

fiary 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 powers¹⁶ 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.¹⁷ 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¹⁰ The original gift tax was repealed when a conclusive presumption was established that gifts within two years of death were in contemplation of death and subject to an estate tax. 44 Stat. 70,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).

¹⁷ 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

an employer held a post mortem, apparently without notifying the next of kin, on the body of an employee who had died after an injury. The decedent's widow recovered a judgment for \$2,500 for mental suffering caused by alleged wrongful and illegal mutilation of the dead body. On appeal, *held*, affirmed. The statutory conditions not having been complied with, the autopsy was an illegal invasion of the widow's right to possession of the remains. *Aetna Life Ins. Co. v. Burton*.²

Although the cases on unauthorized autopsies are in conflict, the majority of American courts allow recovery, contrary to the common law rule that a corpse is not property and that no civil action lies against one disturbing a dead body.³ The statute appears to give the employer⁴ an unqualified right to require an autopsy upon notice to the widow,⁵ but the Indiana court apparently regards her consent a condition precedent to the exercise of this right.⁶ The court has indicated by dictum that a refusal of consent will not deprive dependents of their right to compensation.⁷ By analogy to treatment of accident policy provisions for autopsies, this attitude seems unreasonable, and would in effect nullify the statutory provision. Such insurance contract provisions are enforceable if the right is reasonably exercised,⁸ and unreasonable refusal of consent to an autopsy may forfeit the beneficiary's right to recover.⁹ The language used in the instant case is misleading, but the result may be justifiable if confined to cases of failure to give notice. If, however, the rule is extended to require actual consent by the widow, then the employer's only recourse may be to a court order, which if not immediately forthcoming may present practical difficulties. Thus, all practical possibility of ascertainment by the insurer of the cause and compensability of the employee's death¹⁰ is precluded by the threat of civil liability.

the widow or next of kin, if they reside in this state or their whereabouts can reasonably be ascertained, of the time and place thereof and reasonable time and opportunity given such widow or next of kin to have a representative or representatives present to witness the same: Provided, If such notice is not given all evidence obtained by such autopsy shall be suppressed on motion duly made by the industrial board."

² 12 N.E. (2d) 360 (Ind. App. 1938).

³ See Rogers, Recovery for Mental Anguish Resulting from the Mutilation of a Corpse, 33 Law Notes 225 (1930).

⁴ An insurance carrier has been held to be an "employer" within the meaning of the Act. *Employers' Liability Assurance Co. v. Indianapolis & Cincinnati Traction Co. et al.*, 195 Ind. 91, 142 N.E. 856 (1924).

⁵ See *Indianapolis Abattoir Co. v. Bryant*, 67 Ind. App. 225, 119 N.E. 24 (1918); *Vonnegut Hdw. Co. v. Rose*, 68 Ind. App. 385, 120 N.E. 608 (1918).

⁶ Whether even notice is a condition to exercise of the right to have an autopsy may be questioned in the light of the last proviso of the section. See note 1 *supra*.

⁷ "Neither can it be implied from the statute as a whole that the Legislature intended any penalty to follow a refusal. In our judgment, the refusal of the claimant to consent to an autopsy would not deprive the board of jurisdiction to proceed to a final disposition of the case." *Indianapolis Abattoir Co. v. Bryant*, 67 Ind. App. 225, 228, 119 N.E. 24 (1918).

⁸ Vance, *Insurance* § 273 (2d ed. 1930); see *Painter v. U.S. Fidelity & G. Co.*, 123 Md. 301, 91 Atl. 158 (1914) (receiver for vital organs appointed when consent denied).

⁹ *Patterson v. Ocean Accident & G. Corp.*, 25 App. D.C. 46 (1905).

¹⁰ "The purpose of the lawmaking body in enacting such statute was, no doubt, for the protection of the employer against unjust claims, particularly against the payment of com