

# REPLY BRIEF

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No. 190

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES, PETITIONER

v.

THOMAS CRAWLEY DAVIS AND GRACE ETHEL DAVIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents expressly agree that the decision below would be in direct conflict with those of the Second and Third Circuits in the *Halliwell* and *Mesta* cases if Mr. Davis had transferred the stock to his wife "in discharge of his obligation to support and maintain her" (Br. in Opp. 4). They deny, however, that the transfer here was made in discharge of such obligations and seek to liken the case, instead, to *Swanson v. Wiseman* (W.D. Okla.), decided February 23, 1961 (61-1 U.S.T.C. ¶ 9264). The asserted distinction does not exist.

In *Swanson*, the court found on the facts that the "distribution of the stock under the divorce decree constituted a division of jointly acquired property

and did not constitute a taxable transfer of the husband's separate property to the [wife] in satisfaction of her marital rights" (Concl. of Law No. 3). In this case, in contrast, there is no claim that the property was jointly owned and the Court of Claims expressly found that all the property "was owned by Mr. Davis subject only to the marital rights of Mrs. Davis" (Pet. 23). It was only by virtue of those marital rights that Mrs. Davis had any claim to a share of Mr. Davis' property and it was solely because of, and in satisfaction of, those rights that the transfer here was made.<sup>1</sup> That the transfer was in exchange for a release of marital rights was, moreover, the very premise of the Court of Claims' decision that no gain was realized because those rights could not be valued. That decision, in turn, as the Court of Claims recognized (Pet. 17), cannot be reconciled with the contrary decisions, on "almost identical" facts, in the *Mesta* and *Halliwell* cases.

<sup>1</sup> We fail to perceive the significance of the fact, emphasized by respondents (Br. in Opp. 2), that the periodic payments and the property transfers were, as they customarily are, provided for in separate provisions of the agreement. Property settlements and continuing periodic payments are but alternative methods of satisfying the same obligations arising from the marital relationship. And just as the periodic-payment provisions recited that the payments were in discharge of all claims for "maintenance and support" (Pet. 25), so the property settlement provisions recited that the transfers were "in full settlement and satisfaction of any and all claims and rights against the husband whatsoever (including but not by way of limitation, dower and all rights under the laws of testacy and intestacy), which [the wife] ever had, now has, or might ever have against the husband by reason of their relationship as husband and wife or otherwise" (Pet. 26).

2. We agree with respondents (Br. in Opp. 6-9) that the basis of the property in the wife's hands (for purposes of determining gain or loss upon a subsequent disposition of the property by her) should be a corollary to the recognition or nonrecognition of gain by the husband upon the transfer. See *Estate of Stouffer v. Commissioner* and *Commissioner v. Marshman*, 279 F. 2d 27 (C.A. 6), certiorari denied, 364 U.S. 918. That does not, however, remove the risk of inconsistent results when the husband's case and the wife's case arise in different forums. In particular, the husband might avoid tax on the appreciation in value at the date of the transfer by bringing suit in the Court of Claims—a forum open to all taxpayers—while the wife might similarly avoid tax on that appreciation when she later sells the property by bringing suit in a circuit which takes a different view of the matter and allows the wife a basis equal to the fair market value of the property at the date of the transfer.<sup>2</sup> Thus to prevent that element of

<sup>2</sup> Respondents would distinguish the cases allowing the wife a fair market value basis (*Farid-Es-Sultaneh v. Commissioner*, 160 F. 2d 812 (C.A. 2); *Commissioner v. Patino*, 186 F. 2d 962 (C.A. 4)) on the ground that they involved transfers for a consideration (Br. in Opp. 6-7). As we have shown, however, the transfer here, being in exchange for the relinquishment of marital rights, was equally made for a valuable consideration. In addition, of course, the implication of the decisions of the Second and Third Circuits in *Halliwell* and *Mesta* holding the husband to be taxable on the transfer is that those courts would hold the wife to be entitled to a fair market value basis.

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appreciation from escaping taxation altogether, it is  
essential that the conflict be resolved.

Respectfully submitted.

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