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# WASHINGTON LAW REVIEW

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### CONDITIONAL REMAINDERMAN<sup>1</sup>—BEWARE!

MARYHELEN WIGLE.

If the tax on transfer at death of anticipatory estates levied by the Sovereign State of Washington is imposed upon their inheritance, and is payable by the beneficiary on his future as distinguished from his possessory interest, a legatee or devisee of a conditional<sup>2</sup> remainder may find himself paying handsomely for the mere privilege of having been remembered by the testator in his will<sup>3</sup>—a somewhat ephemeral consideration, to put it mildly.

The purpose of this article is to examine our Inheritance Tax laws with the object of determining (a) whether the tax is imposed upon the remainderman's legacy,<sup>4</sup> and, if so, (b) upon what evaluation such tax on *conditional* remainders is payable.

For, if the tax is not levied against the inheritance nor payable by the beneficiary, but is only a charge against the decedent's estate, the remainderman will not be out of pocket at least,<sup>5</sup> however nebulous the bequest. Nor can he complain if a tax is exacted from him on the basis of his real rather than his fictional interest—that is, when it is determined what of value he will acquire, if anything. But if he must pay for a pig in a poke without assurance that a pig of any kind exists, then blessed indeed is he who expecteth nothing!

Of course, not all remainders are equally dubious legacies. For example, if *T* devises Blackacre to *A* for a term of years with remainder to *B* in fee, or to *A* for life with remainder to *B* in fee, the

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<sup>1</sup> A remainder is any future interest limited in favor of a transferee in such manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest except an interest left in the transferor. RESTATEMENT, PROPERTY (1936) § 156.

<sup>2</sup> The term "conditional remainder" as used in this text includes all remainder interests not indefeasibly vested. See *Note on Terminology*, RESTATEMENT, PROPERTY (1936) § 157.

<sup>3</sup> The term "will" as used in this text includes any instrument or other method effecting a property transfer which is subject to tax under REM. REV. STAT. (Supp. 1939) § 11201 *et seq.*, as made in contemplation of, or intended to take effect in possession or enjoyment after the death of the transferor; the term "testator" includes any such transferor.

<sup>4</sup> The term "legacy" as used in this text includes any property which is the subject matter of a transfer taxable under REM. REV. STAT. (Supp. 1939) § 11201 *et seq.*, as made in contemplation of, or intended to take effect in possession or enjoyment after the death of the transferor.

<sup>5</sup> As a practical matter, where the value of the interests are known, heirs and distributees commonly apportion a tax which is against decedent's estate, among themselves in proportion to their interests. There is no personal liability for the tax in individual transferees. *Higley v. Com'r. Int. Rev.*, 69 F. (2d) 160 (C. C. A. 8th, 1934).

interest which vests in *B* at *T*'s death is certain eventually to ripen into beneficial enjoyment of the property in its entirety. There is no uncertainty here; the term is sure to end, and the fact of *A*'s death is equally definite. Of death and taxes can we at least be certain. True, *B* runs some risk of damage to or depletion of the property during the preceding estate, as well as its depreciation.<sup>6</sup> But his interest in Blackacre can in no way be defeated; the quantum of that interest cannot be abridged. Only the value of the property itself can change.<sup>7</sup>

A conditional remainder, however, has no such certainty—it may be contingent or defeasible, in whole or in part.<sup>8</sup> Thus:

1. It may be vested subject to open. If *T* devises Blackacre to *A* for life, remainder to the sons of *A*, immediately on *T*'s death *B*, as *A*'s only son, has the remainder interest in Blackacre. But that estate is subject to reduction in quantum if other male children are subsequently born to *A*. Here the interest itself is certain, but its extent uncertain.

2. Or the remainder may be contingent—that is, subject to a condition precedent. If *T* devises Blackacre to *A* for life, remainder to *B* if, but only if *B* shall attain the age of twenty-one, *B*'s interest in Blackacre depends entirely upon his ever arriving at that age.

3. Though vesting immediately, the remainder may be subject to complete defeasance. Thus if *T* devises Blackacre to *A* for life, remainder as *A* shall by will appoint, but in default of and until such appointment, to *B*, *B*'s remainder interest in the property can be cut off absolutely by *A*'s exercise of the power conferred upon him.

Only slightly less a gamble is *B*'s remainder interest in Blackacre subject to a life estate in *A* with power in *A* to dispose of the property and use the proceeds for support during his lifetime. This remainder may be reduced in quantum to complete defeasance. And where the power in *A* to invade the corpus is unlimited as to purpose, *B*'s chances of eventual enjoyment of the property are even slimmer.

It is with taxation of devolution of such uncertain interests as these

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<sup>6</sup> But the life tenant has an enforceable duty to subsequent interests not to diminish the value of the estate by volitional or negligent conduct. RESTATEMENT, PROPERTY (1936) § 187 *et. seq.*

<sup>7</sup> This is an indefeasibly vested remainder. See note 8, *infra*.

<sup>8</sup> "A remainder can be (a) indefeasibly vested; or (b) vested subject to open; or (c) vested subject to complete defeasance; or (d) subject to a condition precedent.

"The term 'vested remainder' designates, generically, remainders of the three categories enumerated in Clauses (a), (b) and (c). The term 'contingent remainder' is frequently used to designate a remainder subject to a condition precedent . . . [but] has been used too frequently in a loose manner to designate any remainder involving an uncertainty. It has thus become uncertain as to its exact meaning when used.

"Stress upon the distinction between 'contingent' remainders and other remainders (generically described as 'vested'), and failure sufficiently to note the difference between the two categories enumerated in Clauses (a) to (c) inclusive have caused substantial confusion in the law." RESTATEMENT, PROPERTY (1936) § 157 and *Note on Terminology*.

that we are here concerned.

Throughout this discussion it is essential to keep in mind certain elementary but very fundamental principles of law. The first of these is that no person has the right to control the disposition of his property after death, nor correlatively, is there any inherent right to acquire property by inheritance. Both are done only by permission of the sovereign state.<sup>9</sup> Like the privilege of doing business in corporate form, the grant is one which can be summarily revoked. *Ipso facto*, it can be altered, restricted, and conditioned. And manifestly one of the conditions may be exaction of a toll for the public use.<sup>10</sup>

The second of these is that, being incidental to the grant, the tax may be levied in any manner and upon any theory the legislative body determines. It may be imposed upon exercise of the privilege of transmitting the property from dead to living;<sup>11</sup> it may be imposed upon result of such exercise, that is, upon the privilege of inheriting.<sup>12</sup> It may constitutionally be a combination of both.<sup>13</sup> The theory upon which the tax is levied is of vital importance in the construction and operation of the particular taxing act. But so far as the power of the state to *make* the charge is concerned, it is quite immaterial.

The third of these is that, being a price put upon exercise of a right conferred, it is an excise tax, although it may be measured by the value of the property the ownership of which is suspended by death, or by the extent of the interest transferred or received.<sup>14</sup> Accordingly, it is not subject to constitutional or statutory restrictions applicable to property or other direct taxation.<sup>15</sup> The rate may vary with the value of the interest received, and with the relationship of transferor to transferee.<sup>16</sup> It may be graduated in proportion to the extent of the interest to which death has put a period without reference to beneficiary.<sup>17</sup> The tax may operate retroactively if the statute evidences a clear intention of the legislative body that it shall do so.<sup>18</sup> The effect of its

<sup>9</sup> *In re McGrath's Estate*, 191 Wash. 496, 71 P. (2d) 395 (1937); *In re Sherwood's Estate*, 122 Wash. 648, 211 Pac. 734 (1922); *Estate of Wilmerding*, 117 Cal. 281, 49 Pac. 181 (1897); *In re Hooker's Estate*, 173 Misc. 515, 18 N. Y. S. (2d) 107 (1940).

<sup>10</sup> *In re Fotheringham's Estate*, 183 Wash. 579, 49 P. (2d) 480 (1935).

<sup>11</sup> *Y. M. C. A. v. Davis*, 264 U. S. 47 (1924); *Central Trust Co. v. James*, 120 W. Va. 611, 199 S. E. 881 (1938).

<sup>12</sup> *State v. Clark*, 30 Wash. 439, 71 Pac. 20 (1902); *Estate of Miller*, 184 Cal. 674, 195 Pac. 413, 16 A. L. R. 694 (1921).

<sup>13</sup> *In re Henry's Estate*, 189 Wash. 510, 66 P. (2d) 350 (1937); *State v. Eldodt*, 33 N. M. 347, 267 Pac. 55 (1928).

<sup>14</sup> *In re McGrath's Estate*, *supra* note 9; *Estate of Elston*, 32 Cal. Ap. (2d) 652, 90 P. (2d) 608 (1939); *Kelso v. Sargeant*, 11 Cal. Ap. (2d) 170, 54 P. (2d) 26 (1936).

<sup>15</sup> *In re Ellis' Estate*, 169 Wash. 581, 14 P. (2d) 37 (1932); *State v. Clark*, 30 Wash. 439, 71 Pac. 20 (1902).

<sup>16</sup> *Estate of Rath*, 10 Cal. (2d) 399, 75 P. (2d) 509, 115 A. L. R. 836 (1937).

<sup>17</sup> *Schuetz v. Bowers*, 40 F. (2d) 208 (C. C. A. 2d, 1930).

<sup>18</sup> *In re Coleman's Estate*, 196 Wash. 295, 82 P. (2d) 795 (1938); *In re Ward's Estate*, 183 Wash. 604, 49 P. (2d) 485 (1935).

imposition may be highly discriminatory in fact, so long as there is equal application in identical circumstances.<sup>19</sup> The citizen must take the privilege as he finds it, provided the toll exacted is not confiscation in the guise of taxation.<sup>20</sup>

The last generality to be borne in mind is that a court must look for determination of the exactions upon exercise of the privilege to the statutes of the jurisdiction to which taxpayer or property is subject, and must be guided primarily, if not exclusively, by their language; it cannot be overemphasized that taxation is a field of purely positive law. The United States Supreme Court decisions must be examined, of course, for limitations imposed upon the states by the Federal Constitution. But even the case law of the particular sovereign imposing the tax should be viewed with constant suspicion, lest it be nullified as authority by reason of changes in the statutory law.

Quite generally the scope and meaning of an inheritance tax statute is found in its past. The best approach to construction after the language of the act itself is a comparative study of its development.<sup>21</sup> For, unlike Mark Twain's lament anent the weather, legislatures not only talk about taxes in general, and inheritance taxes in particular—they *do* something about them constantly. Each session of every legislature finds additions, deletions, changes in nomenclature, definition or theory, designed to block some loophole, rectify some injustice, or correct some error which administration or interpretation of the existing law may have disclosed. And subject only to constitutional limitations, the court is, of course, bound by the intent of the legislature, its duty being but to ascertain that intent and to give it effect.

Reflection on these general principles makes it evident we are not here questioning, nor can we question, the power of the State of Washington to tax the devolution of remainder interests, straight<sup>22</sup> or conditional, in any manner its legislature disposes. The problem is how does it deal with and to what extent does the law consider the uncertainties of the conditional remainderman's bequest in imposing the tax.

#### A. IS THE TAX IMPOSED UPON THE REMAINDERMAN'S LEGACY?

The answer to this inquiry depends upon a further question—on what theory does this state tax the transfer of ownership from the dead to the living? Is the levy death duty or succession tax?

If it is the first, the tax is imposed not on the remainderman's legacy, but on the estate of the transferor. For a death duty or estate tax is an exaction upon the privilege of transmission of property *by* the decedent, and is concerned only with the interest which death has ended.

<sup>19</sup> *In re Henry's Estate*, *supra* note 13; *Stebbins v. Riley*, 268 U. S. 137 (1925).

<sup>20</sup> *Dane v. Jackson*, 256 U. S. 589 (1921).

<sup>21</sup> *In re Lindholm's Estate*, 6 Wn. (2d) 366, 107 P. (2d) 562 (1940).

<sup>22</sup> A remainder indefeasibly vesting.

That the transfer will result after payment of the tax in the creation of certain interests is quite immaterial. A death duty takes no cognizance of who the heir or distributee is, or the quantum of his inheritance. It is of no importance whatsoever to imposition of the tax that he shall inherit anything except in the sense that inheritance is necessarily the result of transfer.

The tax collector does not look to the heir or distributee for payment of such part of a death duty as his interest bears to the whole of the property which is the subject of decedent's transfer. The jurisdiction levying an estate tax looks to the whole of the property and demands payment of the executor.<sup>23</sup> The tax as an entirety is a debt due from the estate.<sup>24</sup>

But if it is the second, the tax is imposed upon the remainderman's legacy, for a succession or inheritance tax is a levy upon receipt of property *from* the decedent. Since it is concerned with the interest newly created by death, a succession tax is charged upon the interest of each heir or distributee, whatever that interest may be;<sup>25</sup> and in the absence of statutory lien and other provisions directed toward collection of the tax upon all interests,<sup>26</sup> the tax collector looks to him for payment of the tax on his own.<sup>27</sup>

The statute of this state is designated "Inheritance Tax," but, while the name of the act may be of some assistance in deciding upon which theory the tax is levied, alone it is not conclusive nor even very significant. The term "inheritance" is loosely used to include both types of taxation. We must determine, if we can, whether the Act taxes transfer primarily, or receipt.

The test is what factors are involved in determination of the applicable rate. Is it based on the value of decedent's estate? Or prescribed in terms of the identity of beneficiary and the value of his interest? If, before it can be determined what rate shall apply, it is

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<sup>23</sup> *Edwards v. Slocum*, 287 Fed. 651 (C. C. A. 2d, 1923); *aff'd*, 264 U. S. 61 (1924); *Liebman v. Fontenot*, 275 Fed. 688 (W. D. La. 1921); *In re Smith's Estate*, 147 Misc. 73, 264 N. Y. Supp. 431 (1933); *In re Oakes*, 248 N. Y. 280, 162 N. E. 79 (1928); 28 AM. JUR. 8.

<sup>24</sup> *Estate of Elston*, *supra* note 14. It is in the nature of an administrative expense, not a charge against the legatees. *Hepburn v. Winthrop*, 83 F. (2d) 566 (App. D. C. 1936); *Wellington v. Hamlin*, 185 App. Div. 153, 172 N. Y. Supp. 787 (1918).

<sup>25</sup> *Walla Walla v. State*, 197 Wash. 357, 85 P. (2d) 676, 65 A. L. R. 1379 (1938); 28 AM. JUR. 8.

<sup>26</sup> "The inheritance tax shall be and remain a lien on such estate from the death of the decedent until paid: . . ." WASH. LAWS 1937, c. 106, § 1; REM. REV. STAT. (Supp. 1939) § 11201. For liability of the representative of the estate, see WASH. LAWS 1939, c. 202, § 3; REM. REV. STAT. (Supp. 1939) § 11202-1n. Similar provisions looking to collection of the tax on all interests are quite general in inheritance tax laws, but of course the court cannot compel one legatee to pay the inheritance tax due from another. *In re Clark's Estate*, 37 Wash. 671, 80 Pac. 267 (1905).

<sup>27</sup> *In re Ferguson's Estate*, 113 Wash. 598, 194 Pac. 771 (1921); *Estate of Miller*, *supra* note 12.

necessary to ascertain the relationship of benefactor to beneficiary, and to evaluate the property the transferee receives, the tax is upon receipt. If, however, to fix the tax, all that is *prima facie* required is to ascertain the value of the property which is the subject of transmittal by decedent, and apply the rate prescribed on such value, the tax is upon transfer.<sup>28</sup>

Of course, from death duties deductions may be allowed, for bequests to charity for example.<sup>29</sup> In such case it will be necessary to determine the extent of the interest to which the beneficiary is entitled for which the deduction is claimed. Estate tax exemptions may also be authorized in amounts varying with the degree of consanguinity between transferor and recipient,<sup>30</sup> in which case it will be necessary not only to determine the extent of the interest to which the beneficiary is entitled for which exemption is claimed, but also his relationship to the decedent.

These determinations are required, however, not to fix the rate of tax applicable to the interest received, but to ascertain the taxable value of decedent's estate. An exemption or deduction from a death duty reduces the estate subject to tax by the amount authorized; it affects the rates only insofar as it may vary with the net value of all property which is the subject of decedent's transfer.<sup>31</sup> And this being so, where the statute refers to heirs and distributees and the value of their interests in terms not of rate but of exemption or deduction only, the levy is made not upon receipt of the property or any part of the property but upon the transfer of the whole. Contrarily, where such reference is an integral part of the rate structure, we are likely dealing with a succession tax.<sup>32</sup>

We look now to the language of the Washington statute pertaining to rate.<sup>33</sup> It reads:

"An inheritance tax shall be imposed on all estates subject to this act . . . at the following rates: Class A. Any devise, bequest, legacy, gift or beneficial interest to any property or income therefrom which shall pass to any grandfather, grandmother, father, mother, husband, wife, child, or stepchild, adopted child, or lineal descendant of the deceased

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<sup>28</sup> *In re Corbin's Estate*, 107 Wash. 424, 181 Pac. 910 (1919); *Liebman v. Fontenot*, *supra* note 23; *In re Rothfeld's Estate*, 163 Misc. 11, 296 N. Y. Supp. 320 (1937); *In re Smith's Estate*, 246 App. Div. 99, 285 N. Y. Supp. 109 (1936); *In re Curtis' Estate*, 142 N. Y. 219, 36 N. E. 887 (1894); *Central Trust Co. v. James*, *supra* note 11.

<sup>29</sup> *Humes v. U. S.*, 276 U. S. 487 (1928).

<sup>30</sup> *In re Chollet's Estate*, 148 Misc. 782, 266 N. Y. Supp. 415 (1933).

<sup>31</sup> 107 A. L. R. 801, 802.

<sup>32</sup> *In re Corbin's Estate*, *supra* note 28; *Stebbins v. Riley*, *supra* note 19; *In re Rothfeld's Estate*, *supra* note 28; *In re Smith's Estate*, 147 Misc. 73, 264 N. Y. Supp. 431 (1933).

<sup>33</sup> WASH. LAWS 1939, c. 202, § 1; REM. REV. STAT. (Supp. 1939) § 11202. Italics supplied.

is hereby denominated as Class A. On any amount passing to Class A up to and including \$25,000, 1%; on any amount in excess of \$25,000 up to and including \$50,000, 2%; on any amount in excess of \$50,000 up to and including \$100,000, 4%; on any amount in excess of \$100,000 up to and including \$200,000, 7%; on any amount in excess of \$200,000 up to and including \$500,000, 9%; on any amount in excess of \$500,000, 10%; Provided, That . . . there shall be exempt \$10,000 of any amount passing to Class A . . . .”

The section continues by designating brothers and sisters of decedent as Class B, establishing the rate of tax on varying amounts passing to that class and granting a \$1,000 exemption in terms similar to the grant in favor of Class A. It then provides:

“Class C. Any inheritance . . . or beneficial interest to any property . . . which shall pass to any person . . . other than mentioned in Class A and Class B herein, is hereby denominated Class C. On any amount passing to Class C up to and including \$10,000, 10% . . . .”

The section concludes with the following words:

“The taxes imposed and the exemption with respect to each class shall be apportioned between the beneficiaries in such class *in proportion to the amount receivable by each.*”

What have we here—death duty or succession? Can the tax be fixed solely by ascertaining the value of all the property which is the subject of transfer by decedent, and applying the rate prescribed on such value, less authorized deductions and exemptions? Obviously not, for there is no rate thus prescribed. However, neither is the rate based exclusively upon the value of the interest and the relation to the transferor of each heir or distributee, separately considered. His interest is added to the interests of all others in the defined class of which he is a member, and the rate is determined by the value of the sum of those interests.<sup>34</sup>

Is it nevertheless essential to fix the relationship to transferor of individual transferee, before the tax can be imposed? Is it necessary to evaluate the interest of each beneficiary? The favoritism shown members of Classes A and B is not expressed in terms of exemption to the estate—reduction in taxable value—but in terms of rate differentiation itself. But the statute provides for lumping all beneficiaries other than those defined as Class A and Class B into a group, C, and assessing the total property passing to them at rates dependent upon the value of the whole; and it may be argued therefrom that the legislature intended to place differentiation in treatment of members of the first two classes upon an exemption basis—thus beginning with imposition of the tax at Class C rates upon decedent's entire estate.

If such was the purpose, it is certainly expressed most oddly, and

<sup>34</sup> *In re Lindholm's Estate*, *supra* note 21; *In re Henry's Estate*, *supra* note 19.



the intended result reached with great circuitry. It would have been easy indeed to impose the tax in terms of net value of decedent's estate instead of the value of particular, or rather aggregate, bequests; and to favor certain beneficiaries in terms of exemption, instead of making their relationship to the transferor a fundamental part of the rate structure.

Certainly the legislature understood the meaning and operation of exemptions, for it granted them in favor of certain charitable and religious bequests—although not in terms of reduction in taxable value of the estate, but expressly to the beneficiaries, again indicative of succession tax exaction.<sup>35</sup>

That such was not the legislative intention, however, seems apparent from the mandate contained in the section pertaining to rate, that the taxes imposed with respect to each class shall be apportioned between the beneficiaries in such class in proportion to the amount receivable by such beneficiaries. If, in fixing the rate upon the sum of the interests passing to a class, the legislature actually intended the tax to be upon transfer and not upon inheritance, this is again a most curious provision. If a tax is a death duty, it is a charge against and payable from the residuary, unless otherwise specified in the will, like any debt against or administration expense of the estate.<sup>36</sup> Are such items ordinarily apportionable among the beneficiaries?

The United States, for example, does not care who ultimately bears the weight of its estate tax. Even deductible items are not relieved from being drawn upon to pay the tax imposed on the taxable portion of the estate.<sup>37</sup> If there is any sharing of the burden, it is a matter for the legatees and devisees to determine among themselves.<sup>38</sup>

The federal government does make provision for reimbursement to a beneficiary paying the tax from any part of the estate left undistributed, or by equitable contribution from the persons whose interest in the estate is subject to equal or prior liability for such payment.<sup>39</sup> But this is the nearest it comes to apportionment, or, for that matter, to any inquiry as to identity of the recipients or the quantum of their interests, except for exemption purposes or postponement of payment of the tax when imposed.<sup>40</sup>

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<sup>35</sup> WASH. LAWS 1941, c. 197, § 11; *ibid.* c. 197, § 12.

<sup>36</sup> *Hepburn v. Winthrop*, *supra* note 24; *Amoskeag Trust Co. v. Trustees of Dartmouth College*, 89 N. H. 471, 200 Atl. 786, 117 A. L. R. 1186 (1938).

<sup>37</sup> *Y. M. C. A. v. Davis*, *supra* note 11.

<sup>38</sup> *Edwards v. Slocum*, *supra* note 23.

<sup>39</sup> 44 Stat. 79 (1926); 26 U. S. C. A. § 426.

<sup>40</sup> The federal law provides for extension of time for payment of the part of the tax attributable to a remainder or reversionary interest at the election of the executor, under certain conditions. 53 Stat. 140 (1939); 26 U. S. C. A. §§ 525-527. But of course this is subsequent to imposition of the tax upon the estate as an entirety, and the postponement is under such regulations and conditions as the Commissioner and Secretary of Treasury may prescribe.

But if any tax the State of Washington exacts must be apportioned, then we are not looking at a tax imposed on an estate. Under the terms of the statute, necessarily the tax must be imposed, in the sense that it must be *computed*, before it can be apportioned; but if every beneficiary is entitled to have the tax upon his interest segregated as a matter of right, we are still surveying a levy which looks to receipt, and to the interest of each beneficiary separately considered, even if his interest is added to the interests of others for the purpose of determining how much he shall pay. To append an apportionment provision even to a law which in terms taxes net value is to render negligible, in operation at least, the difference between the two theories of taxation.<sup>41</sup>

How peculiar also, if the purpose was to levy a death duty, to provide in this same section for apportionment of exemptions with respect to each class among beneficiaries of that class, according to individual interests. For exemptions are a credit to, as the tax is a charge against, the estate itself, under estate tax theory.<sup>42</sup>

If the purpose of the apportionment provision was to insure that the burden should rest on each beneficiary in accordance with his interest, as seems to follow from the fact that this is the necessary result of its operation, then we submit the statute does not contemplate a *prima facie* levy upon the entire estate at Class C rates with exemptions to classes A and B, but a levy upon each interest received, although it is combined with others to fix the amount each shall pay. Considering this section of the statute in its entirety, the legislative purpose seems to be only to impose a succession tax computed by a method which will result in bringing inheritances into higher tax brackets.

There are other indications in the Act that the tax is an impost on succession. The same legislature which in 1935 established the present rate method, left on the statute books provision that representatives of the estate should collect the inheritance tax on any property subject thereto from the person entitled to the property. This is, of course, indicative of the theory of a tax on receipt. It also retained provision that the amount of federal estate tax paid by the estate should be deducted as an indebtedness of the estate. Both of these are still part of our Inheritance Tax Law.<sup>43</sup> Failure to allow deduction for federal

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<sup>41</sup> *In re Rothfeld's Estate*, *supra* note 28.

<sup>42</sup> *Ibid.* The 1935 legislature included insurance as a taxable item, and provided for apportionment likewise between beneficiaries of an exemption "from the total amount of insurance receivable by all beneficiaries other than the . . . representative of the estate, regardless of the number of policies" in the sum of \$40,000. The provision also expressly made insurance taxable to the person entitled thereto. WASH. LAWS 1935, c. 180, § 115, amended without change in this respect, WASH. LAWS 1939, c. 202, § 5; REM. REV. STAT. (Supp. 1939) § 11211-b.

<sup>43</sup> WASH. LAWS 1901, c. 55, § 11; REM. REV. STAT. § 11209; WASH. LAWS 1931, c. 134, § 1; REM. REV. STAT. § 11201-b.

tax paid in computation of tax due the state has been construed by the United States Supreme Court as rendering the state tax a death duty, at least to that extent.<sup>44</sup> If the converse of the proposition be evidence, then retention of this provision in our law would appear to lend some weight, at least, to its construction as a succession levy.

Before 1935 the Washington tax was an inheritance tax in the strict sense of the term. The theory of the tax was many times questioned under successive enactments, and the answer was always the same. In *In re Ferguson's Estate*,<sup>45</sup> citing numerous Washington cases, the court said: "We have held, from the first case which had this subject under examination, that the inheritance tax is not on the estate but on the right to inherit."

In all of these prior acts, of course, the rate was fixed in terms of the relationship to the transferor of each transferee, and the value of his individual interest. There is little doubt that in statutes thus worded the tax is an impost on succession.<sup>46</sup> Is the theory and operation of the levy altered *ipso facto* by the fact that *A's* interest is added to *B's* and *C's*, and the rate prescribed upon the sum of those interests?

Let us, for answer, consider three cases in which our Supreme Court has construed the theory of the impost under the 1935 and subsequent laws embodying substantially the same method of rate computation.

The first of these is *In re Henry's Estate*.<sup>47</sup> There the will contained specific provision for payment of inheritance and estate taxes out of the estate. The residuary was left in trust. The court held, *inter alia*, that under the terms of the statute the proper method of computing the tax where the will provided for its payment out of the estate, was not to compute it upon the amount of the specified legacy, but upon a sum which, when added to the legacy and the tax taken off, will leave a balance which is the amount of the bequest.

Our question being what kind of tax does the State of Washington impose, this case is significant (1) because the court expressly stated that, although the 1935 Act embodied death duty features, the tax was still a levy upon the right to receive,<sup>48</sup> and (2) because the court implied that it was still *primarily* a levy upon the right to receive. An expression in a will that the tax shall be payable from the estate has

<sup>44</sup> *Stebbins v. Riley*, *supra* note 19.

<sup>45</sup> *Supra* note 27

<sup>46</sup> *In re Corbin's Estate*, *supra* note 28. For example, the law in effect immediately prior to the 1935 session of the legislature provided: "The inheritance tax shall be imposed on all estates subject to this . . . act at the following rates. If passing to or for the use of a father, mother, . . . of the decedent, . . . the tax shall be one per centum of any value not exceeding \$50,000; . . ." etc. WASH. LAWS 1931, c. 134, § 3.

<sup>47</sup> *Supra* note 19.

<sup>48</sup> *Ibid.* at 514, 66 P. (2d) at 352. Speaking of the theory of the tax, the court said: "Prior to the act of 1935, the inheritance taxes were payable on the right of the heir or legatee to receive. That act, however, embodied not only that feature, but a tax upon the estate . . .".

no significance, of course, unless in absence of the provision the beneficiary must bear it. If our tax were now a death duty, it would be taken from the residuary in the absence of a *contrary* provision in the instrument.<sup>49</sup>

To discuss the statute in the light of the presence of a mandate in the instrument that it shall be so taken is to recognize that, by expressly providing for apportionment of the tax among the beneficiaries in each class according to the interests of each, not as a matter of agreement or civil redress among the heirs and distributees, but as a matter of imposing the tax, the legislature still intended the statute to operate as a levy upon inheritance, and to look to the interest of each beneficiary, however the tax upon that interest might be computed.

The second of these cases is *In re McGrath's Estate*.<sup>50</sup> Here the question was whether insurance policies on which the premium was paid by a corporation, and which were payable to it on the death of the insured without any right in him to change the beneficiary, were property subject to tax—a question involving, of course, not what kind of tax is to be imposed, but whether a tax of any kind can be levied. However, the court, in deciding proceeds of the policies were not taxable, said it often had been decided that *estate* taxes could not be collected with respect to property unless some right in it was transferred by decedent's death, and that the same principles necessarily applied to the *inheritance* tax collected by the state under our Act, for under either theory of taxation there can be no tax unless there is a transfer.<sup>51</sup> Is not this statement ample proof the court did not consider the 1935 Act had fundamentally altered the theory upon which our tax is imposed?

In this case, moreover, with the two theories of taxation and the difference between them in mind, the court directed particular attention to denomination of the 1935 Act as an "Inheritance Tax."<sup>52</sup>

Finally, in *In re Lindholm's Estate*,<sup>53</sup> the court was confronted with the question of whether, in computing the inheritance tax, the total net amount of the estate should be divided into the statutory rate blocks and the statutory exemptions allowable to persons included within the class be then deducted from the first block passing to that class; or whether the exemption should first be deducted from the net amount of the estate and the residue then be divided into the statutory blocks.

The court, by adopting the first method, held the exemption was to the beneficiary, or rather to the beneficiaries, in the defined class, and not a grant to the estate of a reduction in net taxable value. In

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<sup>49</sup> *Dexer v. Jackson*, 245 Mass. 333, 140 N. E. 267 (1923).

<sup>50</sup> *Supra* note 9.

<sup>51</sup> *Ibid.* at 502, 71 P. (2d) at 398.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Supra* note 21.

discussing a case in which the same problem had arisen under the 1917 statute,<sup>54</sup> the court said of the exemption provision of that act:

"In any event, the proviso in the 1917 statute, as construed in the *Sherwood* case, is fundamentally different from that in the 1939 statute. By the 1917 proviso, the 'net value of any estate', if passing to certain persons designated therein, was entitled to an exemption of ten thousand dollars; that is, the exemption applied directly *to the estate itself*, however great or small it might be, and regardless of any other provisions in the statute . . .

"The 1939 statute employs a wholly different formula. *Section 1 of that act . . . [the rate section] is not primarily concerned with the determination of the net amount of the taxable estate, but, rather, with the division of the entire estate into blocks by which the applicable rates of taxation are to be determined.* The denominator employed for that purpose is '*the amount passing*' to persons within class A. Thus, the act first designates a series of blocks, or brackets, to be determined by the amount *passing to* persons included in that class; it then fixes the tax rates to be applied to the respective blocks; and, finally . . . it allows an exemption of ten thousand dollars '*of any amount passing*' to such persons . . .

"*Always to be kept in mind is the fact that in neither statute [the 1935 or the 1939 Act] is there provision for any deduction from the 'net value of any estate'.*"<sup>55</sup>

This is a plain construction of the statute as an inheritance tax act, an act in which the rate is fixed, not in terms of net taxable value of the entire estate passing, from which exemption will be allowed on the basis of consanguinity of transferor to transferee, but in which the transferee himself is exempted from tax. For the statute expressly provides,<sup>56</sup> of course, that the grant to the class of which he is a member, like the tax itself, must be apportioned according to the interest of each beneficiary.

Must we not conclude, from analysis of the terms of the statute itself and in the light of these cases, that provision for computing the tax on the sum of the interests of all beneficiaries bearing a defined relationship to the transferor, instead of on the interest of each transferee, separately considered, has not changed the exaction from succession tax to death duty, but has only affected the amount each beneficiary must pay for the privilege of receiving his legacy? We do not now begin with the value of all property passing from the decedent, deducting therefrom such items as may be exempted from the taxable estate by reason of consanguinity or beneficence of purpose. On the contrary, we start at the other end—with the value of the taxable

<sup>54</sup> *In re Sherwood's Estate*, *supra* note 9.

<sup>55</sup> *Supra* note 21, at 375, 377, 107 P. (2d) at 566, 567. Italics in full sentences supplied.

<sup>56</sup> WASH. LAWS 1939, c. 202, § 1; REM. REV. STAT. (Supp. 1939) § 11202.

property passing to each beneficiary—adding thereto the value of the taxable interests of all others whose relationship to the transferor is in the same defined classification.

The effect of the addition may be a result which approximates that reached where the tax is levied upon the estate—and very probably this is what our court meant by its statement in *In re Henry's Estate*<sup>57</sup> that the 1935 Act embodied features not only of a tax upon the right of the heir to receive, but upon the estate. But resemblance to a true death duty by reason of classification of heirs and combination of their interests is apparent rather than real. There has been no fundamental shift in emphasis from receipt to transfer—from beneficiary to estate. It is the sum total of the combined bequests, not the sum total of decedent's property, upon which the rate is based; and to effect the combination, we must still look to and separately consider each beneficiary. We have here, do we not, an act which levies not a death duty, but one which provides only an unusual method of calculating a succession tax?

In terms of "A" of our problem then, we conclude that the State of Washington imposes the tax upon the remainderman's legacy itself. And, unless the state has considered the uncertainties of conditional remainders in levying the tax upon such interests, it is the remainderman who will be called upon to pay from his own pocket a substantial sum for which he may actually receive nothing at all.<sup>58</sup> There is nothing in the bequest itself to satisfy the tax collector, and the uncertainties of eventual realization obviously make its sale or use as collateral to meet the tax as hazardous to purchaser or prospective lender as it is to the taxpayer himself.

Shifting emphasis momentarily from the taxpayer before going to "B" of our problem, let us consider the effect of our conclusion upon *imposition* of the tax by the state.

To impose its levy, the sovereign exacting an estate tax need establish only the value of all the property which is the subject of transfer by decedent. If it authorizes deduction from the taxable value on the basis of consanguinity, for example, the *estate* must bring itself within the terms of the authorization by establishing that the heir or distributee is one thus favored and that his bequest is in the amount which the statute allows to be deducted. And if the interest concerned is a remainder, it is the estate which must prove the remainderman's identity and the quantum of his interest. Exemptions and deductions are strictly construed.<sup>59</sup>

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<sup>57</sup> *Supra* note 19.

<sup>58</sup> For, irrespective of whether there is personal liability, levying under the succession theory "has the effect of enforcing collection . . . from the devisees and legatees . . ." *In re Ferguson's Estate*, *supra* note 27, at 608, 194 P. at 775.

<sup>59</sup> *In re Rothfeld's Estate*, *supra* note 28; *In re Lande's Estate*, 241 App.

But if the state taxes on the basis of receipt by each beneficiary or combination of beneficiaries and the rate itself varies with the degree of consanguinity and the value of the interest, it is now the *state* which must establish that a beneficial interest is *received*. It is the state which must identify the heir or distributee and prove the quantum of his interest, for manifestly the applicable rate must be determined before any tax can be imposed.<sup>60</sup> And if the interest concerned is a conditional remainder, the problem of proof may be acute indeed.

The state imposing a death duty can dispose of the predicament inherent in the uncertainty of conditional remainder interests with ease. It can say simply: "We tax the privilege of transferring property, and when we allow the transfer itself, the tax lies. Our rate is based on the total value of all property transferred, and unless the estate can prove that it is entitled to reduction in that value by reason of an express exemption or deduction, the tax will remain fixed at that rate. Nor will we indulge in any speculation as to the ultimate taker of a remainder interest or how much he will eventually receive. Reduction in taxable value will not be granted on account of such interest where it is contingent or conditional. To entitle the estate to an exemption, the interest must be certain or definitely ascertainable."

The federal government has said this often.<sup>61</sup> So has the State of New York, since it adopted an estate tax law patterned after the federal act.<sup>62</sup> The exemption is denied as well where the quantum of the remainder interest cannot be determined as where the identity

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Div. 138, 271 N. Y. Supp. 530 (1934); *In re Smith's Estate*, *supra* note 32.

<sup>60</sup> *In re Roosevelt's Estate*, 143 N. Y. 120, 38 N. E. 281 (1894); *Valentine's Estate*, 297 Pa. 99, 146 Atl. 453, 64 A. L. R. 737 (1929); 28 AM. JUR. 30. *In re Curtis' Estate*, *supra* note 28, at 220, 36 N. E. at 888, the court holding that a succession tax could not be imposed upon remainder interests where the identity of the remainderman was not determinable at the time of decedent's death, said: ". . . until the termination of the trusts it will be impossible to know whether the remainders are in truth taxable or not. Prior to that event, the state cannot establish that any beneficial interest will pass to persons in whose hands it will be taxable; and, until it can show that vital and necessary fact, its right to tax cannot arise . . ."

The court in *In re Rothfeld's Estate*, *supra* note 28, at 17, 296 N. Y. Supp. at 324, speaking of the purpose and result of the change in the New York law from succession levy to estate tax, said: "As the estate tax is one which is imposed upon the privilege of the decedent to direct the devolution of his assets on death, and not, as was the transfer tax, on the right of the successor in interest to receive . . . it follows as a logical matter that, *prima facie*, all property thus beneficially transmitted by the decedent is subject to the specified impost, and this is the preliminary statement of the law . . ."

"It may be observed parenthetically that this diversity of basis of tax is of vital importance for recollection, since it alters the location of burden of proof in many respects from its position under the Transfer Tax Law. There, the tax, being imposed on the benefit received by the individual recipient, made necessary a demonstration by the taxing authority of the fact and value of such benefit as a condition to its taxability." (Italics supplied)

<sup>61</sup> *U. S. v. Fourth Nat. Bank*, 33 F. (2d) 85 (C. C. A. 10th, 1936) *cert. den.* 299 U. S. 575 (1936); *cf. U. S. v. Provident Trust Co.*, 291 U. S. 272 (1934).

<sup>62</sup> *In re Leichtman's Estate*, 147 Misc. 589, 265 N. Y. Supp. 617 (1933); *In re Mead's Estate*, 145 Misc. 893, 261 N. Y. Supp. 328 (1932).

of the remainderman cannot be established until the eventuality occurs.<sup>63</sup>

But the state imposing a succession tax cannot dispose of the difficulties inherent in the uncertainty of conditional remainder interests so easily. It must say: "We tax the privilege of receiving property, and our rate is based on what is received and who receives it. Accordingly it must be shown in each instance that a beneficial interest is in fact received, who the recipient is, and what he takes, before the tax can be levied. That there is a beneficiary and the extent of his interest must be certain or sufficiently ascertainable for the applicable rate to be determined and the toll exacted. *And we bear the burden of proof.*"

The matter is not one of denying an exemption to the estate on the basis of uncertainty, but of imposing the tax.

Where future interests are involved, the most simple solution to the problem is for the state to await the eventuality, postponing imposition of the tax until it can be determined who the beneficiary is and the value of his interest. In the early days of taxation on devolution, this was the common method employed.<sup>64</sup> It is eminently fair to the taxpayer, but from the point of view of the state it has two great disadvantages. It places the burden of depreciation of the property during the preceding estate upon the state. It postpones for an indeterminate period collection of the tax.

States formerly taxing upon this basis have for these reasons quite generally either enacted estate tax laws, or levied the tax before termination of the precedent estate upon the theory that an interest in property is transferred, or rather received, upon and by reason of the death of the transferor, and therefore the receipt is taxable.<sup>65</sup> The interest received is not the real interest but, in terms of our problem, the conditional remainder itself.

Its power over property subject to inheritance being plenary, the sovereign may, of course, make its own rules for prescribing the rate and fixing the tax. The State of Washington has done so.<sup>66</sup> But, having established its impost as a levy upon receipt, the state taxing under

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<sup>63</sup> *Del. Trust Co. v. Handy*, 53 F. (2d) 1042 (D. Del. 1931); cf. *Ithaca Trust Co. v. U. S.*, 279 U. S. 151 (1929); *Humes v. U. S.*, *supra* note 29; cf. *U. S. v. Provident Trust Co.*, *supra* note 61.

<sup>64</sup> *Billings v. People*, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807 (1901), *affd.* 188 U. S. 97 (1902); *In re Cassidy*, 122 Me. 33, 118 Atl. 725 (1922); *In re Stewart*, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836 (1892); 28 AM. JUR. 46.

<sup>65</sup> *In re Chollet's Estate*, *supra* note 30; *In re Smith's Estate*, *supra* note 32; *Salmon v. State Tax Comm.*, 278 U. S. 484 (1929); 30 A. L. R. 482; 28 AM. JUR. 47.

Study of successive inheritance tax enactments by the State of Washington is illustrative of a trend of legislative endeavor to impose and collect the tax as speedily as possible.

<sup>66</sup> *In re Fotheringham's Estate*, *supra* note 10; REM. REV. STAT. (Supp. 1939) § 11201 *et seq.*



the succession theory must show that something is in fact received to which its tax is applicable, for it cannot confiscate in the guise of taxation.<sup>67</sup> The difficulties arise not in making the rules for determining who the ultimate taker will be and the value of his interest, but in their application to the vast number of possible conditions, and combinations of conditions upon which estates may be limited. Again, if the state cannot establish identity of the beneficiary and the value of his interest in accordance with its self-imposed burden, it cannot impose the tax. The levies upon transfer of ownership from dead to living being special taxes, they are strictly construed against the taxing body.<sup>68</sup>

#### B. UPON WHAT EVALUATION IS THE TAX ON CONDITIONAL REMAINDERS PAYABLE?

Let us now examine the method and rules established by the State of Washington for taxing conditional remainders, with particular reference to their evaluation.

Our pertinent statutes are as follows:

"When the estate of a deceased person shall be subject to an inheritance tax, and there be an annuity, life estate or an estate for a term of years given to one or more persons and the remainder to another or others, the entire estate shall be appraised as other estates are required to be appraised by the laws of this state. The value of the annuity, life or term estate, shall be determined according to the rules or standards of mortality and of value commonly used in actuaries' combined experience tables on the basis of four per cent annual interest, and the value of the remainder shall be determined by deducting the amount found to be the value of the annuity, life or term estate from the whole estate. After the values shall have been determined as provided in this section, the tax shall be computed and collected in the same manner that the tax on other estate is computed and collected. Provided, however, that any person . . . owning the beneficial interest in the remainder may defer the payment of the tax thereon until they come into possession of the same by filing . . . within thirty days after the determination of the tax, a . . . surety bond to the State . . . in a sum equal to the amount of the tax conditioned that they will pay such tax in full within sixty days after coming into possession of the estate. Such bond shall not operate to defer payment of the tax unless it is approved by the supervisor, and if it shall appear to the supervisor at any

<sup>67</sup> *Dane v. Jackson*, 256 U. S. 589 (1921); *Bente v. Bugbee*, 103 N. J. L. 608, 137 Atl. 552, 58 A. L. R. 137 (1927); *In re Roosevelt's Estate*, *supra* note 60. Cf., under Estate Tax theory, *In re Smith's Estate*, *In re Curtis' Estate*, both *supra* note 28.

<sup>68</sup> *Walla Walla v. State*, *supra* note 25; *Crooks v. Harrelson*, 282 U. S. 55 (1930); *People v Continental Ill. Bank & Trust Co.*, 344 Ill. 123, 176 N. E. 305, 75 A. L. R. 538 (1931); cf. *In re Sweek's Estate*, 191 Wash. 660, 664, 71 P. (2d) 657, 658, 113 A. L. R. 386, 388 (1937), where the court said: ". . . the rule . . . should not be extended so far as to produce an undesirable result."

time that a bond previously filed and approved has become insufficient he may require a new bond to be filed. The State Insurance Commissioner is hereby directed to obtain and publish for the use of courts and appraisers throughout the state tables showing the average expectancy of life and values of annuities and of life and term estate.<sup>69</sup>

"When property is transferred in trust or otherwise and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, *such property shall be appraised at its clear market value immediately upon the transfer or as soon thereafter as practicable* and a tax shall be imposed upon such transfer at the highest rate which on the happening of any such contingencies or conditions would be probable under the provisions of this act and such tax so imposed shall be due and payable in the same manner as other taxes.

"Where an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting."<sup>70</sup>

It is evident from analysis of the first of these sections that no difficulty will be experienced in imposing a tax upon a straight as distinguished from a conditional remainder. All the state need establish is the value of that part of decedent's property which is the subject of divided interests. From that value it is easy to separate the life tenant's estate, for example, from the remainder interest. The statute prescribes a specific and reasonable method for so doing, *viz.* by determining the value of the precedent interest according to the rules or standards of mortality and of value commonly used in actuaries' combined experience tables on the basis of 4 per cent annual interest, and deducting that figure from the value of the property itself.

The value of the remainder interest, though not known at the time the transferor dies, can be ascertained, at least with no more uncertainty than generally attends human affairs.<sup>71</sup> To be sure, the life tenant may die before the date fixed by the mortality tables. Or he may outlive his expectancy. But this is surely the best substitute for sitting out the eventuality. Since neither interest nor quantum of interest in the property of this remainderman can change, he has no just ground for complaint if the tax is imposed upon him at the transferor's death and at a valuation so determined. Particularly can he not be heard to complain in view of the fact that the statute provides for postponement of *payment* of the tax so imposed until he comes into the beneficial enjoyment of the property. For, although he

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<sup>69</sup> WASH. LAWS 1939, c. 202, § 6; REM. REV. STAT. (Supp. 1939) § 11205.

<sup>70</sup> WASH. LAWS 1939, c. 202 § 7; REM. REV. STAT. (Supp. 1939) § 11206. Italics supplied.

<sup>71</sup> Ithaca Trust Co. v. U. S., *supra* note 64; First Nat. Bank v. Snead, 24 F. (2d) 186 (C. C. A. 5th, 1928); *In re Smith's Estate*, *supra* note 32.

must pay a bond premium on an amount of tax based on the value of his interest as so computed until termination of the preceding estate, it is exceedingly unlikely that this cost will exceed or even equal his eventual realization unless disaster overtakes the estate.

1. But the situation is vastly different where the remainder is vested subject to open. Our example here was: *T* devises Blackacre to *A* for life, remainder to the sons of *A*. *B* is *A*'s only son at the date of *T*'s death. Looking to the terms of our statute, *B*'s is an interest which may be "in part abridged" by the birth of other male children to *A* prior to the termination of his estate.

If *B* pays a tax on his interest measured by subtracting *A*'s life interest from the value of Blackacre, and additional sons are thereafter born to *A*, not only will *B* have paid upon a valuation which has greatly shrunk through factors having nothing to do with the value of the property itself, but he will also have paid what is, or rather has become in fact, the debt of another or others, as the case may be; and the statute makes provision neither for reimbursement from the state nor from the after-born remaindermen.

If *B* defers payment by posting a bond conditioned on payment of a tax determined on the basis that he is the sole remainderman, and other sons are born to *A*, not only will *B* pay a premium on the entire remainder interest while awaiting the calamity, but after it happens, for there is no provision in the statute for adjustment of the bond except upwards.

Does the statute necessarily require such result? The text is, in substance, that where the transferee's interest is dependent upon conditions whereby it may be wholly or in part created, defeated, extended, or abridged, the property shall be appraised at its clear market value immediately upon the transfer or *as soon thereafter as practicable* and a tax imposed upon the transfer at the highest rate which on the happening of any such conditions would be *probable*, and the tax so imposed shall be due and payable in the same manner as other taxes.

Assuming that the "property" is the remainder interest, is it to be appraised at its clear market value immediately upon *T*'s death? Or does the statute mean that because new interests may be "created" by the birth of other sons to *A*, appraisal will be postponed until such interests, if any, come into being, at which time only will it be "practicable" to appraise them. Is this the intended method of evaluating this conditional remainder? Unless this is its meaning, the answer to the question must be that the remainder is to be appraised immediately upon the transfer, for at the time of *T*'s death, *B* is certainly the transferee of the entire interest, and the value of Blackacre and of the life tenant's interest in Blackacre are both then ascertainable by the methods the statute provides.

Therefore, if the "transfer" occurs for tax purposes when *T* dies (a question which we shall later consider) it would seem that the tax will be imposed at that time at the rate prescribed for inheritance by persons bearing *B*'s relationship to *T*, and on an evaluation determined by deducting *A*'s life interest from the appraised value of Blackacre. There is no problem here of determining the relationship to the transferor of possible beneficiaries other than *B*, for, of course, any sons afterwards born to *A* will bear the same relationship, and their interests would therefore be taxed in the same rate classification as *B*'s. The question is solely one of ascertaining the amount of the interest which is subject to tax at *T*'s death.

2. Let us pass on to consider, in the light of our statute, remainders subject to a condition precedent. Our example here was: *T* devises Blackacre to *A* for life, remainder to *B* if, but only if, *B* shall attain the age of 21. This is an interest which is "created" by, and only by, *B*'s arrival at that age. Can such an interest be appraised at its clear market value immediately upon the transfer, assuming again that "property" means interest, and that the "transfer" takes place at *T*'s death? If not, does the statute contemplate postponement of the appraisal and so the levy, until evaluation shall become practicable? If so, when is that time? Or does it intend that the same formula of deducting *A*'s life interest from the value of Blackacre shall be employed?

If *B* dies before he reaches 21, under the terms of this devise, the heirs of the transferor or the residuary beneficiary will take the remainder. We thus have another complication. For while *B* may be the son of *T*, for example, on *B*'s death without issue, *T*'s heirs or the residuary beneficiary may be collateral, and the applicable rate will be higher. The statute attempts to meet this issue by providing that the tax shall be imposed upon the transfer at the highest rate which, on the happening of any of the conditions, would be probable. It is not a matter here, of course, of the "happening" of the condition, but of its failure to happen. But if this situation was intended to be included in the scope of the provision, then which is probable—that *B* will live to be 21 and so take the remainder, or that he will die and *T*'s heirs or the residuary beneficiary take? How can the issue be decided? The statute provides no method. Nor can the problem be solved by applying the highest rate, for the statute distinctly says "the highest rate which, on the happening of any such . . . condition, would be probable."<sup>72</sup>

If the state cannot or does not await the eventuality to levy the tax, the only other solutions seem to be either to offer evidence of the precarious condition of *B*'s health, and so the likelihood of his early

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<sup>72</sup> Italics supplied.

demise, or to accept a tax at the *lowest* rate, that is, on the basis that *B* will in fact attain age 21 and so meet the condition.

3. Where the remainder vests but is subject to complete defeasance, the problem under our statute is still different, though no less difficult. Our example here was: *T* devises Blackacre to *A* for life, remainder as *A* shall by will appoint, but in default of and until such appointment, to *B*. Can this estate be appraised at the date of *T*'s death? Or is again the same formula of deducting the value of *A*'s life estate from the value of Blackacre to be used to determine *B*'s interest? If not, there is no practicable time, during the life tenancy at which to evaluate it. Until *A* dies it cannot be known whether *B*'s estate will be defeated. *A* may make a will exercising the power, but it is, of course, ambulatory until his death.

And here again, what rate is to apply? *A* may exercise the power in favor of persons<sup>73</sup> inheritance by whom is taxed at a higher rate than *B*. Is it more probable that *A* will exercise the power than that he will not? And if so in whose favor? What kind of proof can here be offered to determine the applicable rate and so fix the tax? If the state cannot or does not sit out the event, it would here appear that the *only* solution is to accept a tax at the lowest rate.

In the foregoing discussion we have, not been unmindful of the fact that the words of the statute pertaining to taxation of conditional interests are "such *property* shall be appraised at its clear market value immediately upon the transfer or as soon thereafter as practicable."<sup>74</sup> What property? The words immediately preceding are "When property is transferred in trust or otherwise and the rights, interests or estates of the transferees are dependent upon . . . conditions whereby they may be wholly or in part created, defeated . . ." etc. Does this mean the property which is the subject of the remainder interest? That is, does it mean Blackacre? If so, we are certainly left with our formula of evaluating the remainder interest by the statutory method of subtracting *A*'s interest from the value of Blackacre, or we have no method at all.

But when *T* dies the "property" received by *B* is not Blackacre, but a remainder interest in Blackacre. And since the statute pertaining to the evaluation and appraisal of real property of a decedent's estate provides for its appraisal *at the fair market value on the day of his death*,<sup>75</sup> there is some reason at least to suppose, by reason of the difference in wording, and particularly since the section relating to conditional interests provides for appraisal of the property upon

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<sup>73</sup> This state, like many others, taxes exercise of a power of appointment in the estate of the donee, except where, at the time the appointment is effective, the donee is a non-resident. WASH. LAWS 1931, c. 134, § 2; REM. REV. STAT. § 11201-c.

<sup>74</sup> Italics supplied.

<sup>75</sup> WASH. LAWS 1939, c. 202 § 10; REM. REV. STAT. (Supp. 1939) § 11211-a.

the transfer or *as soon thereafter as practicable*, that the legislature meant an appraisal or evaluation of the remainder interest as distinguished from the property itself; and intended that such appraisal should be postponed until there was some reasonable method of determining its "clear market value". For obviously the statutory formula of the preceding section is arbitrary in the extreme in any of the examples of conditional remainders we have cited.

This becomes thoroughly apparent when we consider the second hypothetical under remainders subject to complete defeasance. Our example there was: *T* devises Blackacre to *A* for life, remainder to *B*, but with power in *A* to dispose of the property and use the principal for support during his lifetime. For here, *A*'s interest is surely something greater than an ordinary life tenancy, for all practical purposes at least. True, his use of the principal is restricted to what is reasonably necessary to his support, that is, he may not indulge in riotous living at the expense of the remainder interest.<sup>76</sup> Nevertheless, he may exhaust the corpus if need be. Can such an estate be measured by mortality and actuaries' experience tables commonly in use? Where are they to be found? And if there are no such tables in common or uncommon usage, what does one use for a subtrahend in determining the value of the remainder limited after this kind of precedent estate?

The statute has established only one formula, unless by the words "appraisal of the property" in the succeeding section, is meant evaluation of the conditional remainder interest, and unless the language of this section contemplates such evaluation at such time and by such means as may be or become "practicable". If such is the meaning, then it is perhaps possible for the state at the time of *T*'s death to show with reasonable certainty that there will be no invasion of principal for support, by proof that the income is adequate for the life tenant to maintain himself in his accustomed manner, or that he has income from other sources upon which he can draw,<sup>77</sup> and thus to establish the value of the remainder interest with some degree of accuracy.

But where the power in the life tenant to invade the corpus is unrestricted as to purpose, that is, where he can use the principal for any purpose he deems fit, can the value of the remainder at *T*'s death

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<sup>76</sup> *In re Dorgan's Estate*, 237 Fed. 507 (S. D. Iowa 1916); *Camden Safe Deposit & Trust Co. v. Com'r.* Int. Rev. 30 B. T. A. 287 (1934).

<sup>77</sup> *Millard v. Humphrey*, 8 F. Supp. 784 (W. D. N. Y. 1934); *Lucas v. Merc. Trust Co.*, 43 F. (2d) 39 (C. C. A. 8th, 1930); *Sanderson v. Com'r.* Int. Rev., 18 B. T. A. 221 (1929). These cases involve deductibility from estate tax where the power is limited to support and maintenance, but the same principle would be applicable where the state had the burden.

A most excellent discussion of evaluation and taxation of uncertain interests under both death duty and succession theories, with particular reference to the burden of proof, is contained in *In re Rothfeld's Estate*, *supra* note 28.

be determined by any kind of evidence? In this case the statutory formula is not only arbitrary, but thoroughly absurd. Here there does not appear to be *any* reasonable solution, except for the state to await determination of what amount of the property, if any, will remain when the life tenant dies.

Once more, the statute does not authorize levy of the tax at the highest possible rate, but on the highest possible rate which on the happening of any of the conditions would be *probable*. And assuming the power in *A* to be a further condition on *B*'s estate, who can determine in so absolute a grant what the probabilities are? The state can classify the beneficiary here and in the preceding example, in accordance with his relationship to the transferor, but how can the other rate variable be determined?

And if the tax cannot be determined because the applicable rate cannot be fixed, in what amount shall a bond be exacted as a condition to deferring payment? Here again the statute provides only one answer—"in a sum equal to the amount of the tax".<sup>78</sup>

Most of these questions can only be posed—they can not be answered. But our Supreme Court has passed upon some of them—and in those decisions are indicated the probable answer to many others. We turn therefore to consideration of the case law of the state:

In *In re Phillips' Estate*,<sup>79</sup> the court had before it a will providing that the income of the trust created should go to a brother, two sisters, and two nieces of decedent until death of survivor of brothers and sisters, then to terminate and be distributed to the nieces or their surviving issue, but if no issue then to survivors of brother, sisters, and nieces as if they had not been named in the instrument. The state claimed the tax should be levied as if the estate passed to one brother, sister, or niece; the executor contended that the value of each life estate and remainder should be separately computed and taxed, and that the tax on the remainder should be calculated as if it were certain to vest in the nieces.

The statute then in effect, like our present law, carried no method for evaluating remainder estates, other than deduction of the life tenant's interest as computed by mortality and actuaries' experience tables, from the value of the property itself. It also contained our present provision for appraising the "property" conditionally transferred at its clear market value immediately upon the transfer or as soon thereafter as practicable. But it provided for taxation of conditional interests at the "lowest rate possible," with recoupment by the state if, when the condition happened, it was found a higher rate should have been applied.

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<sup>78</sup> The reader is also invited to consider the probable premium costs in view of the uncertainty that the principal will ever realize anything.

<sup>79</sup> 133 Wash. 41, 233 Pac. 27 (1925).

The court, upholding the executor in both contentions, (1) did not even question when the transfer of the conditional interest took place for the purpose of imposing the tax—it was *assumed* the date of decedent's death governed here as in the case of other interests; and (2) *assumed* that appraisal of the "property" meant the property itself which is the subject of the divided interests, not evaluation of the remainder; and (3) *decided* that the method of determining the value of conditional remainder was the same as that provided for evaluating straight or indefeasibly vested remainders, that is, by subtracting the life estate value from that of the property. It said so flatly.

Here of course the court was not confronted with a case in which the subtrahend of the statutory formula, the value of the life tenancy, cannot possibly be ascertained by resort to mortality and actuaries' experience tables. The question was not evaluation of the remainderman's interest. Nor was there any real problem of ascertainment of identity of the remainderman. Since at all events the state could only levy the least possible tax at the time the transferor died, there was no need to look beyond the instrument itself to determine the beneficiary who would take the lowest rate. Nor was there need to consider when and by what method the statute contemplated conditional remainders should be evaluated, nor what time it fixed as the date of "transfer" of such interests for the purpose of imposing the tax.

Seven years later, and under a statute which now taxed conditional estates at the "highest rate probable" with provision for refund to the taxpayer on the happening of the contingency under certain procedure, the court decided *In re Eaton's Estate*.<sup>80</sup> There the residuary went to a son and daughter, but if both died before twenty-one, unmarried and without issue, then decedent's sister or her heirs were the beneficiaries. The state claimed the rate for collateral heirs was applicable because of the contingency—the executor contended that the estate was taxable to lineals.

Under the wording of the new statute, it was now necessary to identify the *probable* beneficiary in order to determine the applicable rate. The statute then as now provided no method for doing so. But the court, again assuming the effective date of "transfer" of such interests was when decedent died, determined the question by consideration of the relative ages of all possible beneficiaries. It did not discuss the theory of the tax nor the burden of proof, but since the lineal heirs were children and the collaterals adults there was little doubt as to the probable ultimate taker.

In interpreting the statute to mean that the identity of the bene-

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<sup>80</sup> 170 Wash. 280, 16 P. (2d) 433 (1932). A similar problem was raised and a like result reached in *In re Waterman's Estate*, 173 Wash. 101, 22 P. (2d) 53 (1933).



fiary should be determined and the applicable rate thus fixed by extrinsic evidence, the court adopted the only possible construction—and the one the legislature obviously intended. But when it has been confronted with the problem of how, under the wording “the highest rate probable,” the other rate variable—the value of the conditional remainder interest—shall be determined, the court has held that the statutory formula of deducting the value of the life tenancy from the value of the property was intended as blanket coverage for all remainders.

The rule of the *Phillips' Estate* case<sup>81</sup> is still the law, even though that doctrine was established under a statute which provided that the state must tax at the lowest rate which upon the happening of any of the contingencies would be possible. A remainder interest following a life estate with unlimited power in the life tenant to exhaust the corpus is now valued and the applicable tax rate determined as if the power did not exist. This is not the highest rate probable, but the highest rate possible! How this can be reconciled with the emphatic statement in the *Eaton Estate* case that probable does not mean possible,<sup>82</sup> it is difficult to see.

In *In re Daub's Estate*,<sup>83</sup> the will left a community estate to a surviving spouse with power in him to sell and convert the property for his own purposes to any amount “he shall determine to be necessary and proper,” and upon his death the residue, if any, to go to testatrix's brother and nephew. The court held the trial judge erred in ruling that since the husband's interest was greater than a life estate, the inheritance tax should be paid as if he took in fee, leaving the tax upon the remainderman to be imposed when, at *T's* death, it was known what amount they would take. It said the tax should have been paid on the widower's interest as a life estate and an immediate tax imposed upon the remainders according to the statutory formula. There was no discussion in the case of the effect of the power of invasion on the taxable value of the remainder interests. The real value was known, however, at the time the issue arose, for the life tenant had died and the corpus had passed intact to the remaindermen.

The testatrix in *In re Gochnour's Estate*<sup>84</sup> left her property to her husband with “full power to alienate the same for his use and benefit,” remainder over of “the proceeds thereof remaining” to her nieces and sisters. The question of this case was not at what evaluation the tax on either life estate or remainder interests was to be imposed, but whether in view of the statutory \$10,000 exemption to Class A beneficiaries, any tax was payable at all. The estate was in a lesser amount

<sup>81</sup> *Supra* note 79.

<sup>82</sup> “The word ‘probable’ implies a far different meaning than the word ‘possible.’” *Supra* note 80, at 285, 16 P. (2d) at 435.

<sup>83</sup> 190 Wash. 420, 68 P. (2d) 610 (1937).

<sup>84</sup> 192 Wash. 92, 72 P. (2d) 1027 (1937).

than the exemption. It was not necessary therefore to determine the method of taxing either life tenancy or remainder interests, if the full amount of the exemption applied.

The court, however, again discussed taxation of such interests without questioning application of the statutory formula.

But in *In re Bolstad's Estate*,<sup>85</sup> the estate exceeded in value the amount of the statutory exemption, and the problem of taxing the divided interests was therefore present. The bequest here was in trust for an incompetent son with power in the trustee to use the "principal and income for the care and maintenance of the cestui," remainder over to Class C beneficiaries. The trial court had held the entire estate passed for the use of the son by reason of the power to invade, and was therefore taxable as a bequest to lineals. The appellate court classified the bequest for tax purposes as one of divided interests and held that an immediate tax was imposable on the remainders "on the value of the estate in excess of ten thousand dollars" (the statutory exemption applicable to the life beneficiary). Again the court did not question the rationality of applying the statutory formula for evaluating divided interests to this type of bequest.

And in *In re Ivy's Estate*,<sup>86</sup> the court, disposing of the same kind of problem, where at the time the case was decided it was unknown how much of the corpus would be withdrawn said: "our inheritance tax statute and our opinions . . . foreclose the question".<sup>87</sup>

These cases, of course, deal primarily with taxation of the interest upon which the power is engrafted—that is, whether the preceding estate is taxable as a life tenancy or a fee. But with this the question of taxing the remainder is inextricably interbound, for if the precedent estate is taxed as a fee, it necessarily follows that imposition of a tax on the subsequent interests will await determination of what they receive, that is, what portion of the estate remains unconsumed. Such decision would solve our problem, and in failure to so hold, the court in effect is applying the statutory formula to ascertainment of the remainderman's interest. Mortality and actuaries' experience tables are apparently the measuring stick for all technical life estates, and the figure resulting from their use is the subtrahend to evaluate the remainder in all cases.

Courts passing upon exemptions claimed in favor of remainder interests on the ground of consanguinity or beneficence of purpose have denied them where the life tenant has unrestricted power to invade the principal. In such case it is said the amount of the remainder interest is too uncertain for the estate to establish its right to deduc-

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<sup>85</sup> 200 Wash. 30, 93 P. (2d) 726 (1939).

<sup>86</sup> 4 Wn. (2d) 1, 101 P. (2d) 1074 (1940).

<sup>87</sup> *Ibid.* at 8, 101 P. (2d) at 1077.

tion.<sup>88</sup>

In fact, deductions are, as one court said, only allowable where the interests concerned "can be made definite, and certain as of the date of the testator's death either by appraisal of the principal or fee interests then indefeasibly vesting, or by computation of similarly vesting interests in usufruct only, made according to the tables of mortality which the statute authorizes the state superintendent of insurance to use for the purpose."<sup>89</sup> Our own court has denied an exemption to a charitable institution on the ground that the bequest was so conditioned as to make the amount uncertain.<sup>90</sup>

If an exemption will not be allowed because actuaries' tables will not calculate the value of the precedent interest and so provide a means of ascertaining the remainder, how can a sovereign who bears the burden, by reason of the theory of its levy, of establishing that a beneficial interest is received, the amount, and the transferee thereof, impose a tax on such basis?

Our court has never answered this question. It has never discussed a power to invade a corpus in terms of its effect upon the *real* value of either precedent or subsequent interests with reference to taxation. To all queries as to application of the statutory formula, it has had a standard reply—that, according to the law of property, an interest otherwise a life tenancy upon which is engrafted a power to invade the principal, limited or unlimited, is still a life estate and the subsequent interest is a "vested remainder". And this is true.<sup>91</sup> But it is

<sup>88</sup> *Davis v. Com'r. Int. Rev.*, 81 F. (2d) 16 (C. C. A. 2d, 1936); *In re Mead's Estate*, *supra* note 62; *In re Bonner's Estate*, 157 Misc. 810, 285 N. Y. Supp. 283 (1936). In the last preceding case the interest was held not deductible because uncertain, although the power in the trustees to invade was limited to the support of the life cestui. Cf. *Blood v. Com'r. Int. Rev.*, 22 B. T. A. 1000 (1931): same result where the power was limited in terms to maintenance of wife, but broadly discretionary in the trustee, and no proof offered negating probability of invasion.

<sup>89</sup> *In re Smith's Estate*, *supra* note 32; *Edwards v. Slocum*, *supra* note 23, at 654: "Algebraic formulae are not lightly to be imputed to legislators."

Justice Brandeis expressed the matter very succinctly in *Humes v. U. S.*, *supra* note 29, at 494: "One may guess or gamble on or even insure against any future event. The solicitor general tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given a statute. Did Congress, in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency the actual value of which cannot be determined from any known data? Neither taxpayer nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character."

<sup>90</sup> *In re Duncan's Estate*, 113 Wash. 165, 193 Pac. 694 (1920).

<sup>91</sup> The remainder is technically vested subject to defeasance, rather than being subject to the condition precedent of its non-exercise. *RESTATEMENT, PROPERTY* (1936) § 276. The Washington court early recognized, however, that the precedent interest was greater than a life tenancy, even where

an answer which answers nothing.

For we are not dealing with property law except incidentally. Certainly we are not dealing with the ancient though admirable fictions of the common law. We are dealing with something very modern, and unfortunately very real—the taxation of inheritance. The legatee upon whom a tax is imposed is not interested, when called upon to pay it, in the technical definition of his interest. He is concerned, and vitally concerned, in what he receives in terms of real value. If he may receive nothing at all, he does not care whether his so-called estate is truly contingent, or vested subject to defeasance. For the state to tax upon such technicalities seems frankly ridiculous.

Many courts have taken this view.<sup>92</sup> Thus in *Tyler v. U. S.*,<sup>93</sup> a leading tax case, the court was urged to hold that the property of a deceased tenant by the entirety was not taxable because according to common law theory death did not pass the decedent's interest to the survivor. The answer was most emphatic that the exercise of the power to tax "must be determined by the actual results brought about by the death rather than by a consideration of the artificial rules which delimit the title, rights, and powers of tenants by the entirety".

Although the federal courts in considering deductions have given some attention to the question of whether the gift or bequest was subject to a condition precedent or was subject to be divested,<sup>94</sup> it has generally been said that deductibility did not depend on the technical nature of the estate created, but on whether the conditions rendered it so uncertain that it could be said to have no ascertainable value.<sup>95</sup>

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the power was limited to maintenance and support. *Porter v. Wheeler*, 131 Wash. 432, 436, 230 Pac. 640, 642 (1924). This case did not involve taxation of either interest, but whether the power carried the right of testamentary disposition. It was held that it did not; the court did not define the extent or limitations of the power except for the question before it. Its words were: "We shall not attempt to give to this estate so vested in (the widow) any technical name. It seems to be something more than an ordinary conventional life estate . . ."

<sup>92</sup> *Schoenheit v. Lucas*, 44 F. (2d) 476, (C. C. A. 4th, 1930), 107 A. L. R. 802; *Davison v. Com'r. Int. Rev.*, *supra* note 88; *Pennsylvania Co. v. Brown*, 6 F. Supp. 582 (E. D. Penn. 1923), *aff'd*, 70 F. (2d) 269, (C. C. A. 3d, 1934).

In *Lord v. Roberts*, 84 N. H. 517, 525, 153 Atl. 1, 5 (1931), the court said: "One having full title is not much more than a life tenant with power to dispose of the remainder. The value of the remainderman's property interest is lessened by the value of the power, and a life tenant with unrestricted power has about as much in value as the owner of the full title. An owner's right to dispose of an interest in remainder gives the ownership its chief value during the continuance of the antecedent estates."

<sup>93</sup> 281 U. S. 497, 503 (1930). The court's expression is most apt: "Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor."

<sup>94</sup> *U. S. v. Fourth Nat. Bank*, *supra* note 61.

<sup>95</sup> 107 A. L. R. 801, 802.

Conversely, it is not the technical nature of the estate created which permits a levy upon succession, but whether it has an ascertainable value—whether the beneficiary receives anything upon which a tax can be calculated.

As one court rather aptly put it: "If . . . technical vesting be admitted, what so passed was rather a theoretical possibility than a tangible reality, . . . the nominal and technical fee might never become a taxable estate. It was never intended by the law to tax a theory having no real substance behind it . . . *the question of taxation is one of fact and cannot turn on theories or fictions . . .*"<sup>96</sup>

But if our court's solution to this problem seems highly technical and its answer quite unrelated to the facts, what other shall be given under the terms of the statute by which it is governed? Taxation is a fundamental and imperious necessity of all government, not to be lightly denied.<sup>97</sup> Shall the state be left high and dry with its burden of proving the value of the remainder, with no means of doing so? For it does appear that the legislature has provided only one method of evaluating life estates and remainder interests. What shall the court do?

Will the statute bear the construction that conditional remainder interests, as distinguished from the property subject thereto, shall be appraised upon the transfer or as soon thereafter as practicable, thus abating the tax by postponing their evaluation until there is some reasonable means of doing so—even if it may not be practicable during the preceding estate at all? Possibly, but this is doubtful, as the court has already indicated.<sup>98</sup> Can the state simply sit out the eventuality? The court decided in *In re Munson's Estate*<sup>99</sup> that it could not; and the history of our inheritance tax legislation would seem clearly to demonstrate a legislative purpose to exact the state's due as speedily as possible.

But where the statutory formula cannot possibly evaluate the remainder interest—where to apply it is to indulge in legal logistics at the expense of all rationality, and to achieve a result which is so arbitrary as to be in fact confiscatory—perhaps there *is* a better answer than the court has given.

Might it not there say that the law has provided only a method which cannot be applied; and that since the state taxes inheritance and must therefore establish the value of that inheritance, it may introduce evidence, to prove that value—the same means the court approved to determine the identity of the probable ultimate beneficiary?<sup>100</sup> This would serve in those instances, for example, in which the

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<sup>96</sup> *In re Curtis' Estate*, *supra* note 28. Italics supplied.

<sup>97</sup> *Tyler v. U. S.*, *supra* note 93.

<sup>98</sup> *In re Phillips' Estate*, *supra* note 79.

<sup>99</sup> 189 Wash. 537, 66 P. (2d) 293 (1937).

<sup>100</sup> *In re Eaton's Estate*, *supra* note 80.

power to invade is limited to the support and maintenance of the life tenant, for there one could determine with at least some degree of accuracy how much of the principal might be consumed.<sup>101</sup>

Of course, this would still leave unsolved those cases where the power to invade is unlimited as to purpose. The transferee of such an "estate" is the remainderman of a mere chance, the life tenant will not exercise the absolute power granted him. What extrinsic evidence would establish the value of such an interest? But is not the answer in these cases that while there may be a technical "transfer"<sup>102</sup> at the time of the transferor's death, there is no *taxable* transfer, because there is no ascertainable value at all, unless we are now to establish value by the wildest of speculation. Imposition of the tax must be postponed of sheer necessity, for it cannot be levied until the rate is fixed, and that in turn cannot be done until the value of the interest can be determined.

We come back to this—either the statutory formula must be willy-nilly applied, or in many cases the state cannot impose the tax for the duration of the antecedent estate. Our court has chosen the first horn of the dilemma, and we must therefore conclude in terms of "B" of our problem, that all remainders, straight or conditional, and however conditioned, are taxed by the State of Washington at a valuation determined as of decedent's death by deducting from the value of the property, the value of the preceding interest measured according to the standards of mortality and actuaries' combined experience tables on the basis of four per cent annual interest. We must further conclude that such tax is due and payable as the tax upon all other interests, unless its payment is deferred by posting a bond in the sum of, and conditioned to pay the tax as so fixed within sixty days after the remainderman comes into possession—*of anything*.

The dilemma remains inherent in the statute nonetheless. And this is only one of many others which will continue to plague court and taxpayer alike so long as the inheritance tax statutes of this state continue a heterogeneity of law copied from this and that jurisdiction, combined with the session-to-session efforts of our own lawmakers to patch up

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<sup>101</sup> In *Sanderson v. Com'r. Int. Rev.*, 18 B. T. A. 221 (1929), for example, the court considered the age and spending habits of the annuitant. Other factors are the size of the income, and other revenue which may be available to the life tenant.

<sup>102</sup> In this connection, it is interesting to observe that the Washington court lately decided in *In re McCallaugh's Estate*, 193 Wash. 145, 151 74 P. (2d) 877, 880 (1938), that in granting exemption of property "transferred" within a year (now five years: WASH. LAWS 1939, c. 202 § 2; REM. REV. STAT. (Supp. 1939) § 11202-a), the legislature did not intend that no more than a year could elapse between the date of the two deaths, but that the year should begin to run from the date the property was distributed to and "received" by the transferee. The court said, somewhat significantly: "The fact that title to the property may vest at a particular time is not material...."

the most obviously weak of its very weak spots.

In terms of our own problem, the legislature should make up its mind whether it wishes to ignore the beneficiary entirely and tax the estate, or whether it does not. And if it does not, then surely there is some feasible method of imposing the tax on conditional remainders which will not result in such glaring inequities as the foregoing discussion has shown to exist under the Act as it is presently drafted.