and where the issue is that of contributory negligence of a passenger, "the ordinary case calls for elimination of the question from jury consideration."[15]

The Iowa Supreme Court has not been willing to go as far as the Michigan Court in the *Yarabek* case did in saying that the passenger is generally under a duty to remain silent. The apparent reason for this is that the Iowa Court has never been inclined to rule that the usual case is one where the issue of contributory negligence should be withheld from the jury. The vast majority of the Iowa cases hold that the issue is one peculiarly for jury determination.[16] The difference between the ruling of the two jurisdictions is probably attributable to the fact that, in a 1950 case, the Michigan Court had gone to great lengths to define the duty owed by a passenger as to maintaining vigilance and giving warning of danger to the driver.[17] The Iowa Court has been content to stand by the simple criterion that the passenger has the duty to exercise ordinary care for his own safety under the circumstances, and this is generally held to be a question of fact for jury determination.[18]

The sentiments of the Iowa Court do not appear to be in great conflict with those expressed in the *Yarabek* case, however, as the Court has not hesitated to reverse decisions of the lower courts which have held the passenger contributorily negligent as a matter of law[19] or expanded the instructions on the issue of contributory negligence to include the duty of some affirmative act on the part of the passenger.[20] Those cases where contributory negligence as a matter of law on the part of the passenger has been affirmed by the Court are ones where either the minds of reasonable men could not differ or the passenger failed to carry the burden of proof of his freedom from contributory negligence.[21]

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[15] *Id.* at 125, 97 N.W.2d at 800.

[16] Peterson v. Union Motor Sales Co., 245 Iowa 1337, 66 N.W.2d 496 (1954); Jensvold v. Chicago G.W. Ry., 234 Iowa 627, 12 N.W.2d 293 (1944); Carpenter v. Wolfe, 223 Iowa 417, 273 N.W. 169 (1937); Stingley v. Crawford, 219 Iowa 509, 258 N.W. 316 (1935); Muirhead v. Challis, 213 Iowa 1108, 240 N.W. 912 (1932); Bradley v. Interurban Ry., 191 Iowa 1351, 183 N.W. 493 (1921); Willis v. Schertz, 188 Iowa 712, 175 N.W. 321 (1920).

[17] Jones v. Daniels, 328 Mich. 402, 43 N.W.2d 906, 909, (1950) ("A guest passenger, it is true, has a duty towards the driver of the car in which he is riding . . . the guest passenger is not required to keep a lookout nor be on constant vigilance against *possible* dangers. His only duty is to warn the driver of visible or ascertainable imminent dangers *of which the guest is aware*, and this is further qualified by the condition that it is a danger of which the driver is *not* aware, or which the guest has reason to believe the driver is not aware. If the driver is driving in a manner which would not cause a reasonably prudent guest passenger alarm, and such passenger has no previous notice that the driver is inattentive or careless, the passenger is under no duty to be on the lookout nor to anticipate possible dangers. And, even though the guest is aware of visible and imminent danger, if he has reason to believe that the driver is also aware of that danger or the guest has good reason to believe that it would be more hazardous to suddenly warn the driver than not to do so, then the guest is under no duty to warn the driver of the danger. Often a sudden warning, which might cause the driver to take his eyes off the road for an instant or distract his attention from attendant driving conditions, is a greater danger in itself than silence. When averting an accident hinges on a quick decision by a driver, silence may be and sometimes is the safest course. If the guest passenger has no *actual* notice of a danger, and is under no duty to anticipate a danger because of previous notice of the driver's habits, speed, or other conduct then the guest passenger is under no duty to warn the driver of a visible and ascertainable danger which the passenger could have seen if he had been on the lookout.").

[18] 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, Part 1, § 2413, p. 561 (1946); Teufel v. Kaufmann, 233 Iowa 433, 6 N.W.2d 850 (1943); Stingley v. Crawford, 219 Iowa 509, 258 N.W. 316, 318 (1935). See also cases in note 16, *supra*.

[19] Jensvold v. Chicago G.W. Ry., 234 Iowa 627, 12 N.W.2d 293 (1944).

[20] Stingley v. Crawford, 219 Iowa 509, 258 N.W. 316 (1935).

[21] Paulsen v. Haker, 250 Iowa 532, 95 N.W.2d 47 (1959); Hutchison v. Sioux City Serv. Co., 210 Iowa 9, 230 N.W. 387 (1930).

ESTATE TAXATION—Is property given away by eighty-seven year old donor, who died within nine months after making the gift, to be included in donor's estate as a gift in contemplation of death, when one of donor's principal motives was to reduce income taxes, to which he was unalterably opposed?

Decedent, aged 87, gave his son as trustee for decedent's wife and others an undivided one-fifth interest in certain business realty. Decedent died nine months after the transfer of the Deed of Trust. The Commissioner of Internal Revenue determined that this gift was made in contemplation of death and therefore that the donated property should be included in decedent's estate. A deficiency for additional estate tax was asserted, the deficiency was paid, a claim for refund filed and denied, and suit to recover the alleged overpayment was instituted. Petitioner contended that decedent's motivation was to reduce his income taxes to which he was unalterably opposed, and that such a purpose was sufficient to rebut the presumptions raised by the statute,[1] the Commissioner's determination, the decedent's age, his recent hospitalizations (which were not for reasons that should suggest to him that death was imminent), the relationship between decedent and the donees, the fact that the objects of his bounty already were adequately provided for, and the short period between transfer and the date of death.[2] *Held,* claim for refund allowed. The gift was not made in contemplation of death within the meaning of the statute, and thus the donated property was not includible in decedent's gross estate for income tax purposes. *Lockwood v. United States,* 181 F. Supp. 748, 60-1 U.S.T.C. 11,914 (S.D. N.Y. 1959).

The phrase "in contemplation of death" does not refer to a general expectation of death such as all men entertain nor is it restricted to an interpretation that death is imminent.[3] A gift is made "in contemplation of death" when made with the thought of death as the controlling motivation.[4] The inquiry is whether or not the decedent was motivated by the same considerations as lead to testamentary dispositions of property and whether the gifts were made as substitutes for such dispositions without awaiting death.[5]

"The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and

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[1] INT. REV. CODE OF 1954, § 2035:

(a) *General Rule.*—The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) *Application of General Rule.*—If the decedent within a period of 3 years ending with the date of his death (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such three year period shall be treated as having been made in contemplation of death. [Italics supplied.]

[2] Another factor in the estate's favor was that decedent, at approximately the same time he made the gift, purchased an annuity payable over a ten-year period.

[3] United States v. Wells, 283 U.S. 102, 2 U.S.T.C. 715 (1931); Treas. Reg. § 20.2035-1(c) (1958).

[4] Slifka v. Johnson, 161 F.2d 467, 47-1 U.S.T.C. 10,548 (2d Cir. 1957) (avoidance of estate taxes); Gregg v. United States, 13 F. Supp. 147, 36-1 U.S.T.C. 9043 (Ct. Cl. 1936) (knowledge of impending death); Goar's Estate, 9 T.C.M. 854 (1950).

[5] Milliken v. United States, 283 U.S. 15, 2 U.S.T.C. 681 (1930).

its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.' "[6]

The presumption raised by the statute that the gifts were made in contemplation of death is expressly stated to be a rebuttable one and will support a finding only in the absence of any substantial evidence to the contrary.[7] This presumption coupled with the presumptive correctness of the Commissioner's determination[8] in all tax refund suits requires the petitioner to carry the burden of proving that the transfers were not made in contemplation of death.[9] The petitioner must show that the gifts were motivated by reasons associated with life.[10]

The question of motive is principally one of fact, so the bodily and mental condition of the decedent and all other attendant facts and circumstances must be scrutinized to determine whether or not a thought of death prompted the gift.[11] The age [12] and health[13] of the decedent may be considered as inferential evidence that the gifts were made in contemplation of death but do not give rise to a conclusion of such intention if a predominant life motive can be shown.[14] Avoidance of heavy income taxes,[15] aiding a family member in financial distress,[16] a prior policy of making substantial gifts,[17] and a desire to be relieved of the burdens of management[18] are all examples of motives found by the courts to destroy the presumption that a gift was made in contemplation of death. The courts refuse to allow the presumption of the statute aided by unfavorable circumstances to override a bona fide gift springing from a motivation concerned with life and not death.[19]

The law on the subject of gifts made in contemplation of death has undergone no substantial change since the decision in *United States v.*

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[6] United States v. Wells, 283 U.S. 102, 118, 2 U.S.T.C. 715 (1931).

[7] Allen v. Trust Co. of Georgia, 326 U.S. 630, 46-1 U.S.T.C. 10,254 (1946); Becker v. St. Louis Trust Co., 296 U.S. 48, 36-1 U.S.T.C. 9,006 (1936); United States v. Wells, 283 U.S. 102, 2 U.S.T.C. 715 (1931); Bell v. United States, 74 F. Supp. 295, 48-1 U.S.T.C. 10,602 (D. Minn. 1948); Holding v. Commissioner, 30 T.C. 988 (1948).

[8] Old Mission Co. v. Helvering, 293 U.S. 289, 35-1 U.S.T.C. 9,009 (1935); Reinecke v. Spalding, 280 U.S. 227, 2 U.S.T.C. 452 (1930); Commonwealth Trust Co of Pittsburgh v. Driscoll, 50 F. Supp. 949, 43-1 U.S.T.C. 10,011 (W.D. Pa. 1943).

[9] McCaughn v Real Estate Land Title & Trust Co., 297 U.S. 606, 36-1 U.S.T.C. 9,206 (1936); Humphrey's Estate v. Commissioner, 162 F.2d 1, 47-2 U.S.T.C. 10,565 (5th Cir. 1947).

[10] United States v. Wells, 283 U.S. 102 (1931); Holding v. Commissioner, 30 T.C. 988 (1958); Sheldon's Estate v. Commissioner, 27 T.C. 194 (1956).

[11] Metzger v. United States, 181 F. Supp. 830, 60-1 U.S.T.C. 11,935 (N.D. Ohio 1960); Treas. Reg. § 20.2035-1(c) (1958).

[12] United States v. Wells, 283 U.S. 102, 118 (1931) ("Yet age in itself cannot be regarded as furnishing a decisive test. . . ."); Butterworth v. Usry, 177 F. Supp. 197, 59-2 U.S.T.C. 11,881 (E.D. La. 1959); Holding v. Commissioner, 30 T.C. 988 (1958); Johnson's Estate v. Commissioner, 10 T.C. 680 (1948).

[13] United States v. Wells, 283 U.S. 102 (1931); Butterworth v. Usry, 177 F. Supp. 197, 59-2 U.S.T.C. 11,881 (E.D. La. 1959); Lynch's Estate v. Commissioner, 35 T.C. No. 18 (1960); Sheldon's Estate v. Commissioner, 27 T.C. 194 (1956); Casey's Estate v. Commissioner, 25 T.C. 707 (1955).

[14] Parish's Estate v. Commissioner, 187 F.2d 390, 51-1 U.S.T.C. 10,794 (7th Cir. 1951); Hoover v. United States, 180 F. Supp. 601, 60-1 U.S.T.C. 11,923 (Ct. Cl. 1960); Dickson v. Smith, 34 A.F.T.R. 1625, 45-2 U.S.T.C. 10,226 (S.D. Ind. 1945).

[15] Lockwood v. United States, 181 F. Supp. 748, 60-1 U.S.T.C. 11,914 (S.D. N.Y. 1960); Bell v. United States, 74 F. Supp. 295, 48-1 U.S.T.C. 10,602 (D. Minn. 1948); Ackel's Estate v. Commissioner, 17 T.C.M. 110 (1958); Sheldon's Estate v. Commissioner, 27 T.C. 194 (1956).

[16] Welch v. Hassett, 15 F. Supp. 692, 36-2 U.S.T.C. 9429 (1936); Kroger's Estate v. Commissioner, 2 T.C.M. 644 (1943); Moir's Estate v. Commissioner, 47 B.T.A. 765 (1942).

[17] Parish's Estate v. Commissioner, 187 F.2d 390, 5-1 U.S.T.C. 10,794 (7th Cir. 1951); Hoover v. United States, 180 F. Supp. 601, 60-1 U.S.T.C. 11,923 (Ct. Cl. 1960).

[18] First Nat'l Bank of Boston v. Welch, 24 F. Supp. 695, 38-2 U.S.T.C. 9,496 (D. Mass. 1938); Farnum's Estate v. Commissioner, 14 T.C. 884 (1950); Johnson's Estate v. Commissioner, 10 T.C. 680 (1948).

[19] United States v. Wells, 283 U.S. 102 (1931); Holding v. Commissioner, 30 T.C. 988 (1958); Casey's Estate v. Commissioner, 25 T.C. 707 (1955).

Wells.[20] The only major alteration was the extension of the statutory presumption from a two year period to a three year period in 1950. The presumption of the statute, the burden of proof, and the definition of the phrase "in contemplation of death" remain unchanged.[21] A trend appears to have developed, however, whereby in weighing the facts before them the courts have given more weight to evidence tending to establish directly the donor's motivation.[22] Circumstantial factors such as old age and poor health which can establish intention only by inference are of little importance when evidence directly relating to the donor's reasons is introduced and accepted.[23] An excellent illustration of this point is the case of *Casey's Estate v. Commissioner*,[24] involving a trust in favor of decedent's children, executed December 13, 1951, the day following a severe heart attack from which decedent ultimately died on January 9, 1952. The Tax Court held that decedent's motivation was a prior desire to effect these gifts which had been frustrated.

The question, necessarily, is as to the state of mind of the donor, and a life motive may exist even under the most unfavorable of factual situations. The presumption raised by the statute is not and cannot be conclusive, nor can the statutory presumption coupled with such circumstantial factors as old age, ill health, and the like, prevent a bona fide gift inter vivos, springing from a motivation directly concerned with life, from being held not "in contemplation of death".[25]

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[20] 283 U.S. 102 (1931). See Hoover v. United States, 180 F. Supp. 601, 60-1 U.S.T.C. 11,923 (Ct. Cl. 1960); Want's Estate v. Commissioner, 29 T.C. 1223 (1958).

[21] Metzger v. United states, 181 F. Supp. 830, 60-1 U.S.T.C. 11,935 (N.D. Ohio); Lynch's Estate v. Commissioner, 35 T.C. No. 18 (1960).

[22] Hoover v. United States, 180 F. Supp. 601, 60-1 U.S.T.C. 11,923 (Ct. Cl. 1960); Holding v. Commissioner, 30 T.C. 988 (1951); Sheldon's Estate v. Commissioner, 27 T.C. 194 (1956); Casey's Estate v. Commissioner, 25 T.C. 707 (1955); Johnson's Estate v. Commissioner, 10 T.C. 680 (1948).

[23] United States v. Wells, 283 U.S. 102 (1931); Butterworth v. Usry, 177 F. Supp. 197, 59-2 U.S.T.C. 11,881 (E.D. La. 1959); Lynch's Estate v. Commissioner, 35 T.C. No. 18 (1960).

[24] 25 T.C. 707 (1955).

[25] Handy v. Delaware Trust Co., 285 U.S. 352, 3 U.S.T.C. 914 (1932); Littauer's Estate v. Commissioner, 25 B.T.A. 21 (1932).