner had used the phrase "anticipatory arrangement" rather than "anticipatory assignment" in his original brief, apparently upon the theory that the term "assignment" might be construed to require that the res assigned must once have had at least a potential existence in the "assignor." The taxpayers rejected the Commissioner's use of the term "arrangement," however, asserting that it was nothing more than an emotive expression. In support of their proposition that an "arrangement" just like an "assignment" must be based upon voluntary conduct and requires the existence of alternatives, the taxpayer cited the case of Union Mortgage Banking & Trust Co. v. Hagood, 97 Fed. 360, 364 (D.S.C. 1899) which had stated:

The Century Dictionary defines "arrangement" thus: "preparatory measure or negotiation; previous disposition or plan; preparation. . . ."

Webster defines [it] . . . to mean "preparatory measure. . . ." In this case the parties were preparing for a loan. All the terms were distinctly stated. . . . At first they differed. . . . Mrs. Hagood wanted $5,000. . . . The . . . banking company offered $4,000. . . . This was accepted; that is to say, this arrangement preparatory to the execution of the papers was made and concluded then.

28. The approach is a natural unfoldment from the corrosive postulate once pronounced by Holmes in McAuliffe the New Bedford, 155 Mass. 216 (1892) ("the Petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman.")

29. S.M. 3303, IV-1 Cum. Bull. 132 (1925). The life tenant of a trust estate had assigned in advance future income to her husband and some of her children. The various common law theories of assignments were discussed in some detail; after reviewing applicable cases, the Memorandum concluded by noting that the anticipatory assignment doctrine required that the assignor must have had a fixed right to receive the amounts in the future and, indeed, that the only justification for the doctrine was grounded in that condition precedent:

It is apparent from the foregoing authority that a valid assignment of a portion of the income from a life estate does not vest present interest in such income in the assignee but merely impresses the fund with a lien enforceable only when the income accrues. It is further apparent from these authorities that such rights are enforceable only on the theory that the assignment is an agreement, or creates an obligation, to transfer when the right of the assignor becomes fixed.

Id. at 134. See also 0-912 [LO-912] 1 Cum. Bull. 80 (1919). A partner had directed in advance that a certain percentage of the profits of a partnership to which he would otherwise have been entitled should be paid to charity. The opinion concluded that the partner's attempt to divest himself of "income" was to no avail and emphasized that the reason for the conclusion was that the partner, in due course, would have received amounts and that ownership of those amounts by the assigning partner was a condition precedent to the application of the anticipatory assignment doctrine:

The taxpayer here directs his partners, who owe or will owe him money to the
those of the Supreme Court, 31 forecast the *sine qua non* of such a right extent of his share of the profits, to pay a part of those profits to a third person, the donee named in the assignment. It is nonetheless the income of the taxpayer.

While the amount named in the assignment is never actually received by the donor . . . he admits his right of ownership by the very act of executing the assignment. The mere fact that it is received by his nominee rather than by him, does not prevent it being his income.

*Id.* at 81.

30. Ormsby McKnight Mitchel, 1 B.T.A. 143 (1924). The Board of Tax Appeals held that the provisions of the Revenue Act of 1916 which required a partner to include in his income his distributive share of partnership profits could not be modified or changed by an agreement made between a partner and a third person disposing of a portion of the distributive share of the partner. The Board emphasized the requirement that if the assignor-partner was to be held he must have had a right to receive amounts in due course:

*It does not alter the situation to say that as soon as income arises in the partnership at that instant it becomes the property of the grantee, as this is mere assertion. . . . The fallacy of the contention arises from the failure to take account of the fact that the taxpayer is contracting to dispose of something which must first be his before it becomes the property of any one else. . . . As we have attempted to point out above, the defect in the case is the failure to recognize the fact that the distributive share of the taxpayer in the profits of the partnership constitutes income to him before it is disposed of. This is the effect of the Act and is recognized by the agreement itself, for in the first Article it provides: “The party of the second part shall be entitled to one-half of the profit which shall come to the party of the first part from said firm.” . . . When Congress provides that a person in a certain status shall be subject to taxation in a particular manner, we do not believe that person can, at one and the same time, retain such status and by agreement relieve himself from the effect of his act.*

*Id.* at 149. And see Marion Stone Burt Lansill, 17 B.T.A. 413 (1929). The Board held that an order by a taxpayer to his bank directing payment of a percentage of mineral royalties which he was entitled to receive from the bank as trustee directly to a third person did not eliminate those amounts from his “income”:

*The right in the taxpayer to receive the income at the time it is attributed and taxed to him is likewise not essential, where . . . taxpayer has by his own volition chosen to dispose of the right to receive it, or retaining that from which the income is derived. The volition in disposing of the right is important for while all will agree that one who never received or had a right to receive or who has involuntarily lost it should not be taxed, it is also plain that his voluntary exercise of the right to dispose of the income before receipt may be just as valuable and important practically as its exercise after receipt. There is no reasonable ground for supposing that Congress intended . . . to tax the one and relieve the other. The ability to pay in the case at Bar is equally great whether the Petitioner received the entire royalty and then paid the lawyer or told the bank to pay the lawyer directly out of the royalties.*

*Id.* at 423.

31. Poe v. Seaborn, 282 U.S. 101 (1930). The Washington law of community property was non-consensual and the wife owned one-half of the community income under it. The Court held that the husband could not be taxed upon his wife's share of the community income even though he had broad powers of control, management and alienation of his wife's share. The Commissioner argued that since the husband's “earnings” were the income which he was seeking to tax, there had been an “anticipatory arrangement” by the husband; but the Supreme Court pointed out that *Lucas v. Earl* was not controlling since the “. . . very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate.” *Id.* at 117. Helvering v. Horst, 311 U.S. 112, 119 (1940):
to receive.

The Tax Court held for the taxpayers. Observing that income taxes are imposed upon “the income of every individual” and that where an individual neither receives nor has the right to receive income he is not the taxable individual within the contemplation of the statute, the court responded to the Commissioner’s theory that “earners” are the proper persons to be taxed. After first protesting the obscurity of the argument on the point, the court discussed two alternatives: (1) if the Commissioner meant that all income is to be taxed to the person who “generates” the income, then the Commissioner was simply wrong; (2) if the Commissioner used the term “earn” in its commonly accepted usage (“to acquire by labor, service, or performance; to deserve and receive compensation”) then his theory was intelligible but did not enfold the particular case. After affirming that the anticipatory assignment doctrine had been expressly confined to situation “...when he who is entitled to receive it [i.e., the income derived from compensation] makes use of his power to dispose of it in procuring satisfactions which he would otherwise procure only by use of the money when received’ ...,” the court held that the power of designation given to the entrant was no reason for varying the well-settled rule.

Two concurring Tax Court judges observed that all of the Commissioner’s own cases concerned with anticipatory assignments were expressly limited to situations where “one vested with the right to receive income [does] not escape the tax by any kind of anticipatory arrangement, however skilfully devised. ...” They agreed, however, that one

The dominant purpose of the Revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. ... The tax laid ... upon income “derived from ... wages, or compensation for personal services ... in whatever form paid ...” cannot fairly be interpreted as not applying to income derived from interest or compensation when he who is entitled to receive it makes use of his power to dispose of it in procuring satisfactions which he would otherwise procure only by the use of the money when received. ...

Harrison v. Schaffner, 312 U.S. 579, 580 (1941):

We have held, following the reasoning of Lucas v. Earl ... that one who is entitled to receive, at a future date, interest or compensation for services and who makes a gift of it by an anticipatory arrangement realizes taxable income quite as much as if he had collected the income and paid it over to the object of his bounty.

32. Judge Russell E. Train presided at the trial and wrote the majority opinion which included Judges Bruce, Fisher, Forrester, Drennen, Hoyt and Murdock; Judge Howard A. Dawson, Jr. wrote a concurring opinion in which he was joined by Judge Mulroney; a dissenting opinion was authored by Judge Craig S. Atkins for himself and Judges Tietjens, Oppen, Raum, Withey, Pierce and Scott. Of interest, albeit perhaps not of much significance, is the early training of the dissenters: five of the seven formerly worked either for the Treasury Department or the Tax Division of the Department of Justice.
who had only a power to dispose of income with no right to receive it himself could nevertheless in the proper case be taxed upon the exercise of his power if it resulted in an economic benefit to him. The Teschner case was not concerned with any question of economic benefit, however, so the case had been correctly decided.\textsuperscript{33}

A vigorous dissenting opinion by seven of the sixteen Tax Court judges quarreled with the proposition that a right to receive income in due course is a condition precedent to the applicability of the anticipatory assignment doctrine. The dissenters theorized that when the taxpayer entered the contest with full knowledge of the rules, he exercised a power to control income disposition and that the subsequent payment to his designee “... constituted the enjoyment and hence the realization of the income” by the taxpayer. Declaring that the absence of a “right to receive” was irrelevant, the dissenters proclaimed that the case was not to be decided by “attenuated subtleties.”\textsuperscript{34}

\textsuperscript{33} The taxpayers had no quarrel with the proposition that an “earner” would properly be subjected to income tax upon the fair market value of an “economic benefit” attributable to the “earner’s” services. Indeed, the taxpayers concluded their Reply Brief with a specific reference to that possibility:

\textit{Finally, it should be remembered that the Respondent is not seeking to tax Petitioners upon a benefit received. If he had sought to tax them upon the value of their hopes and aspirations attributable to their daughter’s receipt of the annuity policy we would have a different case; we need not be concerned here with speculations as to whether a person could be taxed upon benefits derived from sunlight and rain and cosmic rays although perhaps a disposition of this case favorable to Respondent would be a condition precedent to his attempt to tax such items. That is another matter.}


In the case of Frew v. Bowers, 12 F.2d 625 (2d Cir. 1926), Learned Hand commented upon the special dangers of an income tax not based on a benefit received or which might have been received by a taxpayer:

\textit{Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he has sold outright, or his estate were doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer’s wealth but this section distributes them in accordance with another’s wealth; that is a far more grievous injustice.}


\textit{Id. at 628.}

\textsuperscript{34} The dissenters were themselves guilty of a somewhat “attenuated subtlety” in refusing to discuss the next logical question: even if one “anticipatorily assigns” a right to receive income, may the “assignor” be subjected to income tax if, at the time of “assignment,” a possibility that any amount whatever will be received is so remote as to be negligible?

The answer is no, the relevant case being Cold Metal Process Co. v. Commissioner, 247 F.2d 864 (6th Cir. 1957). The question was whether a corporation which was dissolved in 1945 was properly subjected to income tax liability upon amounts received in 1949 by its sole stockholder. At the time of dissolution of the corporation, litigation was pending in which the government was vigorously contesting the legal right of the corporation to receive the amounts which were later paid to the sole shareholder who had acquired all of the corporate assets in the dissolution. The Commissioner argued that
The most disturbing facet of the Teschner case is that the Commissioner and a significant number of dissenting Tax Court judges announced a theory which would extirpate from the anticipatory assignment doctrine the requirement that a taxpayer must once have had a right himself to receive income in due course, either by taking or rejecting determinable action. Granting that "income" itself is only a concept, nonetheless it demands firm grounding in the roots of voluntary conduct. The requisite volition is so basic to our tax system and the standards of fair play implicit in an ordered society that taxpayers need not seek refuge within the perilous confines of administrative discretion and judicial restraint. The gauntlet thrown by the Commissioner affronts the
distribution to the sole stockholder of the contingent right to receive the income constituted an "anticipatory assignment of income" so that the amount, when subsequently paid to the stockholder, became taxable to the assignor-corporation.

In the course of reaching a decision in favor of the taxpayer, the Court of Appeals for the Sixth Circuit noted the general rule that the anticipatory assignment of earned income would not defeat an income tax, then continued (at p. 72):

As stated by the Tax Court . . . the legal right to the income was being strenuously contested by the government and there was no certainty at the time of the transfer that the transferor's rights thereto would ever be established or that the money would ever be paid to either the transferor or transferee. The amount that might eventually be collected was unliquidated. Having previously held that by reason of the uncertainty of Cold Metal ever being able to collect on any of its claims for infringement, such claims did not constitute accrued income to it in 1945 . . . we have real difficulty in now ruling that under the same circumstances and same uncertainty Cold Metal had nevertheless "earned" such income [at the time of liquidation]. . . . The facts which prevented it from being accrued income in 1945 also prevented it from being "earned" income at that time in the usually accepted meaning of the term.

Regardless of the terminology used with respect to the income, its taxability depends on the actual circumstances existing at the time of the transfer. At that time, it was not income to Cold Metal. It was an unliquidated chose in action. Cold Metal divested itself of all title, interest and control over it at that time. Later developments over which Cold Metal had no control transformed it into taxable income which was paid to and received by the new owner for its sole use and benefit. These facts fall far short of classifying the transaction as an anticipatory assignment of income taxable to the assignor when later paid. . . . Cold Metal's right was not a vested right in 1945. . . . We think that the absolute and unconditional assignment . . . of . . . a contingent right to income . . . payable, if at all, at some indefinite time in the future in an indeterminate amount, with respect to which the assignor had no voice or control whatsoever, prevents us from treating the case as one involving the anticipatory assignment of income which when paid becomes taxable to the assignor. . . .

To say that the dissenters should have reckoned with the Cold Metal case is not tantamount to approving that decision. Indeed, just as "income in respect of a decedent" should not be restricted by normal concepts of "accrual," so too the inquiry to be made in cases involving gift assignments of income should not be so limited. The question which should have been asked in Cold Metal was simple: did the contacts which the corporation had with the amounts subsequently paid to the assignee suffice to make it fair to attribute to Cold Metal the income for federal income tax purposes?
Constitution itself.\textsuperscript{35}

But it is not constitutional limitations with which we are concerned here. Our venture seeks a truly universal application of the generic

\textsuperscript{35} Even without respect to the problems implicit in the sixteenth amendment itself, the fifth amendment is a further limitation upon congressional power to tax "incomes." In the case of Heiner v. Donnan, 285 U.S. 312 (1931), the Supreme Court held that a federal revenue act based upon a conclusive presumption that gifts made within two years prior to the death of the donor were in "contemplation of death" violated the due process clause of the fifth amendment. The Court stated that a statute which bases a tax "... upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand." The Court further pointed out that the restraint imposed on legislation by the due process clauses of the fifth and fourteenth amendments is identical. See also Lewis v. White, 56 F.2d 390, 391-92 (D.Mass. 1932) ("... [T]hat an attempt by Congress to measure the tax on one person with reference to income from another would conflict with the due process clause of the Fifth Amendment seems clear. ... [N]or does the fact that ... the possibility of evasion exists operate to extend the taxing powers of Congress to the point where they can tax one person on the income of another when the income is wholly and completely acquired and beyond any power or right in the taxpayer to reach or control disposition in any manner whatsoever. ...")

Heoper v. Tax Commission of Wisconsin, 284 U.S. 206 (1931), was concerned with the constitutionality of a Wisconsin income tax statute which authorized an assessment against the husband of a tax computed on the combined total of his and his wife's incomes. Mr. Justice Roberts, writing for the Court, observed that a married woman in Wisconsin owned property in her own right, then declared that the question presented for decision was whether Wisconsin had power by an income tax law to measure the husband's tax, not by his own income, but in part by that of another:

We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. ... The effort to tax B for A's property or income does not make B the owner of that property or income, and whether the state has power to effect such a change of ownership in our particular case is wholly irrelevant when no such effort has been made. Under the law of Wisconsin the income of the wife does not at any moment or to any extent become the property of the husband. He never has any title to it, or controls any part of it. That income remains hers until the tax is paid, and what is left continues to be hers after that payment. The state merely levies a tax upon it.

Arbitrary and discriminatory provisions ... cannot be justified by calling them special regulations of the persons or relationships which are the object of the discrimination. The present case does not fall within the principle that where the legislature, in prohibiting a traffic or transaction as being against the policy of the state, makes a classification, reasonable in itself, its power so to do is not to be denied simply because some innocent article comes within the proscribed class. ... Taxing one person for the property of another is a different matter. There is no room for the suggestion that [as against] ... the appellant and those similarly situated the Act is a reasonable regulation, rather than a tax law.

Neither of the reasons advanced in support of the validity of the statute as applied to the appellant justifies the resulting discrimination. The exaction is arbitrary and is a denial of due process.

\textit{Id.} at 215-16, 218. Mr. Justice Holmes, dissenting, would have upheld the tax on the premise that the State of Wisconsin was merely basing the tax against the husband upon his wife's income on the reasonable theory that "... in every probability [it] will make his life easier and help to pay his bills." Fortunately, Holmes' reputation rests on firmer stuff than his proficiency in domestic relations.
principle of anticipatory assignments of income, a non-constitutional inquiry to be sure but one which has been liberated from restrictive concepts of the relevancy of the source of income. So when we look at sale assignments and death assignments, as we do now, let us do so with conviction that the source of assigned income qua source is of no account to the seeking of proper tax results.36

IV.

A death assignment of income matures when a decedent's successor sells or otherwise disposes of property which he had acquired by bequest, devise or inheritance from a decedent. The question is whether amounts realized upon the sale or other disposition are "income" to the transferor or are to be regarded as a return of capital to him to the extent of the value of the property at the time of death of the decedent. Proper resolution of that question also requires a generic anticipatory assignment principle and it is not relevant that the identity of the taxable person will differ from gift assignments where the assignor himself is taxed. Indeed, the precise purpose of the statutory provision taxing to a recipient "income in respect of" a decedent37 was to deflect "income" from the assignor's final income tax return to that of his assignee while at the same time preserving the character of the income when it arrives in the hands of the recipient.38 The mere change in the identity of the taxable

36. See Part VI and notes 94-105 infra.
37. 1954 Code § 691 provides in part as follows:
Sec. 691 Recipients of Income in Respect of Decedents.
(a) Inclusion in Gross Income.—
(1) General Rule.—The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period . . . shall be included in the gross income, for the taxable year when received, of:
(A) The estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;
(B) The person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or
(C) The person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right.

38. 1954 Code § 691(a) (3) states:
(3) Character of Income Determined by Reference to Decedent—
The right . . . to receive an amount shall be treated, in the hands of the estate of the decedent or any person who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction in which the right to receive the income was originally derived and the amount includable in gross income . . . shall be considered in the hands of the estate or such person to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.
person does no violence to the concept of "income."

Before 1942, when the income in respect of a decedent provision became part of our federal income tax law, a recipient of amounts in respect of a decedent had at least two arguments by which he could attempt to escape income taxation upon amounts received: (1) property acquired by "bequest, devise or inheritance" is exempt from income taxation; (2) property acquired from a decedent by inheritance, etc. receives a new tax basis in the hands of the recipient measured by the fair market value of the property at the time of the decedent's death. The argument was that until amounts exceeding the new date-of-death basis had been recovered in respect of the property received from the decedent, the proceeds received by a decedent's successor constituted a mere "conversion of corpus" and were not subject to income tax. This "conversion of corpus" argument proved to be highly successful.

Insulation of a decedent's successor from income taxation left the Commissioner with only one practical alternative: to tax in a decedent's

39. Richardson, Jr. v. United States, 294 F.2d 593 (6th Cir. 1961), where the Court held that 1939 Code § 126 [1954 Code § 691] was constitutional as applied to a decedent's heirs who collected interest accrued on promissory notes owned by the decedent at the time of his death. The Court held that the accrued interest did not become principal on the decedent's death and that it was properly characterized as "income" at that time with the result that:

If the decedent had lived and received the interest, it would have been taxable income to him. We do not think it was an unconstitutional exercise of power for Congress to exact the payment of the income tax on what is clearly income from the person who actually received the income rather than from the decedent. . . . Congress in so doing deprives the taxpayer of no right and subjects him to no hardship, in that the taxpayer receives income with knowledge of the statute and of the tax thereunder inherent in it at the time of its receipt. 294 F.2d at 598.

41. 1954 Code § 102; 1939 Code § 22(b)(3).
42. 1954 Code § 1014; 1939 Code § 113(a)(5). In relevant part, § 1014 reads as follows:

Sec. 1014. Basis of Property Acquired from a Decedent.
(a) In General.—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death . . . , be the fair market value of the property at the date of the decedent's death.

While there are several technical definitions of "property acquired from a decedent," included among them is one which stipulates that "Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent" will constitute such property. 1954 Code § 1014(b)(1).

43. Nichols v. United States, 64 Ct. Cl. 241 (1947); Wm. P. Blodgett, 13 B.T.A. 1243 (1928) (a partner died owning a right to receive a share of partnership profits; held, that only amounts received by the executors which exceeded the date-of-death value of the chose in action were income to the executors); Jackson B. Kemper, Administrator, 14 B.T.A. 931 (1928) (amounts due decedent for salary and bonus for periods prior to his death were not income to his estate when collected by his administrator.)
final income tax return the value of rights to receive amounts which would have constituted income to him had he lived and received them in due course. Such an approach was first utilized in the Revenue Act of 1926 which provided that where a decedent had been reporting income on the installment basis, his death would be deemed a disposition of the installment obligation and the difference between its fair market value at the time of death and the decedent's basis would be income in the decedent's final return. To the objection that the result was to tax unrealized gain, the courts responded that installment reporting was a privilege and the decedent had consented to the treatment.

The consensual theory applied to installment sales was not an adequate answer to the basic problem. If a decedent had been on a cash basis, for example, his final return included only cash receipts as income. For the definition of taxable income to vary in accordance with a discretionary accounting method was irrational, so in the Revenue Act of 1934 Congress sought to catch the subsequent untaxed proceeds:

[I]n the case of the death of a taxpayer, there shall be included in the gross income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includable in respect of such period or a prior period.

The important Enright case held that the statutory provision comprehended an accruable claim of a cash basis decedent at the time of his death albeit such a claim was based only on quantum meruit. The theory

44. 1954 Code § 6012 ("Persons Required to Make Returns of Income") reads in part as follows:
   (b) Returns made by Fiduciaries . . .
   (1) Returns of Decedents.—If an individual is deceased, the return of such individual required . . . shall be made by his executor, administrator or other person charged with the property of such decedent.
45. 44 Stat. 23 (1926).
46. Crane v. Helvering, 76 F.2d 99 (2d Cir. 1935).
49. Helvering v. Enright, 312 U.S. 636 (1941). Enright was a member of a law partnership, the partnership agreement having provided that the estate of a deceased partner would receive the partner's share of subsequent receipts on account of business that had been unfinished at the partner's death. Against the contention that a right to receive payment was a prerequisite to accrual, the court responded that accrual as used in the statute was meant to further the policy of including in the decedent's final return all income earned during his life even though the right was based on quantum meruit.
50. Quantum meruit ("as much as he deserves") is a proper basis for recovery of payment for services performed, but only if the worker had no express contract for a stipulated recovery for his services. It refers to that class of obligations imposed by law, without regard to the intention or assent of the parties bound, for reasons dic-
of the case also embraced a claim which matured solely by reason of the 
decedent's death, as where contractual obligations forming a condition 
precedent to the decedent's right to receive income could be fully per-
formed only by his death. There were of course serious and funda-
mental limitations upon the efficacy of the accrual-by-death rationale, 
but rampant criticism of it was based not so much upon the fact that a 
cash basis decedent was equated with an accrual taxpayer as upon the 
grounds that there was often included as a decedent's income in his final 
return amounts which had not "accrued" by any recognized accounting 
standard.

The Revenue Act of 1942 promulgated a new pattern for taxing 
amounts received by successors in interest of decedents when those 
amounts result to a sufficient extent from the decedent's income-seeking 
lifetime activities. The accounting provisions were changed so as to elimi-
nate the necessity for bunching income in a decedent's final return merely 
because of his death; concurrently, however, the concept of taxable in-
come was expanded to provide that the recipient of "income in respect of 
a decedent" shall be taxable on such income.

The critics of the concept of "bunching" of income in a decedent's 
final return were elated to discover that the theory had been abandoned 
completely. There was no longer even an option available to a de-

_51._ First Nat'l Bank v. Manning, 100 F. Supp. 892 (D. N.J. 1951). The de-
cedent had contracted with his employer that if he should die before a certain date his 
estate would receive what would have been his remaining salary. The amount received 
by the estate was taxable in the decedent's final return since the right to payments ac-
crued at the very instant of his death.

_52._ See Commissioner v. Alldis' Estate, 140 F.2d 885 (6th Cir. 1944), where the 
decedent at the time of his death had owned 100 shares of beneficial interest in the 
Chrysler Management Trust. Prior to his death, the decedent had contracted for the 
sale of the shares to the Trust, the sale to be effective upon his death. The Court 
held that the appreciation in value of the shares during the decedent's lifetime was not 
taxable in his final return under the pre-1942 Section 42 of the 1939 Code.

_53._ See Gemmill, _Accruals to Date of Death for Income Tax Purposes, 90 U. Pa. 
L. Rev. 702 (1942); Wentz, _Distortion of Income Tax Occasioned by Death and the 
Misapplication of Graduated Rates, 19 Taxes 707 (1941)._


_55._ Revenue Act of 1942, §§ 134(a), (c), (e). The "Income in Respect of De-
cedents" provision was added (see note 31 supra) and the generic definition of income 
was expanded to include as a component of "Gross Income" items of "Income in Respect 
of a Decedent" [see 1954 Code § 61(a) (14)].

_56._ Because of the new concept of "Income in Respect of Decedents," bunching of 
income items in a decedent's final return had become unnecessary. Accordingly, 1939 
Code § 42 [1954 Code § 451(b)] which had required bunching in the decedent's 
final return was changed [by Revenue Act of 1942, § 134(a)] to read:

[1] In the case of the death of a taxpayer whose net income is computed upon 
the basis of the accrual method of accounting, amounts (except amounts in-
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cedent’s successor to include as income in his final return items which would not have been includable under his lifetime accounting method.  

Final returns of cash basis decedents were to be computed on the cash basis, returns of accrual basis decedents were to be computed on the normal accrual basis, and subsequently received income in respect of a decedent was taxable to a recipient if it was not includable in the decedent’s final return.

Perhaps a major contribution which the theory of death assignments will make to a generic anticipatory assignment principle will be the statutory concept of relation back. Both the holding period of assets giving rise to income in respect of a decedent and the character of income when received by a decedent’s successor shall be determined as if the decedent had lived and received the proceeds. Also, since income in respect of a decedent usually will constitute a subsequent fruition of determinable rights to receive income which were includable in the decedent’s gross estate for estate tax purposes, a deduction is granted the person who is taxable on the income which is called a “deduction for estate tax.”

Income in respect of a decedent is of course not restricted by the concepts of what would properly have been income reportable in a decedent’s final return.

57. Estate of Fred Basch, 9 T.C. 627 (1947). The decedent had been on the cash basis. His executor included in the decedent’s final return employment bonuses and commissions which were not determined until after death. The Tax Court upheld the Commissioner’s exclusion of these amounts from decedent’s final return and remarked that the only theory of inclusion would be constructive receipt since the decedent had been on the cash basis.

58. The cash basis of accounting defers recognition of income until money is received (or constructively received); the principal criticism of this accounting method is probably that it fails to coordinate the rendering of services and the recognition of income. The most common exception to a strict requirement of receipt by a cash basis taxpayer is that if cash is “subject to a man’s unfettered command and . . . he is free to enjoy it at his own option . . .” realization of income cannot be avoided by refusal to claim the amount available. Corliss v. Bowers, 281 U.S. 376 (1930). In all cases, however, the cash basis, like any other basis of reporting, must clearly reflect income. See 1954 Code § 446(b).

59. The usual accounting treatment is to accrue income only when there has been a completed contract or sale and the amount in question has become an unequivocal asset of the taxpayer. Commissioner v. Hansen, 360 U.S. 446 (1959) (holding that automobile dealers realized income as soon as finance companies credited amounts upon their books because, at that time, the dealers acquired “fixed rights to receive the amounts” so credited. The Court held that it was immaterial that the dealers, having guaranteed or endorsed the commercial paper involved in the transactions, might never receive the amounts because of their application by the finance company against a guarantee or endorsement liability of a given dealer.)

60. Sarah L. Narischkine, 14 T.C. 1128 (1950); Estate of Fred Basch, 9 T.C. 627 (1947); Conner’s Will, 75 N.Y.S.2d 709 (1948).


62. 1954 Code § 691(c).
cedent’s final return under the Enright rule. There is no longer any reason to distinguish between ordinary claims to income, whether inchoate or legally matured, which a decedent had at the time of his death and a decedent’s contractual rights to have future income of a business entity paid to his successors after his death. The death assignment concept would subject to income tax all amounts of a decedent’s income received by his assignee without resorting to the legal fiction that the

63. The Enright rule was interpreted to require that the decedent must have died owning at least a quantum meruit claim before a bunching of income in the decedent’s final return would be permitted. In the case of Randolph Peyton, 44 B.T.A. 1246 (1941), the Board of Tax Appeals held that amounts paid to a decedent’s estate by the former partners of the decedent, which were based upon moral obligations having no basis in quantum meruit, were not subject to income tax in the decedent’s final return. But the income in respect of a decedent provision is not amenable to such a narrow construction. In the important case of Bausch’s Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951), for example, voluntary payments had been made by a decedent’s former employer to the decedent’s estate. The Second Circuit held that the estate was taxable upon income in respect of a decedent since the executors “in contemplation of law continued the legal personalities of the employees who were specifically taxed under [1939 Code] Section 126(a) upon receipts for services by their testators.” Id. at 314.

64. This is not to indicate that legal fictions are not eminently useful and proper methods of developing important legal principles. See, for example, Frank, Law and the Modern Mind 315 (1930):

No doubt [Vaihinger’s] . . . superficial acquaintance with law and lawyers caused him to ignore lawyers’ deficiencies. He seems to know little of the continued use of so-called legal fictions as semi-myth to conceal the actualities of legal change and adaptation—a misuse of fictions which indicates that liberated fictional thinking is not too evident, as yet, in law. Vaihinger has not been apprised of that fiction phobia among lawyers of which Tourtoulon speaks. To be sure, that phobia may be the first step in a health reaction against the misuse of legal fictions, that is, against the use of fictions in law as semi-myth. But such a reaction, when it leads to a war on legitimate fiction is a vice; the cure for such fiction-phobia is to be found in the next step—the recognition by the legal profession of the correct use of valid fiction and the acknowledgment that all legal rules are relative and instrumental. What Vaihinger observes of thinkers in other fields is no less true—is perhaps the more true—of lawyers: a vast deal of their thought-devices involves conceptual distortion of the truth without awareness of the distortion. Nominalism (the first step towards knowledge of the provisional or relative character of all concepts) has made but little headway in jurisprudence. Conceptualism may perhaps be said to have its chief modern stronghold in the law. Many lawyers are still infected with that scholasticism which converts abstractions into independent entities having an “out-there” character. Vaihinger would doubtless be astonished to discover how greatly the legal profession would be helped by assimilating the following criticism which he makes of the naive use of “general ideas”: . . . general judgments when connected with a general subject, only represent convenient methods of expression. There is no such thing as a general subject in reality. . . . As opposed to particulars, the [concepts or general ideas] have been regarded as the permanent essence, and this permanent essence has been hypostasized into an energetic thing interpreted as the general basis of particular phenomena. . . .

Frank’s great work is the best one on the subject and varieties of legal fictions. Such fictions exist on many levels, of course, and indeed “. . . in a sense, all legal rules, principles, precepts, concepts, standards—all generalized statements of law—are fiction.” Id. at 107.
assignee has in fact himself become a partner or business associate in the business enterprise.

Perhaps the principal limitation of the death assignment cases which have been decided without respect to a generic anticipatory assignment principle springs from the failure to recognize that a decedent may effectually assign rights to receive income in a form other than a mere right to collect amounts. The theory is that there is a basic, absolute distinction between “rights to income” and “rights to property.” A decedent’s successor need do nothing himself in order for “rights to income” to mature, so the courts have had no trouble in deciding that rights to receive renewal commissions, an employer’s custom to pay bonuses, and all rights to receive amounts on account of lifetime services by the decedent, including those based on *quantum meruit*, nurture income in respect of a decedent when the referent amounts are subsequently collected by the decedent’s successor in interest.  

Unless a decedent’s transferee acquires from the decedent a right to collect such amounts, however, the transferee himself must take action to convert his rights into income by sale or exchange. Those who would import significance to that distinction in deciding death assignment cases consider it one thing passively to pick fruit which is itself already classified as income but deem it fundamentally different for a recipient of property rights in respect of a decedent to enter the market place and sell or exchange them. The approach leads to illogical variances: (1) a decedent’s successor who sells accounts receivable not includable in the decedent’s final income tax return is in receipt of income in respect of a decedent;  

but (2) a decedent’s successor who, after the decedent’s death, sells produce of a farm which was growing thereon at the time of the decedent’s death will not be subject to income taxation in respect of the decedent unless the decedent had delivered the produce to a marketing

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65. Findlay v. Commissioner, 332 F.2d 620 (2d Cir. 1964) (renewal insurance commissions); O’Daniel’s Estate v. Commissioner, 173 F.2d 966 (2d Cir. 1949) (custom to pay bonuses); Davison’s Estate v. United States, 292 F.2d 936 (Ct. Cl. 1961) (*quantum meruit* claim).


67. Treas. Reg. § 1.691(a)-2(b) (1957) states the following illustration: *Example (5).* (1) A owned and operated an apple orchard. During his lifetime, A sold and delivered 1,000 bushels of apples to X a canning factory, but did not receive payment before his death. A also entered into negotiations to sell 3,000 bushels of apples to Y, a canning factory, but did not complete the sale before his death. After A’s death, the executor received payment from X. He also completed the sale to Y and transferred to Y 1,200 bushels of apples on hand at A’s death and harvested and transferred an additional 1,800 bushels. The gain from the sale of apples by A to X constitutes income in respect of a decedent when received. On the other hand, the gain from the sale of apples by the executor to Y does not.

The Commissioner should not properly make such a concession, of course, especially in
cooperative, or perhaps arranged for such delivery, before his death.\footnote{8} And to add insult to anamoly, a decedent's successor who sells inherited farm produce for less than its fair market value at the time of the decedent's death would even be entitled to claim a loss chargeable against his other income.

There is an elemental difference between original income earned by a decedent's successor as a result of his own efforts and income received from the sale of assets which the successor received by bequest, devise or inheritance from a decedent; the distinction has been recognized as basic. Before the enactment of the Internal Revenue Code of 1954, an estate was entitled to deduct in its income tax return amounts of current "income" which were "to be distributed currently" or amounts of such income "properly paid or credited" to legatees, heirs or beneficiaries.\footnote{69}

light of the prior provision of his own regulations [Treas. Reg. § 1,691(a)-1(b)(3) (1957)] which would include within the term "income in respect of a decedent" any income "... to which the decedent had a contingent claim at the time of his death."

\footnote{68} Commissioner v. Linde, 213 F.2d 1 (9th Cir. 1954). The Ninth Circuit reversed a decision of the Tax Court which had held that "income in respect of a decedent" did not include amounts paid to a decedent's successor by a cooperative marketing association on account of grapes which had been turned over to the association for marketing by the decedent before his death.

The Tax Court [Rose J. Linda, 17 T.C. 584 (1951)] had held for the taxpayer in a puzzling decision. The decedent had been a grape farmer; at the time of his death he had contributed his grape crop to various cooperatives in return for a pro rata share of the proceeds after the pools had been "liquidated." The decedent died before liquidation, and the taxpayer was bequeathed the decedent's right in the unliquidated wine pool. The pools were finally liquidated and the taxpayer received the proceeds. The Commissioner argued that the proceeds constituted "income in respect of a decedent" because they arose from "deferred purchase agreements" the decedent had made with the cooperative. The Tax Court replied that there had been no sale, that the decedent had retained an "equitable title" and the cooperative had become, in effect, a trustee. Since there had been no "sale," the Tax Court reasoned that there had been no right to income bequeathed to the taxpayer and the taxpayer's equitable interest was susceptible to a basis increase at the time of the decedent's death.

In its reversing decision, the Ninth Circuit rejected the Tax Court's argument which would have based the decision upon the existence or non-existence of a "sale":

We perceive no difference between what O'Daniel's employer did in paying his estate the bonus, and what the cooperative did in paying respondent taxpayer the proceeds of the wine pool. After decedent had delivered his grapes to the associations all he had remaining was a right to collect sums of money, the amounts of which awaited the event of marketing. To say the expected proceeds would be income in respect of the decedent if the transaction was a sale, but not if it was a consignment, would be to apply an irrelevant test.

To make the decision turn on the label applied by the California courts to the relationship of decedent to the cooperatives is to disregard the fact that we have here a Federal law designed to deal with broad concepts of income. In terms of realities there is no reason for distinguishing, tax-wise, between these particular contracts and others which the California courts might label otherwise. Our problem is one of Federal law. In just as real a sense these proceeds would have become income to the decedent had he lived to receive them, whether they be called sales or something else. . . .

\footnote{69} 1939 Code §§ 162(b), (c).
The estate was not entitled to a deduction, however, where the income realized by the estate arose from sales of assets left by a decedent. Significant to our generic anticipatory assignment principle would be the judicial comprehension of the fact that a decedent himself had had sufficiently greater contacts leading to income arising from the sale of his assets by an executor or administrator than did the executor or administrator himself.

Maximum beneficial contacts of a decedent with subsequently realized proceeds of sale of his assets exist in those cases where the decedent leaves the assets subject to a non-personal contract for sale. Since property in the goods still remains in the decedent at his death, no traditional "right to income" replaces the property itself in the decedent's estate. To hold that such a difference influences subsequent income taxation of amounts received by a decedent's successor, however, would be superficial. It was the decedent's efforts and the decedent's contract of sale which gave rise to the subsequent income no less than if the property in the goods had been transferred to the vendee before the decedent's death. Aside from the intricacies involved in determining the

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70. Dunlop v. Commissioner, 165 F.2d 284 (8th Cir. 1948); Burchenal v. Commissioner, 150 F.2d 482 (6th Cir. 1945); In re Rogers' Estate, 143 F.2d 695 (2d Cir. 1944).

71. A contract which has its object personal services by the decedent would be discharged upon his death. 2 Williston, Contracts § 411 (1936).

72. See, for example, Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951). Following the deaths of two employees, a corporation, acting in accordance with past custom, voluntarily paid the estate of each of the two decedents the amount of $1500 per month for a period of twelve months following death. The Second Circuit held that the amounts constituted taxable income to the executors and were not "gifts" since the real question was whether the amounts paid were attributable to the decedents' lifetime efforts:

The fact that [the payments] ... were voluntary and could not have been enforced by action did not necessarily render them gifts within the meaning of [the statute]. ... Here ... it had become a practice of the Company to recompense the estates or dependents of deceased founders. Payments were measured by the salary paid each decedent during the year prior to his death; from such undisputed facts, there would seem to be a reasonable inference that the payments were a reward for past services, and so the determination of the Tax Court should be upheld.

Id. at 314. See also, the dissenting opinion written by Mr. Justice Cardozo in the case of Bogardus v. Commissioner, 302 U.S. 34 (1937). The majority there had held that payments voluntarily made by a corporation to former employees constituted gifts albeit the facts clearly indicated the payments were made because of faithful past services. The dissenters challenged the majority's theory that the case was to be decided in terms of the "voluntary" nature of the payments:

What controls is not the presence or absence of consideration. What controls is the intention with which payments, however voluntary, have been made. Had it been made with the intention that services rendered in the past shall be required more completely, though full acquittance has been given? If so, it bears a tax.

Id. at 45.
difference between a sale and a contract of sale, one of the most immutable principles of income tax law rejects the relevancy of technicalities of title.

Must a decedent's assets received by his successor have been subject to a contract of sale before amounts received by the successor upon a subsequent sale will constitute income in respect of a decedent? The argument for the affirmative would be that without a contract of sale a decedent would not have died owning a "title" to a right to receive income in due course. But such a proposition advances the same old warmed-over theory of the relevancy of "title," a test which courts have repeatedly rejected. The want of a "title" to a right to receive amounts from a sale, a mere formalism, is no reason not to impute sales proceeds of a particular sale to a former owner of the property sold. Whether or not there should be such an imputation to a decedent as the former owner of the "property" sold by his successor demands a factual, not a legal, resolution. Perhaps the inquiry should be, in all cases, whether a decedent's pre-death contacts with the subsequently maturing income items were of sufficient quality and quantity to make it fair to subject the successor to tax upon income in respect of a decedent.

Total attainment or even partial fulfillment of a cogent death assignment concept predictively will gore many a favorite ox. But the courts should not be deterred from fully effectuating the proper result by the emotional approach that there is something magical taxwise in a decedent's death which compels that his transferee receive a new date-of-death basis in "property" rights which are received by bequest, devise or inheritance. It is beyond dispute that if the income in respect of a de-

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73. Assume, for example, that a decedent had contracted with his business partners for them to purchase his partnership interest at death; would that be a sale or a contract to sell? There is disagreement. 1 WILLISTON, SALES § 6 (1948).


75. This argument enjoyed a brief period of success, typified by the Tax Court decision in Rose J. Linde, 17 T.C. 584 (1951), a decision which was later reversed, and properly so, by the Ninth Circuit (see note 66 supra). The Tax Court's naive enchantment with technicalities of title was evidenced by such remarks as:

The only logical explanation for the use of the terminology that the "member sells and the association buys" grapes is that these were terms conveying the legal title to the association while the members at all times retained an equitable property interest in the grapes or the wine in the pool pro rated to the grapes they had delivered. . . . Accordingly, we reject Respondent's contention that the proceeds received by the Petitioner from the association consisted of deferred purchase payments for grapes which decedent had sold them. . . . Since sales were not made during decedent's lifetime, there could be no distributable proceeds due him when he died. Accordingly, no right to income from this source arose during decedent's lifetime.

Id. at 593-94.
cedent provision applies, the date-of-death basis section does not; and there is indeed support in the legislative history itself for the conclusion that the major purpose of the entire death assignment concept was to purge the inequities of the date-of-death basis provisions.77

A statutory writ legitimately aids and abets a plenary development of the concept of death assignments of income, but when we turn to sale assignments of income we have no felt need for legislative patronage. We enter full upon a common law development of federal income taxation.

V.

The income tax problem posed by a sale assignment of income is to determine whether amounts received by a seller of “property” are to be characterized as ordinary income, because of being an anticipatory assignment of income, or should be attributed to a sale or other disposition of property other than a right to receive income.78 In the Hort case,79 the taxpayer had inherited land and a ten story office building from his father in 1928. The land and building were subject to a lease, but five years after his father's death the taxpayer received $140,000 from the lessee in consideration for the cancellation of the lease. The taxpayer argued that since the real estate he had received by bequest was subject to

76. United States v. Ellis, 264 F.2d 325 (2d Cir. 1959); Senate Report No. 1631, 77th Cong., 2d Sess., 1942-2 C.B. 580:
Since this Section provides for the treatment of such amounts as income to the persons placed in the same position as the decedent with respect to such amounts, the provisions of [1939 Code] Section 113(a)(5) with respect to the basis of property do not apply to these amounts in their hands. . . .
and Treas. Regs. § 1.691(a)-3(a) (1957):

[T]he provisions of Section 1014(a), relating to the basis of property acquired from a decedent, do not apply to these amounts in the hands of the estate and such persons.
And of course 1954 CODE § 1014 itself states:

(c) Property Representing Income in Respect of a Decedent.—This Section shall not apply to property which constitutes a right to receive an item of income in respect of a decedent under Section 691.

77. Randolph Paul, the then tax advisor to the Secretary of the Treasury, made two recommendations to the House Ways and Means Committee concerning the Revenue Act of 1942 amendments: (1) he recommended that relief be given in the area where [1939 Code] § 42 caused income to be bunched in a decedent's final return; (2) he also urged that the inequities caused by [1939 Code] § 113(a)(5) be removed:

A large part of the capital gains inherent in the increased value of property thus escapes income tax as the assets are handed down from one generation to the other.

Hearings before Committee on Ways and Means on Revenue Revision of 1942. 77th Cong. 2d Sess. 89 (1942).

78. That is, whether a given case is to be determined by 1954 CODE § 61 (“Gross Income Defined”) or by the interaction of 1954 CODE §§ 1001 (“Determination of Amount of and Recognition of Gain or Loss”), 1002 (“Recognition of Gain or Loss”), 1011 (“Adjusted Basis for Determining Gain or Loss”), 1202 (“Deduction for Capital Gains”), and 1221-23 (“General Rules for Determining Capital Gains and Losses”).

the lease at the date of his father's death, the lease itself constituted "property" so that the amount he received upon its cancellation was simply a return of capital, not income. Mr. Justice Murphy, writing for a unanimous court, disagreed:

The consideration received for cancellation of the lease was not a return of capital. We assume that the lease was "property" whatever that signifies abstractly. Presumably the bond in . . . Horst . . . and the lease in . . . Bruun . . . were also "property" but the interest coupon in Horst and the building in Bruun nevertheless were held to constitute items of gross income. Simply because the lease was "property," the amount received for its cancellation was not a return of capital, quite apart from the fact that "property" and "capital" are not necessarily synonymous in the Revenue Act . . . or in common usage.\(^8\)

The Court went on to point out that the cancellation of the lease "involved nothing more than the relinquishment of the right to future rental payments in return for a present substituted payment and possession of the leased premises." The case is good authority for the proposition that a right to receive an amount, even though it is "property," which would constitute income when received is not a capital asset; and any amounts attributable to a transfer by sale of that right before the amounts are received will constitute an anticipatory assignment of income, hence ordinary income.

Those who would advert importance to the fact that a given sale assignment of income is accompanied by a concomitant sale of a "source" of the income would distinguish the Horst case as involving no simultaneous transfer of the source, that is, the apartment building itself. The Watson case\(^81\) is a good answer to such critics. There the taxpayer had reported the sale of orange trees which included green oranges growing thereon as giving rise to gain from the sale of a capital asset. Rather than approaching the case as one involving an anticipatory assignment of income, however, the Supreme Court followed the taxpayer's reasoning and chose to decide whether the amounts received attributable to the green oranges arose from the sale of "property used in a trade or business," gain from which would qualify for capital gain treatment. Excluded from the category of property so used was "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade

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80. Id. at 31.
or business.” The Supreme Court held that the proceeds fairly attributable to the sale of the green oranges were from property so held and therefore constituted an exception to the statutory rule allowing for capital gain treatment. 82

If the Supreme Court had chosen to decide Watson within the figuration of an anticipatory assignment of income rather than as a controversy requiring only a definition of “capital asset” it would have evaded the logical and forceful dissenting opinion which was well documented by the legislative history of the capital asset provision. 83 The Hort case had established that a right to receive income is not a capital asset, and the majority easily could have based its decision upon a natural extension of that concept. Because of this limitation, Watson gave apparent encouragement to those who would convert business income into capital gain through the simple expedient of selling a “capital asset.” The theory was that the vision of Hort had been largely undone by Watson; but the next Supreme Court expression on the subject invigorated the anticipatory assignment idea in business situations.

The Corn Products decision 84 held that the sale of corn futures did not qualify for capital gain treatment. Because of adverse business experiences in 1934 and again in 1936 attributable to droughts in the cornbelt which caused a sharp increase in the price of spot corn, Corn Products Refining Company had established a long position in corn futures “as a part of its corn-buying program” and “as the most economical method of obtaining an adequate supply of raw corn.” Corn Products realized substantial profit from the sale of corn futures which it argued necessarily constituted capital gain income; both the Tax Court 85 and the Court of Appeals for the Second Circuit 86 found that the taxpayer’s fu-

82. The Court in Watson found it unnecessary to consider the alternative argument by the Commissioner that the taxpayer had not held the oranges themselves for over six months, hence would not have been entitled to long term capital gain treatment upon the proceeds attributable to the sale of the oranges even if they had been characterized as “capital assets.”
83. Mr. Justice Minton, joined by Justices Reed and Douglas, dissented in Watson and noted: “Congress took cognizance of the construction . . . by the Commissioner and the Tax Court, and amended the section to make it abundantly clear that unharvested crops were a part of the realty upon which they were growing and were to be given capital gains treatment. . . .” 345 U.S. at 553. Legislative history supports this argument insofar as it interpreted growing crops as constituting a part of real estate.
ture transactions were integral parts of its business designed to protect manufacturing operations against a price increase in the principal raw material and to assure a ready supply for future manufacturing requirements, hence nurtured ordinary income. The Supreme Court unanimously affirmed both lower courts and rejected the taxpayer's notion that a literal reading of the capital asset provision was ever proper in cases concerning sale assignments of income:

Admittedly, Petitioner's corn futures do not come within the literal language of the [capital asset definition provisions] . . . But the capital asset provision . . . must not be so broadly applied as to defeat rather than further the purpose of Congress. . . . Congress intended that profits and losses arising from the everyday operations of a business be considered as ordinary income. . . . The preferential treatment [given capital gains] . . . applies to transactions and property which are not the normal source of business income. . . .

Probably the most significant contribution of the Corn Products case to the generic anticipatory assignment principle is the concept that we do not even reach the capital gains provisions if the amounts realized upon a sale, albeit a sale of "property," are substitutes for a "normal source of business income." 8

Notwithstanding the "normal source of business income" language of Corn Products, however, the fact of the matter is that the Supreme Court had yet to take a firm position that it need not even be concerned with technicalities of definitions in cases involving sale assignments of inventory purchase system which is utilized solely for the purpose of stabilizing inventory cost. It is an integral part of the productive process in which the property is held not for investment but for the protection of profit with the intent of disposition when that purchase has been achieved. The futures transactions of this Petitioner, it is true, did not constitute what is known as "true" hedging. But this is a distinction presently of no significance. The property here was used for essentially the same purpose and in the same manner as in true hedging. Futures contracts were entered into to stabilize inventory costs and thus protect profit, and whether complete or only partial insurance was thereby obtained is simply a difference in degree, not in kind. Therefore, for the same reasons that the true hedge is not accorded capital treatment . . ., the kind of transactions with which we are now concerned, are not to be regarded as capital ones either.

215 F.2d at 516.
87. 350 U.S. at 51-52.
88. The query as to whether amounts which would have been received in the future, absent a sale assignment, would have represented a "normal source of business income" properly emphasizes the volitional element in capital gains taxation. Necessarily a taxpayer who assigns away his right to receive "normal business income" in due course is turning his back on such income (cf., the constructive receipt cases), something he should not be allowed to do with tax impunity.
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income; but it was only three years before that the Court had before it a suitable vehicle for doing just that. The *P. G. Lake* decision⁹⁹ was based firmly upon the sale assignment of income theory. The question was whether taxpayers who received amounts for the transfer of mineral payment rights carved out from larger mineral interests were entitled to capital gain treatment.⁹⁹ The court admitted that rights to receive mineral payments were interests in land but rejected the argument that it was necessary to determine whether or not such interests were "capital assets." The equivocating theories of *Watson* and *Corn Products* were discarded, the Court concluding quite simply that the taxpayers had clearly attempted anticipatory assignments of income, hence realized ordinary income upon the sale of the mineral payment rights.⁹¹

The normal business income theory of *Corn Products* was sharpened considerably when the Supreme Court decided the *Gillette Motor* case⁹² where a taxpayer had received $100,000 as compensation for a "taking" by the government of its business during World War II. In point of

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⁹⁰. The difficulty inherent in the "source" approach to anticipatory assignment questions is well evident in the mineral cases. In Clampitt v. Ponder, 91 F. Supp. 535 (W.D. Ark. 1950), the court held that the reservation in a warranty deed of one-half royalty of all minerals described in a deed was ambiguous and that under the circumstances the grantors were entitled to a perpetual royalty interest rather than to a mineral fee. The court stated that the "... mere use of the word 'royalty' in a reservation does not of itself compel the conclusion that only leases then in existence are included. ..." *Id.* at 541.

Standard Oil Co. v. Marshall, 265 F.2d 46 (5th Cir. 1959), held that owners of oil payment rights had only non-possessory incorporeal interests in land, and hence were not necessary parties plaintiff in a suit of trespass to try title. The court discussed the nature of the problem (at p. 53):

"[Those cases] have settled the law in Texas that an oil payment is not a conveyance of oil in place, not a promise to pay money, not a contract for sale of oil after production, but an incorporeal hereditament in the nature of an overriding royalty creating a present interest in land in the payee. An oil payment is like an overriding royalty. It is carved out of the lessee's share of the oil, the working interest, as distinguished from the lessor's royalty interest. It differs from an overriding royalty only in that it is of limited duration; it expires when the payee receives a fixed amount for his interest.


[C]ash was received which was equal to the amount of the income to accrue during the term of the assignment, the assignee being compensated by interest on his advance. The substance of what was assigned was the right to receive future income. The substance of what was received was the present value of income which the recipient would otherwise obtain in the future. In short, consideration was paid for the right to receive future income, not for an increase in the value of the income-producing property. ... [W]e have held that if one, entitled to receive at a future date interest on a bond or compensation for services, makes a grant of it by anticipatory assignment, he realizes taxable income as if he had collected the interest or received the salary and then paid it over. That is the teaching of ... *Horst* ... and *Schaffner* ... and it is applicable here.

fact, the taxpayer had continued to direct the operation of the business subject only to certain orders given by the "Federal Manager" from time to time. The Court rejected the taxpayer's idea that the taxpayer had received compensation for the taking of a "capital asset"; but probably more important was yet another permutation of the sale assignment principle expressed by the Court:

[T]he right [of the taxpayer to use its transportation facility as it saw fit] is manifestly not of the type which gives rise to the hardship of the realization in one year of an advance in value over costs built up in several years, which is what Congress sought to ameliorate by the capital-gains provisions. . . . In short, the right to use is not a capital asset, but is simply an incident of the underlying physical property, the recompense for which is commonly regarded as rent. . . .

Not much imagination would be required to interpret the Gillette Motor case as supporting the proposition that a right to use business assets is an incident of them with the obvious result that a sale of business assets with a retention by the seller of a right to use them would constitute an anticipatory assignment of income even when measured by the traditional tree-fruit metaphor.

Unhappily for the integrity of our Federal income tax system, however, the next principal sale assignment case decided by the Supreme Court superficially (but not actually) represented a substantial retrogression in the conceptualistic treatment of sale assignments of income. In Clay Brown, the Supreme Court held that the sale of all of the stock of a closely held business corporation gave rise to capital gain even though the selling shareholder retained control of the operation of the business and the selling price was to be paid solely out of the profits of the business. Admittedly the case had within it distractive elements of tax avoidance (the "sale" was to a charity with the result that the subsequent business earnings would not contribute their fair share of income taxes to the economy), but the most recedent part of the decision was the Supreme Court's apparent enchantment with the naive, formulistic methods of analysis which preceded such cases as P. G. Lake and Gillette Motor.

A civilized amount of charity demands some moderation of criticism of the Supreme Court for its decision in Clay Brown because the Commissioner himself injected an almost unbelievable amount of confusion

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93. Id. at 135.
into the case. For one reason or another, he refused to present the case to the Supreme Court as one concerning a clear and apparent sale assignment of income. Rather than seeking confirmation of the obvious irrelevancy of such attenuated subtleties as "source of income" and "capital assets" in sale assignment cases, the Government lawyers pursued a blind, almost mystical course in urging the Supreme Court to decide the case in terms of whether or not a "sale" had really taken place. We can hardly blame the Supreme Court for accepting the invitation:

To say that there is no sale because there is no risk-shifting because the price to be paid is payable only from the income produced by the business sold, is very little different from saying that because business earnings are usually taxable as ordinary income, they are subject to the same tax when paid over as the purchase price of property. This argument has rationality but it places an unwarranted construction on the term "sale," is contrary to the policy of the capital gains provisions . . . , and has no support in the cases. We reject it.

Since the question of whether or not there had been a sale assignment of income was neither raised nor decided in Clay Brown, that case does not overrule, limit or even modify the holdings in such cases as Hort, Watson, Corn Products, P. G. Lake, and Gillette Motor. All that the Clay Brown case really decided was that there can be a "sale" for tax purposes even though a seller is to pay the purchase price from the earnings of the

95. In its Petition for a Writ of Certiorari filed in Clay Brown, the attorneys for the Commissioner explained to the Supreme Court the "Reasons ForGranting The Writ":

This is a tax case of rare importance. Its importance lies both in the fundamental character of the question of statutory interpretation involved—what constitutes a "sale" for purposes of the capital gains provisions—and in the social, economic and revenue implications of the particular transaction in issue—"bootstrap" sales of businesses to charities. 

Id. at 7. And in the Brief for the Petitioner, the Government lawyers defined the "Question Presented":

Whether a transfer of stock in which the transferor receives nothing but (1) a right to have remitted to him, until he has received a stated amount, whatever income accrues to the transferee from the ownership of the stock (or the underlying corporate assets), and (2) a right to recover the stock (or the assets) if the stated amount has not been remitted by a prescribed date, is a "sale" of the stock . . . entitling the transferor to report the income thereafter remitted to him only as long-term capital gain, or is a transfer of the stock with a retained income interest, making the remitted income taxable to the transferor as ordinary income.

Id. at 2. It is surprising, indeed shocking, that normally sophisticated lawyers would all but concede a case by themselves urging that a decision not only be based upon the "attenuated subtlety" of "sale" but also that if a "sale" occurred capital gain treatment necessarily results, a truly amazing concession.

96. 380 U.S. at 570.
property sold; the Court did not even reach the question which had not been presented of whether there had been a sale assignment of income because of the Government's strange concession that, given a "sale," the taxpayer qualified for capital gains treatment.

The Supreme Court partially redeemed itself from its Clay Brown misadventure with its decision in Midland-Ross, a case which closely followed (chronologically) the Clay Brown case. A unanimous Supreme Court held in the latter case that amounts received upon a sale of a non-interest-bearing promissory note which had been purchased at a discount, to the extent they were attributable to earned original issue discount, were not eligible for capital gains treatment. The Commissioner had the good sense not to lead the Supreme Court down the primrose "sale" path again so the case was correctly analyzed in sale assignment terms.

Hopefully, it may be predicted that more and more of the sale assignment of income cases will reject analysis in terms of a proper definition of "capital assets" or "sale" and will instead pursue the question of whether taxpayers "... can convert what would in time constitute ordinary income ... into capital gain." The Court of Appeals for the Fifth Circuit, for example, holding that the portion of consideration received upon the sale of rights and interest in a partnership business which were attributable to the transfer of a management contract gave rise to ordinary income, used language which correlated closely with that usually reserved by courts for the traditional gift assignment cases. We may

98. Arnfeld v. United States, 163 F. Supp. 865, 869 (Ct. Cl. 1958). The Court of Claims held that gains realized by a taxpayer from the sale of an annuity policy to a third person before its maturity were taxable as ordinary income, not as capital gain. The court cited with approval the cases of Helvering v. Smith, 90 F.2d 590 (2d Cir. 1937) (taxing as ordinary income amounts received by a partner upon a "sale" of his interest in billed and unbilled fees of the partnership to the remaining partners); Rhodes' Estate v. Commissioner, 131 F.2d 50 (6th Cir. 1942) (classifying as ordinary income amounts received by a taxpayer upon a "sale" of a right to receive dividends which had already been declared upon stock owned by the taxpayer); and Fisher v. Commissioner, 209 F.2d 513 (6th Cir. 1954) (holding that amounts received upon the sale of corporate notes which were then in default both as to principal and interest were taxable as ordinary income).
99. United States v. Woolsey, 326 F.2d 287 (5th Cir. 1963). The court stated in part:
  Intricate and complicated problems are presented in applying the recognized rules to the facts in each case. Fundamental to a proper decision in each case, and to the application of well-recognized rules, is a determination of the type and nature of the underlying right or property assigned or transferred. It is always pertinent to inquire how the proceeds to be received would have been taxable if there had been no assignment of the contract. Close scrutiny is required if the consideration received is actually a present substitute for what would have been ordinary earned income in the hands of the assigning taxpayer, if the assignment or transfer had not been made. A mere "sale or exchange" does not convert a right to earn income in the future which would be taxable as ordinary income to the taxpayer, into a capital gain."...
hope for a plenary development of the sales assignment principle, but one thing is certain: the courts must never recede by restoring any semblance of the concept that the sale assignment principle will not apply if the "source" of income is sold by a taxpayer along with the subsumed rights to receive income from that source in the future.

VI.

The purpose of the sixteenth amendment was to eliminate the source of income as a relevant factor in the taxing of income. Before

The existence of a partnership does not result in the creation of a sovereign alchemist that can transmute ordinary income into a capital asset. When we look at the underlying right assigned in this case, we cannot escape the conclusion that so much of the consideration which relates to the right to earn ordinary income in the future under the "management contract," taxable to the assignee as ordinary income, is likewise taxable to the assignor as ordinary income although such income must be earned. . . . It is our conclusion that such portion of the consideration received by the taxpayers in this case as property should be allocated to the present value of the right to earn ordinary income in the future under the "management contract" is subject to taxation as ordinary income.

Id. at 291.

100. Brushaber v. Union Pacific, 240 U.S. 1 (1916) upheld the income tax provision of the Tariff Act of 1913. Mr. Chief Justice White observed that it was only the unity of the statutory scheme which caused the tax on earned incomes (i.e., incomes from "business, privileges, and employment") to fall in the Pollock case [158 U.S. 601 (1895)] then continued:

[T]he whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the Pollock case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived. . . . The contention that the Amendment treats a tax on income as a direct tax . . . and is necessarily therefore not subject to the rule of uniformity . . . is also clearly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the Pollock case by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity and were placed under the other or direct class. This must be unless it can be said that although the Constitution as a result of the Amendment in express terms excludes the criterion of source of income that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed, consistently with the requirements of the Constitution. . . . The purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes.

240 U.S. at 18-19.
adoption of the sixteenth amendment\textsuperscript{101} which authorized an unapportioned tax on "incomes," the \textit{Pollock} case\textsuperscript{102} held that if a tax on an income-source (such as real estate or personal property) would be a direct tax, a tax on income from that source would also constitute a direct tax within the meaning of the Constitution and would therefore demand apportionment for its validity.\textsuperscript{103} After the sixteenth amendment, the definitive case of \textit{Eisner v. Macomber}\textsuperscript{104} then affirmed the proposition that an income tax cannot validly be assessed against the source of in-

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101. On February 25, 1913, the United States Secretary of State proclaimed that the Sixteenth Amendment to the Constitution of the United States had been properly ratified. The amendment is succinct:

The Congress shall have power to lay and collect taxes upon incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.


103. The sixteenth amendment was enacted to evade the holding of the \textit{Pollock} case. An 1894 act of Congress had imposed a tax of 2\% upon the net income of corporations. \textit{Pollock v. Farmers' Loan \\& Trust Co.}, 158 U.S. 601 (1895). Mr. Chief Justice Fuller, writing for the Court, pointed out that an excise tax limited to income itself would be indirect and therefore require no apportionment, but then held the particular tax statute unconstitutional:

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the Constitutional restriction is to be treated as utterly illusory and futile, and the object of the framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to the property, and the property itself.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connections with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matters; in other words, that income is taxable irrespective of the source from whence it is derived.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution.

\textit{Id.} at 627-30. The Court concluded by remarking that since there was only one scheme of taxation involved, the entire statute, even including those sections taxing income from "businesses, privileges or employment" which would by themselves have been indirect, was invalid.

104. 252 U.S. 189 (1920). In his dissenting opinion, Mr. Justice Holmes wrote:

"The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes..." \textit{Id.} at 220. Contrary to Mr. Justice Holmes' immoderate judgment, the purpose of the sixteenth amendment was not to eliminate the distinctions between direct and indirect taxes but was rather to say that taxes on "incomes" are proper without regard to their characterization as either direct or indirect.
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come itself unless it is apportioned; and it was quickly decided, without significant comment, that a taxpayer need not own the source of income to be taxed upon it. Indeed, except for Holmes' tree-fruit metaphor, the Supreme Court has constantly recognized over the years that the determination of the proper person to be taxed is not limited by ownership or even control of the source itself.

Mr. Justice Holmes himself once expressed the proposition that it is the use of a particular source for the benefit of the recipient of amounts from it, rather than its ownership, which is the significant factor in identifying the proper taxpayer. Before the establishment of the special statutory trust provisions imposing income taxes directly against a trust beneficiary, the Supreme Court once faced the question whether under the general income provisions of the Code an income beneficiary for a period of years with no interest in the corpus of the trust fund was in receipt of "income." In *Irwin v. Gavit*, Mr. Justice Holmes wrote the Court's affirmative answer:

The courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard those considerations as conclusive, as we have said, but if it were material, a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes. Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. . . . It seems to us immaterial the same amounts might receive a different color from their source.

The *Gavit* case preceded by five years Mr. Justice Holmes' tree-fruit metaphor by which he ignored his own admonition by drawing an illusive "line" between income and source.

Notwithstanding the metaphor, down through the years the Supreme Court has continued to affirm the irrelevancy of source. The 1933 case of *Reinecke v. Smith*, for example, expressed the concept that it is the right to receive income by control of the source of it rather than technical

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105. 268 U.S. 161 (1925).
106. Id. at 167-68.
107. 289 U.S. 172 (1933)
concepts of ownership of the source which is important. In holding that the grantor of a trust was properly taxed upon its income where he and a non-adverse party had a power during the taxable year to revest in the grantor title to the corpus, the Supreme Court indicated that it was because the source was controlled that the grantor could have received the income had he chosen to do so:

A settlor who at every moment retains the power to repossess the corpus and enjoy the income has such a measure of control as justifies the imposition of a tax upon him. . . . As declared by the Committee reporting the section in question, a revocable trust amounts . . . to no more than an assignment of income. . . . It cannot therefore be successfully urged that as the legal title is held by the trustee the income necessarily must for income taxation be deemed to accrue from property of someone other than . . . [the grantor]. . . . The measure of control of corpus and income retained by the grantor was sufficient to justify the attribution of the income of the trust to him.108

Even in its present imperfect state, the anticipatory assignment principle does not require that a taxpayer who voluntarily transfers ownership of a source of income must retain at least a reversionary interest in it before he may be taxed upon future income from the source. If the assignor has dedicated the future income from the source to a satisfaction of his legal obligations, for example, Mr. Chief Justice Hughes' opinion in Douglas v. Willcuts,109 aids identification of the proper taxpayer:

No question is raised as to the constitutional power of the Congress to attribute to Petitioner the amount thus segregated and paid in discharge of his obligations, and that authority could not be challenged successfully. . . . We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor. . . . The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered.110

108. Id. at 177-78.
110. Id. at 9.
Since the entire concept of "income" is evolutionary and expansive in nature, however, the real importance of *Douglas v. Willcuts* is not its particular holding at all. Hughes announced that the question of whether future income should be taxed to a one-time owner of the "source" which produces it is a question which arises under the general provisions of the Internal Revenue Code defining "income" rather than under any particular sections:

We do not regard the provisions of the statutes as to the taxation of trusts, fiduciaries and beneficiaries . . . as intended to apply to cases where the income of the trust would otherwise remain, by virtue of the nature and purpose of the trust, attributable to the creator . . . and accordingly taxable to him. . . . [W]e find no warrant for a construction which would preclude the laying of the tax against the one who . . . enjoys the benefit of the income as though he had personally received it.\(^{111}\)

And a one-time owner of a source of income may continue to be taxed on income from it unless he can show by "clear and convincing proof that application of amounts from the source does not constitute income" to him.\(^{112}\)

One reason why the source of income is not significant in determining income tax consequences is that ". . . the determination . . . of what is income and to whom it is attributable . . . has but an economic significance, and so . . . is properly a matter of economic analysis."\(^{113}\) Indeed, it is unnecessary to identify any source at all in deciding whether one is to be charged with taxable income. In the *Glenshaw Glass* case,\(^{114}\) the Supreme Court held that money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble damage anti-trust recovery " . . . had to be included in 'gross income' within the general income concepts of the Internal Revenue Code." The Court expressly rejected the taxpayer's theory of the relevancy of a "source" and underscored the importance of the benefit concept of "income":

Respondents contend that punitive damages, characterized as "windfalls" . . . are not within the scope of the section. But Congress applied no limitation as to the source of taxable receipts, nor restrictive labels as to their nature. And the Court

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111. *Id.* at 9-10.
has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted.

Nor can we accept Respondents' contention that a narrower reading of Sec. 22(a) [of the 1939 Code] is required by the Court's characterization of income in *Eisner v. Macomber,* . . . as "the gain derived from capital, from labor, or from both combined." . . . In that context—distinguishing gain from capital—the definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions.115

And by rejecting once and for all consideration of the source of particular income as a factor of relevancy, we are able to identify an income tax as being nothing more or less than an excise tax upon incomes.116

VII.

Like all excise taxes, an income tax is to be "cut from" the thing taxed, i.e., the income itself. Since a person is a proper taxpayer only if he at least had it within his power to enjoy the actual benefit for which the tax is to be paid, in most cases the appropriate inquiry is elemental: who is the "owner" of the income?117 The bisector of the line to be

115. *Id.* at 429-31.

116. *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916). The taxpayer there urged that because of the failure of the 1913 act to allow for depletion of natural resources, the income tax as applied to mines was really a tax on property because of its ownership and hence not protected by the sixteenth amendment. In holding for the Government, Mr. Chief Justice White remarked quite simply that the income tax was not a direct tax at all but was rather "a true excise levied on the results of the business of carrying on mining operations."

117. *Hughes v. Commissioner*, 153 F.2d 712 (5th Cir. 1946). The Commissioner had included in a husband's income dividends which had been paid to his wife upon stock owned by her. The only explanation of the adjustment which the Commissioner made was "... that dividends ... on ... stock ... are taxable to you rather than to your wife. [1939 Code] § 22(a) ... ." The Court of Appeals for the Fifth Circuit, noting quite simply that a married woman had a right to own property individually, decided against the Commissioner. In so doing, the court adverted to the stated grounds for the Commissioner's action:

The Commissioner gives no reason why the dividend was not hers save to refer to . . . Section 22(a). That Section includes in taxable income "dividends." Dividends are of course taxable. The Section, like the Constitutional Amendment permitting the taxation (without apportionment) of "incomes, from whatever source derived," does not say who is to pay the tax. The taxpayer is of course the person who owns the income, and in the case of income arising from the ownership of property, the person who owns the property.

The vague ruling of the Commissioner, which he did not amplify or define in any manner by his pleading in the Tax Court, is amply shown to be incorrect. The presumption in its favor cannot lawfully be given prevalence over the sworn testimony and the local law touching ownership.

*Id.* at 713, 715.
drawn joints two antithetic points of reference: (1) if a given taxpayer “... may spend [amounts] ... substantially as he chooses, and ... waste [them] ... in debauchery ...,” he is the “owner” of income, but (2) if the taxpayer has merely “broad powers of control and alienation” even with only limited accountability for the exercise of such powers, then the taxpayer is not properly the owner of the income.

And a mere power to appoint or designate the beneficiary of amounts is not a sufficient interest in the income attributable to such amounts to constitute ownership of it.

118. United States v. Robbins, 269 U.S. 315 (1926). Mr. Justice Holmes, after observing that the husband-taxpayer could in fact have spent the entire community income for his own debauchery if he had chosen, commented picturesquely upon the nature of income taxes:

That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed while liable to be taken for his debts, is not liable to be taken for the wife's ... so that the remedy for her failure to pay may be hard to find.

Id. at 327-28. See also Corliss v. Bowers, 281 U.S. 376 (1930). A grantor was taxed upon trust income where the res had been granted to the trustee who were charged with paying the income to the donor's wife for life with remainder over to the children. Remarked Mr. Justice Holmes for the Court:

But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend ... no one would doubt that he could be taxed upon the amount so paid. It is answered that in that case he would have a title, whereas here he did not. From the point of view of taxation there would be no difference. Title would merely mean a right to stop the payment before it took place. The same might have existed here, although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. ... Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate, it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

281 U.S. at 378.

119. Poe v. Seaborn, 282 U.S. 101 (1930) (holding that the one-half of a husband's "earnings" which was owned by his wife under the non-consensual Washington community property law was not taxable to the husband-taxpayer). The Seaborn case by itself repudiates the Commissioner's theory that "earners" are to be taxable upon their earnings without further inquiry. But distinguish sharply those situations in which the "earner" once did have a right to have received in due course his earnings—then the "earner" would be taxable under the anticipatory assignment doctrine notwithstanding that the earnings, when received, were owned by another. Commissioner v. Harmon, 323 U.S. 44 (1944) (holding that an election by a husband and wife to be bound by the consensual Oklahoma community property law was ineffective to relieve the husband from liability to pay income tax upon all of his earnings including the share thereof owned by his wife at the time of receipt).

120. Helvering v. Safe Deposit & Trust Co., 316 U.S. 56 (1942). The Commissioner had attempted to subject to a state tax an unexercised general testamentary
Conceding the general rule that income is to be taxed to its owner, the easy case arises when the owner of capital or the one who generates earned income also owns at the time of realization the income derived from them. In such cases, the owner of the referent capital or the performer of the compensated services is properly to be taxed on the income, but because he owns the income, not because he also happens to own the source of it.

The hard case is posed when a former owner of a source of income or the generator of earned income does not own the derivative income at the time of its realization. If the general principle that “income is to be taxed to its owner” were inexorably true, no anticipatory assignment principle would have arisen in the first place. The fact that it has been abused over the years because it has been equated with the tree-fruit metaphor should not cause us to reject the principle itself. As long as a taxpayer has it within his power in due course of events to become the owner of future income, by definition he makes an anticipatory assignment of that income whenever he voluntarily divests himself of his right to receive it in the future without respect to whether he does or does not concurrently transfer a “source” of that income. We must stop using the expression “anticipatory assignment of income” as a consequential summation of the results reached in a particular case; the phrase demands neutrality. Inquiry into tax consequences should begin only after a particular case has been characterized as concerning an assignment of income—be it by gift, sale, or death. Our federal income tax system is mature enough to reject the indignity of obscurity.

VIII.

A condition precedent to the application of a philosophic principle of anticipatory assignment will be the one-time existence of an assignor’s right to receive income in due course of events. This teaching of the Teschner case is properly applicable to all three areas so that, without the existence of such a right, a gift assignor should not be chargeable with income he never himself could have received, a sale assignor should not be held to have received ordinary income if he himself could never have received it in due course, and the recipient of property from a decedent should not be chargeable with income in respect of the decedent if the

power of appointment under a statutory provision which included in an estate subject to tax “interests of decedents” generally. The Court held that a general power of appointment was not an interest in the property subject to the power. See also, Robert P. Crowley, 34 T.C. 333 (1960), where the Tax Court held that an individual taxpayer’s control of who should perform business generated by his controlled corporation’s lending activities did not make the taxpayer taxable on the income derived from those activities by his designees.
decedent himself, had he lived, could never have received that income had he chosen to do so.

Granting a former right in a particular taxpayer to have become the owner of income in due course of events, it is the other side of the income assignment coin which will challenge judicial craftsmanship. At what point should a court refuse to impute income to a donor who once made a gift assignment of it? When should amounts received attributable to a sale assignment of income not be classified as ordinary income rather than as a gain from the sale of "property"? Should a court ever allow a decedent's successor who realizes amounts from a sale by him of "property" received from a decedent to use a date-of-death basis rather than the decedent's basis in computing gain?

A gift assignment of income which effectuates... a continuing exercise... of a power to direct the application of the income along previously determined channels... will never preclude attribution to the donor of all future income so applied even though the donor had also divested himself of the source of the assigned income. 121 But should any

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121. Burnet v. Wells, 289 U.S. 670 (1933) (holding that the taxpayer was taxable upon income from an irrevocable trust which he had established to pay premiums on his life insurance policy; the taxpayer was taxable to the extent that the trust income was so applied). The case is direct authority for the proposition that an assignor of even an admitted property interest in a fund may continue to be tax-able upon its earnings if he intentionally devoted the fund to a purpose he desired but was not legally obligated to effectuate:

[One can read in the revisions of the Revenue Act] the record of the government's endeavor to keep pace with the fertility of invention whereby taxpayers would contrive to keep the larger benefits of ownership and be relieved of the attendant burdens. ...

Through the devices thus neutralized as well as through many others, there runs a common thread of purpose. The solidarity of the family is to make it possible for the taxpayer to surrender title to another and keep dominion for himself, or if not technical dominion, at least the substance of enjoyment. ...

The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically in slavery to forms or phrases. ...

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Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place. ...

Government in casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership, but any right or privilege that is a constituent of ownership. ...

Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis. A margin must be allowed for the play of legislative judgment. To overcome this statute the taxpayer must show that in attributing to him the ownership of the income of the trust, or something fairly to be dealt with as equivalent to ownership, the lawmakers have done a fully arbitrary thing, and have found equivalence where there was none or anything approaching it, and laid a burden unrelated to privilege or benefit. ...

Wells... did more than devote his income to the benefit of relatives. He devoted it... to the protection of an interest which he wished to keep alive. ...

In effect he said to the trustees that for the rest of his life he would dedicate
gift assignment of income, whether accompanied by a concurrent transfer of the source of the income or not, ever preclude attribution of all future earnings to the transferor? If so, why? Should an “earner” ever be discharged from liability for income taxes upon amounts attributable to his efforts? If not, why not? Is it proper that assigned earned income attributable to personal services of the assignor be treated in perpetuity as income of the “earner” while assigned income attributable to an income-producing asset which was transferred along with a right to receive its income engenders a different result? Is it proper for the theory to seek sustenance in continued control by the assignor over the source of the income? If so, what of a transfer subject to a limitation or condition subsequent? What of a transfer with a retention by the assignor of a right to use the source of the income? Is it relevant that those who subsequently receive amounts from the source are related to the taxpayer? Is there any correlation with the economic benefit or familial satisfaction theories? Should we balance the respective contributions of an assignor and assignee towards the earning of the future income, whether technically it might be derived from a “source” or not?

The statutory concept of “income in respect of a decedent” necessarily walks hand in hand with the principle of death assignments of income. Here we may start with the proposition that amounts received by a decedent’s successor will always constitute income in respect of a decedent if the source of such amounts is found in the services performed by the decedent during his lifetime without respect to whether the decedent had an accrued right to receive those amounts at the time of his

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a part of his income to the preservation of these contracts, so much did they mean for his peace of mind and happiness. Income permanently applied by the act of the taxpayer to the maintenance of contracts of insurance made in his name for the support of his dependents is income used for his benefit in such a sense and to such a degree that there is nothing arbitrary or tyrannical in taxing it to him.

Trusts for the preservation of policies of insurance involve a continuing exercise by the settlor of a power to direct the application of the income along predetermined channels. In this they are to be distinguished from trusts where the income of a fund, though payable to a wife or kin, may be expended by the beneficiaries without restraint, may be given away or squandered, the founder of the trust doing nothing to impose his will upon the use. . . . Here use to be made of the income of the trust was subject, from first to last, to the will of the grantor announced at the beginning. . . . He might have created a blanket trust for the payment of all the items of his own and the family budget, classifying the proposed expenses by adequate description. If the transaction had taken such a form, one can hardly doubt the validity of a legislative declaration that income so applied should be deemed to be devoted to his use. Instead of shaping the transaction thus, he picked out of the total budget an item or class of items, the cost of continuing his contract of insurance, and created a source of income to preserve them against lapse.

*Id.* at 676-78, 680-82.
death. But at that point, significant inquiry is just beginning. If a decedent leaves assets subject to contracts of sale which are later completed by his successor, should not the recipient clearly be chargeable with income in respect of a decedent? Without a doubt! If a decedent's successor in interest need only enter the marketplace to receive a determinable value for assets left him by the decedent, does not he have a right to receive income in respect of a decedent measured by the difference between the decedent's basis and the fair market value of those assets at the time of the decedent's death? If he has this right, should he not be taxed upon income in respect of a decedent to the extent that the date of death value exceeds the decedent's basis of the assets? Does not this mean that anyone receiving marketable assets from a decedent must utilize the decedent's basis in determining gain upon a subsequent sale of the assets? Is it necessary to await "realization" or a "taxable event"? If no ascertainable fair market value may be attributed to "property" left by a decedent, does this necessarily mean that a decedent's successor will receive a new date of death basis in such property? How could this be possible, however, if we say that such assets did not have a definite fair market value in the first place? Indeed, does this not mean that anyone who acquires "property" from a decedent always must use the decedent's basis in computing gain upon a subsequent sale unless that property was without value when the decedent died and its value is due entirely to the efforts of the recipient of such property?

Do not all sales of income-producing assets necessarily constitute sale assignments of income? Without respect to whether an income-producing asset is "property" or not, is not its entire value necessarily based upon future income to be derived from its use? If that is true, are not all amounts received upon the sale of an income-producing asset necessarily attributable to the asset's income-producing potential? If so, are not all such amounts paid to the seller for a right to receive future income? Should not all sales of such assets be fragmented to determine with precision the amount of consideration attributable to the right to receive future income and the amount allocable to the intrinsic or salvage value of such assets? Should we distinguish between sales of assets such as publicly held corporate shares and interests in minerals already being extracted by another, where the abilities of the transferee had nothing to do with the production of future income, from transfers of business assets where the subsequent earnings will vary in direct ratio to the skill of the buyer? If a seller of business assets retains the right to use those assets, does he not necessarily retain sufficient control of them so that he will be in receipt of ordinary income when he sells them even under
the traditional concept of the retention of a source? If income-producing assets would be valueless without the owner's right to receive income from them, should not capital gain be eliminated entirely upon the sale of any income-producing asset except as to amounts which the seller can prove are not attributable to the potential income capacity of the transferred assets? Why should not capital gain treatment hereafter be limited to the sale of non-income-producing assets such as residential real estate and personal automobiles? Is it not a self-evident fact that preferential capital gains have no proper place in our current business society and that any income—compensation or otherwise—may equally suffer from massive realization in a single year! If rate symmetry is a separate problem—as it is—can we in good conscience continue a favoritism which discriminates against earned income when no statute compels such a result?

Those who seek simplicity at the expense of equity and logic will experience frustration when the concept of "source" is rejected as a basis for decision in assignment of income cases. Particular cases will again be decided one by one within traditional concepts of functional jurisprudence; answers to the questions presented in each case will not be easy, but query whether it has ever been a proper purpose of law—including and perhaps especially tax law—to provide the glib answer and the easy assurance. The tree-fruit metaphor has too long survived its original purpose of providing an immature tax system with an eloquent philosophy; it must not now restrain the proper evolution of a mature tax policy, even at the expense of indeterminacy.

Indeterminacy, after all, is the *sine qua non* of law in the West. If Western society prides itself on the inherent dignity of the individual—as it does—it must never discount the worth of any individual claim. The certainty demanded by the sophist cannot be allowed to dim the eternal hope that perhaps—just perhaps—justice will prevail one way.

122. One may anticipate the cry: "... but justice has nothing to do with law at all." As any practical lawyer knows, however, justice has a great deal indeed to do with law. The justice we seek here is modest, clarity of judicial expression, but it is a facet of justice which will at least unmask and perhaps unnerve the judicial scoundrel. The Supreme Court of Texas once considered the point:

A frequent recurrence to first principles is absolutely necessary in order to keep precedents within the reason of the law.

Justice is the dictate of right, according to the common consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals.

Law is a system of rules, conformable... to this standard, and devised upon an enlarged view of the relations of persons and things, as they practically exist. Justice is a chaotic mass of principles. Law is the same mass of principles, classified, reduced to order, and put in the shape of rules, agreed upon by this ascertained common consent. ...
or another in any particular case; but such a hope will persist only as long as we compel our courts to make their ideas clear.

The vagueness in judicial decision which hides many a particular injustice usually flows from an apparently irresistible impulse of judges to use individual cases for the pronouncement of universal truths as they see them. One may sympathize with the impulse, of course, for man always has resented the tie of his life to that particular which he thinks enslaves him; but the inclination must be sublimated for at least two reasons of overriding importance: (1) particular cases are properly ends in themselves, not merely means of attaining some ultimate truth, and each case deserves the best of legal craftsmanship; (2) quality is usually a direct function of the particular and this is true in law as elsewhere.

We have come full circle in our scrutiny of income assignments and it is only fitting that we close as we opened by paying our respects to the illustrious author of the tree-fruit metaphor. Mr. Justice Holmes, always delightfully ambivalent, himself once penned the truest general proposition of them all: "General propositions do not decide concrete cases." They still do not and it would be impertinent either to proclaim or to demand one which would materially touch anticipations of income.

The act of moulding justice into a system of rules detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. . . . Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law.

A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of.


123. Mr. Justice Holmes, dissenting, in Lochner v. New York, 198 U.S. 45, 76 (1905) ("General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. . . . Every opinion tends to become a law.").

Holmes' opinion in Lochner was anticipated by the decision he had written earlier in the case of Lorenzo v. Wirth, 170 Mass. 596, 600-01 (1898):

We think the case at bar is not beyond our competence to decide. The greatest danger in attempting to do so is that of being misled by ready-made generalizations, and of thinking only in phrases to which as lawyers the judges have become accustomed, instead of looking straight at things and regarding the facts in all their concreteness as a jury would do. Too broadly generalized conceptions are a constant source of fallacy. Thus it is easy to say that the continuity of the sidewalk was an invitation and then to discuss in universals the duty of one who invites the public upon his land.