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An important question under the capital gains provisions of the revenue laws is the meaning of the term "hold." The author studies judicial concepts of "holding" and concludes that inconsistencies have been introduced by judicial reaction to changing concepts of property. Noting that past legislative attempts to remedy the situation have been fruitless, he issues a call for "enlightened" congressional action.

> [T]axation 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. *Holmes, J.*, in *Corliss v. Bowers*, 281 U.S. 376, 378 (1930).

I.

Back in 1930, the United States Supreme Court declared that "income that is subject to a man's unfettered command and 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."[1] This general principle, recently characterized by the Court as "one of the basic precepts of the income tax law,"[2] appears to have had far-reaching ramifications.[3]

In the area of deductions, this emphasis on this concept of "dominion"[3a] was applied within a short time to a situation wherein property

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1. Corliss v. Bowers, 281 U.S. 376, 378 (1930).
2. Commissioner v. Lester, 366 U.S. 299, 303 (1961).
3. It was quite consistent, therefore, when that tribunal stated in its leading decision ten years later that "the power to dispose of income is the equivalent of ownership of it." Helvering v. Horst, 311 U.S. 112, 118 (1940).

3a. This legal conception of "dominion" *vis a vis* "title" probably grew out of the use of the "writ of right" (*de recto tenendo*) when Henry II "ordained that no action for a freehold land shall be begun in a manorial court without such a writ." When, in this manner, the king's justices took cognizance of the possessory assizes, Henry II took into control the replacing into possession (seisin), those who claim to have been unjustly deprived of their land. This procedure of repossession by the disseised individual, done by means of the writ, did not in theory look into the matter of title or ownership; however, the king's justices soon were not too discriminating with respect to the limitations of their jurisdiction. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 112 (1st paperback ed. 1961). For the use of "dominion" as a basis for imposing the federal gift tax, see Burnet v. Guggenheim, 288 U.S. 280 (1933); Bradford, J. C. 34 T.C. 1051 (1960).

An excellent example of the extent of these ramifications can be seen in the recent decision of David L. Zips, 38 T.C. No. 62 (Aug. 14, 1962), wherein it was held that, "the value of property received by taxpayer was includible in gross income when it was 'held' and used under complete dominion and control. The fact that valid title was not acquired and that taxpayer's use and possession were assailable by someone

was held under a "lease" agreement by a taxpayer after he had conveyed it to the lessor as security for a loan. Speaking for the Supreme Court, Mr. Justice Black stated that the transaction was in reality a mortgage, and that the taxpayer, having "dominion"—but not title—over the property, would be permitted the "depreciation deduction."[4]

At first blush, it would appear that there would be no substantial difference between the treatment of property "held for the production of income" under the depreciation provisions,[5] and property "held" by the taxpayer under the capital gains provisions of the revenue laws.[6] Consistency would certainly demand similar results since capital gains treatment is granted to depreciable property disposed of through either sale, exchange, or involuntary conversion.[7] Consequently, the apprehension of a contrary situation suggests an investigation into judicial concepts of "holding" under the federal capital gains provisions.

In 1935, the United States Supreme Court, faced with a split in the circuits, interpreted the term "held" as used in the capital gains provisions of the Revenue Act of 1928. The confusion surrounding the meaning of that term in the federal courts was evidenced by the fact that in ruling upon five cases decided by four different circuit courts, the Supreme Court reversed three decisions from two of the four circuits and affirmed the other two decisions. Moreover, the three reversals were in cases that affirmed the Board of Tax Appeals, and the two affirmations were in cases where the board and the district court were reversed upon appeal to circuit.

To compound this lack of unanimity, the Supreme Court itself was

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with a better title did not prevent inclusion of the amounts in income." Such a broad interpretation of the gross income provisions of § 61(a) of the 1954 Code is to be expected in light of the 1961 Supreme Court decision of James v. United States, 366 U.S. 213 (1961), which "devitalized" its earlier opinion in Commissioner v. Wilcox, 327 U.S. 404 (1946).

4. "While it may more often be that he who is both owner and user bears the burden of wear and exhaustion of business property in the nature of capital, one who is not the owner may nevertheless bear the burden of exhaustion of capital investment . . . . [T]he transaction between the taxpayer and the trustee bank, in written form a transfer of ownership with a lease back, was actually a loan secured by the property involved. . . . In the field of taxation . . . the courts are concerned with substance and realities, and formal written documents are not rigidly binding." Helvering v. F. & R. Lazarus Co., 308 U.S. 252, 254-55 (1939). See also Gladding Dry Goods Co., 2 B.T.A. 336 (1925).

Indeed, in 1926 the Government permitted depreciation to be taken in a purchase situation "from the time possession and the burdens and benefits of ownership are transferred to him, or when the deed passes, whichever occurs first." I.T. 2275, V-1 CUM. BULL. 62 (1926).

5. "There shall be allowed as a depreciation deduction a reasonable allowance for exhaustion, wear and tear . . . of property held for the production of income." INT. REV. CODE OF 1954, § 167(a)(2).

6. INT. REV. CODE OF 1954, § 1221.

7. INT. REV. CODE OF 1954, § 1231.

divided upon the construction of the term "hold." In the decision of *McFeely v. Commissioner*,[8] Justices Brandeis, Cardozo, and Stone registered a terse dissent "on the ground succinctly stated" in a decision rendered six months earlier by the Second Circuit. In this latter decision, a per curiam opinion by Judges L. Hand, Swan, and Chase, the court said that the word "held" was "indeed colloquial," and that it does not always imply possession.[9] In sharp contrast, the Supreme Court's later definition stated that "In common understanding to hold property is to own it. In order to own or hold one must acquire. The date of acquisition is, then, the one from which to compute the duration of ownership or the length of holding."[10] Having thus equated "hold" with "acquired," the next problem was to define the latter term. A partial attempt to do so was made the following year when the Court explained that "acquired" was "not a term of art in the law of property but one in common use." It declared that the plain import of the word is "obtained as one's own,"[11] an equation adopted by state[12] as well as federal courts.[13]

In *McFeely* the Supreme Court also held that the title to property is acquired for holding period purposes by a legatee or next of kin at the date of decedent's death. This was in accord with its decision the year before that the periods during which property was held by the trustor and trustee may be added for purposes of satisfying the two-year definitional requirement of the 1921 revenue statute.[14] Both executor (or administrator) and trustee are fiduciaries, and the problem of possible differing basis,[15] although presently accounted for,[16] was said by the Court not to be "inconsistent and that each should be read as affecting the subject to which alone it applies."[17]

Six years later the Supreme Court announced, as a corollary to this principle, the rule that the holding period of property purchased by a testamentary trust begins, in the hands of the beneficiary, on the date of purchase by the trustees.[18] Complying with the ramifications of utilizing the acquisition of equitable title as governing the transaction,

8. 296 U.S. 102, 113 (1935).
9. Ogle v. Helvering, 77 F.2d 338, 339 (2d Cir. 1935).
10. 296 U.S. at 107. In the majority opinion, Mr. Justice Roberts' conclusions were contrary to those of his dissent in the case of Helvering v. New York Trust Co., 292 U.S. 455 (1934), decided a year earlier on almost the same facts.
11. Helvering v. San Joaquin Fruit & Inv. Co., 297 U.S. 496, 499 (1936).
12. Boss v. Polk County, 236 Iowa 384, 391, 19 N.W.2d 225, 228 (1945).
13. Shattuck v. Helvering, 119 F.2d 902, 903 (2d Cir. 1941).
14. Helvering v. New York Trust Co., 292 U.S. 455, 467 (1934).
15. Due to application of § 113(a)(5) of the Revenue Act of 1928, 45 Stat. 819 (1928).
16. INT. REV. CODE OF 1954, § 1223(2).
17. McFeely v. Commissioner, 296 U.S. 102, 112 (1935).
18. Helvering v. Gambrill, 313 U.S. 11, 14 (1941); Helvering v. Campbell, 313 U.S. 15, 20 (1941).

Mr. Justice Douglas declared that an interest did not have to "ripen" into full and complete ownership for purposes of capital gains holding, and, consequently, that the fact that an interest is vested, contingent, or conditional is "inconsequential."

II.

Looking to the results of the application of these rules in subsequent litigation, one discerns a definite pattern. Aside from cases involving insufficient information,[19] public policy,[20] or conversion of a retained asset for a different tax purpose,[21] the lower court decisions appear to fall into three general groups: those that involve action on the part of an instrumentality of the state; those that adhere strictly in principle to the Supreme Court decisions; and those that allow some leeway in their interpretation.

Generally, when a judicial, legislative, or administrative act constitutes a necessary element in the completion of the transaction, courts determine the holding period to begin at the date of the act.[22] Thus, the period has been held to begin when a statutory right of possession attached to a leasehold,[23] when the requirements of local law were satisfied,[24] and when a requisite court approval of contract rights was obtained.[25]

19. Kessler v. United States, 124 F.2d 152, 155 (3d Cir. 1941).

20. When taxpayer uses an agent as a conduit for a tax evasion scheme, his holding period ends with the commencement of the scheme and is not affected by the period the agent subsequently held the property. Deal v. Morrow, 197 F.2d 821, 827 (5th Cir. 1952).

21. Petitioner constructed a residence in 1921 and converted it into rental property in 1930. In determining the loss resulting from its sale in 1934 it was said to have been "held" from the earlier date. Kay Kimbell, 41 B.T.A. 940 (1940).

For the suggestion that the adding of the two holding periods be permitted only when both are capital assets, see Report of Ways & Means Committee (Internal Revenue Code of 1954), H.R. REP. No. 1337, 83d Cong., 2d Sess. 82 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 111 (1954).

22. An excellent example of the soundness of the principle in using official acts can be seen in the recent decision of Wagar Lumber Co. v. United States, 181 F. Supp. 388 (W.D. Wash. 1960).

23. Commissioner v. McCue Bros. & Drummond, Inc., 210 F.2d 752 (2d Cir. 1954). The issue was the period that a surrendered leasehold was held by the lessee under a statutory continuance.

24. E. F. Blaise, 42 B.T.A. 1232 (1940), *rev'd on other grounds*, 126 F.2d 383 (10th Cir. 1942). See also R. O'Brien & Co. v. United States, 51 Am. Fed. Tax R. 1249 (D. Mass. 1956).

25. Vincent Coraci, 13 CCH Tax Ct. Mem. 533 (1954). Although the registration of notes does not affect the holding period, this is probably due to the fact that such registration is a ministerial act, rather than a diseretionary one; solely for the protection of the public, it is a commercial matter in which the state's limited interest is sustained by the principle of *caveat emptor*. Since primary consideration for legal acts strengthens the law and its administration, it is unfortunate that the principle embodied in this group of cases cannot be extended to all areas amenable to its application. With respect to patents, see Thompson v. Johnson, 42 Am. Fed. Tax R. 1284 (S.D.N.Y.

The second group of cases attempts to follow closely the interpretive policy of the Supreme Court. They equate "acquisition" with ownership, and the latter with transfer of title under applicable state law. As a consequence of this formula, which is adhered to by state courts[26] as well as the Internal Revenue Service,[27] the holding periods have been held to begin with purchase and delivery, and not subsequent payment,[28] even though the amount of consideration is indefinite at the time of transfer.[29] Similarly, it has been held that the period does not begin until release of the property from escrow,[30] that assets obtained from liquidation are held from the date of the liquidation,[31] that the disposition by means of conditional sale terminates seller's holding period notwithstanding retention of installment obligations,[32] and that an option or contract to buy does not commence buyers' holding period, which rather awaits subsequent payment and possession.[33]

In addition, "acquisition" was held to begin the period for stock acquired (a) in a recapitalization pursuant to previous contracts to exchange,[34] and (b) under a contract to purchase stock held by a third party, the earlier agreements in each case being characterized as executory contracts and not ones of sale.[35] In like manner, the period was held to begin when stock was issued in exchange for bonds, and not on the earlier date when bonds were obtained as security for purposes of reorganization.[36] Similarly, only final distribution of the

1950); Kronner v. United States, 110 F. Supp. 730 (Ct. Cl. 1953); Samuel E. Diescher, 36 B.T.A. 732 (1937), *aff'd*, 110 F.2d 90 (3d Cir. 1940); G.C.M. 21507, 1939-2 CUM. BULL. 189 (acquiescence in the *Diescher* case).

26. Boss v. Polk County, 236 Iowa 384, 391, 19 N.W.2d 225, 228 (1945).

27. Rev. Rul. 220, 1959-1 CUM. BULL. 210.

28. George S. Lavin, 3 CCH Tax Ct. Mem. 228 (1944).

29. Patterson v. Hightower, 245 F.2d 765 (5th Cir. 1957) (call contract); William A. Cluff, 17 T.C. 225 (1951).

30. Howell's Estate, 1 CCH Tax Ct. Mem. 918 (1943), *aff'd*, 140 F.2d 765 (5th Cir. 1944). Affirming, the Fifth Circuit said the holding must be for oneself, and, consequently not that of a bailee. 140 F.2d at 767. See also William U. Watson, 8 CCH Tax Ct. Mem. 357 (1949) (debentures); Albert E. Dyke, 6 T.C. 1134 (1946).

31. Thomas R. Reyburn, 5 CCH Tax Ct. Mem. 680 (1946). *Cf.* Mattison v. United States, 163 F. Supp. 754 (D. Idaho 1958), where the court, implying the decision would be contra if title had passed, stated: "It is the clear implication of several of the cases involving the reporting of gains or losses realized on corporate liquidation that whether or not an amount received on an installment liquidation is long or short term gain is determined by the length of time that has passed between the purchase of the stock and the actual receipt of the amount on which gain is realized." *Id.* at 758.

32. *In re* Rogers' Estate, 143 F.2d 695, 696-97 (2d Cir. 1944), citing congressional committee reports to § 44(d) of the 1939 Code.

33. Max M. Wyman, 33 T.C. 622 (1959); Marian L. Bloxom, 9 CCH Tax Ct. Mem. 104 (1950).

34. Fleda F. Iverson, 1 CCH Tax Ct. Mem. 777 (1943).

35. Ethlyn L. Armstrong, 6 T.C. 1166 (1946), *aff'd*, 162 F.2d 199 (3d Cir. 1947).

36. Kinkel v. McGowan, 188 F.2d 734, 736 (2d Cir. 1951).

assets of an employee's trust began the employee's holding period, since prior to such distribution title was vested in the trustee.[37] Nor does the retention of proxy rights and an option to repurchase continue seller's period, since title vests in buyer, and a new period begins upon exercise of the option.[38] Finally, when more than one governmental act is involved in the transfer of property, as exemplified above with respect to condemnation, the time title vests determines the period of holding.[39]

When the ramifications of the principles established by the Supreme Court would result in decisions that appear inequitable in result or illogical in theory, courts usually have tended to establish inroads in the application of title as the guide to determining the period of holding. Thus, "constructive receipt" was used to grant a sole stockholder favored tax treatment even though the stock was not issued within the statutory period.[40] Similarly, the period that bonds were held commenced with the contract of sale prior to their issuance[41] as that was the time the rights of the parties became fixed.[42] Indeed, a like result occurred when the stock that was subsequently authorized and issued constituted part of the consideration for a loan.[43]

In 1941, the Court of Claims established a limitation on the Supreme Court's rule with respect to the holding period of the beneficiary of a trust. In a four-to-one decision it held that the period does not commence until the death of the trustor if the trust is revocable at the trustor's will.[44] Although the Supreme Court in *McFeely* clearly disassociated basis from holding period, the Court of Claims cited as authority for its decision a portion of the Conference Committee Report on the Revenue Act of 1928, a reference to the basis of

37. Harvey S. Strassburger, 37 B.T.A. 881 (1938).

38. Max M. Wyman, 33 T.C. 622 (1959). This is in accord with § 1223(6) of the 1954 Code, discussed below.

39. Commissioner v. Kieselbach, 127 F.2d 359, 362 (3d Cir. 1942), *aff'd*, 317 U.S. 399 (1943).

40. Albert K. Orth, 11 CCH Tax Ct. Mem. 452 (1952). Subsequent issuance "merely reflected a capital interest which he already had and constituted no new asset with a new holding period." *Id.* at 453.

41. C. A. Sporl & Co., 40 B.T.A. 829 (1939), *aff'd*, 118 F.2d 283 (5th Cir. 1941).

42. Commissioner v. C. A. Sporl & Co., 118 F.2d 283 (5th Cir. 1941).

43. W. F. Marsh, 12 T.C. 1083 (1949). Based partially upon the authority of *Sporl*, the court said that "there was never any doubt" that petitioners and their associates would be the holders of the stock. This was evidenced by the back-dating of the stock to the date of agreement, which was also the time of the completed performance of the taxpayer's part of the agreement. *Cf.* James L. Meldon, 13 CCH Tax Ct. Mem. 765 (1954), *aff'd*, 225 F.2d 467 (3d Cir. 1955), where a deposit made pursuant to an oral agreement did not commence the holding period. Rather, it was held to be the subsequent written agreement, which was presumed in law to express their final understanding.

44. Fifth Avenue Bank v. United States, 41 F. Supp. 428 (Ct. Cl. 1941).

property in a revocable trust.[45] In his dissent, Judge Whitaker pointed out that the quote with reference to basis does not necessarily apply to holding periods. In addition, he contended that to "hold" to an ordinary man connotes title, *i.e.*, the right to exercise the incidents of ownership, which the settlor does not possess.

III.

To ascertain wherein lie the inconsistencies of these cases, we need but go back to the original Supreme Court decisions. In them the Court, over notable dissent, proclaimed its adherence to a property-inspired rule of title. However, although it spoke of "title," it seemed to have meant "equitable title"; for the very cases that proclaimed the rule contradicted it by tacking on the period that title was held by a fiduciary to that of the beneficiary. Thus, the guideposts established in the Court's holdings contained at the outset the seeds of their own contradiction.

The Supreme Court decisions, therefore, had the effect of granting considerable leeway to lower tribunals in their interpretation of the term "hold." Aside from cases involving governmental action, whenever the lower court's attempt to apply the principle of legal title would lead to clearly improper results, it was able to use other devices, such as constructive receipt, to gain an equitable and just result. Such use may have satisfied the equation that to "hold" is to "acquire," but it did little to enhance the concept of title, and thereby to develop that property approach to the term. Indeed, quite paradoxically, it fostered an early developing concept of "dominion," and, consequently, an English "production of income" approach to the definition.

A few courts, as noted above, have attempted to follow the fiat of the Supreme Court to its extreme application. The results of such a religious construction of the concept of title were recently evidenced in the Federal District Court for the District of Massachusetts in *O'Brien v. United States*.[46] Although adhering to this concept as the determining factor for the commencement of the holding period, the court held that trawlers and their engines, though sold as a unit, may be separated for holding period purposes if purchased at different times, and that the taxpayer did not own, and therefore hold, one of the engines until it was completely paid for, due to the provisions of the contract of sale.

Another resulting incongruity is reflected in the cases dealing with

45. *Id.* at 431. The Report stated: "In view of the complete right of revocation . . . it is proper to view the property for all practical purposes as belonging to the grantor rather than the beneficiary and . . . vesting in the beneficiary . . . on the date of the grantor's death."

46. 51 Am. Fed. Tax R. 1249 (D. Mass. 1956). See note 24 *supra*.

the so-called "split" or "divided" holding period. Its first significant appearance was on February 9, 1934, when the Board of Tax Appeals decided the case of *Ellen Ayer Wood*.[47] Reasoning that the exercise of a stock option is "analogous to . . . a purchase of stock," the Board held that the *date the right was exercised commenced the holding period* of the stock obtained thereby. Rejecting the taxpayer's contention that the period began with the acquisition of the parent stock which produced the option rights, the Board, maintaining its earlier position,[48] pointed out that "whether or not the stockholder's interest will be the same after issuance of rights to subscribe depends upon whether or not such rights are exercised by the stockholder." Upon appeal by the taxpayer, the Board's decision was reversed by the Court of Appeals for the First Circuit, which held that part of each share of stock is a capital asset, even if not held for the specified period, if it was purchased under rights to subscribe that were held for such period. To justify this doctrine of apportionment, the court reasoned that,

> when new capital is added to the assets of an existing corporation each share represented by the certificates issued therefor is not a share in the new capital alone, but automatically spreads over and attaches itself to the whole and every part of the corporation and the old certificates likewise automatically come to represent interests in the new as well as the old.[49]

One year after this decision came down, the Second Circuit Court of Appeals was faced with the same problem. Quoting the above rationale, the court adopted the principle recently applied by their brethren to the north.[50]

On July 14, 1942, seven years after the First Circuit decided the *Wood* case, and after that decision was also followed by the Seventh Circuit, the House Ways and Means Committee suggested amendatory

47. 29 B.T.A. 1050 (1934), *rev'd*, 75 F.2d 364 (1st Cir. 1935).
48. Rodman E. Griscom, 22 B.T.A. 979 (1931).
49. Wood v. Commissioner, 75 F.2d 364, 366-67 (1st Cir. 1935).
50. Macy v. Commissioner, 82 F.2d 183 (2d Cir. 1936). Although this view was perhaps strengthened two weeks later by a Supreme Court decision holding a real estate option of purchase to be valuable property, within a year the same Supreme Court refused to extend the principle to a situation where prefered stock having a basis of zero was issued as a dividend on common. Under such circumstances, wrote Mr. Justice Brandeis, the preferred stock constituted income, and, whether taxed or not, possesses its own holding period. Commissioner v. San Joaquin Fruit & Inv. Co., 297 U.S. 496, *rehearing denied*, 297 U.S. 728, *motion to withhold mandate denied*, 85 F.2d 854 (9th Cir. 1936); Commissioner v. Gowran, 302 U.S. 238, *rehearing denied*, 302 U.S. 781 (1937). *Caveat:* These rules with respect to a stock dividend (in contrast to an option) have been amended by statute. INT. REV. CODE OF 1954, § 307(a) determines the basis by means of allocation between the stock distributed, and the stock with respect to which the distribution was made; § 1223(1) includes the holding period of the original stock in that of the new stock.

legislation. In its report to Congress,[51] the Committee pointed out that the administrative difficulty caused by the rule of apportionment was obvious, and, at times, "becomes absolutely unworkable."[52] As a result of this suggestion, and a similar one the same year by the Senate Finance Committee,[53] Congress added section 117(h)(6) to the Code—presently section 1223(6). Representing Congress' desire to obtain "a simple, uniform, and administratively workable solution," it provided that

> the holding period of stock acquired in the exercise of stock rights shall date, in every case and whether or not receipt of taxable gain was recognized in connection with the distribution of the rights, from the day upon which the rights to acquire such stock were exercised.[54]

One might believe that this promulgation would constitute a guide for judicial resolutions of similar problems; the impact of *McFeely*, however, was such that the "word game" was again to be utilized to "split" or "divide" the holding period of property. Taxpayer, M. A. Paul, had sold an apartment building which he had constructed upon his property, and which had been completed within the minimum six-month holding period. Reversing the Tax Court, the Third Circuit Court of Appeals held that the "portion of the gain which is properly allocable to that part of the building which was erected more than six months before the sale may be given long-term capital gain treatment" in petitioners' 1946 return.[55]

Although Circuit Judge Staley, in his opinion in the *Paul* case, felt that the problem was so rare that it would not "materially harass the Commissioner," in a very short time the Tax Court was again considering the very same situation. Harold and Claire Williams claimed long-term capital gains treatment in their 1947 return on the gain realized from the sale of a tankship. The vessel had been sold

51. H.R. REP. No. 2333, 77th Cong., 2d Sess. 98 (1942).

52. The Report explained that: "In any case where there is a series of stock rights issued by a corporation and exercised by a shareholder, the rule becomes absolutely unworkable, since, in the case of the later issues in the series, the property element representing the stock right will be computed with reference to old stock which in turn has a holding period computed with reference to other old stock. The result is a pyramiding of stock lots each with a different holding period. It has been estimated that six issues of rights, if exercised, will result in no less than 64 different lots." H.R. REP. No. 2333, 77th Cong., 2d Sess. 98 (1942).

53. S. REP. No. 1631, 77th Cong., 2d Sess. 121-22 (1942).

54. The House Report justified the chosen solution by "the fact that, normally, much the greater proportion of the basis pertaining to stock acquired in the exercise of stock rights is attributable to the subscription price. The stock right represents so small a property element that it can be eliminated from the computation without inequity, and with benefits to taxpayer and Treasury through the elimination of complexities." H.R. REP. No. 2333, 77th Cong., 2d Sess. 98 (1942).

55. Paul v. Commissioner, 206 F.2d 763, 764 (3d Cir. 1953).

pursuant to an agreement that was concluded less than six months after their acquisition of the hull from which they constructed the tanker. However, the satisfaction of conditions subsequent in the contract resulted in the registration of the ship and execution of the bill of sale at a later date, one well within the statutory requirement of section 117 of the 1939 code. In its decision the Fifth Circuit, citing *Paul*, once again reversed the Tax Court. In so doing, it remanded the case to that court, with instructions to apportion the gain between long and short-term, and to determine whether the basis should be value or cost.[56] On remand, Judge Van Fossen, in adopting the Commissioner's method of allocation,[57] reiterated his earlier position that a completed tanker was the object of the sale.[58]

Seven days after Judge Van Fossen's opinion came down the Tax Court decided the cause of Fred and Carrie Draper. They had deducted as an ordinary loss on their 1949 joint return the casualty loss of a building they had constructed for use in their business.[59] On May 29, 1959, the Tax Court held that the loss of their self-constructed section 1231 asset, destroyed six months or less after its completion, must be apportioned for the purpose of reducing the amount of gain on other assets used in the trade or business realized in the same year. It also held that it did not matter that the *Paul* case involved a sale or exchange and the instant one deals with a casualty, since the "central point" in both is whether the asset had been held for more than six months.[60] In this manner the Tax Court, *after twice being reversed*, had to abandon the principle of a completed asset, and thus bow to higher judicial authority. Recent administrative[61] and judicial[62] pronouncements testify to the continued establishment of the doctrine of dividing the taxpayer's holding period. This is true even though such splitting seems to defy both logic and congressional intent as evidenced by its enactment of the stock option provision, a "simple, uniform, and administratively workable solution."

56. Williams v. Commissioner, 256 F.2d 152 (5th Cir. 1958). "Obviously something more than the hull . . . was acquired . . . and sold. . . ." *Id.* at 155.

57. Taxpayer adopted the "cost" or completed construction concept, but argued it should be computed from the total sale price excluding the cost of acquiring the hull. The Commissioner's method, the one adopted by the court, considered the cost of acquisition and rebuilding as part of the investment in the asset.

It is noteworthy that the regulations implementing § 167(c)(1) of the Code, with respect to the construction, reconstruction or erection of capital assets to qualify a portion for accelerated depreciation, uses the cost of completed construction as the basis for allocation. See Treas. Reg. § 1.167(c)-1 (1960).

58. Harold G. Williams, 18 CCH Tax Ct. Mem. 460 (1959).

59. Pursuant to Int. Rev. Code of 1939, § 117(j), added by ch. 619, 56 Stat. 846 (1942).

60. Fred Draper, 32 T.C. 545 (1959).

61. Rev. Rul. 62-140, 1962 INT. REV. BULL. No. 34, at 18.

62. United States v. Ivey, 294 F.2d 799 (5th Cir. 1961). *Cf.* Goldstein v. Allen, 306 F.2d 711 (10th Cir. 1962).

IV.

A capital asset should be viewed as a *res*, an object of property, be it a bond, a stock option, or a partially constructed asset. However, for purposes of sound tax administration, and for logical and definite taxpayer predictability, its holding period should follow the "production of income" principles presently applied in the area of short sales[63] and collapsible corporations.[64] Consequently, the asset should be considered "held" when its construction is completed, or, in the alternative, when it is first placed in the use for which it is intended. Until such completion or use, the taxpayer should be considered to possess *inchoate* rights in the capital gains possibilities of his asset.

The resolution of these problems has been substantially obstructed by judicial reactions to changing concepts of property. This impediment has been described by a leading jurist in the following manner:

> In the United States . . . the . . . conception of property as an absolute right . . . has persisted longer than anywhere else. This is due largely to the support given by the Supreme Court, as interpreter of the Constitution, to a rigidly individualistic interpretation. Grants of title to land, and eventually all property rights, were elevated into inalienable natural rights, and the power of taxation . . . strictly limited.[65]

Indeed, the persistent and contradictory lip-service paid to "title," as well as the results of the *Paul, Draper,* and *Williams* cases, seem quite consequential when viewed against this conclusion, even though they contradict the oft-quoted truism that the tax law must be practical.[66] It was a similar statutory construction that motivated Mr. Justice Cardozo to declare for the Supreme Court:

> Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of

63. "[T]he holding period of such substantially identical property shall be considered to begin (notwithstanding section 1223, relating to the holding period of property) on the date of the closing of the short sale, or on the date of a sale, gift, or other disposition of such property, whichever date occurs first. . . ." INT. REV. CODE OF 1954, § 1233(b)(2).

64. "[F]ollowing the completion of such manufacture, construction, production, or purchase." INT. REV. CODE OF 1954, § 341(d)(3).

65. FRIEDMANN, LEGAL THEORY 486 (3d ed. 1953).

66. See, for example, Mr. Justice Roberts' statement to this effect in Helvering v. New York Trust Co., 292 U.S. 455, 471 (1934). See also Hayes v. United States, 227 F.2d 540, 542 (10th Cir. 1955) (the "language of the [Internal Revenue] Act must be taken in context and must be considered in light of the purpose sought to be accomplished"); Commissioner v. Schock, Gusmer & Co., 137 F.2d 750, 754 (3d Cir. 1943) (where the court is confronted with equally available routes leading to different results, in determination of a tax matter, practical considerations rather than technical niceties should point the way); Pleasants v. United States, 22 F. Supp. 964 (Ct. Cl.), *aff'd*, 305 U.S. 357 (1938) ("consistency in theory is not necessary in matters of internal revenue").

> a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. . . . 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.[67]

In summation, it can only be concluded that "enlightened" congressional action is long past due if the area of capital gains holding is to possess that consistency and predictability that is the law's aim. The confusion and the difficulty caused by the content and implications of the *McFeely* decision demand legislative attention.[68] For, as Edmund Burke has pointed out, there is a limit at which forbearance ceases to be a virtue.

67. Commissioner v. Wells, 289 U.S. 670, 678 (1933).

68. Some recent decisions indicating the confusion and/or the possibility of taxpayer abuse are, First Am. Nat'l Bank v. United States, 209 F. Supp. 902 (M.D. Tenn. 1962) and Dorman v. United States 296 F.2d 27 (9th Cir. 1961). In *First Am.*, taxpayer was allowed capital gains treatment on the disposition of stock sold to an adversary group in a proxy battle, taxpayer transferring the proxy power prior to the six month period but retaining the title specifically for the tax advantage. In *Dorman*, taxpayer received the preferential treatment from the relinquishment of an interest in an executory contract to acquire a partnership interest. The Ninth Circuit held that the period began on the contract date even though the interest disposed of resulted *entirely* from the *subsequent* activities of the taxpayer. This, of course, contradicts the *Armstrong* case at note 35 *supra*.