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FEDERAL ESTATE AND GIFT TAX: CONCEPT OF A TRANSFER

*Henry J. Merry**

THE first of the "modern" federal death tax laws, enacted in 1916¹ "imposed upon the transfer of the net estate of every decedent"² a tax measured essentially by the net value of certain property interests at the time of his death.³ The tax was upheld as an indirect tax or excise upon the privilege of transmitting property at death⁴ and its fundamental nature has never been changed.⁵ There has been, however, an almost continuous controversy as to the property interests which may and should be included in the basic measure of the tax—the gross estate—and the present law embodies numerous amendments in this respect.⁶ The property interests included may be classified as (1) in-

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¹ Sept. 8, 1916, 39 Stat. L. 777-780, amended Mar. 3, 1917, 39 Stat. L. 1002, and Oct. 3, 1917, 40 Stat. L. 324-325. Subsequent enactments: Feb. 24, 1919, 40 Stat. L. 1096-1101; Nov. 23, 1921, 42 Stat. L. 277-284; June 2, 1924, 43 Stat. L. 303-313; Feb. 26, 1926, 44 Stat. L. 69-87. The 1926 act was amended as follows: May 29, 1928, 45 Stat. L. 862-863; Mar. 3, 1931, 46 Stat. L. 1516-1517; June 6, 1932, 47 Stat. L. 278-284; May 10, 1934, 48 Stat. L. 752-754; Aug. 30, 1935, 49 Stat. L. 1022-1023; June 22, 1936, 49 Stat. L. 1744-1745; May 28, 1938, 52 Stat. L. 564-565, 583. The 1926 act has now been superseded by an amended form: Feb. 10, 1939, 53 Stat. L. 120-140, 26 U. S. C. A. (1939), §§ 810-931, amended June 29, 1939, 53 Stat. L. 883. An additional enactment of June 6, 1932, 47 Stat. L. 243-245, was amended May 10, 1934, 48 Stat. L. 754-755; Aug. 30, 1935, 49 Stat. L. 1021-1022; and May 28, 1938, 52 Stat. L. 564. It is now superseded in amended form by the Act of Feb. 10, 1939, 53 Stat. L. 141-143, 26 U. S. C. A. (1939), §§ 935-938.

² 39 Stat. L. 777 (1916).

³ "A tax . . . equal to the sum of the following percentages [rates] of the value of the net estate. . . ." 39 Stat. L. 777 (1916). The net estate was defined as the gross estate less certain allowances or deductions, 39 Stat. L. 778 (1916), and the value of the gross estate includes "the value at the time of his death of all property" to the extent of various interests therein. 39 Stat. L. 777-778 (1916). Real property situated outside the United States was not excepted until 1934. 48 Stat. L. 754. The option of valuing the gross estate as of the date one year after the decedent's death was not granted until 1935. 49 Stat. L. 1022-1023.

⁴ *New York Trust Co. v. Eisner*, 256 U. S. 345, 41 S. Ct. 506 (1921). Distinguished from an inheritance tax: *Young Men's Christian Association v. Davis*, 264 U. S. 47, 44 S. Ct. 291 (1924).

⁵ See statutes cited in note 1, supra. There have been substantial changes as to rates, exemption and credits. See MONTGOMERY, *FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS*, 1938-39, pp. 156-157 (1938).

⁶ See Knouff, "Death Taxes on Completed Transfers Inter Vivos," 36 MICH. L.

terests passing by will or the laws of succession⁷ and (2) interests of which the decedent for no valuable consideration made a transfer *inter vivos* related in some manner to his death.⁸ The latter type of interests,

REV. 1284 (1938); Sutter and Owen, "Federal Taxation of Settlers of Trusts," 33 MICH. L. REV. 1169 (1935).

⁷ Property interests of the decedent at the time of his death, 53 Stat. L. 120 (1939), 26 U. S. C. A. (1939), § 811 (a); dower and curtesy interests of the surviving spouse, 53 Stat. L. 120 (1939), 26 U. S. C. A. (1939), § 811 (b); property passing under a general power of appointment executed by will, 53 Stat. L. 122 (1939), 26 U. S. C. A. (1939), § 811 (f).

⁸ (1) Transfers in contemplation of or taking effect at death.—Any property interest "of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death,"¹ or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom. . . ." 53 Stat. L. 121 (1939), 26 U. S. C. A. (1939), § 811 (c). The matter after the asterisk was introduced in 1931 and 1932. 46 Stat. L. 1516 (1931), 47 Stat. L. 279 (1932). The first part dates from 1916. 39 Stat. L. 777-778 (1916).

(2) Revocable transfers.—Any property interest "of which the decedent has at any time made a transfer . . . by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death." 53 Stat. L. 121 (1939), 26 U. S. C. A. (1939), § 811 (d) (1). Transfers prior to June 22, 1936, are not affected by the italicized matter. 53 Stat. L. 121 (1939), 26 U. S. C. A. (1939), § 811 (d) (2). The subsection was first enacted in 1924, 43 Stat. L. 304 (1924). See historical note, 26 U. S. C. A. (1935), pp. 140-141.

(3) Joint interests.—The property interest "held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent" as a gift. 53 Stat. L. 122 (1939), 26 U. S. C. A. (1939), § 811 (e). In general the subsection dates from 1916. 39 Stat. L. 778 (1916).

(4) Property passing under a general power of appointment exercised by deed in a transaction comparable to those described in paragraphs (1) and (2) above. 53 Stat. L. 122 (1939), 26 U. S. C. A. (1939), § 811 (f).

(5) Proceeds of life insurance.—"the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." 53 Stat. L. 122 (1939), 26 U. S. C. A. (1939), § 811 (g). Not changed since being introduced by the Revenue Act of 1918. 40 Stat. L. 1098 (1919).

The provisions quoted above in paragraphs (1), (2), (3) and (4) did not

included in the gross estate in an effort to prevent tax avoidance,⁹ have precipitated most of the Supreme Court decisions in the estate tax field,¹⁰ and as to the inclusion of these interests there has been "painfully developed" a "concept of a transfer"¹¹ which is unique.

The meaning of the word "transfer" has been influenced by the fact that, while the statute indicates a single taxable event—the transfer of the net estate—the courts have tended to find a transfer at death as to each item of property included in the gross estate.¹² In this regard transfers in contemplation of death¹³ are an exception, being related to death only by way of motive.¹⁴ In all other instances there is at the decedent's death the surrender of some interest, although such a general requirement is not explicit in the statute.¹⁵ The statutory provision concerning insurance¹⁶ makes no mention of the status existing at death. However, the inclusion of insurance proceeds in the gross estate has been upheld where the decedent at death possessed incidents of ownership in the policies, e.g., the power to change the beneficiary, because in such instance death brings about "the completion of that shifting of the economic benefits of property which is the real subject of the tax."¹⁷ On the other hand, inclusion of insurance has not been upheld where at death the decedent lacked control of the policies or proceeds, because "No interest passed to the beneficiary as the result of the death of the

apply to transferred property to the extent that the transfer was for "money or money's worth." See 53 Stat. L. 122 (1939), 26 U. S. C. A. (1939), § 811 (i), and unquoted portion of subsections noted in above paragraphs.

⁹ See PAUL, *STUDIES IN FEDERAL TAXATION* 27-59 (1937). See *infra* at notes 14 and 44.

¹⁰ The question producing the greatest volume of litigation is that of valuation. See index of valuation cases in HUGHES, *THE FEDERAL DEATH TAX* 323-386 (1938). Undoubtedly a vast number of valuation disputes are compromised in treasury department procedure either alone or in conjunction with the settlement of other issues.

¹¹ *Burnet v. Guggenheim*, 288 U. S. 280 at 287, 53 S. Ct. 369 (1933).

¹² Some indication that the measure of the tax must be reasonably related to the taxable event is found in *Nichols v. Coolidge*, 274 U. S. 531 at 542, 47 S. Ct. 710 (1927), and *Heiner v. Donnan*, 285 U. S. 312 at 330, 52 S. Ct. 358 (1932). But see *United States v. Jacobs*, 306 U. S. 363 at 371, 59 S. Ct. 551 (1939).

¹³ See note 8, *supra*, paragraph (1).

¹⁴ The inclusion was upheld as reasonably necessary to prevent tax avoidance. *Milliken v. United States*, 283 U. S. 15 at 20, 51 S. Ct. 324 (1931). The classic interpretation of the statutory phrase is found in *United States v. Wells*, 283 U. S. 102, 51 S. Ct. 446 (1931).

¹⁵ See note 8, *supra*.

¹⁶ See note 8, *supra*, paragraph (5).

¹⁷ *Chase National Bank v. United States*, 278 U. S. 327 at 338, 49 S. Ct. 126 (1929).

insured."¹⁸ In approving the inclusion of property held in joint tenancy¹⁹ (meaning in this article any co-tenancy giving rights of survivorship to property formerly owned by the decedent), the Supreme Court stated that "There was—at his death—a distinct shifting of economic interest, a decided change for the survivor's benefit."²⁰

The statutory provision embracing property interests "of which the decedent has at any time made a transfer . . . intended to take effect in possession or enjoyment at or after his death"²¹ has been applied to a variety of situations (including some transfers in trust now covered by a specific statutory provision²²), but in each the decedent possessed at his death some power or right reserved in a transfer inter vivos.²³ The provision was at first limited to "interests passing from the possession, enjoyment or control of the donor at his death."²⁴ Thus it was applied in *Reinecke v. Northern Trust Co.*²⁵ when the decedent reserved in a trust the power to revoke for his own benefit and in *Porter v. Commissioner*²⁶ when he reserved a power to modify a trust except for his own benefit, but it was not applied in *May v. Heimer*²⁷

¹⁸ *Bingham v. United States*, 296 U. S. 211 at 219, 56 S. Ct. 180 (1935). Cf. *Bailey v. United States*, (Ct. Cl. 1939) 27 F. Supp. 617, 30 F. Supp. 184, and (Ct. Cl. 1940) 31 F. Supp. 778. See, generally, Paul, "Life Insurance and Federal Estate Tax," 52 HARV. L. REV. 1037 (1939).

¹⁹ See note 8, *supra*, paragraph (3).

²⁰ *United States v. Jacobs*, 306 U. S. 363 at 371, 59 S. Ct. 551 (1939). See also *Tyler v. United States*, 281 U. S. 497 at 503, 50 S. Ct. 356 (1930); *Phillips v. Dime Trust & Safe Deposit Co.*, 284 U. S. 160, 52 S. Ct. 46 (1931).

²¹ See note 8, *supra*, paragraph (1).

²² See note 8, *supra*, paragraph (2).

²³ The Supreme Court has distinguished a power from a condition which the law imposes, *Helvering v. Helmholz*, 296 U. S. 93 at 97, 56 S. Ct. 68 (1935), and a power exercisable as trustee and one exercisable as settlor, *White v. Poor*, 296 U. S. 98, 56 S. Ct. 55 (1935).

²⁴ *Reinecke v. Northern Trust Co.*, 278 U. S. 339 at 348, 49 S. Ct. 123 (1929). The passing of "title or control" at death was expressed as a general requirement for estate tax liability in *Knox v. McElligott*, 258 U. S. 546 at 548-549, 42 S. Ct. 396 (1922).

²⁵ 278 U. S. 339, 49 S. Ct. 123 (1929). The case concerned seven trusts. The taxable estate was held to include the corpus of two trusts revocable by the transferor, but not to include the corpus of five irrevocable trusts, even though the transferor retained powers of management. In *Helvering v. Clifford*, (U. S. 1940) 60 S. Ct. 554, a settlor with trustee's powers was held liable for income tax on the income of a short term trust. Cf. *Helvering v. Wood*, (U. S. 1940) 60 S. Ct. 551.

²⁶ 288 U. S. 436 at 444, 53 S. Ct. 451 (1933), stating, "the reservation . . . made the settlor dominant. . . . His death terminated that control . . . and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living."

²⁷ 281 U. S. 238, 50 S. Ct. 286 (1930).

when he reserved a life interest. As to the latter situation the Supreme Court pointed out that the transfer inter vivos was "beyond recall"²⁸ and that the reserved interest of the decedent did not pass but was obliterated at death.²⁹ Similar reasoning was at first used where the decedent at death had a contingent reversion conditioned upon his surviving the donee,³⁰ although a previous decision had held that where such a reversion is vested the property is to be included in the gross estate.³¹ Recently, however, the technical nature of the distinction between contingent and vested reversions led the Supreme Court, in *Helvering v. Hallock*,³² to reverse its position as to the former. Whether contingent or vested, reversions of this type, being conditioned upon surviving the donee, have much in common with the joint tenant's right of survivorship.³³ In the *Hallock* case the Court stated that "The taxable event is a transfer inter vivos,"³⁴ but the general tenor of the opinion is that the transferred property is to be included because the transfer was not in substance complete until death.³⁵

The statute has been expanded to cover specifically transfers with a reservation of a power to revoke or to appoint, or a reservation of a life interest, and in providing that such powers or rights must be possessed at death³⁶ the statute bears out the principle that the taxable

²⁸ *Ibid.*, 281 U. S. at 243.

²⁹ *Ibid.*

³⁰ *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 at 43, 56 S. Ct. 74 (1935), stating "His death passed no interest" but "simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it"; *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 S. Ct. 78 (1935).

³¹ *Klein v. United States*, 283 U. S. 231, 51 S. Ct. 398 (1931).

³² (U. S. 1940) 60 S. Ct. 444. The distinction is recognized without dispute as to remainders. *TREAS. REG.* 80, art. 13 (1937).

³³ See dissenting opinion of Justice Stone in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 at 46, 56 S. Ct. 74 (1935). The *Hallock* case concerned situations in which the donee was the wife. In *Helvering v. St. Louis Union Trust Co.*, supra, and *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 S. Ct. 78 (1935), the beneficiaries to be outlived were children. The opinion in the *Hallock* case makes no point of this distinction and the decision was followed in *Bailey v. United States*, (Ct. Cl. 1940) 31 F. Supp. 778, where insurance proceeds would go to decedent's estate if he survived his wife and child.

³⁴ *Helvering v. Hallock*, (U. S. 1940) 60 S. Ct. 444 at 447.

³⁵ The Court quoted from the dissenting opinion in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 at 47, 56 S. Ct. 72 (1935): "it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form." *Helvering v. Hallock*, (U. S. 1940) 60 S. Ct. 444 at 449.

³⁶ See note 8, supra, paragraphs (1) and (2).

event is something occurring at death.³⁷ The subsection dealing with revocable trusts embraces instances in which the power is exercisable in conjunction with another person,³⁸ and where the other person is a beneficiary³⁹ there is some ground for saying that the power really gives no control over the property. The estate tax provision, however, was upheld in *Helvering v. City Bank Farmers' Trust Company*,⁴⁰ where the other person had a remainder interest in the income but was also the husband of the grantor. The Supreme Court stated that "Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion. . . ."⁴¹ Inasmuch as the estate tax law does not reach trusts revocable or terminable solely by another person, whether or not he is amenable, the essential factor seems to be a "veto power"⁴² the relinquishment of which at death constitutes the taxable event. The Court made no mention of a veto power, but stated that the inquiry is whether "a transfer, complete when made, shall be deemed complete only at the transferor's death,"⁴³ and held the provision in question reasonably necessary to prevent tax avoidance.⁴⁴ Even if the transfer inter vivos was complete when made, as is a gift in contemplation of death, it is significant that there is no estate tax liability unless some power is possessed by the decedent at his death.

The statutory provision⁴⁵ that the subsections relating to transfers inter vivos shall apply whether the original transfer was made before or after the enactment of the statute in effect at the decedent's death may indicate that the taxable event is the transfer inter vivos. That

³⁷ Cf. *Helvering v. Bullard*, 303 U. S. 297 at 301, 58 S. Ct. 565 (1938). See note 88, *infra*.

³⁸ See note 8, *supra*, paragraph (2).

³⁹ A comparable provision in the income tax law taxes the settlor on the income of a trust revocable by the settlor, or "any person not having a substantial adverse interest" or both. 53 Stat. L. 68 (1939), 26 U. S. C. A. (1939), § 166. A beneficiary is deemed to have such an interest. *Savage v. Commissioner*, (C. C. A. 3d, 1936) 82 F. (2d) 92. As to a trustee, see *Reinecke v. Smith*, 289 U. S. 172, 53 S. Ct. 570 (1933).

⁴⁰ 296 U. S. 85, 56 S. Ct. 70 (1935).

⁴¹ *Ibid.*, 296 U. S. at 90.

⁴² See PAUL, *STUDIES IN FEDERAL TAXATION* 55 (1937).

⁴³ *Helvering v. City Bank Farmers' Trust Co.*, 296 U. S. 85 at 90, 56 S. Ct. 70 (1935).

⁴⁴ "A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process." *Ibid.*, 296 U. S. at 90.

⁴⁵ 53 Stat. L. 124 (1939), 26 U. S. C. A. (1939), § 811 (h), first enacted in 1924, 43 Stat. L. 305. See historical note, 26 U. S. C. A. (1935), pp. 140-141.

conclusion may seem to be fortified by the cases denying "retroactive application" in certain instances, but these cases are not at all consistent and it appears that the limits on "retroactive application" may be traced to the statutory provision itself. The provision was introduced in the 1918 act and was confined until 1924 to transfers in contemplation of or taking effect at death.⁴⁶ The courts made the limited nature of the provision a basis for denying "retroactive application" of the 1916 act⁴⁷ and other subsections of the 1918 act.⁴⁸

The leading case denying "retroactive application" is *Nichols v. Coolidge*,⁴⁹ where the Constitution was deemed to prohibit inclusion of property transferred in 1907 with a reservation of income for life. The reserved interest, however, was relinquished prior to death, and although the Court made no point of that fact, it can hardly be overlooked. Moreover, in *May v. Heiner*,⁵⁰ a transfer with a similar reservation made after 1916 was likewise held not to be a transfer taking effect in possession or enjoyment at death. The statutory provision specifically embracing such transfers⁵¹ was upheld in *Helvering v. Bullard*,⁵² and in *Hassett v. Welch*⁵³ it was deemed to have no "retroactive" effect both as a matter of statutory interpretation and because a treasury department ruling to that effect apparently met the approval of Congress.⁵⁴ The other leading cases denying "retroactive application," *Helvering v. Helmholz*,⁵⁵ *White v. Poor*,⁵⁶ and *Bingham v. United States*⁵⁷ were also decided on more than one ground. The recent decision in *United States v. Jacobs*⁵⁸ that property held in a joint tenancy created prior to 1916 may be included in the gross estate casts considerable doubt upon the materiality of the date of the transfer *inter vivos*.⁵⁹

⁴⁶ 40 Stat. L. 1097 (1919); 42 Stat. L. 278 (1921).

⁴⁷ *Schwab v. Doyle*, 258 U. S. 529 at 536, 42 S. Ct. 391 (1922), gift in contemplation of death; *Knox v. McElligott*, 258 U. S. 546, 42 S. Ct. 396 (1922), joint tenancy.

⁴⁸ *Lewellyn v. Frick*, 268 U. S. 238 at 252, 45 S. Ct. 487 (1925).

⁴⁹ 274 U. S. 531, 47 S. Ct. 710 (1927).

⁵⁰ 281 U. S. 238, 50 S. Ct. 286 (1930).

⁵¹ See note 8, *supra*, paragraph (1).

⁵² 303 U. S. 297, 58 S. Ct. 565 (1938).

⁵³ 303 U. S. 303, 58 S. Ct. 559 (1938).

⁵⁴ *Ibid.*, 303 U. S. at 310-313.

⁵⁵ 296 U. S. 93, 56 S. Ct. 68 (1935).

⁵⁶ 296 U. S. 98, 56 S. Ct. 66 (1935).

⁵⁷ 296 U. S. 211, 56 S. Ct. 180 (1935).

⁵⁸ 306 U. S. 363, 59 S. Ct. 551 (1939).

⁵⁹ "Neither the amount of the tax nor its application to the survivor's change of status and ownership, was in any manner dependent upon the date of the joint ten-

In general, it appears that the basis for including property transferred by decedent during his lifetime is the extinguishment at his death of some reserved interest in the property.⁶⁰ The interest is generally of one of two types: (1) powers giving control over the disposition of the property, e.g., the power to revoke, modify or appoint; and (2) rights giving some definite interest in the property—the right of a joint tenant, a life tenant or a reversioner. Transfers creating the latter type of interests have two significant characteristics. They are “beyond recall” and they “split up the fee.” The value of such interests rests in part upon the life expectancy of the donor and, also, in some cases, the life expectancy of the donee. The ratio of their value to the value of the “fee” is not constant and in most instances will decline as the years pass.⁶¹ As a general rule their value does not approximate the value of the “fee” as does the value of powers which give control over disposition. The estate tax law, however, makes no distinction. When either type is present at death the value of the entire “fee” is included in the gross estate.⁶²

The Supreme Court has required a transfer at death and then defined transfer broadly—“the shifting of economic benefits”⁶³—so as to include the mere relinquishment or extinguishment of a power or right. There has been a definite tendency to find a taxable transfer as to the whole property when the final interest therein is surrendered although the bulk of economic benefit may have passed beyond recall at some previous time. This result may be due in part to the fact that in all the leading cases the transfer *inter vivos*, while without considera-

ancy’s creation, whether before, or after, 1916.” *United States v. Jacobs*, 306 U. S. 363 at 371, 59 S. Ct. 551 (1939). See also *Sanford’s Estate v. Commissioner*, 308 U. S. 39 at 43, 60 S. Ct. 51 (1939).

⁶⁰ It is not enough that the decedent caused a transfer from one party to another to be conditional upon his death. The proceeds of insurance policies as to which the decedent retained no incidents of ownership are not included in his taxable estate although they are paid at his death. *Bingham v. United States*, 296 U. S. 211, 56 S. Ct. 180 (1935). The income beneficiary of some of the trusts held non-taxable in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123 (1929), changed at the death of the settlor.

⁶¹ The proportionate value of a life interest naturally declines. As to a right of survivorship, the donor in the majority of cases at least has the shorter life expectancy, and the probability of his being the survivor decreases as time passes.

⁶² *TREAS. REG. 80*, art. 15 (1938). See *United States v. Jacobs*, 306 U. S. 363 at 371, 59 S. Ct. 551 (1939), where all of a severable joint tenancy was included.

⁶³ “. . . the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title.” *Sanford’s Estate v. Commissioner*, 308 U. S. 39 at 43, 60 S. Ct. 51 (1939).

tion, appears to have occurred when there was no gift tax law.⁶⁴ The reservation of interests would not seem to be so important where the transfer inter vivos was subject to gift tax (in force from 1924 to 1926, and from 1932 to date⁶⁵) because "An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes. . . ."⁶⁶ However, the same emphasis on reserved interests is developing in the gift tax. This tax is also a transfer tax,⁶⁷ and Congress in enacting the law is considered to have adopted "the concept of a transfer, so painfully developed in respect of taxes on estates."⁶⁸

In *Burnet v. Guggenheim*,⁶⁹ the relinquishment inter vivos of a power to revoke (which relinquishment left the grantor with no further interest in the property) was, in accordance with the treasury department regulations,⁷⁰ held to be a taxable gift because "a gift is not consummate until put beyond recall."⁷¹ More recently, in *Sanford's Estate v. Commissioner*,⁷² it was held, perhaps contrary to

⁶⁴ One of the five cases (No. 183) considered in the Hallock case occurred during 1925 when a gift tax was in force. *Helvering v. Hallock*, (U. S. 1940) 60 S. Ct. 444 at 449.

⁶⁵ June 2, 1924, 43 Stat. L. 313-316. Held invalid as to bona fide gifts not in contemplation of death and completed prior to approval of act. *Blodgett v. Holden*, 275 U. S. 142, 48 S. Ct. 105 (1927); *Untermeyer v. Anderson*, 276 U. S. 440, 48 S. Ct. 353 (1928). The statute was held valid as to gifts completed after approval of act. *Bromley v. McCaughn*, 280 U. S. 124, 50 S. Ct. 46 (1929). It was repealed Feb. 26, 1926, 44 Stat. L. 125 at 126, but reenacted June 6, 1932, 47 Stat. L. 245-259, and amended: May 10, 1934, 48 Stat. L. 758-762; Aug. 30, 1935, 49 Stat. L. 1023-1025; May 28, 1938, 52 Stat. L. 565, 583. It has now been superseded by the act of Feb. 10, 1939, 53 Stat. L. 144-157, 26 U. S. C. A. (1939), §§1000-1031. As to the advantages of transferring part of a prospective estate by gift, due to the lower rates of the gift taxes, the double use of exemptions and the lower brackets, etc., and the disadvantages thereof, see MONTGOMERY, FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS, 1938-39, pp. 423-437 (1938).

⁶⁶ *Sanford's Estate v. Commissioner*, 308 U. S. 39 at 44, 60 S. Ct. 51 (1939). It may be noted that during the six-year period (1926 to 1932) in which there was no gift tax, the estate tax contained a conclusive presumption as to gifts in contemplation of death. See *Hesslein v. Hoey*, (C. C. A. 2d, 1937) 91 F. (2d) 954 at 956.

⁶⁷ 53 Stat. L. 144 (1939), 26 U. S. C. A. (1939), § 1000. See also note 65, supra.

⁶⁸ *Burnet v. Guggenheim*, 288 U. S. 280 at 287, 53 S. Ct. 369 (1933).

⁶⁹ 288 U. S. 280, 53 S. Ct. 369 (1933).

⁷⁰ *Ibid.*, 288 U. S. at 283, quoting TREAS. REG. 67, art. 1 (1924).

⁷¹ *Ibid.*, 288 U. S. at 286.

⁷² 308 U. S. 39, 60 S. Ct. 51 (1939). See also *Hesslein v. Hoey*, (C. C. A. 2d, 1937) 91 F. (2d) 954, cert. denied 302 U. S. 756, 58 S. Ct. 284 (1937). As to tax on the income of such a trust, see *Knapp v. Hoey*, (C. C. A. 2d, 1939) 104 F. (2d) 99.

the then existing regulations,⁷³ that the relinquishment inter vivos of a power to modify or appoint constituted a taxable gift. The Supreme Court stated that there is nothing apparent in the gift tax law or its legislative history to indicate that "the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death."⁷⁴ This principle seems unobjectionable if the word "complete" means without a reservation giving control over disposition—the type of reservation found in the *Reinecke*, *Porter*, *Guggenheim* and *Sanford* cases—but "complete" may mean without any reservations whatsoever. The above quoted words were written by Justice Stone, whose statement in the dissenting opinion in the *St. Louis Trust* case,⁷⁵ that a reversion conditioned upon surviving the donee leaves a transfer incomplete, was quoted approvingly in the majority opinion of the *Hallock* case.⁷⁶ If these statements, which are to some extent dictum, can be taken to mean that there is no gift tax liability on a transfer with a conditional reversion, the application of the gift tax law would seem to face some substantial changes.

The courts have disapproved of subjecting the same property to gift tax at two different times⁷⁷ or to both estate and gift tax. An exception is admitted in the case of gifts in contemplation of death.⁷⁸ There may be other instances. The present gift tax regulations provide that there is some liability upon the creation of (1) a joint ten-

⁷³ TREAS. REG. 67, art. 1 (1924), under the 1924 act and TREAS. REG. 79, art. 3 (1932) under the 1932 act, stated that there was a gift when a power to revoke is terminated. In the *Sanford* case the donor had previously relinquished the power to revoke, but retained the power to appoint. *Sanford's Estate v. Commissioner*, 308 U. S. 39 at 41, 60 S. Ct. 51 (1939). The decision that gift tax liability arose upon the surrender of the final right in the property is significant and the regulations probably were intended to cover situations in which the relinquishment of the power to revoke left the donor with no interest in the property. The regulations have been amended. TREAS. REG. 79 (1936 ed.), art. 3.

⁷⁴ *Sanford's Estate v. Commissioner*, 308 U. S. 39 at 44, 60 S. Ct. 51 (1939).

⁷⁵ *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 at 46-47, 56 S. Ct. 74 (1935).

⁷⁶ *Helvering v. Hallock*, (U. S. 1940) 60 S. Ct. 444 at 449.

⁷⁷ "Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power." *Burnet v. Guggenheim*, 288 U. S. 280 at 285, 53 S. Ct. 369 (1933).

⁷⁸ *Hesslein v. Hoey*, (C. C. A. 2d, 1937) 91 F. (2d) 954 at 956.

ancy,⁷⁹ (2) a life interest in another⁸⁰ (leaving the donor a reversion), and (3) a vested remainder⁸¹ (leaving the donor a life interest), although it has been well settled for some years that the entire "fee" is included in the gross estate if the donor retains the respective reserved interest until death.⁸² The gift tax liability in such cases, however, is not measured by the value of the entire "fee" but by the value of the right actually transferred,⁸³ and the relinquishment inter vivos of the interest reserved is likewise considered to result in gift tax liability, measured probably by the then value of that interest.⁸⁴ It is significant that the reserved interests in these situations do not give control over disposition. The type of interests involved in the *Hallock* case, and possibly in the *City Bank* case,⁸⁵ are essentially of the same class, and it is submitted that they should be accorded similar treatment for gift tax purposes, whatever finally that may prove to be. Because of the manner in which the tax is measured, there is nothing unfair in the present method of taxing both the original transfer and the relinquishment inter vivos. "Double taxation" results only when the relinquishment is caused by death.

When property as to which a gift tax has been paid is included in the gross estate, the estate tax law allows a credit for gift taxes paid,⁸⁶ but that credit does not afford a full measure of relief. The property is included at the value of the date of death and not the value at the date of gift, but the credit is computed on the basis of the lower of the two values and the average estate tax on the entire gross estate. It is further limited by the affected property's pro rata share of the gift tax paid for the year of the gift. In contrast, however, the inclusion of the property in the gross estate causes higher rates to be applied to some of

⁷⁹ TREAS. REG. 79, art. 2 (7), (8) (1936 ed.).

⁸⁰ *Ibid.*, art. 19 (7).

⁸¹ *Ibid.*, art. 11.

⁸² *Tyler v. United States*, 281 U. S. 497, 50 S. Ct. 356 (1930), joint tenancy; *Klein v. United States*, 283 U. S. 231, 51 S. Ct. 398 (1931), reversion; 46 Stat. L. 1516 (1931), and note 8, *supra*, paragraphs (1) (2), life estate.

⁸³ TREAS. REG. 79, art. 19 (7), (8) (1936 ed.). Cf. *J. C. Gutman v. Commissioner*, 41 B. T. A. No. 108 (Apr. 11, 1940).

⁸⁴ The portion of the "fee" taxed at relinquishment would probably vary from the portion not taxed at the original transfer, because the values would depend to some extent upon life expectancies. See TREAS. REG. 79, art. 19 (7), (8) (1936 ed.); and note 61, *supra*.

⁸⁵ A transfer in trust revocable by the settlor and a beneficiary might be held a taxable gift to the extent of the beneficiary's interests. See, generally, MONTGOMERY, *FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS*, 1938-39, pp. 386-387 (1938).

⁸⁶ 53 Stat. L. 125, 142-143 (1939), 26 U. S. C. A. (1939), §§ 813 (a), 936(b).

the estate and its inclusion as a gift will result in higher rates being applied to any gifts made in subsequent years. Even if the credit gave a full measure of relief it would not justify the estate tax's identical treatment of the two classes of reserved interests. A transfer in which control is not reserved is substantially less testamentary in character than a transfer in which control is reserved. The transferor who reserves a life estate or a right of survivorship does not have the essential control over disposition possessed by the man who has made his will or last testament or the donor who may recall his gift or appoint a new donee.

On the other hand, a transfer reserving a right terminable at death should not be treated the same as a transfer without any reservation. Inasmuch as what is being taxed is not the transfer *inter vivos* but the relinquishment at death, it would seem reasonable to take into account in some way the value of the interest reserved until death. The estate tax cannot reasonably include such rights at their value at death because by their nature they would have little or no value at that time. Everything considered, there would seem to be realistic basis for a provision that in case a person dies possessed of powers or rights as to property transferred by him *inter vivos*, his gross estate shall include that fraction of the value of the "fee" which was not subject to a gift tax, the fraction of value not subject to gift tax to be determined on the basis of the value at the date of the gift and applied for estate tax purposes to the value at the date of death.⁸⁷ By some such provision the amount included in the gross estate because of a reservation in a transfer *inter vivos* would be reasonably related to the nature of the interest reserved.

Such a provision would eliminate the need for a credit for gift taxes paid except in the case of gifts in contemplation of death. The purpose of including such transfers might be accomplished with much less administrative difficulty by providing that property donated in the calendar year of death, and perhaps if death occurred prior to, say March 1st, that donated in the preceding calendar year, shall not be subject to gift tax, but shall be included in the gross estate. Such a provision would affect only gifts now reportable after the donor's death. Some strong arguments might be made for its validity if it is not

⁸⁷ The determination of the fraction of value not subject to gift tax is essentially the same type of computation now required in determining gift tax liability in the case of joint tenancies, life interests and remainders. TREAS. REG. 79, art. 19 (1932). It would seem desirable to determine this fraction of value before any exclusions or exemptions.

expressed in terms of a conclusive presumption and if the donated property is included at the value at the time of the gift.⁸⁸

So far as concerns transfers with a reservation of rights, the estate tax is, in large measure at least, a tax on relinquishments mainly as a result of efforts to prevent tax avoidance during a period when only the relinquishment could be taxed. The development of the gift tax in the same direction may have revenue benefits if the original transfer was not and cannot be subjected to tax, but the number of such instances naturally will decrease and the real result will be to postpone the taxable event beyond the time when the bulk of economic benefit is transferred. It is now and has been for several years possible to tax the original transfer, as well as the relinquishment, and it would seem reasonable to tax the original transfer to the extent that it constitutes a surrender of control and to tax the balance at the relinquishment of the reserved right. This may increase the relative importance of the gift tax, but only because the estate tax has been over-emphasized in the past. There is no longer any necessity for taxing the whole property when the final right therein is surrendered. Regardless of whether the estate and gift taxes remain separate systems or are integrated in a single system (with the tax rate brackets for transfers at death dependent upon the amount of accumulated gifts),⁸⁹ it would seem reasonable for Congress and, where possible, for the courts to give "transfer" a more balanced meaning than that so painfully developed, in respect of taxes on estates, during a period when death was the only occasion for the assessment of a transfer tax.

⁸⁸ Some support may be found in *Helvering v. Bullard*, 303 U. S. 297 at 301, 58 S. Ct. 565 (1938): "Since Congress may lay an excise upon gifts it is of no significance that the exaction is denominated an estate tax or is found in a statute purporting to levy an estate tax. Moreover, Congress having the right to classify gifts of different sorts might impose an excise at one rate upon a gift without reservation of a life estate and at another rate upon a gift with such reservation." See Knouff, "Death Taxes on Completed Transfers Inter Vivos," 36 MICH. L. REV. 1284 at 1303-1311 (1938). As to the use of the value at the date of death, see *Heiner v. Donnan*, 285 U. S. 312 at 330, 52 S. Ct. 358 (1932). The statement in the *Bullard* case may or may not apply where the basis for classification is an event occurring between the date of the gift and the day on which the tax is due. A somewhat similar situation is found in regard to the income tax. 53 Stat. L. 17, 26 U. S. C. (1939), § 24 (c).

⁸⁹ See Knouff, "Death Taxes on Completed Transfers Inter Vivos," 36 MICH. L. REV. 1284 at 1311 (1938).