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State Gift Taxes -- Their Relation to Death Taxes

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STATE GIFT TAXES—THEIR RELATION TO DEATH TAXES*

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BACKGROUND OF STATE GIFT TAXES

Revival of the federal gift tax in 1932[1] has been followed by widespread consideration of state gift taxes and adoption of such taxes in nine states—Oregon and Wisconsin in 1933, Virginia in 1934, Colorado, Minnesota and North Carolina in 1937, California and Tennessee in 1939, and Louisiana in 1940.[2] This compares with forty-seven states having death taxes, Nevada being the sole exception.[3]

It is generally conceded that the federal tax was the result of: (1) the belief that such a tax was necessary to prevent wholesale avoidance of death taxes by gift *inter vivos,* or at least to recoup part of the death tax revenue so lost; and (2) the belief that it was necessary to prevent substantial income surtax losses through the *inter vivos* distribution of large estates. The latter reason seems to have been stressed less in 1932 than in connection with the enactment of the first federal gift tax in 1924.[4]

If these are sound reasons they have been sound since the federal and state governments began to levy death taxes and graduated income taxes, though the need for the gift tax becomes more apparent and more acute as increasing death and surtax rates put an increasing premium on discovery of tax free methods of distribution; and this is true whether the legislative purpose be to raise revenue or to force the

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[1] For the current version of the federal tax, see Int. Rev. Code, §§1000-1031, as amended, primarily as to rates, by the First Revenue Act of 1940.

[2] The current versions of the state gift tax laws are as follows: Calif. Laws 1939, c. 652, *amended* Laws 1940, c. 41; Colo. Laws 1937, c. 161, *amended* Laws 1939, c. 111; La. Acts 1940, No. 149; MINN. STAT. (Mason, Supp. 1940) §§2394-71-84; N. C. CODE ANN. (Michie, 1939) §§7880(156)ee-nn; ORE. CODE ANN. (Supp. 1935) §§69-1601-1628, *amended* Laws 1937, c. 250; Tenn. Acts 1939, c. 137; VA. CODE ANN. (Michie, 1936) TAX CODE §§120(1)-(15); Wis. Laws 1933, c. 363, *amended* Laws 1933, c. 450, Laws 1935, c. 35, Laws 1937, cc. 32, 263, 302, 306-8, Laws First Spec. Sess. 1937, c. 14, Laws 1939, c. 412. The Wisconsin tax is still designated as an emergency tax and will, unless re-enacted, expire on July 1, 1941.

For a commentary on the 1937 version of the North Carolina law, see (1938) 16 N. C. L. REV. 194.

[3] For a summary of the development of American transfer taxes, including gift taxes adopted prior to 1935, see Sullivan, *The Development of Transfer Taxes in the United States in the Twentieth Century* (1935) 13 TAX MAG. 389.

[4] Harriss, *Legislative History of Federal Gift Taxation* (1940) 18 TAXES 531. See also Magill, *The Federal Gift Tax* (1940) 40 COL. L. REV. 773.

break-up of large estates (the latter being an objective, incidentally, which, if ever attained, will lead to reduction in surtax revenues which no gift tax can recoup).

States which have no graduated personal net income taxes lack at least one of the major motives for a gift tax; and it is probably of some significance that, of the gift tax states, only Tennessee falls in this category. It seems probable, however, that death tax motives have been the controlling ones in bringing forth the state gift taxes so far enacted.[5] Legislatures in other states may have felt that the process of using the taxing power to break up estates has progressed to a point beyond which the states should not carry it; that gift taxes might disadvantage them in competing for wealthy residents; and that, in view of the comparatively small portion of total state tax revenues produced by death taxes,[6] further shrinkage to be anticipated as a result of the present situation, as outlined below, will create no alarming fiscal condition. Nevertheless, the slow but steady increase in the number of gift tax states is probably due to continue.

Comparative Cost to the Taxpayer and Comparative Revenue to the States

In the average situation, so far as federal taxes alone are concerned, it is clearly cheaper to give away property *inter vivos* than to die with it, for the following main reasons: (1) The gift tax rates are only three-fourths of estate tax rates.[7] (2) The estate tax must be paid out of the estate taxed, while the donor can use other funds to pay the gift tax—funds not serving to increase the amount of the taxable gift. (3) The gift tax provides, in addition to the same $40,000 specific exemption as the estate tax, annual exemptions of $4,000 to each donee except as to gifts in trust and gifts of future interests.[8] (4) Since each tax has its separate exemptions, and since each begins at a low rate and increases progressively, the first gifts made are exempt or taxable at the lowest gift tax rates, whereas if the property were retained until

[5] See, for instance, Jacobs, *The Gift Tax Act of 1939 and Recent Inheritance Tax Legislation* (1940) 15 The State Bar J. (Calif.) 193, 195.

[6] Statistics given in (1940) 4 Tax Administrators News 85 show that death and gift taxes produced 3.5% of total state tax revenue in 1937 and 1939 and 2.9% in 1940. Figures in (1940) 7 Tax Policy No. 10, p. 4, showing, by states, the average percentage of total tax revenue derived from death and gift taxes for 1936-9, indicate a range from 8.2% in New Jersey to 0 in Nevada, with 42 states below 5% and 33 below 3%. Wisconsin, standing 10th with 4.3%, was the top gift tax state, being preceded, in the order named, by New Jersey, Rhode Island, Pennsylvania, Connecticut, New York, Massachusetts, Florida, Maryland and New Hampshire. The other gift tax states stood: Colorado—13th with 3.1%; California—16th with 2.9%; North Carolina—19th with 2.6%; Oregon—21st with 2.5%; Tennessee—23rd with 2.4%; Minnesota—27th with 1.8%; Virginia—29th with 1.5%; Louisiana—33rd with .9%.

[7] Int. Rev. Code §§810, 935, 1001, *amended* Pub. L. No. 656, 76th Cong., 2d Sess. (June 25, 1940) §§206-7.

[8] Int. Rev. Code §§1003-4.

death it would then, in effect (because added to all other property of the decedent), be taxed at the rate applicable in the highest bracket reached by estates of the particular size.[9]

It is quite clear that Congress realized it was favoring gifts, but preferred reduced revenue at an earlier date;[10] and, had it been originally uninformed, the existence of the favoritism has now certainly been amply publicized.[11] While the situation is not so bad as it would have been had Congress attempted to levy the present high death duties without a complementary gift tax, it is still clear that the federal differential may encourage gifts to the extent of eliminating a substantial percentage of state death tax revenue, whether the amount in dollars be great or small; and it is also clear that any state which, without levying a gift tax, levies a death tax which may exceed the 80% credit allowed against the federal tax, is increasing the differential in favor of gifts. To what extent, then, have the gift tax states nullified this advantage?

In the first place, only Minnesota[12] has fixed gift tax rates at three-fourths of death tax rates.[13] Excepting Oregon, the others have the same basic gift and death tax rates, though Colorado has tacked an additional 10% on inheritance taxes, apparently inapplicable to gift taxes,[14] and Wisconsin has a possibly inadvertent difference in rates as to one class of beneficiaries.[15] In all of these states the gift tax follows the state's inheritance tax plan of classifying beneficiaries in accordance with relationship to the donor and computing the tax accordingly. In Oregon the gift tax rates are based on total gifts to all donees and comparison with the death tax is difficult, because the latter (while legally an inheritance tax *in toto*) consists of one set of rates based on the entire estate plus additional rates on the shares of all

[9] Conversely (also because of the separate exemptions and rate schedules) it is possible for gift tax rates to reach a point at which it would be cheaper to retain remaining property until death; and this would be true wherever total remaining estate has dropped below the estate tax exemption, assuming that any gift tax at all would be payable on further gifts.

[10] Harriss, *supra* note 4 at 536.

[11] See, for instance: WINSLOW, MINIMIZING DEATH TAXES (3rd ed. 1939) cc. X-XV; Magill, *supra* note 4 at 776; Magill, *Federal Regulation of Family Settlements* (1937) 4 U. OF CHI. L. REV. 265; Becker and Becker, *Saving Shrinkage in Estates by Giving* (1940) 18 TAXES 555; Boye, *Advantages and Disadvantages in Making Gifts* (1935) 13 TAX MAG. 699; Hughes, *Federal Estate and Gift Taxes* (1938) 16 TAX MAG. 446.

[12] MINN. STAT. (Mason, Supp. 1940) §§2293, 2394-76. Actually, because of limitations on maximum over-all rate applying to both taxes, the three-fourths ratio would not always be preserved.

[13] "Death tax" as applied to state taxes in this article means, unless the context otherwise indicates, the basic plan of death taxation, not including the special estate tax which may be levied to take up the 80% federal credit, if the basic tax would be less, by all the states involved except Oregon.

[14] COLO. STAT. ANN. (1935) c. 119, §29.

[15] WIS. STAT. (1935) §72.02-3, *amended* Laws 1939, c. 111; Laws 1933, c. 363, §4, *amended* Laws 1937, c. 306, Laws First Spec. Sess. 1937, c. 14.

except Class A beneficiaries.[16] The gift rates seem to be higher than death tax rates on gifts made to those closest to the donor (i.e., those who would be his Class A beneficiaries if the donor died) and, at least where substantial amounts are involved, lower on gifts to other donees.

On the whole, then, the state comparative rate picture is less favorable to gifts than is the federal, particularly because, when interest loss due to earlier payment is considered, a gift tax rate which equals the death tax rate is, in reality, higher.[17] Further, if the donee dies shortly after receiving a taxable gift, his federal estate tax may be credited with the gift tax,[18] while no state has extended this type of provision, common with respect to successive death taxes, to apply to gift taxes. All the states except Wisconsin have followed the federal law in making the donor primarily liable and the donee only secondarily liable, thus clearly sanctioning payment of the tax from other funds. Originally Wisconsin made the donee alone liable,[19] and it was held that if the donor paid the tax it constituted an additional gift.[20] However, since 1937, the donor is secondarily liable,[21] and it has not yet been decided whether the additional gift doctrine still prevails.

Simple rate comparisons are misleading. North Carolina, Tennessee, Virginia and Wisconsin have omitted the cumulative feature of the federal law. They tax each year's gifts separately (except for exemption carry-overs in North Carolina and Wisconsin), instead of determining the rate applicable to the particular year's gifts by adding them to total gifts for prior years since adoption of the law. This makes no difference in an unrealistic comparison of death taxes with gift taxes due if the entire estate were given away in one year; but in the more likely case in which gifts cover several years, beginning at the lowest rate each year makes the gift tax much cheaper though nominally the rates are the same.

In Virginia[22] annual exemptions equal, and in Tennessee[23] they exceed, the death tax exemptions. In Wisconsin the specific exemption, to be taken once, approximates the death tax exemption, and there is an annual exemption of $1,000 per donee.[24] North Carolina allows

[16] ORE. CODE ANN. (Supp. 1935) §§10-603, 69-1602.

[17] For the mathematics of this, see Winslow, *supra* note 11 at 81.

[18] INT. REV. CODE §812(c). This should not be confused with the credit provided against the tax on the estate of the *donor.*

[19] Wis. Laws 1933, c. 363, §4(7).

[20] Boyd v. Department of Taxation, Wis. Board of Tax Appeals, Aug. 9, 1940, C. C. H. Inh., Estate and Gift Tax Serv. ¶9227.

[21] Wis. Laws 1937, c. 307. Even if the doctrine still prevails, the tax paid would presumably be a gift only in the year following the original gift, when the return is due; and, if this is the case, since the Wisconsin tax is not cumulative, the effect would not be the same as requiring that the tax be paid out of the gift taxed.

[22] VA. CODE ANN. (Michie, 1936) TAX CODE §§98, 120(1).

[23] TENN. CODE ANN. (Williams, 1937) §1266; Acts 1939, c. 137, §4.

[24] WIS. STAT. (1935) §72.04, *amended* Laws 1939, c. 311; Laws 1937, c. 308.

a total of $25,000 to Class A donees (equivalent to the death tax exemption for a widow and three minor children), plus exemption for gifts of $1,000 or less to any donee in any year.[25] As for the cumulative states, specific exemptions in all equal the inheritance tax exemptions, and there are annual exemptions ranging from $500 in Louisiana to $5,000 (to Class A beneficiaries) in Oregon.[26] The state annual exemptions average below the federal exemption (which was once $5,000),[27] but no state now denies the exemption to gifts in trust[28] and Louisiana, North Carolina, Tennessee, Virginia and Wisconsin do not deny it to gifts of future interests.[29]

In summary, state laws as a group seem to encourage gifts by permitting property presumably withdrawn from the high death tax brackets to be taxed in the low gift brackets; by permitting use of other funds, not included in the taxable amount of the gift, to pay the tax; and by granting substantial annual exemptions. To farsighted donors, the noncumulative states seem to have given additional encouragement, though comparative rates on gifts in the other states, except Minnesota, are less favorable than the federal rates.

However, the giver of gifts cannot evaluate his total blessings simply by adding the state and federal favors, even assuming that each is capable of precise mathematical determination—an assumption which, in view of the number of unknowns involved is obviously incorrect. The reason is, of course, that there is an overlap between the estate and

[25] N. C. CODE ANN. (Michie, 1939) §§7880(3), 7880(156)ee.

[26] CALIF. GEN. LAWS (Deering, 1937) Act 8495, and Laws 1939, c. 652, §§24, 28-9, *amended* Laws 1940, c. 41; Colo. Laws 1939, c. 111, §§4-5, and c. 118, §1; LA. GEN. STAT. ANN. (Dart, 1932) §8556, and Acts 1940, No. 149, §§4, 7; MINN. STAT. (Mason, Supp. 1940) §§2293, 2394-73, 2394-74; ORE. CODE ANN. (Supp. 1935) §§10-603, 69-1604-5, *amended* Laws 1937, c. 250.

[27] See INT. REV. CODE §1003(b)(1).

[28] Calif. Laws 1939, c. 652, §29, denied the exemption to gifts in trust, but this was changed by Laws 1940, c. 41.

Prior to 1938 the federal law did not deny the exemption to gifts in trust and controversy ensued as to whether there should be one exemption for the trust or one for each beneficiary, with the latter theory having, so far, the upper hand. Welch v. Davidson, 102 F. (2d) 100 (C. C. A. 1st, 1939); Rheinstrom v. Commissioner, 105 F. (2d) 642 (C. C. A. 8th, 1939); McBrier v. Commissioner, 108 F. (2d) 967 (C. C. A. 3rd, 1939); Commissioner v. Hutchings, 111 F. (2d) 229 (C. C. A. 5th, 1940), *cert. granted* 61 Sup. Ct. 73 (1940); Early v. Reid, 112 F. (2d) 718 (C. C. A. 4th, 1940); United States v. Pelzer, 31 F. Supp. 770 (Ct. Cl. 1940), *cert. granted* 61 Sup. Ct. 65 (1940). *Contra:* United States v. Ryerson, 114 F. (2) 150 (C. C. A. 7th, 1940), *reversed on another point* 61 S. Ct. 479 (1941).

Under Calif. Gift Tax Rules and Reg., Rules 31 and 113, it appears that the beneficiary of a trust is regarded as the donee; and such was also the holding in *In re* Fink, Wis. Tax Commission, Dec. 8, 1938, C. C. H. Inh., Estate and Gift Tax Serv. ¶8049. The Minnesota Court, in State v. Probate Court, 101 Minn. 485, 112 N. W. 878 (1907), dealing with a similar problem as to inheritance taxes, reached the same conclusion as the majority of the federal cases cited above.

[29] For definitions of "future interest" see U. S. Treas. Reg. 79, Art. 11, and Calif. Gift Tax Rules and Reg., Rule 28; *cf.* Silbert, *Voluntary Trusts and Federal Taxation* (1937) 17 B. U. L. REV. 1, 27.

federal death taxes to the extent of the 80% credit, while there is no such credit and, consequently, no such overlap in the gift taxes. Therefore, the combined comparison is between: (1) total gift taxes, state and federal, at full statutory rates; and (2) federal death taxes at full rates plus that part of the state death tax, if any, which exceeds the 80% credit. If, as would ordinarily be the case, the state gift tax is greater than the amount by which the state death tax would exceed the 80% credit, then the *inter vivos* gift is less attractive than if the state had neither gift nor death taxes. And, perhaps not infrequently, total federal and state gift taxes actually payable on a specified sum may exceed total death taxes payable on the same sum, presenting the anomalous spectacle of adding two savings to produce a loss; though the privilege of paying the taxes from other funds, anticipated income tax savings and numerous other factors, both pecuniary and sentimental, might still influence the taxpayer in favor of the gift. In some cases, however, the differential in favor of the death tax might be so substantial as to be controlling. Facts can vary so infinitely that it is difficult if not impossible to generalize.

In the main it seems that Congress, in offering tax bargains to *inter vivos* gifts, has done so to a very large extent at the expense of the states. Yet no state can undertake to protect its death tax revenue without making gifts much less attractive and thus, in effect, running counter to congressional policy. What the eventual result will be defies current prediction. The most obvious possibility, for which increasing sentiment may be anticipated, at least among the gift tax states, is a gift tax credit comparable to the death tax credit, though seventeen billion dollar spending programs have at least a slight tendency to darken prospects for any action potentially involving reduction in federal revenue. The outcome may eventually depend upon the fate of the suggestion, subsequently mentioned briefly, that gift and death taxes be more completely integrated and made, in effect, one tax. At any rate, any changes in policy must wait upon legislative changes; and it is to be hoped that this will be regarded not as an isolated problem, but merely as one phase of the problem of coordinating overlapping tax systems, solution of which could conceivably render the credit question academic by allocating administration of, if not all revenues from, transfer taxes to one level of government.[30] If a credit provision were adopted it would clearly tend to force adoption of state gift taxes; but such coercion

[30] It is clearly impossible here to treat adequately this complex subject which, in recent years, has called for so much research, discussion and exposition—all with such meager concrete results. For brief commentaries on the various possibilities, see Hall, *The Coordination and Integration of Federal, State, and Local Tax Systems* (1935) 10 WASH. L. REV. 22; Magill, *The Coördination of State and Federal Taxes* (1937) 15 TAX MAG. 187.

should be no more abhorrent to the Constitution (and the Supreme Court) than the death tax credit.[31]

Primarily protective measures, state gift taxes were probably nowhere expected to be major revenue producers. If fulfillment of this negative expectation is their true measure of accomplishment, the taxes have been a howling success. Collection figures[32] may be summarized as follows:

State	*Years*	*Death Tax Revenue* (in Thousands)	*Gift Tax Revenue* (in Thousands)	*Per Cent of Total Produced by Gift Tax*
California	1940	$10,530	$ 208	2
Minnesota	1939	1,691	140	8
North Carolina	1938-40	3,887	155	4
Oregon	1935-9	2,919	445	13
Tennessee	1940	854	5	1
Virginia	1935-40	3,805	483	11
Wisconsin	1936-9	14,868	1,519	9
Totals		$38,554	$2,955	7

Perhaps the Tennessee and California figures should be eliminated because, while in each case a full fiscal year elapsed after adoption of the tax, the annual return system means that less than a year's gifts were included. However, the gift tax in the other states produced only 9% of total transfer tax revenue. By comparison, the federal government, for the period 1933 through 1939, collected $1,489,000,000 in death taxes and $333,000,000 in gift taxes,[33] the gift tax constituting 18% of the total or twice the average for the states. This apparently tends to confirm the thesis that state gift taxes may discourage *inter vivos* giving, at least by comparison with the situation in other states, though discouragement to the point of abandonment is certainly not indicated. However, there are numerous other factors to be considered and, further, the collection figures obviously do not represent as yet an experience record which would justify anything other than the most tentative conclusions.

Other General Provisions and Constitutionality

All the state taxes are apparently intended to be excise or privilege taxes on transfers by gift, even though the North Carolina and Vir-

[31] Florida v. Mellon, 273 U. S. 12, 47 Sup. Ct. 265, 71 L. ed. 511 (1927).

[32] For the information as to collections, grateful acknowledgment is made to the following: Floyd Clouse, Chief Accounting Officer, California State Controller's Office; Franklin B. Stevens, Director Inheritance and Gift Tax Division, Minnesota Department of Taxation; R. L. Ward, Jr., Chief, Division of Accounts, North Carolina Department of Revenue; E. G. Sanders, Auditor, Oregon Treasury Department; Newt Cannon, Jr., Senior Examiner, Inheritance Tax Unit, Tennessee Department of Taxation and Finance; Jesse W. Dillon, Supervisor of Inheritance Taxes, Virginia Department of Taxation; Neil Conway, Inheritance Tax Counsel, Wisconsin Department of Taxation. The Wisconsin death tax figures represent the state's 92½% of total collections.

[33] Rep. Sec'y. Treas. (1939) 375; U. S. Budget for 1941, p. A 3.

ginia statutes, in terms, tax "the shares of the respective beneficiaries."[34] Though the language varies, all the statutes expressly provide that if property is transferred for less than adequate consideration, the difference between the value of the property and the consideration is a taxable gift. Some expressly exclude bad bargains from this provision by requiring donative intent;[35] but the same result should clearly be reached without the express requirement.[36] The California regulations[37] and the Oregon return form probably represent the prevailing view when they negative, as adequate consideration, such items as love and affection, promises of marriage, and release of inchoate dower.[38] The Wisconsin statute uniquely exempts reasonable gifts made for the "current maintenance, support or education" of a dependent;[39] though the same result might follow elsewhere to the extent that "gifts" serve only to fulfill a legal obligation to support.

The Minnesota and Wisconsin laws seem definitely to contemplate that corporate gifts shall be taxable. However, they also provide that payments by employers (corporate or otherwise) shall be exempt when made for various specified employee benefits.[40] This departs from the federal statute, which taxes transfers by "any individual," whether "direct or indirect".[41] Most of the other state laws are little more specific as to corporate gifts than the federal law, though several tax the transfers of "persons" and define "persons" to include corporations unless the context otherwise indicates.[42] However, the federal authorities have deduced that a corporate gift is a gift by the stockholders,[43] and California in its regulations[44] and Oregon in its return form indi-

[34] N. C. CODE ANN. (Michie, 1939) §7880(156)ee; VA. CODE ANN. (Michie, 1936) TAX CODE §120(1). Both statutes, however, also refer to the "passage" of property as the thing to which the tax applies.

[35] Calif. Laws 1939, c. 652, §36; Colo. Laws 1937, c. 161, §7, *amended* Laws, 1939, c. 111; La. Acts 1940, No. 149, §2; MINN. STAT. (Mason, Supp. 1940) §2394-72.

[36] See Magill, *supra* note 4 at 778. See, also, holding consideration inadequate and the excess taxable, *In re* Connor, Wis. Tax Commission, July 17, 1939, C. C. H. Inh., Estate and Gift Tax Serv. ¶8279.

[37] Calif. Gift Tax Rules and Reg., Rule 112.

[38] *Cf.* Housman v. Commissioner, 105 F. (2d) 973 (C. C. A. 2d, 1939), *cert. denied* 309 U. S. 656, 60 Sup. Ct. 469, 84 L. ed. 1005 (1940); B. B. Bristol, 42 B. T. A. 263 (1940); John P. Archbold, 42 B. T. A. 453 (1940).

For more detailed treatment of the consideration problem, see Note (1938) 51 HARV. L. REV. 533. With specific reference to divorce settlements and alimony trusts, see Magill, *supra* note 4 at 790; Hines, *Tax Aspects of Property Settlement Agreements* (1939) 12 So. CALIF. L. REV. 386, 388, Paul, *Five Years with Douglas v. Willcuts* (1939) 53 HARV. L. REV. 1.

In this connection the income tax cases concerned with what constitutes a gift may be of importance. See note (1938) 22 MINN. L. REV. 539.

[39] Wis. Laws 1933, c. 363, §4(6), *amended* Laws 1937, c. 308.

[40] MINN. STAT. (Mason, Supp. 1940) §2394-71; Wis. Laws 1933, c. 363, §§4(6)-(7), *amended* Laws 1937, cc. 307-8.

[41] INT. REV. CODE §1000.

[42] See, e.g., La. Acts 1940, No. 149, §1.

[43] U. S. Treas. Reg. 79, Art. 2(1).

[44] Calif. Gift Tax Rules and Reg., Rule 110.

cate that they are sufficiently impressed to follow this lead. To prevent circumvention of the tax by use of closely held corporations some such policy seems appropriate and in accord with legislative intent. On the other hand, it is very doubtful that most legislative bodies contemplated that gifts by ordinary business corporations, not closely held, should be regarded as taxable gifts from the stockholders to the donees. Perhaps, though, the gap between legislative intent and administrative construction in these situations is more apparent than real, because the annual exception allowed for gifts from each stockholder-donor to each donee would, except in unusual cases, be more than enough to prevent tax liability. However, in those states whose laws expressly include gifts by corporations, the corporation would apparently be the donor and entitled to one annual exemption only per donee. In the only state case reported, Wisconsin taxed as gifts the amounts by which a closely held corporation reduced mortgages owed by sons of the principal stockholders, apparently treating the corporation as the donor.[45] The converse situation of gifts to corporations does not seem to have been passed upon by any state.[46]

The state laws, like the federal, are silent with respect to gifts by minors and incompetents. However, the California authorities, no doubt with an eye to juvenile earning capacity in Hollywood, have provided rather elaborately: that payment of the earnings of an emancipated child to parents he is not legally obligated to support is a taxable gift; that, except for sums reasonably necessary for maintenance, payment to him, in trust or otherwise, of an unemancipated child's earnings is a taxable gift from the parents (this flawless product of pure legal reasoning the writer finds a little hard to take); and that transfers to parents by emancipated minors or adult children, when the latter are legally obligated to support the former, are not taxable gifts except to the extent that they exceed the amount reasonably necessary for maintenance.[47] The time the gift takes place is not specified, but the implication is that it takes place when the transfer first occurs. On the other hand, the idea of the federal courts has been that the gift is taxable when the erstwhile minor neglects to disaffirm after coming of age,[48] though it is none too clear just how long such neglect must continue.

The federal courts have held, as to incompetents, that transfers of

[45] Wallrich v. Department of Taxation (2 cases), Wis. Board of Tax Appeals, July 26, 1940, C. C. H. Inh., Estate and Gift Tax Serv. ¶9206-7.

[46] *Cf.* Frank B. Thompson, 42 B. T. A. 121 (1940); (1940) 50 YALE L. J. 335.

[47] Calif. Gift Tax Rules and Reg., Rule 117.

[48] Commissioner v. Allen, 108 F. (2d) 961 (C. C. A. 3rd, 1939), *cert. denied* 309 U. S. 680, 60 Sup. Ct. 718, 84 L. ed. 1023 (1940); (1940) 53 HARV. L. REV. 690; (1940) 88 U. OF PA. L. REV. 631.

the incompetent's funds authorized by court order, if for maintenance of dependents are not taxable gifts, being in discharge of legal obligations; but that payments not in discharge of such obligations are taxable.[49] Substantially the same rule has been adopted in the California regulations,[50] but the other states seem not to have committed themselves as yet.

Charitable and similar exemptions evince the usual legislative tendency to suggest that legitimate generosity stops at the state line. Only Tennessee places no geographical limitations on such exemptions,[51] though the Oregon and Virginia provisions are broad enough to cover most gifts to the organized foreign benighted,[52] and the Minnesota provision is also fairly liberal.[53] At the other extreme are Colorado, Louisiana and Wisconsin, exempting only gifts to institutions within or for use within the state,[54] while California and North Carolina occupy the center with reciprocal provisions.[55] The gift tax exemptions are substantially the same as death tax exemptions, the chief exceptions being Minnesota, where the death tax exemptions require use of the bequest within the state,[56] and Oregon, where the death tax exemption is reciprocal.[57]

Except in Wisconsin no gift tax case has reached a state court of last resort. In the Wisconsin case the taxpayer attacked the constitutional power to levy a graduated gift tax, and the court must have passed upon it, since it found in favor of the tax, but little, if any, attention is devoted to this phase of the taxpayer's contention in the opinion.[58] In the other states the question of constitutionality is technically open, but there is little reason to anticipate unfavorable decisions. In support of constitutionality there is the obvious analogy to the death tax; there is the Supreme Court's decision that the federal gift tax is constitutional and is not a property tax (which might find trouble lurking in a state uniformity clause);[59] and there is the existing levy,

[49] City Bank Farmers Trust Co. v. Hoey, 101 F. (2d) 9 (C. C. A. 2d, 1939); Alice H. Lester, 41 B. T. A. 515 (1940).

[50] Calif. Gift Tax Rules and Reg., Rule 118.

[51] Tenn. Acts 1939, c. 137, §3.

[52] ORE. CODE ANN. (Supp. 1935) §69-1605, *amended* Laws 1937, c. 250; VA. CODE ANN. (Michie, 1936) TAX CODE §120(1), *amended* Laws 1940, c. 118.

[53] MINN. STAT. (Mason, Supp. 1940) §2394-73.

[54] Colo. Laws 1937, c. 161, §4, *amended* Laws, 1939, c. 111; La. Acts 1940, No. 149, §3; Wis. Laws 1933, c. 363, §4(5), *amended* Laws 1937, c. 302.

[55] Calif. Laws 1939, c. 652, §23 (see also Rules and Reg., Rules 150-162); N. C. CODE ANN. (Michie, 1939) §7880(156)ee. The North Carolina provision, which is peculiarly worded, may exempt without reference to reciprocity.

[56] MINN. STAT. (Mason, Supp. 1940) §2293.

[57] ORE. CODE ANN. (1930) §10-601, *amended* Laws 1939, c. 148.

[58] Van Dyke v. Wisconsin Tax Commission, 235 Wis. 128, 292 N. W. 313 (1940), *aff'd per curiam* 61 Sup. Ct. 36 (1940).

[59] Bromley v. McCaughn, 280 U. S. 124, 50 Sup. Ct. 46, 74 L. ed. 226 (1929); (1930) 28 MICH. L. REV. 778. See also (1926) 39 HARV. L. REV. 888.

by eight of the nine states, of graduated net income taxes. In fact, the very dearth of case material indicates the general resignation of taxpayers and attorneys to the constitutionality of the tax, at least in those states adopting it in 1937 or earlier, when there has been adequate time for the question to be brought before the appellate courts.

Retroactivity, which furnished the only serious constitutional trouble encountered by the federal tax,[60] is expressly negatived in all the state laws. No appellate court has yet passed upon the validity of a state gift tax on state or federal securities, but the federal courts have already indicated they will follow the death tax rules and allow a federal gift tax,[61] and the states will undoubtedly also be free to reach the same results.[62] Constitutional problems involving jurisdiction will be mentioned briefly at a later point.

TRANSFERS INTER VIVOS—GIFT TAX OR DEATH TAX OR BOTH?

Once it is conceded that a death tax can apply to *inter vivos* transfers, it is necessary to classify those transfers which are subject, respectively, to gift tax only, death tax only, and both. Crystal clear statutory answers are rare. Therefore, in view of the almost phenomenal lack of state case material, little can be done in the way of positive delineation of the state situation. Such administrative action as the writer has been able to discover can be pointed out. Federal authorities will be stressed in the belief that, despite theoretical differences as to the taxable event between federal estate and state inheritance taxes, they will receive respectful consideration if not universal acceptance. However, as will be apparent, the state of the federal law is often none too clear; and the situation under state laws may be said, therefore, to be doubly uncertain.

Every state except Oregon has followed the federal lead in allowing a gift tax credit on the death tax when property on which a gift tax was paid is thereafter included in the donor's estate. The Oregon law provides flatly that no transfer subject to inheritance tax shall be subject to gift tax,[63] and emphasizes the literal meaning of the words by providing

[60] Untermyer v. Anderson, 276 U. S. 440, 48 Sup. Ct. 353, 72 L. ed. 645 (1928). See also Blodgett v. Holden, 275 U. S. 142, 48 Sup. Ct. 105, 72 L. ed. 206 (1928), commented on (1928) 26 MICH. L. REV. 944; *cf.* Milliken v. United States, 283 U. S. 15, 51 Sup. Ct. 324, 75 L. ed. 809 (1931).

[61] Phipps v. Commissioner, 91 F. (2d) 627 (C. C. A. 10th, 1937), *cert. denied* 302 U. S. 742, 58 Sup. Ct. 144, 82 L. ed. 574 (1937), commented on in (1938) 12 TULANE L. REV. 319 and (B. T. A. version) (1936) 85 U. OF PA. L. REV. 123; Hamersley v. United States, 16 F. Supp. 768 (Ct. Cl. 1936), *cert. denied* 300 U. S. 659, 57 Sup. Ct. 435, 81 L. ed. 868 (1937), *petition for rehearing denied* 302 U. S. 774, 58 Sup. Ct. 132, 82 L. ed. 600 (1937), commented on in (1937) 50 HARV. L. REV. 840.

[62] See Calif. Gift Tax Rules and Reg., Rule 111, stating that the tax applies to gifts of federal, state and local bonds. Several of the return forms carry instructions to the same effect.

[63] ORE. CODE ANN. (Supp. 1935) §69-1601.

no credit. The Wisconsin law contains a similar provision, but it is incongruously coupled in the same sentence with a credit provision,[64] and both obviously cannot be entitled to literal application. The Tennessee law contains a much vaguer provision to the effect that it does not repeal or modify the death tax, but the two shall be construed as *"in pari materia"*.[65] Against this background we consider, necessarily very briefly, some typical situations in which overlap problems are certain to arise.

1. *Transfers in Contemplation of Death*

A gift is ordinarily none the less absolute when made because made in contemplation of death, and such gifts seem clearly to fall under the language of the gift tax statutes. Under the federal law the Supreme Court seems to have conceded that this is one situation (possibly the only one) in which both gift and death taxes will apply.[66] In view of this and of the fact that a contrary construction would render the credit provisions virtually meaningless, all the states except Oregon are likely to enforce the gift tax here, even though all of them tax such transfers also at death.[67] Faced with the statutory exclusion provision mentioned above, Oregon authorities have specified on the gift tax return form that gifts in contemplation of death should be reported with a statement of the motive to show that the gift tax does not apply. Conceding that this is binding on the taxpayer, would acceptance of gift tax be equally binding on the authorities and prevent later inclusion of the property in gross estate? Difficulties of proof and decision being what they are, as long as death tax laws include such transfers, it seems administratively much more desirable to recognize an overlap than to attempt to classify each gift as soon as made, particularly when death tax statutes include presumptions covering the period immediately prior to death, the effect of which can be determined only on a hindsight basis.

2. *Retention of Control Powers by the Donor*

The laws of California, Minnesota, North Carolina, Oregon, Tennessee and Virginia clearly provide that creation of a revocable trust is not taxable, but that the relinquishment of the revocation power, other than by death, is a taxable gift;[68] and at least one other state, Colorado,

[64] Wis. Laws 1933, c. 363, §4(1). [65] Tenn. Acts 1939, c. 137, §21.

[66] Sanford's Estate v. Commissioner, 308 U. S. 39, 60 Sup. Ct. 51, 84 L. ed. 20 (1939).

[67] CALIF. GEN. LAWS (Deering, 1937) Act 8495, §2(3)-(4); COLO. STAT. ANN. (1935) c. 85, §7; LA. GEN. STAT. ANN. (Dart, 1932) §§8556, 8573; MINN. STAT. (Mason, Supp. 1940) §2292; N. C. CODE ANN. (Michie, 1939) §7880(1); Ore. Laws 1939, c. 148; TENN. CODE ANN. (Williams, 1937) §1260; VA. CODE ANN. (Michie, 1936) TAX CODE §98; WIS. STAT. (1935) §72.01(3).

[68] Calif. Laws 1939, c. 652, §37, *amended* Laws 1940, c. 41; MINN. STAT. (Mason, Supp. 1940) §2394-71; N. C. CODE ANN. (Michie, 1939) §7880(156)ee;

has reached the same position by administrative construction.[69] Under the 1924 federal statute the Supreme Court reached the same conclusion without benefit of an express provision, in *Burnet v. Guggenheim*.[70] That, for practical tax purposes, a gift is incomplete until made irrevocable is almost unquestionably a correct concept.

However, tax cases have a way of becoming more complicated. If a taxpayer creates a trust, later relinquishes his revocation power, and still later relinquishes a separately reserved power to change the beneficiaries in any way not involving designation of himself or his estate, when does the gift take place? In *Estate of Sanford v. Commissioner*[71] and *Rasquin v. Humphreys*[72] the Court selected the last-mentioned time. The decisions rested primarily on the belief that Congress didn't intend that gifts not in contemplation of death should be subject to both gift and estate taxes, and retention until death of the power to change beneficiaries would clearly make the property taxable at death.[73] A secondary reason was that the donee might become liable for gift tax and it would be unfair to him if he were deprived of the property after having paid the tax. The federal regulations have now been revised to attempt to follow these decisions.[74]

It is likely, of course, that some states will follow this lead. However, there are at least three reasons why a state might reach a different result. (1) A court in one of the states with the statutes providing that relinquishment of a power of revocation is a taxable gift might hesitate to say that the legislature would have decreed differently had it contemplated the case in hand. The Supreme Court has not yet had to pass on this question squarely. All these state statutes stem from section 501(c) of the federal Revenue Act of 1932, but, as pointed out in the *Humphreys* case, that section was repealed in 1934 because it was thought that *Burnet v. Guggenheim* rendered it unnecessary. It seems improbable, however, that had it been in force, it would have changed

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ORE. CODE ANN. (Supp. 1935) §69-1601; Tenn. Acts 1939, c. 137, §2; VA. CODE ANN. (Michie, 1936) TAX CODE §120(1).

[69] Explanation of Colorado law by the Attorney General and Inheritance Tax Commissioner, reported in C. C. H. Inh., Estate and Gift Tax Serv., Colo., ¶2600.

[70] 288 U. S. 280, 53 Sup. Ct. 369, 77 L. ed. 748 (1933). Accord: Means v. United States, 39 F. (2d) 748 (Ct. Cl. 1930), *cert. denied* 282 U. S. 849, 51 Sup. Ct. 28, 75 L. ed. 753 (1930); *cf.* Orrin G. Wood, 40 B. T. A. 905 (1939)

[71] 308 U. S. 39, 60 Sup. Ct. 51, 84 L. ed. 20 (1939).

[72] 308 U. S. 54, 60 Sup. Ct. 60, 84 L. ed. 77 (1939). See also Hesslein v. Hoey, 91 F. (2d) 954 (C. C. A. 2d, 1937), *cert. denied* 302 U. S. 756, 58 Sup. Ct. 284, 82 L. ed. 585 (1937). For comments on these cases and the Sanford case, see (1938) 23 CORN. L. Q. 464; (1937) 50 HARV. L. REV. 995; (1938) 32 ILL. L. REV. 890; (1940) 38 MICH. L. REV. 566; (1940) 18 TEX. L. REV. 238; (1938) 5 U. OF CHI. L. REV. 521.

[73] Porter v. Commissioner, 288 U. S. 436, 53 Sup. Ct. 451, 77 L. ed. 880 (1933).

[74] U. S. Treas. Reg. 79, Art. 3, as amended by T. D. 5010, approved Sept. 19, 1940.

the result of the *Sanford* and *Humphreys* cases, as a regulation with virtually the same provisions was ineffective to prevent that result.[75] (2) The death tax law of the particular state may not cover trusts where less than a full power of revocation is reserved.[76] (3) A state court may feel that the general provisions of the gift tax taxing transfers of property require a tax in this situation, regardless of what the court's views may be about the undesirability of overlapping gift and death taxes. Nothing definitely indicating the attitude of the states has been found except in California; and the considerations just mentioned have left administrative authorities there peculiarly unimpressed, as they have indicated in their regulations that the *Sanford* case will be followed.[77]

A further complicating factor arises when the power is reserved to the donor and others rather than to the donor alone. Most of the state laws refer expressly to powers reserved to the donor alone or to the donor in conjunction with any one not having a substantial adverse interest. This language also came from old federal section 501(c), and the federal regulations still carry substantially the same provision.[78] The obvious implication is that if the other person has a substantial adverse interest, the creation of the trust is a taxable gift. If, as under the present federal law,[79] continued existence of such power until the death of the settlor will result in inclusion of the trust property in gross estate, then there is an overlap of the sort the Supreme Court apparently disapproves. Nevertheless, the highest federal authority to date indicates that such an overlap will occur.[80] What the state answer to

[75] *Cf.* Commissioner v. Prouty, 115 F. (2d) 331 (C. C. A. 1st, 1940).

[76] The state statutes are, in the main, even less specific than the federal law as to the powers which, if reserved, will result in taxation at death. For example, the Louisiana law contains no provision regarding reserved powers; the North Carolina law, N. C. CODE ANN. (Michie, 1939) §7880(1), refers to reservation of a power of revocation or a right to designate the persons who will enjoy the property or income, but makes no mention of powers held in conjunction with others; the Virginia law, VA. CODE ANN. (Michie, 1936) TAX CODE §98, mentions reservation of the right to change the beneficiaries, but also omits mention of jointly held powers; and the Tennessee law, TENN. CODE ANN. (Williams, 1937) §1262, refers to powers of revocation, alteration or amendment *upon exercise of which the property would revert to the settlor.*

[77] Calif. Gift Tax Rules and Reg., Rule 113.

[78] U. S. Treas. Reg. 79, Art. 3, as amended by T. D. 5010, approved Sept. 19, 1940.

[79] INT. REV. CODE §811(d).

[80] Commissioner v. Prouty, 115 F. (2d) 331 (C. C. A. 1st, 1940). The actual decision was that when jointly held powers, created in 1931, were released in 1935, the release was non-taxable when the person sharing the power with the settlor had a substantial adverse interest and taxable otherwise. The result was that, as to the substantial adverse interest situation, the trust escaped both gift and death taxes since, for gift tax purposes, it was treated as complete prior to enactment of the law, and it was withdrawn from the purview of the estate tax law by release of the power (unless the original transfer or the release was in contemplation of death). However, at p. 337, the opinion seems to concede that, as to future cases, an overlap might be possible—i.e., the gift would be

the problem will be is largely unpredictable, particularly since the state statutes are neither identical nor clear on the question of death tax liability when the reserved powers of the deceased are shared by others.[81]

The state statutes dealing expressly with reserved powers of revocation, still following old section 501(c), provide that when income from a trust subject to such powers is paid to a beneficiary other than the donor, it is a taxable gift. Though the Board of Tax Appeals has held to the contrary,[82] there is no sound reason why the states should follow the decision, at least until it has been approved by more advanced members of the judicial hierarchy. Express statutory provision is the only reason which need be assigned, though the Board's decision seems erroneous even without the statute.

There are other problems, in reserved power situations, involving relationship between gift and death taxes and gift and income taxes;[83] but, even if space limitations permitted their discussion here, there is little, if anything, in the way of authority to indicate the probable developments in the states. The only thing inevitable is that the interrelation of the three taxes will call for considerably more study by legislative bodies, state and federal, and more definitely expressed legislative policies than have yet been forthcoming.

3. *Reversions and "Possibilities of Reverter"*

The present position of the United States Supreme Court, as expressed in *Helvering v. Hallock,*[84] is that when the settlor of a trust or grantor of an estate would retake the property if the beneficiaries or donees predecease him, then, regardless of the particular property law theory of the reversion, the transfer is a taxable event for death tax purposes when he predeceases them. The high courts of Oregon[85] and Colorado[86] have reached the same result; and, since the result depends not upon specific statutory description of the transfer, but rather upon the general and common language taxing transfers "intended to take effect in possession or enjoyment at or after death," some, if not all,

complete and taxable when the trust is created and, if the power is not thereafter surrendered *inter vivos* the property will necessarily be included in gross estate because of the continued existence of the power. *Contra:* First National Bank v. United States, 25 F. Supp. 816 (N. D. Ala. 1939).

[81] See statutes cited, *supra* note 76.

[82] Giles W. Mead, 41 B. T. A. 424 (1940); Jack L. Warner, 42 B. T. A. 954 (1940). See criticism by Magill, *supra* note 4 at 785.

[83] See Magill, *supra* note 4 at 780; Sutter and Owen, *Federal Taxation of Settlors of Trusts* (1935) 33 MICH. L. REV. 1169; Tremper, *Single and Multiple Trusts—Some Observations* (1939) 17 TAXES 463.

[84] 309 U. S. 106, 60 Sup. Ct. 444, 84 L. ed. 604 (1940).

[85] *In re* Lowengart's Estate, 160 Ore. 118, 84 P. (2d) 105 (1938).

[86] Milliken v. People, 102 P. (2d) 901 (Colo. 1940).

of the other gift tax states may be expected to hold likewise when opportunity arises. Should such transfers also be subject to gift taxes in the light of the mutual exclusion implications of the *Sanford* case?

Before attempting to answer, it is necessary to define more precisely, if possible, what is taxed at death. There are three main possibilities: (1) the entire value of the property; (2) the value of the property, excluding the value of outstanding life estates; and (3) the value of the contingent interest retained by the decedent. This third alternative, while not without support,[87] should probably be rejected offhand because, at the date of death, as a practical matter it has no value and there is no authority for valuing it at the date of the original gift or any other time. Of the remaining two, the Colorado court, with two judges dissenting, chose the first, while in the Oregon case it was conceded by all hands that the second was the proper rule. The language of the *Hallock* decision seems to point to the first, but the history of the litigation there involved rather indicates the second.[88]

When it is recalled that if a grantor gives only a life estate, retaining a reversion, only the value of the reversion subject to the life estate will be included in gross estate if the grantor predeceases the life tenant, the second alternative above seems clearly the proper one when the remainder which depends upon the longevity of the life tenant is held by some one other than that tenant. Such is the rule clearly adopted by the current federal regulation[89] and such were the facts involved in the Oregon case. More difficult is the situation in which only one donee is involved and the gift is not, in express terms, divided into life estate and remainder. Such was substantially the situation in the Colorado case. The federal regulation does not seem to cover this expressly, though if it contains any implications they favor the second alternative. In view of the fact that the least which is taken by the donee absolutely, prior to the death of the donor, is a life estate, this second alternative seems preferable.

If death and gift taxes are to be mutually exclusive, then the uncertainty as to death tax liability creates a corresponding uncertainty as to gift tax liability; and, even if some overlapping is to be permitted here, there is still a question as to what part of the property value is a taxable gift. Here, again, there are three main alternatives: (1) the entire value; (2) value of a life estate in the donee, plus the value of the contingent remainder (or entire value less value of donor's "possibility"); and (3) value of the life estate only.

[87] Everett, *Valuation of a "Possibility of Reverter" under the Hallock Case* (1940) 18 TAXES 611.
[88] Everett, *supra* note 87.
[89] U. S. Treas. Reg. 80, Art. 17, as amended by T. D. 5008, approved Sept. 19, 1940. Accord: Bradlee v. White, 31 F. Supp. 569 (D. Mass. 1940).

Since the *Sanford* and *Hallock* cases the Board of Tax Appeals has held a gift subject to a possibility of reverter nontaxable,[90] and if this is followed no choice of alternatives will have to be made. However, the possibility that something less than the entire fee might be taxed was conceded, though, because the case had not been argued on that theory and there was nothing in the record as to the value of any such lesser estate, no attempt was made to pass on it. At most, then, the case is authority for rejection of the first alternative above. A very recent Board case may indicate that the value of a life estate is taxable, thus adopting the third alternative.[91]

The only state whose authorities seem to have committed themselves on the point is California, where the regulations term such a transfer a taxable gift, the tax to be computed as if the transfer were made subject to a contingency.[92] This means that the tax may be computed on the assumption that the events producing the greatest tax will transpire, with privilege of refund in the light of actual developments; or that payment may be postponed upon filing of proper bond; or that a compromise figure may be agreed upon as a final discharge.[93]

Without attempting to predict what developments will be,[94] it at least may be said that: (a) If the mutual exclusion doctrine is to be followed, then the most logical course is to tax the life estate value as a gift and the remainder value upon death (or when relinquished); and the gift tax paid on the life estate would not be a credit on the estate tax. (b) The *Sanford* case does not require such a result, because the contingency in this situation is not under the control of the donor—

[90] Marrs and Verna Hooks McLean, 41 B. T. A. 1276 (1940).
For prior cases see Hughes v. Commissioner, 104 F. (2d) 144 (C. C. A. 9th, 1939) (contingent reversionary interest in settlor might prevent entire value of corpus from being taxed as gift, but burden was on taxpayer to show what value of the interest was); John S. Mack, 39 B. T. A. 220 (1939); William T. Walker, 40 B. T. A. 762 (1939).

[91] Margaret W. Marshall, 43 B. T. A., Dec. 17, 1940. The writer has seen only a reference to this case and has had no opportunity to examine the opinion.
See also Emery M. H. Norweb, 41 B. T. A. 179 (1940), decided after the Sanford case, holding that where taxpayer created a revocable trust, with her husband as life tenant, and later released all power to change the trust in any way inimical to the husband during his life, and still later transferred additional property to the trust, this latter transfer was a taxable gift to the extent of the husband's life interest in the property transferred.

[92] Calif. Gift Tax Rules and Reg., Rule 113. The same Rule follows the doctrine of the Sanford case on the facts involved therein, clearly indicating that the California authorities perceive a difference between the two situations. See also Rule 91.

[93] Calif. Laws 1939, c. 652, §§64-71, *amended* Laws 1940, c. 41. See also Gift Tax Rules and Reg., Rule 325. Several of the other gift tax laws have this type of provision as to contingencies; but they do not refer expressly to possibilities of reverter, and there are no administrative regulations dealing with the matter comparable to those in California.

[94] For discussion of the possibilities from the standpoint of the federal tax, see Magill, *supra* note 4 at 787.

i.e., while relinquishment can enlarge the donee's interest, no voluntary act of the donor can defeat it. And if the mutual exclusion doctrine is not to be followed, then, in the absence of a statute expressly dealing with valuation of contingencies, the most logical alternative is the second one above (taxation of the life estate plus the contingent remainder). As of the date of the gift it most closely conforms to what is actually given; though it may discourage this type of transfer, not only because it subjects it, in part at least, to both taxes, but also because it may result, if the initial donee predeceases the donor, in taxing benefits never actually received. (Of course, to a lesser degree, taxing a life estate on an expectancy basis may have the same result.) (c) The California method, which is a logical and possibly a required one in states having a statute of the California type concerning contingent gifts, will result, wherever the donor predeceases the donee, in taxing the entire property, thus causing the maximum overlap if the death tax also applies to such transfers. However, the provisions dealing with refunds and deferment offer opportunity to prevent gift taxation of non-existent benefits should the donee first die.

4. *Life Estate Reserved to the Donor*

The statutes of at least four of the gift tax states,[95] in common with the federal law,[96] provide that reservation of a life estate will subject the transfer to death tax; and at least three of the others have reached the same result by court decision.[97] Under the mutual exclusion idea, if strictly followed (as it presumably would be in Oregon), the gift of the remainder would not be subject to gift tax when made, even though irrevocable. Nevertheless, the federal rule, before and after the *Sanford* case, seems to have resulted in levying the gift tax,[98] though there is a

[95] CALIF. GEN. LAWS (Deering, 1937) Act 8495, §2(3)-(4); COLO. STAT. ANN. (1935) c. 85, §7; N. C. CODE ANN. (Michie, 1939) §7880(1); VA. CODE ANN. (Michie, 1936) TAX CODE §98.

[96] INT. REV. CODE §811(c). See Helvering v. Bullard, 303 U. S. 297, 58 Sup. Ct. 565, 82 L. ed. 852 (1938).

[97] Rising's Estate v. State *ex rel.* Benson, 186 Minn. 56, 242 N. W. 459 (1932); *In re* Wallace's Estate, 131 Ore. 597, 282 Pac. 760 (1929); *In re* Schranck's Estate, 202 Wis. 107, 230 N. W. 691 (1930); Waite v. Tax Commission, 208 Wis. 307, 242 N. W. 173 (1932); *In re* Ogden's Estate, 209 Wis. 162, 244 N. W. 571 (1932); *cf. In re* Hamilton's Estate, 217 Wis. 491, 259 N. W. 433 (1935).

[98] This is the logical meaning, as applied to this point, of U. S. Treas. Reg. 79, Art. 3, both before and after its amendment by T. D. 5010, approved Sept. 19, 1940. And see: Rheinstrom v. Commissioner, 105 F. (2d) 642 (C. C. A. 8th, (1939) (when taxpayer reserved 40% of income for life, putting another 10% in fund from which trustees in their discretion could make payments to her, she was allowed to deduct from the total value of the property, for gift tax purposes, the value of the reserved interest in the 40% but not in the 10% of the income); Martin Beck, 43 B. T. A., Dec. 20, 1940 (when the taxpayer created a funded life insurance trust, with remainder over, he was allowed to deduct from the value of the corpus, for gift tax purposes, the present value of the income required to pay the insurance premiums, this being regarded as the equivalent of a reserved

curious absence of direct authority on the point.[99] The California regulations also provide that the remainder is taxable as a gift.[100]

On the other hand two Attorneys General have ruled to the contrary,[101] thus giving possibly over-zealous approval to the general implications of the *Guggenheim* and *Sanford* cases. Presumably, under this view, if the life estate were relinquished *inter vivos* the entire value of the property would then be taxable as a gift.

To the writer, viewing this split of state "authority," it seems that, because an irrevocable gift of a remainder is clearly a gift of property having a present value, the California position more closely follows the provisions of the statutes.

5. *Joint Estates with Survivorship Rights*

All the gift tax statutes, state and federal, are silent on the creation of joint bank accounts, joint tenancies and estates by the entirety—a silence which, in the light of the death tax troubles which have grown out of these types of property tenure, is rather hard to understand. The bank account problem is settled by the federal regulations,[102] which specify that the gift tax attaches when the donee withdraws the money. This eminently sensible method of handling a practical problem eliminates all possibility of an overlap with death taxes here unless the withdrawal can be said to have been permitted in contemplation of death. All indications are that the states will follow this method,[103] except for Wisconsin, where the Tax Commission ruled that creation of a joint bank account is a taxable gift of one-half thereof.[104] What happens if the donee withdraws more than half the fund is not specified.[105]

life estate). These cases are not strong authority for continued taxation of remainders in reserved life estate cases, because the taxpayers seemingly conceded that the remainders were taxable. However, they illustrate the fact that taxpayers and the government have had a common understanding on the point.

[99] Magill, *supra* note 4 at 788; (1940) 40 Col. L. Rev. 467, 473; (1938) 32 Ill. L. Rev. 890, 891.

[100] Calif. Gift Tax Rules and Reg., Rule 113.

[101] C. C. H. Inh., Estate and Gift Tax Serv., ¶8165 (North Carolina) and ¶8179 (Tennessee).

[102] U. S. Treas. Reg. 79, Art. 2(4).

[103] See Calif. Gift Tax Rules and Reg., Rule 105; explanation of Colorado law by Attorney General and Inheritance Tax Commissioner, C. C. H. Inh., Estate and Gift Tax Serv., Colo., ¶2600; tax return forms for Minnesota, Oregon and Tennessee. Oregon probably could not tax prior to withdrawal, because funds contributed by the decedent and still in the account at his death are subject to death tax. Holman v. Mays, 154 Ore. 241, 59 P. (2d) 392 (1936).

[104] See the Wis. tax return form.

[105] Gift taxation only upon withdrawal may not be wholly satisfactory if the death tax law includes only one-half the account upon death of the donor, as, in such a situation, one-half of the excess of the donor's contributions over the donee's withdrawals would always escape both taxes. However, this cannot be completely rectified, if it needs rectification, by taxing one-half as a gift upon creation of the account. The entire fund will then be taxed only if there are no withdrawals by the donee between the creation of the account and death of the donor.

As for the joint interests in realty (created by one of the joint owners) which involve survivorship rights, the federal regulations provide, in effect, that if either owner can defeat the survivorship by individual action the creation of the estate is a gift of one-half; but if, as in an estate by the entireties, neither acting alone can defeat it, creation of the estate is a gift of (a) the right, if any, of the donee to share in income or enjoyment during the joint lives, plus (b) the right to receive the whole in case of survival, the value of both parts to be determined by the mortality tables.[106] Clearly, if the donor dies first, there will be an overlap with the death tax, as the federal estate tax law provides, in effect, that such jointly held property shall be included in the gross estate to the extent that it cannot be shown to have been originally the property of the survivor or procured with his funds.[107] On the other hand, if the donee dies first, a gift tax has probably been collected on more than, as it turned out, was actually given away.

The effect may be to discourage creation of this type of estates. However, Professor Magill thinks that the regulations will continue to be the law;[108] and his position is supported not only by the logical meaning of the statute, but also by the decided cases, the latter including one in which, long after the *Guggenheim* case and only a short time prior to the *Sanford* case, the Supreme Court refused to grant *certiorari* when the lower court had upheld the gift tax levy.[109]

As usual, there is no state litigation and only scattering administrative enlightenment. California, Minnesota, Oregon, Tennessee and Virginia have death tax laws which accord ordinary joint tenancies treatment very similar to that accorded by the federal law,[110] though some

To illustrate: if the donor deposits $10,000, and the donee withdraws $4,000 prior to death of the donor, gift taxes will have been paid on $5,000 (one-half the original deposit) and death tax will be due on $3,000 (one-half the balance remaining) —a total of four-fifths of the entire fund. Even if the gift taxes are levied on any excess over one-half the fund withdrawn by the donee during the life of the donor, the total effect of the two taxes, when some but not all of the fund is withdrawn prior to the donor's death, will not be to tax the total fund. However, the difficulty here is not primarily with the gift tax. It is the inescapable result of the provision taxing one-half at death instead of the decedent's contribution to the fund. A further difficulty with this provision is that, as pointed out in the text in other connections, it will tax one-half of the fund when the *donee* dies first.

[106] U. S. Treas. Reg. 79, Art. 2(7)-(8), 19(8).

[107] INT. REV. CODE §811(e).

[108] Magill, *supra* note 4 at 785.

[109] Lilly v. Smith, 96 F. (2d) 341 (C. C. A. 7th, 1938), *cert. denied* 305 U. S. 604, 59 Sup. Ct. 64, 83 L. ed. 383 (1939), *motion for rehearing denied* 307 U. S. 651, 59 Sup. Ct. 1040, 83 L. ed. 1530 (1939), commented on in (1938) 51 HARV. L. REV. 1120, (1938) 37 MICH. L. REV. 340, (1938) 17 N. C. L. REV. 71. See also Commissioner v. Hart, 106 F. (2d) 269 (C. C. A. 3rd, 1939), commented on (B. T. A. version) in (1938) 47 YALE L. J. 1213; Hopkins v. Magruder, 34 F. Supp. 381 (D. Md. 1940); J. C. Gutman, 41 B. T. A. 816 (1940).

[110] CALIF. GEN. LAWS (Deering, 1937) Act 8495, §2(5); MINN. STAT. (Mason, Supp. 1940) §2292; ORE. CODE ANN. (1930) §10-601, *amended* Laws 1939, c. 148;

of them exempt tenancies by the entirety. To some extent, at least, their problem here as to the relation between gift and death taxes is similar to that of the federal authorities, but it is too early to tell whether most of them will follow the federal lead. The writer has discovered nothing to indicate the attitude of Minnesota or Virginia as to how the gift tax will apply. Tennessee's return form specifies that creation of a joint tenancy or tenancy by the entirety is a taxable gift, but it fails to indicate how the gift would be valued. Oregon's return form indicates substantial adoption of the federal rule as to estates by the entireties, but makes no mention of joint tenancies. This comes about, presumably, because the inheritance tax law taxes joint tenancies after the manner of the federal estate tax law, but exempts tenancies by the entireties, and, as already indicated, Oregon's statute prohibits gift taxation when there will be a death tax. Finally, California authorities have decided that upon creation of a joint tenancy, one-half the value of the property is taxable.[111]

The problem may be somewhat different in Colorado, North Carolina and Wisconsin, inasmuch as the Colorado and Wisconsin death tax laws tax one-half the value of tenancies by the entirety and (assuming two joint tenants) joint tenancies, while the North Carolina statute, without mentioning joint tenancies, applies the same rule to tenancies by the entireties.[112] Colorado authorities have indicated that creation of a joint tenancy is a taxable gift, without indicating to what extent.[113] The Wisconsin return form indicates that creation of a joint tenancy, including one involving husband and wife, constitutes a taxable gift of one-half the value of the property. Rulings of the North Carolina Attorney General seem to indicate that he leans in the same direction.[114]

When the donor dies first, taxing one-half upon creation of the estate and one-half upon death prevents an overlap. However, it offers a discouragement to such transfers possibly even more serious. If the donee dies first, not only has the gift been overtaxed, but death tax must be paid on half the property before the donor receives it back. The wisdom of this is, of course, open to serious question, but the situation can be corrected only by legislative action. The proper form

TENN. CODE ANN. (Williams, 1937) §1261; VA. CODE ANN. (Michie, 1936) TAX CODE §98.

[111] Calif. Gift Tax Rules and Reg., Rule 105.

[112] Colo. Stat. Ann. (1935) c. 85, §8; N. C. CODE ANN. (Michie, 1939) §7880(1); WIS. STAT. (1935) §72.01(6). In Wisconsin, tenancies of husband and wife are apparently considered as ordinary joint tenancies. *In re* Ray's Will, 188 Wis. 180, 205 N. W. 917 (1925).

[113] Explanation by Attorney General and Inheritance Tax Commissioner, C. C. H. Inh., Estate and Gift Tax Serv., Colo., ¶2600. The Colorado statute, in providing for gift taxes to be credited against death taxes, refers to gift taxes previously paid on "jointly held property." Colo. Laws 1937, c. 176, §2.

[114] Rulings reported C. C. H. Inh., Estate and Gift Tax Serv. ¶8165, 8177.

for that action to take would seem to be amendment of the death tax rather than elimination of the gift tax. Meanwhile, the method of applying the gift tax could probably be changed by administrative action. The federal rule, while less certain as a rule of thumb, is likely to be much more accurate in relation to what is given away. Its adoption by these states could either increase or decrease the possible hardship when the donee dies first, dependent upon the facts of the individual case, though the chances probably favor the former in the majority of cases.

The California gift tax law is the only one to deal expressly with community property, though Louisiana is also a community property state.[115] It provides that, whether wife or husband is the donor, the transfer is a taxable gift of one-half the value of the property; and if the wife is the donor and predeceases the husband, the second one-half is then taxed as a *gift*, without benefit of the annual exemption.[116] Under the death tax law, one-half of community property is taxed upon the husband's death and none upon the wife's death.[117] California is thus in the same position as to community property as is Wisconsin with respect to joint estates.

As a final word, attention may be called to the essential similarity between joint estates with survivorship rights and the "possibility of reverter" situations. In both cases a life interest of some sort is the minimum gift, and in both cases the remainder right depends upon a survival contingency beyond the donor's control. The actual value of the life interest might vary considerably, dependent upon income and enjoyment rights in the joint estate cases, but there seems no sound reason why the two situations should not be governed by the same basic ideas. It is too early yet to say that they will be.

6. *Insurance*

No gift tax law, state or federal, provides expressly that gifts of insurance shall be taxable, though the Colorado statute contains a left-handed recognition of their taxability.[118] However, the federal regulations currently provide that it is a taxable gift if the insured assigns a life policy or designates a beneficiary without retaining what amounts

[115] See, regarding the Louisiana death tax on community property, *In re* Stelly's Estate, 185 So. 637 (La. 1939).

[116] Calif. Laws 1940, c. 41; Gift Tax Rules and Reg., Rules 80-2, 101-4. Rule 82 provides that conversion of community property into a joint tenancy of the spouses or *vice versa* does not constitute a taxable gift. For explanation of the community property provisions, see Jacobs, *Administrative Rules and 1940 Changes for State Gift Tax Explained* (1940) 15 The State Bar J. (Calif.) 240.

[117] Calif. Gen. Laws (Deering, 1937) Act 8495, §1(2).

[118] Colo. Laws 1937, c. 176, §2, the provision for credit of gift taxes against death taxes, refers to gift taxes previously paid on insurance.

to a power of revocation, or if he pays a premium on a policy already irrevocably assigned.[119] The right to surrender or cancel or obtain a loan against the policy, and the right to change the beneficiary *if this latter could be exercised in favor of the insured or his estate or for his benefit,* are stated as illustrations of "what amounts to a power of revocation." This expressly denies the application to insurance gifts of the precise holding of the *Sanford* case that reservation of a power to change beneficiaries, even though the donor or his estate could not be designated, prevents gift taxation, and its validity for that reason may be doubted, particularly since it is in conflict with the more general provisions of the regulations which follow the *Sanford* case.[120] Nevertheless, California's gift tax regulations as to insurance substantially follow the federal regulations,[121] even though this creates a similar inconsistency, as the regulations elsewhere provide that reservation of a power of the *Sanford* case type prevents the creation of a trust from being a completed gift.[122]

Indications are that most of the other gift tax states, if not all, will attempt to tax irrevocable assignments or designations of beneficiaries when no legal incidents of ownership are retained and, also, to tax premium payments by the insured after such assignment or designation.[123] Their attitude toward a reserved power of the *Sanford* case type has not been specifically indicated, though the logical meaning of the language used, except possibly in Oregon, would be that it rendered the gift incomplete.

The latest insurance move of the federal authorities is to amend the estate tax regulations to provide that, to the extent the insured pays the premiums, all policies payable to named beneficiaries are includible in gross estate if taken out after January 10, 1941, whether the insured retained any incidents of ownership or not.[124] This, except for the date mentioned, is already the rule specified by statute in California, Minne-

[119] U. S. Treas. Reg. 79, Art. 2(5)-(6). The taxability as a gift of an irrevocable assignment of insurance policies (without reduction in value because of payment of premiums from Texas community funds, though the assignment was to insured's wife) was upheld in Blaffer v. Commissioner, 103 F. (2d) 489 (C. C. A. 5th, 1939), *rehearing denied* 103 F. (2d) 1007 (1939), *cert. denied* 308 U. S. 559, 60 Sup. Ct. 91, 84 L. ed. 469 (1939).

[120] U. S. Treas. Reg. 79, Art. 3, as amended by T. D. 5010, approved Sept. 19, 1940.

[121] Calif. Gift Tax Rules and Reg., Rule 114.

[122] Calif. Gift Tax Rules and Reg., Rule 113.

[123] See explanation of Colorado law by Attorney General and Inheritance Tax Commissioner, C. C. H. Inh., Estate and Gift Tax Serv., Colo., ¶2600. See also return forms for Minnesota, Oregon, Tennessee and Wisconsin, and ruling of the North Carolina Attorney General, C. C. H. Inh., Estate and Gift Tax Serv. ¶9101.

[124] U. S. Treas. Reg. 80, Art. 25-7, as amended by T. D. 5032, approved Jan. 10, 1941. Contrast these new regulations with the recommendations of the American Bar Association's Section of Taxation (1940) 26 A. B. A. J. 835.

sota and, probably, North Carolina.[125] Assuming the validity of this system for taxing insurance at death,[126] then under the broad implications of the *Sanford* case, would virtually all gifts of insurance, even though irrevocable, be relieved of gift tax? Without more express legislative direction to that effect than has yet been supplied, it is very doubtful that such a result should be reached, particularly since there would be no overlap to the extent that all the death tax statutes of the governments in this group provide some special exemption for insurance payable to named beneficiaries,[127] while the gift tax statutes provide none.[128]

At the other extreme stand Oregon, where the death tax law expressly exempts insurance payable to named beneficiaries other than the estate,[129] and Louisiana and Virginia, where the same result seems to be reached under laws which do not mention insurance.[130] Certainly in these states there is unlikely to be any overlap between gift and death taxes, though there may be some question raised about taxing as a gift somthing which the legislature favors strongly enough to exempt completely from death taxes. (The contrast is more startling here than in the states in which the insurance death tax exemption is in a specified sum.)

The death tax statutes of the other gift tax states tax policies pay-

[125] CALIF. GEN. LAWS (Deering, 1937) Act 8495, §2(9); MINN. STAT. (Mason, Supp. 1940) §2292; N. C. CODE ANN. (Michie, 1939) §7880(11), as construed by ruling of the Attorney General, C. C. H. Inh., Estate and Gift Tax Serv. ¶8563.

[126] In the first two versions of Bailey v. United States, 27 F. Supp. 617 (Ct. Cl. 1939) and 30 F. Supp. 184 (Ct. Cl. 1939), it was held that insurance could be taxed at death, even though the insured retained no incidents of ownership, except to the extent that the beneficiary paid the premiums. These opinions were superseded by the opinion in the third version of the case, 31 F. Supp. 778 (Ct. Cl. 1940), *petition for certiorari dismissed by agreement*, 60 Sup. Ct. 1107 (1940), which proceeded on another ground. For comments at various stages of this peculiar litigation, see Friedland, *The Bailey Case* (1939) 17 TAXES 512; (1940) 53 HARV. L. REV. 1208; (1939) 49 YALE L. J. 126; *cf.* cases cited *infra* note 132, and Industrial Trust Co. v. United States, 296 U. S. 220, 56 Sup. Ct. 182, 80 L. ed. 191 (1935).

[127] INT. REV. CODE §811(g) ($40,000); CALIF. GEN. LAWS (Deering, 1937) Act 8495, §2(9) ($50,000); MINN. STAT. (Mason, Supp. 1940) §2292 ($32,500); N. C. CODE ANN. (Michie, 1939) §7880(2) ($20,000).

[128] One result of omission of an insurance exemption in the gift tax is that the question as to what constitutes an insurance policy for death tax exemption purposes, currently troubling the federal courts, is not presented for gift tax purposes. See, for instance, Commissioner v. LeGierse, 110 F. (2d) 734 (C. C. A. 2d, 1940), *cert. granted* 61 Sup. Ct. 32 (1940); Tyler v. Commissioner, 111 F. (2d) 422 (C. C. A. 8th, 1940), *cert. granted* 61 Sup. Ct. 49 (1940); Estate of Keller v. Commissioner, 113 F. (2d) 832 (C. C. A. 3rd, 1940), *cert. granted* 61 Sup. Ct. 50 (1940); *cf.* ruling of the Oregon Attorney General, C. C. H. Inh., Estate and Gift Tax Serv. ¶9246.

[129] Ore. Laws 1939, c. 148.

[130] Succession of Hedden, 146 So. 732 (La. 1932); *reversing* 140 So. 851; and see the Virginia inheritance tax return form. In Louisiana, the community property rules may reduce to one-half the taxability of policies payable to the estate. See Attorney General's ruling, C. C. H. Inh., Estate and Gift Tax Serv., La., ¶1580.

able to the estate and those payable to others in which the decedent retained any of the legal incidents of ownership.[131] These states face the problem of determining the status of assignments of policies or designations of beneficiaries which are irrevocable, but under which the proceeds of the policy would be payable to the insured or his estate should the beneficiary predecease the insured—*i.e.*, the *Hallock* case situation applied to insurance. Should such transfers be taxed under the gift tax law or the death tax law or both? The problem is shared by the federal government and California, Minnesota and North Carolina except to the extent that it might be eliminated if they should finally reach the position that, because of their all-inclusive death tax regulations and statutes, mentioned above, virtually all insurance transfers escape the gift tax. Federal cases since the *Hallock* case (decided without reference to the new regulations) hold that a possibility of reverter as to insurance renders it subject to death tax;[132] and presumably some of the states, at least, will follow the same rule. Whether this will prevent gift taxation has not yet been made clear. Logically these cases should be treated under whatever rules are evolved for the other possibility of reverter cases, already discussed.

Space does not permit discussion here of the problem of the proper valuation of an insurance policy at the time of the gift, which has troubled federal administrative authorities and courts,[133] or of the matter of the gift tax as applied to funded insurance trusts.[134] There is no state litigation on either point, as yet.

7. *Summary*

The situations discussed are not the only ones in which gift and death taxes might apply to the same transfer, but they are among the more important possibilities, and the inquiry naturally arises as to whether some consistent rule might be made to apply to all of them. Such a rule can, and eventually probably will, be applied; but, first, the policy which is to underlie the rule must be selected.

One possibility, of course, is to follow the idea expressed in the *Sanford* case that if a death tax would be levied the gift tax will not

[131] Colo. Laws 1939, c. 118; TENN. CODE ANN. (Williams, 1937) §1261a, *amended* Laws 1937, c. 129; WIS. STAT. (1935) §72.01, *amended* Laws 1939, cc. 168, 405, 515.

[132] Chase National Bank v. United States, 116 F. (2d) 625 (C. C. A. 2d, 1940); Bailey v. United States, 31 F. Supp. 778 (Ct. Cl. 1940), *petition for certiorari dismissed by agreement* 60 Sup. Ct. 1107 (1940). See also Broderick v. Keefe, 112 F. (2d) 293 (C. C. A. 1st, 1940), *petition for certiorari dismissed by agreement* 60 Sup. Ct. 1107 (1940).

[133] U. S. Treas. Reg. 79, Art. 2, 19; Guggenheim v. Rasquin, 61 Sup. Ct. 507 (1941); United States v. Ryerson, 61 Sup. Ct. 479 (1941); Powers v. Commissioner, 61 Sup. Ct. 509 (1941).

[134] Magill, *supra* note 4 at 789; Martin Beck, 43 B. T. A., Dec. 20, 1940.

be; and, as already indicated, authorities in some of the states have been sufficiently impressed by this idea to give it an extended application. Even assuming that liability to death tax can be accurately predicted in all cases, such a rule is still open to serious criticism. It is difficult for the writer to believe the legislative intent was to make the taxes mutually exclusive, or confine their overlap to one small class of cases, when the legislature has provided: (a) that the gift tax applies to all transfers by gift; (b) that the death tax applies to enumerated transfers *inter vivos;* and (c) that credit shall be allowed on the death tax for gift tax paid on the same transfer. Had the gift tax preceded the death tax, it is doubtful if such a construction would ever have been suggested; though the reverse (*i.e.,* not taxing at death anything already taxed as a gift) might have been. In fact, such a construction substitutes a part of the history of the tax for its actual provisions. The other part of the history of the tax—its relationship to the income tax—is conveniently forgotten. Further, it assumes that the death tax in force at the time of the gift will remain in force at the death of the donor. (This factor is perhaps not currently of great importance, since the tendency of death tax legislation and construction in recent years has been to expand the concept of taxable transfers and to increase the rates of taxation; but should the concept of a taxable transfer be contracted, or rates reduced, then waiving gift taxation in favor of anticipated death taxation may prove to have been questionable policy.) Finally, state authorities may well consider the fact that if, between the time of the gift and his death, the resident donor of intangibles becomes a non-resident, the state may receive neither tax; and both state and federal authorities might consider the effect upon actual total tax collection when the gift is dissipated between the date of the gift and the death of the donor.

The alternative is to hold that the gift tax applies to all completed gifts; to define "completed" as meaning placed beyond the power of the donor to revest the property in himself; and to say that if the property might revest in the donor upon the happening of some contingency over which he has no control, this fact may affect the value of the gift but cannot render it incomplete so as to make the transfer non-taxable. Such a rule would not remove all uncertainties, and the battleground would most likely be in the field of powers reserved to the donor in conjunction with others or given to others alone. In the absence of contrary statutory instructions, the substantial adverse interest theory might offer as good a dividing line here as any other.

The suggested rule would be contrary to the result reached in the *Sanford* case, because, as far as the donor is concerned, a transfer of

the type there involved (reserving only the right to change beneficiaries, but not to designate the donor or his estate) would be complete under the suggested definition. However, the argument that this is unfair to the donee, in that he might be forced to pay tax on a gift that may be taken away from him, is not overly impressive. In the first place, realism should compel recognition of the fact that, as payment of the gift tax out of other funds is one of the advantages conceded to it, the possibility that it will have to be paid by the donees in cases involving large sums is remote. For even if the gift must thereafter be included in gross estate, this does not destroy the conceded advantage, as it will be included at the value of the property involved in the gift and not at the value of such property plus the taxes paid on it. In the second place, the same thing would be true of any gift defeasible upon a contingency, even though the contingency depended in no way upon the action of the donor. Finally, any hardship could easily be cured by giving the donee a lien on the gift for any overpayment of tax he might make.

The other major objection to the suggestion would be that it would increase the number of cases in which gift and death taxes would apply to the same transfer and that, while a credit is provided, it is not satisfactory. This argument, as applied to federal taxes, is usually grounded on the fact that the gift tax credit must be deducted before the 80% credit for state death taxes is computed, so that in the end total transfer taxes paid are considerably greater, despite the credit, than they would be if only the tax at death were involved.[135] This does not apply to state taxes, considered alone; but it must be admitted that if the state charged a gift tax when the federal government did not, then, even if credit were later allowed on the state death tax, the total transfer taxes paid might likewise be greater than if only the death taxes were involved.[136] However, these arguments seem to the writer to be directed against the injustice of situations created by express statutory provisions. The remedy for them, in common with the remedy for many other problems growing out of complex, expanding and overlapping

[135] Magill, *Federal Regulation of Family Settlements* (1937) 4 U. OF CHI. L. REV. 265; Note (1935) 44 YALE L. J. 1408 (examples given).

[136] When state and federal death taxes are both levied, it is obvious that anything which operates only to reduce state death taxes will not reduce total taxes unless the state tax, prior to such reduction, exceeds the 80% credit for state death taxes allowed against the federal tax. Any reduction which brings the state's basic death tax below the 80% credit can result only in: (a) increasing the federal tax actually payable by decreasing the amount of the credit; or (b) increasing the additional tax levied by the state to take up the 80% credit. Thus, if only a state gift tax is levied, and the gift is thereafter included in gross estate for both federal and state death tax purposes, crediting the state gift tax against the state death tax will effect an actual saving only to the extent that the credit applies to any amount by which the state death tax exceeds the 80% credit.

tax systems, would seem to be legislative action rather than administrative or judicial attempts to establish more acceptable policy by departing from the provisions of the statutes.[137]

As a final word, perhaps many of these problems would be greatly simplified, if not eliminated, if the gift and death taxes were combined into one tax in accordance with recent suggestions, under which, in effect, property still retained by the decedent at death would be taxed as gifts in the year of death, the rate of the tax being determined by considering the cumulated gifts for preceding years.[138] Should Congress decide to attempt such a system, some of the gift tax states would probably follow the lead, but the prospects of a state pioneering the change are probably somewhat more remote. Incidentally, such a move by Congress would almost inevitably require some revision of the 80% credit, and might well lead to a credit for state gift taxes.

JURISDICTION

Even if space permitted, this writer could add little, if anything, to the discussion of state jurisdiction to tax which has been the subject of many articles in recent years.[139] With respect to the theoretical aspects of the subject, it need be said only that, while it has been urged that jurisdiction over gifts should be analagous to jurisdiction over sales,[140] the assumption of the draftsmen of the various gift tax statutes seems to have been that the gift tax and death tax would be governed by the same rules. That seems to the writer to be the practical viewpoint.

The only case on the subject is *Van Dyke v. Wisconsin Tax Commission*.[141] There a Wisconsin resident went to Chicago, converted intangibles into silver dollars and made a gift in trust of the dollars, which the trustee thereafter reconverted into intangibles. The Wisconsin court held this taxable as a gift in Wisconsin. The United States Supreme Court gave the decision a *per curiam* affirmance[142] on the authority of *Pearson v. McGraw*,[143] a death tax case in which a transaction virtually identical, except that federal reserve notes were used

[137] In addition to articles cited elsewhere, see the following for discussion of the relation between death and gift taxes: Chrystie, *Death Taxes and Gift Taxes on Inter Vivos Transfers—Their Correlation* (1936) 14 TAX MAG. 716; Merry, *Federal Estate and Gift Tax: Concept of a Transfer* (1940) 38 MICH. L. REV. 1032; Nash, *Implications of Some Recent Developments in the Taxation of Trusts* (1940) 18 TAXES 267.

[138] Altman, *Combining the Gift and Estate Taxes* (1938) 16 TAX MAG. 259; Altman, *Integration of the Estate and Gift Taxes* (1940) 7 LAW & CONTEMP. PROB. 331.

[139] See, for instance, articles cited in Merrill, *Jurisdiction to Tax—Another Word* (1935) 44 YALE L. J. 582 at 582.

[140] Cahn, *State Gift Tax Jurisdiction* (1939) 87 U. OF PA. L. REV. 390. But see note (1938) 51 HARV. L. REV. 533.

[141] 235 Wis. 128, 292 N. W. 313 (1940), commented on in (1940) 54 HARV. L. REV. 151.

[142] 61 Sup. Ct. 36 (1940).

[143] 308 U. S. 313, 60 Sup. Ct. 211, 84 L. ed. 293 (1939).

instead of silver, which also took place in Chicago, was held a gift in contemplation of death taxable in Oregon, domicile of the decedent. Subsequently, the Oregon Attorney General has ruled that gifts by the wife of the taxpayer whose estate figured in the *Pearson* case, made under the same circumstances, constituted taxable gifts in Oregon.[144]

If gift tax jurisdiction is to follow the pattern of death tax jurisdiction, then *Curry v. McCanless*[145] means that in some circumstances, at least (which ones, in all cases, being still undefined), more than one state will be able to tax gifts of intangible property. As to both taxes, therefore, the same problem is raised as to whether the legislature will attempt to tax to the limit a liberal Court will permit. It would be expected that the legislatures would renounce or retain their rights as to both taxes equally, but, whether through inadvertence or otherwise, such is not always the case.

The gift tax statutes of Louisiana, Minnesota, North Carolina, Oregon, Virginia and Wisconsin seem broad enough to tax such gifts of intangibles by nonresidents as they have power to tax, the usual language being "within the jurisdiction" or having a "situs" within the state.[146] (This refers to jurisdiction over or situs of the property, not the transfer.) Of these states, Louisiana and Virginia seem clearly to exempt nonresidents' intangibles from death taxes[147] and Oregon has a reciprocal death tax exemption provision.[148] North Carolina has apparently modified the provisions of its laws, by administrative action, to eliminate taxes on intangibles, not used in business in the state, held in trust for nonresidents by resident trustees.[149] Of the remaining states, Tennessee exempts nonresidents' intangibles from both taxes,[150] Colorado seems to exempt them from gift taxes and certainly exempts them from death taxes if they are taxed at domicile,[151] and California alone has a reciprocal exemption provision as to both taxes.[152] It seems not

[144] C. C. H. Inh., Estate and Gift Tax Serv. ¶9046.

[145] 307 U. S. 357 (1939). The decision permitted both Tennessee and Alabama to levy death taxes when decedent, domiciled in Tennessee, died without having exercised reserved control powers over a trust of intangibles held by an Alabama trustee.

[146] La. Acts 1940, No. 149, §1; MINN. STAT. (Mason, Supp. 1940) §2394-71; N. C. CODE ANN. (Michie, 1939) §7880(156)ee; ORE. CODE ANN. (Supp. 1935) §69-1601; VA. CODE ANN. (Michie, 1936) TAX CODE 120(1); Wis. Laws 1933, c. 363, §4(1). In Louisiana, if Acts 1940, No. 67, is intended to apply to gift taxes, as well as to death taxes, then intangibles of non-residents are exempt; but the wording is far from clear.

[147] La. Acts 1940, No. 67; VA. CODE ANN. (Michie, 1936) TAX CODE §98, 120.

[148] ORE. CODE ANN. (1930) §10-605.

[149] Letter of Commissioner of Revenue, C. C. H. Inh., Estate and Gift Tax Serv. ¶8246. While the letter refers expressly only to intangible property taxes and death taxes, the same policy would undoubtedly be applied to gift taxes.

[150] TENN. CODE ANN. (Williams, 1937) §1259; Acts 1939, c. 137, §1.

[151] Colo. Laws 1937, c. 176, §1; Laws 1939, c. 111, §2.

[152] Laws 1939, 652, §30, *amended* Laws 1940, c. 41; Laws 1939, c. 694. However, the Inheritance Tax Attorney ruled that the death tax law was not broad

improbable that reciprocal provisions may be expected to multiply, unless some more satisfactory method of dealing with the double taxation problem is evolved,[153] or unless modern legislatures are content to permit the interstate property owner to pay something extra for his cosmopolitan interests.

Theoretically the double domicile anomaly can pop up in the gift tax as well as in the death tax field,[154] though as a practical matter it may be more difficult to establish two domiciles to universal judicial satisfaction when the peripatetic taxpayer is present in person to distinguish between his penny-wise intentions and his pound-foolish peregrinations.

Though North Carolina has taken advantage of the decision in *Maxwell v. Bugbee*[155] to consider out-of-state property in determining the rate of death tax applicable to property within the state,[156] neither North Carolina nor any other gift tax state has as yet attempted to invoke this principle for gift taxes; nor has any state even required proration of exemptions between gifts taxable within and without the state.

As one final word, it may be pointed out that a form of double taxation may result if A, domiciled in a gift tax state, makes a taxable gift of intangibles which, upon his later death domiciled in another state, is held to be a transfer which must be included in gross estate for death tax purposes. While cases of this sort may be comparatively rare, legislatures of gift tax states, at least, might consider the possibility of crediting, on a reciprocal basis, gift taxes paid to other states under such circumstances. It is hardly to be expected, however, that the states having no gift taxes could, as yet, be interested in any such provision.

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enough to apply to intangibles of residents of other states of the United States, and hence the 1939 amendment was meaningless as to them. C. C. H. Inh., Estate and Gift Tax Serv., Calif., ¶1490.

[153] For discussions of reciprocity, see: Brady, *Statutory Solutions of Multiple Death Taxation* (1927) 13 A. B. A. J. 147; Brady, *Death Taxes—Flat Rates and Reciprocity* (1928) 6 NAT. INCOME TAX MAG. 415; Kappes, *Double Taxation by the States* (1940) 18 TAXES 15; Orr, *Reciprocal Exemptions from Inheritance Taxation* (1938) 18 B. U. L. REV. 39. For a summary of the situation as to death taxes on non-residents' intangibles in all states, see Research Bulletin 46, Federation of Tax Administrators, March 22, 1940.

[154] See Texas v. Florida, 306 U. S. 398, 59 Sup. Ct. 563, 83 L. ed. 763 (1939); Knapp, *Solution of Double Domicile Problems—History and Prospects* (1940) 18 TAXES 289; Tannenbaum, *Double Domicile* (1938) So. CALIF. L. REV. 329; Tweed and Sargent, *Death and Taxes Are Certain—But What of Domicile?* (1939) 53 HARV. L. REV. 68.

[155] 250 U. S. 525, 40 Sup. Ct. 2, 63 L. ed. 1124 (1919). See Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee* (1936) 49 HARV. L. REV. 756.

[156] N. C. CODE ANN. (Michie, 1939) §7880(20).