Taxation—Gift Tax—Taxing Transfer in Trust Where Power to Change Cestuis Is Retained—[Federal].—In 1934 the plaintiff created a trust for donee beneficiaries, reserving to himself the power to change the beneficiaries of income and principal and the power to alter the trust in any manner not beneficial to himself or his estate. The settlor paid a federal gift tax on the total transfer, and, claiming the tax was illegally collected, brought this action against the collector to recover the amount paid. *Held* (A. Hand, C. J., dissenting), the reservation of powers prevented the transfer from being taxable as a gift within the meaning of the statute.[1] *Hesslein v. Hoey.*[2]

Income[3] and estate[4] taxes upon revocable trusts have been upheld; this case represents the first attempt to tax a revocable trust under the federal gift tax statute. The majority opinion was influenced by the circumstance that a reservation of power to alter, when cut off by the settlor's death, makes the transfer subject to an estate tax,[5] or, if terminated in his lifetime, taxable under the gift tax act.[6] But this fact does not mean, necessarily, that there is not also a present transfer, for it is clear that in the instant case, at least, the settlor has parted with all beneficial interests. Although it may seem paradoxical to tax the same transaction both as a completed gift and as a part of the settlor's estate, a slight study of the transfer shows that some property passes presently, some later, and the problem of precisely evaluating how much passes at either time is unsolvable. So regardless of when the total tax is levied, more property is being taxed than actually has passed at that time. Since the taxpayer is either post-paying or pre-paying part of the tax, the controversy is over the enjoyment of the tax money in the interval between the original transfer and the transferor's death. Constitutional arguments that imposing a tax at a time when no substantial interest has passed is a violation of due process may be disposed of on the ground of administrative necessity.[7] Thus, the problem is narrowed to one of construing the statute.

That Congress did not intend the estate tax and gift tax to be mutually exclusive, is indicated by provisions in the former act for deductions for gift taxes collected on the same property.[8] The majority opinion slides over this argument by citing one example where the deduction provision would apply, *i.e.*, a gift in contemplation of death. On the other hand, it is argued that because the donee may be held personally liable under the act,[9] it is unlikely that Congress meant to tax a transfer where the bene-

[1] Revenue Act 1932, § 501 (a)(b), 47 Stat. 245 (1932), 26 U.S.C.A. 550 (a)(b) (1936).

[2] 91 F. (2d) 954 (C.C.A. 2d 1937).

[3] Corliss v. Bower, 281 U.S. 376 (1930); *Cf.* Burnet v. Wells, 289 U.S. 670 (1932); Douglas v. Willents, 296 U.S. 1 (1935); see also 2 Bogert, Trusts and Trustees §§ 266–7 (1935).

[4] Porter v. Commissioner, 288 U.S. 436 (1933).

[5] *Ibid.*, note, however, that this case was decided under the Revenue Act of 1926, which contained no gift tax provisions.

[6] Burnet v. Guggenheim, 288 U.S. 280 (1933) (but the donor could revest title in himself).

[7] "But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured." Holmes, J. in Schlesinger v. State of Wisconsin, 270 U.S. 230 (1926); Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935), noted 49 Harv. L. Rev. 491 (1936) (transfer in trust, revocable only with the consent of a beneficiary and the trustee, held taxable as part of the transferor's gross estate).

[8] Revenue Act 1932, § 801, 47 Stat. 278, 26 U.S.C.A. § 413(a)(2).

[9] Revenue Act 1932, § 510, 47 Stat. 249, 26 U.S.C.A. § 559.

ficiary may be deprived of any interest at the will of the settlor. Practically speaking, it is extremely unlikely that such a situation would ever occur in the case of a transfer in trust, since the government is fully protected by its lien on the trust *res* and by the liability of the donor. Finally, although, as shown by its history,[10] the gift tax was primarily intended to supplement the estate tax statute, originally, by preventing circumvention of the latter,[11] another reason for its enactment was to provide immediate revenue.[12] In view of the extended scope given the estate tax act by court decisions,[13] it appears that the original reason has become subordinated to the latter,[14] since it is now largely a superfluous check.

Since the construction arguments on neither side are compelling, the problem should be solved from the practical angle of the best method of administration of the statute. Looked at in this light, there seems to be no reason why the government should not tax all revocable trusts under both the gift and estate tax statutes.[15] The government would gain greater certainty of collection by getting immediate revenue, avoiding the risk of depreciation of the property. Such a procedure would eliminate doubt as to the effect of reservation of powers[16] on the taxability under the gift act of a transfer in trust, thus eliminating much litigation.

Torts—Dead Bodies—Recovery by Widow for Mental Suffering Caused by Autopsy of Husband—[Indiana].—Under the Indiana workmen's compensation law an employer may require an autopsy in any case of death.[1] The insurance carrier of

[10] The original gift tax was repealed when a conclusive presumption was established that gifts within two years of death were in contemplation of death and subject to an estate tax. 44 Stat. 70, 126 (1926). When this provision was invalidated, the present tax was enacted. Heiner v. Donnan, 285 U.S. 312 (1932); 47 Stat. 245 (1932), 26 U.S.C.A. § 550 (1934).

[11] 75 Cong. Rec., pt. 5, 5691, 5788. (1932).

[12] *Ibid.* Crisp, Chairman House Ways & Means Committee: "The Committee wanted to hold an invitation to the holders of these enormous estates to dissipate them, or to divide them before death, and the committee knew that if this was done the Government would begin to get taxes on these distributions and not have to wait until the owner died." Gift tax rates are uniformly 25% lower than estate tax rates.

[13] Porter v. Commissioner, 288 U.S. 436 (1933); Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935). The decision of the City Bank case would seem to include a revocable trust of any nature within the estate tax provisions.

[14] Revenue collected under these acts in the last two years: Estate tax, 1935, $140,441,000; 1936, $218,781,000; gift tax, 1935, $71, 671,000; 1936, $160,059,000. 14 Tax Mag. 687 (1937).

[15] Double taxation is avoided by the deduction allowances in the estate tax law. Since state inheritance taxes commonly do not allow for federal gift taxes, the suggested solution would increase the tax burden of the donor, but that condition is one for the states to alleviate. See 44 Yale L. J. 1409, 1423 (1935).

[16] See Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935). Would a gift tax be leviable in the City Bank situation? It seems probable that it would be; if so, where is the line between it and the instant case? See also Equitable Trust Co. of New York v. Commissioner, 31 B.T.A. 329 (1934).

[1] 18 Burns' Ind. St. Ann. 1933, § 40–1227. "The employer, or the industrial board, shall have the right in any case of death to require an autopsy at the expense of the party requiring same. No autopsy shall be held in any case, by any person, without notice first being given to