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THE EFFECT OF RENUNCIATIONS AND COMPROMISES ON DEATH AND GIFT TAXES

WALTER E. BLACK, JR.*

I. Introduction

When a man dies, it must be decided how his property shall be distributed. Ordinarily, the distribution will follow his express intention as evidenced in a will or the presumed intention of the state laws of intestacy. In these ordinary situations, the state death tax is applied to the various legacies and devises and to the property passing by descent in the manner provided by the state tax statutes. Thus, the majority of testamentary distributions are carried out without any state death tax problems.

However, in some cases, events occur after the death of the decedent which change the testator's or intestacy law's scheme of distribution. A legatee or devisee may renounce under the will, leaving the property to be distributed elsewhere. The wife of the decedent may elect to take her dower interest, her statutory share, or her interest under an ante-nuptial agreement rather than what her husband has provided in his will. The appointee of a power may renounce his interest under such power. There may be a will contest, which upsets the will of the decedent in favor of his heirs. Or there may be a compromise agreement between interested parties to prevent costly litigation. Any of these events will raise state death tax problems.

Where state death tax statutes are of the inheritance tax type, these changes in the distribution plans may have an important effect on the amount of the tax. The inheritance tax is imposed on the transfer of the property, and the relation of the transferee to the decedent is directly reflected in the rates. Some statutes have no inheritance tax at all on transfers to close relatives. Other statutes tax transfers to close relatives at a low rate, and transfers to "strangers" at a higher rate. Also, the rates on charitable gifts may be of importance. These changes after the death of the decedent will frequently cause a change in the beneficiary, which may mean a change in the tax rate. A change in the beneficiary may also alter the statutory exemption. Particularly is this so where spouses or charities are involved. The question which arises when the state government assesses the tax is what rates and exemptions shall be applied. This discussion will be directed toward answering that question.

Although renunciations and compromises do not have as great an effect on death taxes of the estate tax type, there are situations there, also, where

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such changes may be significant. The most important and most comprehensive estate tax statute is that found in the Internal Revenue Code. Under the Code, renunciations and compromises may affect, in particular, the marital deduction and the charitable deduction. The state estate tax problems are similar to those arising under the federal statute after which the state laws are patterned.

The motivating factor behind most of these changes in the scheme of distribution is a desire for economic gain. This is not the exclusive motive, since a beneficiary may renounce his interest in a donative spirit, so that someone else may have the property. A possible complication involving a gift tax may result from this motive. These problems will be discussed later. One kind of economic motive is simply the attempt to get a larger share of the estate. This is seen in the case of a person instigating a will contest. Resisting such an attack is also done for economic reasons—*i.e.*, to retain as large a share as possible. Or the motive may be to escape an economic burden, such as a devise of property conditioned on the support of some individual.[1]

In the renunciation cases particularly, the most common motive is to minimize taxes. This may be accomplished in several ways. It may be possible for a beneficiary to choose between two ways of taking. Thus, a person may be able to qualify both as an appointee under a power and as a taker in default. Similarly, a widow may have a choice of taking her dower or the legacy provided by the decedent husband. In the simple case, the individual will choose the larger interest, and if they are equal, he will choose the one on which less inheritance tax will be due. Or the beneficiary may renounce an interest in the property so that it will not be subjected to double taxation, where he is the ultimate beneficiary anyway.[2] Any of these methods of minimizing state inheritance taxes may succeed. However, if the transaction is a mere sham, then the courts will look through the deception and assess the tax accordingly.

This discussion of the state death taxes has been divided into two general parts: (1) renunciations; (2) will contests and compromise agreements. This appears to be the best way to approach the subject, since renunciations present a broad general rule, with certain ramifications for special situations, while the contest and agreement cases are split by a definite conflict of authority. In connection with the first part, certain other topics will be discussed. The various problems arising from the husband-wife relationship, although under sound legal theory more nearly involving an election than a renunciation, are included with renunciations because the courts deal with them as such. Similarly, elections to take by default rather than under a power of

1. Tax Commission of Ohio v. Glass, 29 Ohio App. 352, 163 N. E. 605 (1928), *aff'd*, 119 Ohio St. 389, 164 N. E. 425 (1928).
2. Owings v. State, 22 Md. 116 (1864).

appointment have been construed by the courts as renunciations. Assignments are transfers that sometimes are treated differently from renunciations and sometimes are not. Finally, the case of In re *Howe's Estate* [3] presents some rather unique problems involving reciprocal wills and a common disaster, and has therefore been dealt with separately. The second part of the discussion will be approached from the two different views as to application of state inheritance taxes to property passing under a compromise agreement.[4]

II. State Death Taxes

(1) *Renunciations*

(a) *General Rule*

Where a legatee renounces a gift under the will of the decedent, no state inheritance tax can be imposed on the legatee, but rather the tax is levied on the transfers that take place when the estate is actually distributed.[5] The tax is applied to the ultimate devolution of the estate and not to the plan set forth in the will of the testator.

The Maryland case of *Bouse v. Hull,*[6] where the amount of the state inheritance tax turned on the renunciations of certain legacies, provides a good illustration of the rule. The testatrix left pecuniary legacies to certain charities, and the residuary estate to her descendants. Each of the charities renounced the legacy by formal written renunciation filed in the orphans' court. These legacies fell into the residue and passed to the testatrix's descendants. The register of wills, acting for the State of Maryland, claimed that the executors were liable to pay the state collateral inheritance tax on the legacies. The Maryland statute divides the beneficiaries into two classes, lineal descendants and others. The tax rate on the latter at that time was 5%, the former being tax exempt. Thus, if the state inheritance tax were imposed according to the will, there would be a tax of 5% due on the specific legacies; but if the tax were applied to the ultimate devolution of the estate, no tax at all could be assessed. In an action by the register of wills to recover the tax, the court held that no tax could lawfully be imposed.

This case illustrates the general rule in its simplest terms. It also shows the rule applied in a situation where there is a loss of revenue as a result of its

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3. 112 N. J. Eq. 17, 163 Atl. 234 (Prerog. Ct. 1932).
4. Although the substantive law of property is extremely important in the solution of all the problems discussed in this article, the tax law and not the law of property is our prime consideration here. Only tax cases have been used as references. Most of the propositions stated in these pages could be supported by numerous decisions involving the law of property alone, but such accumulation of authority is unnecessary, since the tax cases reflect the substantive property law of the jurisdiction adequately.
5. People v. Flanagin, 331 Ill. 203, 162 N. E. 848 (1928); *In re* Stone's Estate, 132 Iowa 136, 109 N. W. 455 (1906); *In re* Wolfe's Estate, 89 App. Div. 349, 85 N. Y. Supp. 949 (2d Dep't 1903), *aff'd,* 179 N. Y. 599, 72 N. E. 1152 (1904).
6. 168 Md. 1, 176 Atl. 645 (1935).

application; if the renunciation had not been recognized, there would have been a tax payable. It is not clear in *Bouse v. Hull* whether the motivating factor behind the renunciation was a desire to avoid taxes or not. However, in *People v. Flanagin,*[7] a devisee renounced his right in a very remote contingent interest and the motive to minimize taxes was clear; but the court stated that such a motive was immaterial and the general rule applied:

> "Their motive in executing the document was to minimize the inheritance tax, and this was not an unlawful motive for refusing to accept the devise. So long as they did not fraudulently receive a benefit for their action, their motives were immaterial. . . . So here while the renunciation results in depriving the state of a tax which it might have received if the devisees had accepted the devise, instead of rejecting it, the act of renunciation is not illegal. In executing the instrument the makers were entirely within their rights. They were not bound to accept the devise, in order that the state might collect a tax on it, and their motive in refusing is not open to investigation."[8]

This general rule on renunciations rests solidly on the law of property and also on statutory construction. It is clear that a beneficiary has the right to refuse a gift. While the law presumes that a legatee assents to the gift, such assent may be expressly withheld, and where it is withheld, nothing passes to the legatee.[9] The courts have found it possible to leap the theoretical hurdle that the inheritance tax accrues immediately on death and that therefore subsequent acts should not be controlling. They hold that while the situation at the time of death controls for tax purposes, the renunciation of the interest relates back to the death of the testator, and thus the gift and the renunciation cancel out, leaving no transfer that can be subject to the tax.[10] Since the legatee has the power to reject, the rejection must operate as of the time of the testator's death; otherwise, the intervening period would be a time over which the legatee had no control. If the legatee has the power to renounce ownership, it must be a complete power. The Ohio court treats a legacy as having an option implicit in it, and on that theory reaches the same general result:

> "The inheritance or succession tax cannot be assessed upon the theory that there was a passing of the property, when, at most, there was only an option to take the property upon attached conditions which were promptly rejected, thereby making it impossible for any beneficial interest whatever to pass to the persons named in the will."[11]

Most courts find in the state inheritance tax statute sufficient basis for following this general rule as to renunciations. The very concept of an inherit-

7. 331 Ill. 203, 162 N. E. 848 (1928).
8. *Id.* at 211, 162 N. E. at 851.
9. *In re* Stone's Estate, 132 Iowa 136, 140, 109 N. W. 455, 457 (1906).
10. People v. Flanagin, 331 Ill. 203, 211, 162 N. E. 848, 851 (1928).
11. Tax Commission of Ohio v. Glass, 119 Ohio St. 389, 392, 164 N. E. 425, 426 (1928).

ance tax implies a tax on the transfer of property.[12] Where the legatee renounces, this takes effect as of the time of the testator's death, so there is no transfer; to hold otherwise would be to assess a tax, not upon a transfer, but rather upon the attempt to transfer.[13] Indeed, a look at the illustrative case of *Bouse v. Hull,*[14] shows that a contrary rule would defeat one of the plain purposes of the statute, namely, to permit lineal descendants to take property free from the tax. Clearly, both the theoretical and practical arguments used by the courts in reaching their result are sound.

There is at least one definite exception to the general rule that no inheritance tax can be imposed on the legatee who renounces. If the renunciation is not in good faith or if there is fraud or collusion involved, the state will collect the tax. This is clearly so in any case where consideration passes from the ultimate beneficiary to the renouncing legatee.[15] Then, the theoretical arguments would not stand up, since the legatee has not renounced all benefits, and indeed, has exercised some control over the property in order to get such benefits. The courts will cut through this fraud or collusion and allow the state to tax the transfer of property as it would have passed in the absence of the bad faith.

There is also a suggestion of another possible exception to the general rule where the decedent dies intestate and the transfers of property operate under the laws of inheritance or descent. The New York court has indicated that where the transfer is effected by operation of law, there can be no act of volition on the part of the heir or next of kin, and therefore renunciation is impossible.[16] The cases, however, do not seem to support this dictum.

This general rule on renunciations has been almost unanimously supported in the cases. The only substantial authority to the contrary was a series of early Pennsylvania cases, which are continuously quoted as holding that a legatee is subject to inheritance tax despite a renunciation.[17] This so-called Pennsylvania rule actually resulted from faulty reading of these old cases, since all of them can easily be reconciled with the general rule. After half a century of confusion, the Pennsylvania court finally embraced the general rule in 1946.[18]

12. *In re* Stone's Estate, 132 Iowa 136, 140, 109 N. W. 455, 457 (1906).

13. *In re* Wolfe's Estate, 89 App. Div. 349, 351, 85 N. Y. Supp. 949, 950 (2d Dep't 1903).

14. 168 Md. 1, 7, 176 Atl. 645, 648 (1935), *supra* note 6.

15. See Tax Commission of Ohio v. Glass, 29 Ohio App. 352, 357, 163 N. E. 605, 606 (1928).

16. *See In re* Wolfe's Estate, 89 App. Div. 349, 354, 85 N. Y. Supp. 949, 953 (2d Dep't 1903). The use of New York cases as authority on inheritance tax questions may seem odd, since New York has a comprehensive estate tax and no inheritance tax. However, New York did have an inheritance tax until the present estate tax law was enacted in 1930. As is the situation in many fields of the law, New York cases before that time played a leading part in the development of the case law on the subject.

17. Commonwealth's Appeal, 34 Pa. 204 (1859); Small's Estate, 11 Pa. Co. Ct. 1, *rev'd,* 151 Pa. 1, 25 Atl. 23 (1891); Frank's Estate, 9 Pa. Co. Ct. 662 (1891); *In re* Paul's Estate, 1 Pa. Dist. & Co. R. 231 (1921).

18. *In re* Bute's Estate, 355 Pa. 170, 49 A. 2d 339 (1946).

(b) *Marital Interests*

Certain problems arise out of the husband-wife relationship that may be discussed in connection with the general problems of renunciation. The courts usually treat these cases just like other renunciation cases, but the problem should be segregated. Basically, the act of the beneficiary—in these cases, the spouse—is not a renunciation, so much as an election. When the testator dies, his widow has the choice of taking the property in the way provided by his will or taking her dower interest or statutory share against the will. She does, in a sense, renounce her interest (either the dower or the legacy) but only in that she elects to take the other. Particularly is this true where she elects to take under the will, because no positive act on her part is required. If she does nothing, she is deemed to have accepted the legacy, and it is difficult to say that there has been any renunciation. Therefore, these cases will be discussed in terms of an election, although the courts see fit to use the term renunciation as if it were synonymous.

A preliminary question in these cases is whether the marital interests involved are subject to the state inheritance tax at all. This problem may be discussed more easily in two parts: (1) common law dower interest, statutory shares, and curtesy; (2) interests under ante-nuptial agreements. Statutory shares for the widow are merely a statutory modification of common law dower, and the same law is applicable to both.[19] Curtesy is treated by the courts like dower because of the obvious similarities.[20] Ante-nuptial agreements bring other considerations into play, and it is easier to deal with them separately.

There is a direct conflict of authority as to whether a widow's dower is subject to an inheritance tax. It all depends upon the language and interpretation of the statute. The statute may be clear, as in *State v. Boney*,[21] where the Arkansas act provided that the decedent's estate should include the "widow's dower or any property in any way granted, given, or devised to the widow in lieu of dower." But usually inheritance tax laws are not explicit in their inclusion of marital interests. Most states which hold that the tax should be imposed do so under the statutory phrase which includes property passing by the intestate laws of the state.[22] The Illinois court stated that "the statute is comprehensive, and was designed to embrace, as nearly as practicable, all property passing from a person, upon his death, by will or intestacy, except such as the statute exempts"; it added that as a general rule, property of the

19. *In re* Roger's Estate, 250 S. W. 576, 579 (Mo. 1923).

20. *In re* Starbuck's Estate, 63 Misc. 156, 116 N. Y. Supp. 1030 (Surr. Ct. 1909), *aff'd* 137 App. Div. 866, 122 N. Y. Supp. 584 (2d Dep't 1910); *In re* Green's Estate, 63 Misc. 1, 124 N. Y. Supp. 863 (Surr. Ct. 1910).

21. 156 Ark. 169, 245 S. W. 315 (1922).

22. Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936); Billings v. People, 189 Ill. 472, 59 N. E. 798 (1901); State *ex rel.* Pettit v. Probate Court, 137 Minn. 436, 163 N. W. 285 (1917); State *ex rel.* Corporation Commission v. Dunn, 174 N. C. 679, 94 S. E. 481 (1917).

decedent passes in two ways, by will or by descent under the intestacy laws, and applied that rule by holding that since dower does not pass by will, it must pass by intestacy.[23]

In *Murphy v. Murphy*,[24] a Florida widow tried to avoid the tax under a provision of the statute that dower right shall be free from "all liabilities for the debts of the decedent." The court held that succession taxes are liabilities of the estate, not of the decedent, because they do not come into existence as a liability until the time of death. The widow was therefore held subject to the tax on her dower right.

At least one other statutory provision has been interpreted in some states to indicate that dower is subject to the inheritance tax. Where the statute provides an exemption of a certain amount for the widow, obviously the dower must be subject to an inheritance tax—otherwise the exemption would be unnecessary.[25] This argument is not conclusive, however, since the exemption may have been provided by the legislature for the benefit of the widow who takes a legacy under the will.

On the other side, several states hold that marital interests are not subject to the inheritance tax. The courts of these states hold that dower does not come under a statute which taxes the passing of property by will or by the intestate laws of the state, because dower passes under neither.[26] The Missouri court, expressly disapproving the Illinois view, says that intestacy means absence of a will, and in these cases, there always is a will.[27]

These courts point out that the purpose of an inheritance tax law is to tax property which descends, while dower is a right which has existed in the wife from the time of the marriage.[28] Dower is in an inchoate condition during the marriage and merely is consummated on the death of the husband. "The interest which the widow acquires does not descend. Her interest inheres and remains." [29] The Missouri court drew an analogy here to community property: the wife's interest does not pass to her either by the will or intestacy—it is hers all along.[30]

McDaniel v. Byrkett [31] indicates that it makes no difference that the widow takes a statutory share. It is not taxable under a statute taxing all property which passes "by will or by the intestate laws," since the statutory

23. Billings v. People, 189 Ill. 472, 478, 59 N. E. 798, 800 (1901).
24. 125 Fla. 855, 170 So. 856 (1926).
25. Billings v. People, 189 Ill. 472, 59 N. E. 798 (1901); State *ex rel.* Corporation Commission v. Dunn, 174 N. C. 679, 94 S. E. 481 (1917).
26. *In re* Roger's Estate, 250 S. W. 576 (Mo. 1923): *In re* Strahan, 93 Neb. 828, 142 N. W. 678 (1913); *In re* Castle, 25 Hawaii 108 (1919).
27. *In re* Roger's Estate, 250 S. W. 576, 578 (Mo. 1923).
28. *In re* Weiler's Estate, 122 N. Y. Supp. 608 (Surr. Ct.), *aff'd*, 139 App. Div. 905, 124 N. Y. Supp. 1133 (1st Dep't 1910); Crenshaw v. Moore, 124 Tenn. 528, 137 S. W. 924 (1911).
29. *In re* Roger's Estate, 250 S. W. 576, 579 (Mo. 1923).
30. *Id.* at 578.
31. 120 Ark. 295, 179 S. W. 491 (1915).

share is merely declaratory of common law dower, and therefore is not an interest passing under the intestate laws. This Arkansas statute was amended specifically to tax dower interests the year after this case was decided.[32]

There are limitations on the view that dower is not taxable. Under Utah law, the widow takes one-third of the real property which her husband possessed during marriage, and also shares in the estate as one of his heirs.[33] In re *Bullen*[34] holds that the inheritance tax does not apply to the part she takes as widow, since it is not property passing by will or the statutes of inheritance, but the other part is taxable since the widow takes as heir under the statute. This is a logical limitation on the general rule, which the peculiar Utah statute makes necessary.

Something may be said in favor of both views. The latter rule seems to have logic and property law on its side when it maintains that the word "intestacy" does not include dower. But reality seems to be more in accord with the former view, in that the legislatures probably thought they were including all transfers in the two possibilities, will or intestacy. Should the assessment of the tax be controlled by the technical common law concept of dower as an inchoate interest throughout marriage which merely is consummated on death? If not, Arkansas has found the easy solution by expressly stating in the statute that dower interests are taxable.

On the subject of ante-nuptial agreements, the decisions present a confusing picture of the law. In order to reconcile seeming conflicts it is desirable first to divide the cases in which the husband makes provision in his will for the payment promised in the ante-nuptial agreement from the cases where no such legacy is involved. Where the ante-nuptial contract provides for payment in lieu of dower, then the taxability of the payment depends on whether the jurisdiction taxes dower interests. If dower is taxed in the state, this debt against the estate arising from the ante-nuptial agreement will also be taxed.[35]

In states where dower is taxed, and therefore payments in settlement of ante-nuptial contracts are taxed, clearly legacies to satisfy these contracts will also be taxed. It has been suggested that even in the states where the mere payment of the debt to satisfy the contract would not be taxable, payment by legacy should be taxed, on the ground that in this situation the parties have voluntarily chosen a method of transfer which is taxable regardless of the motive.[36] Massachusetts indicates acceptance of this view in *Hill v. Treasurer and Receiver General*.[37] In that case, the court admits that if the widow had received payment of the debt under the agreement in cash, no tax would

32. State v. Boney, 156 Ark. 169, 245 S. W. 315 (1922).
33. UTAH COMP. LAWS §§ 2826, 2828 (1907).
34. 47 Utah 96, 151 Pac. 533 (1915).
35. People v. Field, 248 Ill. 147, 93 N. E. 721 (1911).
36. Note, 43 HARV. L. REV. 295 (1929).
37. 227 Mass. 331, 116 N. E. 509 (1917).

have been due; however, the testator had provided in his will that she could have securities if she so elected. She made the election, and the court held that the tax was due.

> "The transfer and acceptance of these securities by Mrs. Hill was in fact and in law a legacy in payment of a debt. The inheritance tax law of the commonwealth . . . applies to all cases where property or an interest therein passes by will. It is not confined to cases where property or an interest therein so passes as a gratuity." [38]

The New York court also adhered to this view in the early case of *Matter of Kidd.*[39] There the decedent failed to make the legacy as promised in the contract. The question arose whether the property passing in a suit for specific performance was subject to the inheritance tax. The court overlooked the technical problem of whether the property passed by will, and held that the husband could not avoid taxes otherwise payable by violating the contract. Implicit in this result is the fact that the court believed that payment by legacy to satisfy an ante-nuptial agreement was taxable.

In the next decade, the New York courts deviated from this sound view. They held that the valuable consideration contributed by the wife made the legacy tax-exempt, since the widow took as obligee rather than legatee.[40] In re *Koeffler's Will,* a Wisconsin case, holds the same way.[41] In taking this position, the courts forget that the statute taxes all transfers by will and makes no exception where consideration is paid. The rule as set forth in *Hill v. Treasurer and Receiver General* is sounder both in statutory construction and in practice.

So far as the elections or "renunciations" involved here are concerned, there are two possibilities: (1) the widow may "renounce" the dower to take under the will; or (2) she may "renounce" her legacy in favor of her dower right. In the former situation the imposition of the tax may depend on whether dower is subject to the inheritance tax in the jurisdiction. In jurisdictions where the tax is imposed on a widow's dower interest, then a legacy to the widow which she elects to take will clearly be taxable.[42] The conflict of authority arises in states where the inheritance tax is not assessed on dower. The Nebraska court holds that since dower is not taxable, when the widow elects to take under the will, the value of her dower interest should be deducted from her interest under the will, and the inheritance tax will be assessed only on the excess.[43] In most of these states, however, it is held that a legacy to the widow under the will is a taxable transfer, and there can be no deduction of her dower

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38. *Id.* at 335, 116 N. E. at 510.
39. 188 N. Y. 274, 80 N. E. 924 (1907).
40. *In re* Vanderbilt's Estate, 184 App. Div. 661, 172 N. Y. Supp. 511 (1st Dep't 1918), *aff'd,* 226 N. Y. 638, 123 N. E. 893 (1919).
41. 218 Wis. 560, 260 N. W. 638 (1935).
42. State v. Lane, 134 Ark. 71, 203 S. W. 17 (1918).
43. *In re* Sanford, 90 Neb. 410, 133 N. W. 870 (1911), *modified on rehearing,* 91 Neb. 752, 137 N. W. 864 (1912).

interest in the husband's estate.[44] This latter rule seems sounder in light of the reasoning discussed above in connection with ante-nuptial agreements; namely, that the inheritance tax statutes provide for imposition of the tax on all transfers by will, regardless of the motive or purpose of the legacy.

Where the widow renounces a legacy to take her dower, the only real hurdle is the previously discussed question of whether dower is taxable. The general rule as to renunciations applies, and the estate is taxed just as the actual transfers took place. There is no tax due from the widow on any part of the legacy which she renounced.[45] The dower interest is taxed or not depending on the jurisdiction, and any remainders or executory interests which accelerate as a result of the widow's renunciation are taxed as they actually pass.[46] Once the basic question of whether dower is taxable or not has been decided, the cases fall into a logical pattern quite consistent with the general rule.

(c) *Powers of Appointment*

In order to study the legal problems arising when a transfer under a power of appointment is renounced, it seems desirable to limit the discussion to a few cases and examine them closely. Four New York cases have been selected.[47] They have several elements in common. In each, the appointee by the exercise of the power was also a taker in default of appointment; and in each, the transfer tax had not been enacted at the time of the donor's death, but was in effect at the time of the donee's death. As a result, taking under the power was a transfer subject to the tax, while taking in default was a transfer under the donor's will before the tax was enacted.

The first decisive problem stems from the difference between a renunciation and an election. A renunciation is absolute and irrevocable; while an election is only a manifestation of intent to take in a certain way if it is lawful to do so, but at the same time with the intent to keep the alternative way open. As far as a real renunciation is concerned, the rules applicable here are the same as elsewhere:

> "Where there is an express renunciation or rejection of all benefits of a power of appointment, obviously the interest of the designated beneficiary of the power cannot be assessed as passing under a power of appointment. The power is then quite out of the case. Property cannot be thrust by a power upon one without his consent."[48]

44. Estate of Bernays, 344 Mo. 135, 126 S. W. 2d 209 (1939); *In re* Riemann's Estate, 42 Misc. 648, 87 N. Y. Supp. 731 (Surr. Ct. 1904); *In re* De Graaf's Estate, 24 Misc. 147, 53 N. Y. Supp. 591 (Surr. Ct. 1898); *In re* Osgood, 52 Utah 185, 173 Pac. 152 (1918).

45. *In re* Hartmann's Estate, 133 Misc. 428, 232 N. Y. Supp. 672 (Surr. Ct. 1928).

46. Billings v. People, 189 Ill. 472, 59 N. E. 798 (1901).

47. *In re* Haggerty's Estate, 128 App. Div. 479, 112 N. Y. Supp. 1017 (1908); *In re* Hoffman's Estate, 161 App. Div. 836, 146 N. Y. Supp. 898 (1st Dep't 1914), *aff'd.* 212 N. Y. 604, 106 N. E. 1034 (1914); *In re* King's Estate, 217 N. Y. 358, 111 N. E. 1060 (1916); *In re* Chauncey's Estate, 102 Misc. 378, 168 N. Y. Supp. 1019 (Surr. Ct. 1918).

48. *In re* Chauncey's Estate, 102 Misc. 378, 381, 168 N. Y. Supp. 1019, 1021 (Surr. Ct. 1918).

Under the general rule, no tax can be applied where the appointee has renounced.[49] The application of the tax is not nearly so simple where an election is concerned.

It is this difference between renunciation and election that leads to the use of two different approaches in deciding a case. One approach is to decide first if it is a renunciation or an election. If it is the former, there is no tax, since the beneficiary takes under the donor's will as a taker in default; while if it is the latter, the other basic problem arises as to the effect of the election. The *Haggerty* case followed this approach in finding that there was a renunciation and therefore no tax.[50] The concurring opinion in the *Hoffman* case used the same approach to reach the same result.[51]

The other approach stems from the law of property as to powers. It is usually held that the taker in default has a vested interest under the donor's will subject to be divested by the donee's exercise of the power. However, if the interest which the taker in default would take under the power is identical with the interest he takes under the donor's will, then it is not divested by the exercise of the power.[52]

In this situation, if the beneficiary's act was a renunciation, he is not subject to the tax under the general rule, while if his act was an election, he is not subject to the tax because nothing has passed to him that he had not already acquired under the donor's will.[53] Since it makes no difference whether it is a renunciation or an election, the second or alternative approach to these cases is to decide first whether the two interests are identical or not. If they are identical, then there is no tax; if they are not identical, then the question of renunciation or election must be decided.

Thus, either of the two basic problems in these cases may be decided first. If it is found either that there was a renunciation or that the two interests in question were identical, there will be no tax. The only situation where an inheritance tax will be due is where the beneficiary's interest under the appointment is not identical with his interest as taker in default, and he makes no express renunciation under the power.[54] Then his vested interest as a taker in default is divested by the donee's exercise of the power, and his mere election not to take under the power is insufficient to avoid the tax.

The application of state inheritance taxes to renunciations under powers of appointment would consist merely of a fairly simple use of the general rule as to renunciations, were it not for this complicating element of election.

(d) *Assignments*

49. See *In re* Hoffman's Estate, 161 App. Div. 836, 840, 146 N. Y. Supp. 898, 902 (1st Dep't 1914) (concurring opinion).
50. *In re* Haggerty's Estate, 128 App. Div. 479, 112 N. Y. Supp. 1017 (1908).
51. *In re* Hoffman's Estate, 161 App. Div. 836, 146 N. Y. Supp. 898 (1st Dep't 1914).
52. *Ibid.*
53. *In re* Chauncey's Estate, 102 Misc. 378, 168 N. Y. Supp. 1019 (Surr. Ct. 1918).
54. *In re* King's Estate, 217 N. Y. 358, 111 N. E. 1060 (1916).

The courts are sometimes confused by the difference between an assignment and a renunciation. *Frank's Estate*,[55] a Pennsylvania case, involved an assignment, and the court decided that the inheritance tax should be imposed on the transfer by will to the assignor, and not on the assignment. The court did not differentiate between an assignment and renunciation. Under strict property law, an assignment of interest passing under a will is a recognition of the transfer to the assignor, rather than a rejection of it; if there has been a bona fide renunciation, an assignment would have no effect at all. An Ohio case[56] follows the traditional law of property and thereby ignores the substance of the problem. In addition to filing a renunciation in probate court, the devisees had executed a quitclaim deed to the widow for the purpose of clearing any possible cloud upon the title. The court held that these renounced devises were not subject to the inheritance tax, and that the deed did not alter the situation. These two cases indicate that the mere technical differences between the words "renunciation" and "assignment" resulting from the law of property may be controlling on tax questions. It is likely that the courts today would cut through such technical distinctions and treat the two situations alike. This problem may be of even greater importance in connection with the gift tax, discussed later in this article.

(e) *Reciprocal Wills—Common Disaster*

The case of In re *Howe's Estate*[57] has such interesting and unique renunciation problems that it requires separate treatment. *H* and *W* both were involved in an automobile accident, in which *H* was killed instantly and *W* died three days later without ever regaining consciousness. *H* left his whole estate to *W*, and *W's* will gave her whole estate to *H*. They had one child who survived. *H* had property worth $50,000 at the time of the accident, and *W* had $90,000. The Comptroller assessed an inheritance tax on the $50,000 transfer from *H* to *W*, and taxed the intestate transfer from *W* to the child at $140,000. *W's* administrator objected to the assessment on grounds that four months after *H's* death, he had executed an instrument renouncing all right, title and interest in *H's* estate. The administrator alleged that the tax should only be assessed on $50,000 passing from *H* to the child by intestacy, and $90,000 passing from *W* to the child by intestacy.

The court recognized the common law presumption that a beneficiary under a will has accepted the interest. However, this may be rebutted either by proof of rejection within a reasonable time or proof that the beneficiary had no opportunity to decide. It is clear that *W* had no chance to accept or reject *H's* estate, since she never regained consciousness. Therefore, her right to accept or reject passed to her administrator.

55. 9 Pa. Co. Ct. 662 (1891).
56. Tax Commissioner of Ohio v. Glass, 119 Ohio St. 389, 164 N. E. 425 (1928).
57. 112 N. J. Eq. 17, 163 Atl. 234 (Prerog. Ct. 1932).

The court then upheld the assessment of the Comptroller on the ground that the administrator's attempted renunciation was invalid. Two reasons were given for its invalidity. First, after the right to renounce has passed to the administrator, it must be exercised within a reasonable time, and "it is obvious that four months is far more than a reasonable time for the administrator to decide the simple question of election as between accepting and rejecting an unencumbered gift of some $50,000."[58] Secondly, the administrator must exercise this right to accept or reject the gift for the best interest of *W's* estate. It is hard to see how *W's* estate can benefit from renouncing the right to $50,000. The benefit in this renunciation accrued entirely to the child in the form of minimizing taxes. The court recognized this as another basis for ignoring the renunciation in assessing the tax.

> "No other reason can be ascribed for the rejection than a desire thereby to benefit the daughter by avoiding the transfer tax. It may be assumed that the mother herself might validly have rejected the gift for that reason and purpose; but it cannot be said with certainty that she would have done so, even if she had had the opportunity and had known that her death would occur within a day or two. In any event, the administrator had no right to do so, and hence her attempt so to do, after a prior acceptance by acquiescence for more than a reasonable time, can be afforded no force or effect."[59]

While the fact situation of a beneficiary's never having the opportunity to renounce is relatively rare, it does raise problems of wider application.

(2) *Compromise Agreements and Will Contests*

(a) *Majority View*

After the death of the decedent if prospective heirs and legatees find it desirable to reach some sort of compromise agreement, the question arises as to the effect of this agreement on the assessment of the state inheritance tax. These agreements result when the heirs feel they have sufficient grounds to have the will set aside by court proceedings. It is frequently to the interest of the legatees under that will to reach an agreement to share the estate with the heirs, rather than to engage in expensive litigation and run the risk of losing everything. The compromise agreement may result from the opposite situation—the heirs may have succeeded in having the will set aside, and in order to avoid an appeal or a rehearing, they compromise with the legatees under the will.

In the majority of states, the courts have adopted the view that where there has been a compromise of a will contest, the property is subject to the inheritance tax as it passed by the will, unaffected by the agreement.[60] Thus

58. *Id.* at 23, 163 Atl. at 238.
59. *Ibid.*
60. MacKenzie v. Wright, 31 Ariz. 272, 252 Pac. 521 (1927); *In re* Rossi's Estate, 169 Cal. 148, 146 Pac. 430 (1915); People v. Upson, 338 Ill. 145, 170 N. E. 276 (1930); Fidelity & Columbia Trust Co. v. Commonwealth, 241 Ky. 656, 44 S. W. 2d 603 (1931);

it is the original beneficiary who is liable for the tax, regardless of where the property is transferred thereafter by agreement. It makes no difference what arrangements the parties make among themselves; the property is taxed as it passed under the will.

In adopting this view, the courts reach their conclusions through statutory interpretation. In Massachusetts, the statute imposes the tax on all property "which shall pass by will," and the Massachusetts court holds that the most reasonable interpretation of that phrase is that "it describes only property that passes by the terms of the will as written and not as changed by any agreement for compromise made within or without the statute." [61] The Kentucky court interpreted a statute imposing a succession tax on all property which should "pass by will" or "by the laws regulating intestate succession" in the same way, holding that the tax was payable upon the entire amount received under the will, although part of that amount was later transferred to others under a compromise agreement.[62] Not only do the states espousing the majority view interpret their inheritance tax statutes so that the entire amounts passing under the will are taxable, but they also can find no basis in the statutes for taxing transfers under a compromise agreement:

> "The agreement operates, and can operate, only by way of transfer subject to the transfer made by the will; the transfers by or pursuant to the agreement are transfers made by those to whom transfers were previously made by the will. They are not taxable—because the statute does not impose a tax upon them. . . . The tax must be assessed under the statute on the transfers made by the will, and no notice need be, nor can be, taken of the dealings by the beneficiaries with the property among themselves." [63]

Behind this interpretation of the statutes are various concepts of the law of property. Interests under the will vest in the legatees as of the date of the death of the testator.[64] Since the inheritance tax is a tax on the succession or transfer, it accrues at the same time that the estate vests in the legatees.[65] All questions concerning the tax must therefore be determined as of the date of the decedent's death, which necessarily antedates any compromise agreement.[66] The Arizona court treats the tax as a lien on the legacy from the date of the testator's death, and holds that such a lien cannot be de-

Baxter v. Treasurer, 209 Mass. 459, 95 N. E. 854 (1911); *In re* Sanford, 90 Neb. 410, 91 Neb. 752, 133 N. W. 870, 137 N. W. 864 (1911); *In re* O'Neill's Estate, 111 N. J Eq. 378, 162 Atl. 425 (Prerog. Ct. 1932); *In re* Cook's Estate, 187 N. Y. 253, 79 N. E. 991 (1907); Crane v. Mann, 162 S. W. 2d 117 (Tex. Civ. App. 1942).

61. Baxter v. Treasurer, 209 Mass. 459, 463, 95 N. E. 854, 856 (1911).

62. Fidelity & Columbia Trust Co. v. Commonwealth, 241 Ky. 656, 44 S. W. 2d 603 (1931).

63. *In re* O'Neill's Estate, 111 N. J. Eq. 378, 380, 162 Atl. 425, 426 (Prerog. Ct 1932).

64. People v. Kaiser, 306 Ill. 313, 137 N. E. 826 (1922); *In re* Sanford, 90 Neb. 410, 133 N. W. 870 (1911).

65. *In re* Rossi's Estate, 169 Cal. 148, 146 Pac. 430 (1915).

66. *In re* Graves, 242 Ill. 212, 89 N. E. 978 (1909).

feated or changed by a compromise agreement.[67] Thus, the courts distinguish between a renunciation, which takes effect as of the date of the testator's death, and a compromise agreement, which is given no retroactive effect whatever for tax purposes.

Even though the heir who contests the will gets his right to maintain a contest from his relationship to the testator, his title to the property is held to stem from the contract with the legatees.[68] Despite this relationship, the contestant takes under neither the will nor the statute of descent, but under the compromise agreement.[69] This leads to some incongruity in Massachusetts, where it is the practice of the probate court to insert a clause in the decree that the estate is to be administered in accordance with the compromise agreement, even though it is clear that the rights of the parties under the compromise agreement are contractual and not testamentary.[70] Since the transfer is of contractual origin, the state inheritance tax has no application.

The arguments most frequently used in opposition to this result are the same as the reasons, to be discussed later, that courts which adopt the minority view use to support their decisions. Here, brief consideration will be given to the answers of the majority rule courts to these arguments. A familiar reason presented in opposition to the majority rule is that it discourages compromise agreements, which are to the advantage of all concerned even if the state does suffer a loss of revenue. The Texas court suggests that this is spurious reasoning, since it is easy enough for the parties to the compromise to take into consideration the fact that the legatees under the will will be required to pay the tax.[71] The inheritance tax should not be any real deterrent to compromise agreements, no matter who technically pays the state.

A second argument is that the compromise agreement constitutes a modification or alteration of the will. While the agreement may change the testator's testamentary plan, it does not change the will. The concessions made in the agreement are binding upon the parties, but they do not constitute a modification of the will or the rights under it.[72] The New York court stated:

> "The compromise did not change the will. No settlement could change a word that the testator wrote. The will stands as it was written, and the most solemn instrument, executed by all parties interested, could not convert a bequest to the nephews and nieces into a bequest to the widow."[73]

The will remains what the testator intended it to be, and since the state inheri-

67. MacKenzie v. Wright, 31 Ariz. 272, 252 Pac. 521 (1927).
68. Fidelity & Columbia Trust Co. v. Commonwealth, 241 Ky. 656, 44 S. W. 2d 603 (1931).
69. People v. Kaiser, 306 Ill. 313, 137 N. E. 826 (1922).
70. Tye, *Tax Status of Will Compromise Agreements*, 19 TAXES 350 (1941).
71. Crane v. Mann, 162 S. W. 2d 117, 119 (Tex. Civ. App. 1942).
72. People v. Union Trust Co., 255 Ill. 168, 182, 99 N. E. 377, 383 (1912).
73. *In re* Cook's Estate, 187 N. Y. 253, 259, 79 N. E. 991, 993 (1907).

tance tax is imposed on property passing by will, the tax is assessed on the legacies, regardless of the effect of the later compromise agreement.

The most common argument against the majority rule is the doctrine of partial renunciation. The supporting cases will be discussed in connection with the minority view. The destruction of this analogy to the renunciation is best accomplished by Professor Joseph Warren:

> "It is true that a legatee may renounce, and if he does, the legacy is not taxable to him but to the residuary legatee; and if he may renounce in full, it is said he may by a compromise renounce in part, escape the burden, and let the person who actually receives the property pay the tax. But in renunciation, as in the case of lapsed or void legacies, the law of wills or the intestate law—not the agreement of parties—carries the property to the person taxable." [74]

Actually, there is a fundamental difference between a renunciation and a compromise, for in assigning over the interest received under the will, the legatee is by necessary implication accepting the legacy.[75] The legatee would have no right to say whom the property should go to or in what amount unless he had accepted the legacy. In *Fidelity & Columbia Trust Co. v. Commonwealth,*[76] the Kentucky court based its rejection of the doctrine of partial renunciation on the fact that the legatees had exercised control and dominion over the property. Conceding that it might be desirable to have such partial renunciations under a compromise agreement treated the same way as a full renunciation, the court regarded it as impossible under the statute.[77]

When following the majority view, the courts never fail to mention that the rule prevents fraud. Professor Warren sees the minority view as a "foundation for collusive agreements to deprive the government of its just due." [78] It is true that there is more chance for fraudulent activity under the minority rule. Where the tax is imposed according to the testator's will, there is no room for collusion. On the other hand, fraud is a distinct possibility where the interested parties may agree among themselves how the property should be divided. Where the assignee is tax-exempt or taxable at a lower rate than the legatee, it is virtually an invitation to all but the most upright citizens to reach a compromise agreement, giving the assignee most of the legacy in return for some "secret" consideration. This is undoubtedly one of the strongest practical arguments in favor of the majority view.

There are disadvantages in this rule. It frequently results in a loss of revenue for the state, where the legatee is exempt from the inheritance tax or has a low rate, while the assignee under the compromise agreement is tax-

74. Warren, *The Progress of the Law, 1918-1919—Wills and Administration,* 33 HARV. L. REV. 556, 574 (1920).
75. *In re* Cook's Estate, 187 N. Y. 253, 258, 79 N. E. 991, 993 (1907).
76. 241 Ky. 656, 661, 44 S. W. 2d 603, 605 (1931).
77. *Ibid.*
78. Warren, *The Progress of the Law, 1918-1919—Wills and Administration,* 33 HARV. L. REV. 556, 574 (1920).

able at a higher rate. This arises mostly in the situation where the legatee is a charitable organization; the application of the majority view makes the charitable exemption assignable. In the case of In re *Murray's Estate*[79] in New York, the testatrix bequeathed her entire residuary estate to charitable corporations which were entitled to exemption from the transfer tax. In order to prevent a will contest, the residuary legatees had to pay one-third of the residuary estate to the next of kin. An application of the majority view meant that no inheritance tax could be collected. Thus, the next of kin had the advantage of the charitable exemption, completely defeating the purpose of such exemptions. This result constitutes a distinct flaw in the operation of the majority rule.

The application of the rule is also unfair where the contestant of the will has a lower tax rate than the legatees. The tax applied is the high rate of the legatee, and not the low rate of the contestant.[80] The statutory rates for the widow and descendants are lower for a definite purpose; in fact, it is part of the theory of the inheritance tax that the closer the relationship to the testator, the lower the tax. This theory is certainly defeated in such cases under the majority rule.

(b) *Minority View*

The inheritance tax should be imposed according to the actual disposition of the property under the compromise agreement, rather than according to the terms of the will: this is the rule that is followed in a few of the states—Colorado, Georgia, Maryland, Minnesota, Missouri, Pennsylvania, and with some limitations, Nebraska.[81] The way in which the rule works may be illustrated by the leading case of *State* ex rel. *Hilton v. Probate Court*.[82] The testatrix left one-third of her small estate to her husband and two-thirds to her niece. A compromise agreement was reached by the two beneficiaries in order to prevent a will contest. Under the agreement, the husband and the niece each took half of the estate. There was no question as to the inheritance tax on the husband's share, since it was smaller than the $10,000 exemption

79. 92 Misc. 100, 155 N. Y. Supp. 185 (Surr. Ct. 1915).

80. *In re* O'Neill's Estate, 111 N. J. Eq. 378, 162 Atl. 425 (Prerog. Ct. 1932); *In re* Cook's Estate, 187 N. Y. 253, 79 N. E. 991 (1907).

81. People *ex rel.* Attorney General v. Rice, 40 Colo. 508, 91 Pac. 33 (1907); Taylor v. State, 40 Ga. App. 295, 149 S. E. 321 (1929); Hart v. Mercantile Trust Co., 180 Md. 218, 23 A. 2d 682 (1942); *In re* Thorson's Estate, 150 Minn. 464, 185 N. W. 508 (1921); *In re* Gartside's Estate, 357 Mo. 181, 207 S. W. 2d 273 (1947); *In re* Kierstead, 122 Neb. 694, 241 N. W. 274 (1932); *In re* Taber's Estate, 257 Pa. 81, 101 Atl. 311 (1917). While Pennsylvania has definitely been a minority rule state since In re *Taber's Estate,* there was much doubt before 1917. There was a rule then attributed to Pennsylvania that amounts paid in compromise of a will contest were not subject to inheritance tax at all. Note, 29 Col. L. Rev. 1164 (1929). An examination of the early Pennsylvania cases indicates that they may have been misinterpreted through the years. *In re* Hawley's Estate, 214 Pa. 525, 63 Atl. 1021 (1906); *In re* Pepper's Estate, 159 Pa. 508, 28 Atl. 353 (1894); *In re* Kerr's Estate, 159 Pa. 512, 28 Atl. 354 (1894). The court in In re *Taber's Estate* indicates that Pennsylvania has always been a minority rule state, and any contrary idea was the result of a misreading of the previous Pennsylvania decisions.

82. 143 Minn. 77, 172 N. W. 902 (1919).

provided by statute. The issue before the court was whether the niece should pay taxes on one-half or two-thirds of the estate. The court held that the niece was subject to the inheritance tax only on the share that she actually received—one-half of the estate.

The principal reason for this rule stems from the basic theory of the inheritance tax—that the inheritance tax is a tax on the transfer to beneficiaries, rather than a tax on the estate. The Maryland court sees the inheritance tax statute as "concerned with the persons who receive portions of the testator's estate in distribution." [83] The Minnesota court pronounces the keynote of the argument:

> "The fundamental principle in the whole inheritance tax law is to exact a tax upon the clear amount in money value received by each beneficiary, legatee, or heir from a decedent's estate, by virtue of the provisions of a will, or the intestate law, or otherwise, for the tax reaches transfers made by a decedent in contemplation of death. The tax is upon the transfers by which a beneficiary, legatee, or heir obtains a portion. It is not a tax upon the estate, but upon the privilege of receiving a portion thereof, and is to be computed on the clear value of the portion received." [84]

An integral part of the theory behind the inheritance tax is the application of different rates to different classes of beneficiaries depending on the relationship to the testator. The majority rule nullifies this principle by ignoring the consequences of a compromise agreement. The Missouri court feels that this principle necessitates adoption of the minority view:

> "It seems to us the intention of the legislature was that the rate and the amount of tax should be determined upon the basis of the amount of property actually received by the recipient and on a basis of that person's relationship to the deceased whose property is being distributed." [85]

Another reason given for the adoption of the minority view is that for the purposes of an inheritance tax the compromise agreement becomes the will, and a tax on the transfer of property by will should be assessed accordingly. *McCoy v. Gill* [86] is frequently cited on this point. Actually, it involved a federal inheritance tax under the War Revenue Act of June 13, 1898. The case arose in connection with the death of a Massachusetts resident, and a subsequent compromise agreement. In Massachusetts, the agreement is admitted to probate, and the federal court in *McCoy v. Gill* held that whatever was admitted to probate under state law was a will under the statute for tax purposes. The force of this case was greatly weakened as authority outside the federal courts when the Massachusetts court held, a few years later, that

83. Hart v. Mercantile Trust Co., 180 Md. 218, 222, 23 A. 2d 682, 684 (1942).
84. State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 80, 172 N. W. 902, 903 (1919).
85. *In re* Gartside's Estate, 357 Mo. 181, 186, 207 S. W. 2d 273, 276 (1947).
86. 156 Fed. 985 (C. C. D. Mass. 1907).

for state inheritance tax purposes, a compromise agreement is not part of the will.[87]

The doctrine of partial renunciation is the theoretical backbone of the minority view. Since a legatee has a right to renounce the whole legacy, logically he may renounce only a part, and the part so renounced will not be subject to the inheritance tax as property passing to him by will.[88] The flaws in this doctrine were discussed previously in connection with the majority view, particularly in the quotation from Professor Warren's article. His criticism is shown to be justified upon the examination of a Minnesota case, In re *Thorson's Estate*,[89] in which the minority view is adopted and the doctrine of partial renunciation is mentioned with approval. In that case, the testator left his residuary estate to charity, but his children succeeded in reaching a settlement with the residuary legatee. If this settlement had been a true renunciation, the son and daughter would have shared equally as the testator's heirs, whereas under the agreement the daughter got $100,000 and the son only $90,000. The partial renunciation doctrine can have validity only if the agreement provides for the transferred property to pass by intestacy.

Some of the courts have recognized this limitation on the doctrine of partial renunciation, and have stated that the assignee under the agreement must be an heir at law in order for the minority view to apply.[90] Then the minority rule is resting on a logical basis:

> "The right to contest a will is given only those who have a right under the law to participate in the estate. Therefore, an heir who brings a will contest is claiming the property in his own right under the statute of descent and distribution. When such an heir takes property under a compromise agreement, the legatee renounces so much of the legacy and the contestant takes the property as heir, and not as an assignee."[91]

An obvious limitation on the application of the minority rule is where there is an outright purchase and assignment of a legatee's interest in the estate. Then, it is only right that the tax should be assessed on the basis of its being in the hands of the assignor.[92] This is consistent with the treatment of full renunciations, for there also the renouncing legatee is taxed if he receives any consideration.

The question of whether there has to be a decree of the court recognizing the agreement in order for the minority rule to apply is treated differently in the various states. In Minnesota, it makes no difference whether the compromise agreement is embodied in the court decree and the estate is distributed

87. Baxter v. Treasurer, 209 Mass. 459, 95 N. E. 854 (1911).
88. State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 82, 172 N. W. 902, 904 (1919); *In re* Kierstead, 122 Neb. 694, 704, 241 N. W. 274, 278 (1932).
89. 150 Minn. 464, 185 N. W. 502 (1921).
90. People *ex rel.* Attorney General v. Rice, 40 Colo. 508, 91 Pac. 33 (1907).
91. *In re* Gartside's Estate, 357 Mo. 181, 184, 207 S. W. 2d 273, 275 (1947).
92. State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 83, 172 N. W. 902, 905 (1919).

directly to the ultimate beneficiaries, as in the *Hilton* case, or whether the estate is distributed under the decree in accordance with the will, and thereafter the legatee pays over to the heirs the amount they are entitled to under the agreement, as in the *Thorson* case.[93] The Nebraska courts take an intermediate view. If the decree of distribution is in accordance with the compromise agreement, the tax is assessed on interests passing under that agreement.[94] But if the property is distributed by the probate court in accordance with the terms of the will, the court will not look further to see if there is a later compromise agreement; the property has passed by will, and the tax is assessed accordingly.[95]

Doubtless there is more possibility of fraud and collusion under the minority view than under the opposing rule. However, would it not be an answer that the state should be ever on the alert for such tax evasion, and deal with it harshly under various penalties where it is discovered? Fraud is not so prevalent that such schemes could all escape the watchful eye of the tax collector. After adopting the minority rule, the Maryland court examined the danger of fraud:

> "The court is not unaware of the danger that agreements might be made which, following this solution of the problem, would by a merely pretended change in distribution defraud the state of the greater amount of taxes due it upon the actual distribution. It is a danger which does not seem great, but however that may be, the solution adopted appears to this court more in conformity with the purpose of the statutes, and frauds can be dealt with when they are practised."[96]

Under this minority rule, no revenue is lost by the assignment of exemptions. In cases where a compromise agreement is reached providing for the heirs to get a share of the property bequeathed to a charity, the tax is applied to property so passing, even though the charity is exempt.[97] Under the majority rule, none of the property bequeathed to a charity is taxable, even if most of it ultimately passes into the hands of beneficiaries who have no such exemptions. This is one part of the basic advantage which the minority rule enjoys—the inheritance tax is applied on the basis of who gets the ultimate economic benefit of the transfer. This is spelled out with telling effect in In re *Gartside's Estate:*

> "What is most impressive and persuasive in favor of the rule of taxing on the basis of what is actually paid and not on the basis of what is bequeathed by the will, is the fact that under such a rule all are taxed as provided by law. Under the other rule, that is, basing the tax according to the will and not upon the actual distribution

93. State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 172 N. W. 902 (1919); *In re* Thorson's Estate, 150 Minn. 464, 185 N. W. 502 (1921).
94. *In re* Kierstead, 122 Neb. 694, 241 N. W. 274 (1932).
95. *In re* Soutter, 142 Neb. 42, 5 N. W. 2d 263 (1942).
96. Hart v. Mercantile Trust Co., 180 Md. 218, 222, 23 A. 2d 682, 684 (1942).
97. Taylor v. State, 40 Ga. App. 295, 149 S. E. 321 (1929); *In re* Thorson's Estate, 150 Minn. 464, 185 N. W. 508 (1921).

as provided for in a compromise agreement, some may escape taxation even though they receive large sums, while others may be compelled to bear a burden far beyond that fixed by the statute." [98]

Where a will contest is not compromised, but proceeds to litigation, and a court decision is ultimately rendered, all courts hold that the inheritance tax is assessed in accordance with the transfers under the court decision, and not under the will. This would obviously be the result in a jurisdiction following the minority rule.[99] It is just as true in majority view jurisdictions.[100] The legatees under a will cannot be taxed, if there has been a judicial determination in the will contest. Once the issue has been determined, the final judicial decree of distribution relates back to the date of death, and the transfers are effective as of that time.[101]

The case of a will contest must be distinguished from the case where a compromise agreement is adopted by the court in its final decree of distribution. Under the majority view, such a compromise agreement is still not recognized for tax purposes.[102] The minority rule and the Nebraska rule both assess the inheritance tax on the basis of the decree. Nebraska parts with the minority view on compromise agreements which are not embodied in a judicial decree.

(c) *Deductibility of Expenses*

The expenses incurred in a will contest or in reaching a compromise agreement fall into two categories: (1) expenses to the executor or administrator in defending the will; (2) expenses to the contestants in attacking the will. The two kinds of expenses are treated differently by the court in so far as deductibility for inheritance tax purposes is concerned. Expenses of the personal representative in defending an attack on the proposed distribution may be deducted before any death tax is assessed.[103] On the other hand, the amounts expended by the heirs or legatees in an attempt to establish their rights may not be deducted when the inheritance tax is assessed on their shares.[104]

Expenses of the executor in defending a will contest are deductible as expenses of administration.[105] Such expenses are obviously for the benefit of the estate, since success will mean that the estate can be distributed in accordance with the testamentary plans of the decedent. The Tennessee court holds that the inheritance tax is imposed on "clear value," which is somewhat analogous to the net estate in federal taxation:

98. 357 Mo. 181, 185, 207 S. W. 2d 273, 275 (1947).

99. *See* State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 80, 172 N. W. 902, 904 (1919).

100. *See* MacKenzie v. Wright, 31 Ariz. 272, 275, 252 Pac. 521, 522 (1927).

101. *See* State *ex rel.* Hilton v. Probate Court, 143 Minn. 77, 80, 172 N. W. 902, 904 (1919).

102. Baxter v. Treasurer, 209 Mass. 459, 95 N. E. 854 (1911).

103. People v. Upson, 338 Ill. 145, 170 N. E. 276 (1930); *In re* Gihon's Estate, 169 N. Y. 443, 62 N. E. 561 (1902); Shelton v. Campbell, 109 Tenn. 690, 72 S. W. 112 (1902).

104. People v. Klein, 359 Ill. 31, 193 N. E. 460 (1934); *In re* Westurn's Estate, 152 N. Y. 93, 46 N. E. 315 (1897); *In re* Lines's Estate, 155 Pa. 378, 26 Atl. 728 (1893).

105. *In re* Reed's Estate, 98 Misc. 102, 162 N. Y. Supp. 412 (Surr. Ct. 1916).

> "We are of the opinion, however, that the estate is liable for the tax only to the extent of its clear value, and that 'clear value' means that value after payment of all debts and expenses of administration, or execution of the will, in case of testacy, and in cases where the will is contested, and expenses for attorney's fees, etc., are incurred by the executor in attempting to sustain the will, these fees and expenses must be treated as expenses of administration, and deducted from the amount of the estate, in order to reach its clear value." [106]

Illinois finds that these expenses are proper deductions since it is the duty of the executor to defend the will, although there is authority to the contrary.[107] The time element is also relevant here, in that the inheritance tax is a tax on the succession, and these expenses are incurred before any distribution is made.[108]

In re *Sanford's Estate* [109] seeks to differentiate between the treatment of the two categories of expenses on the basis of whether the expenses are incurred in an effort to affect the size of the estate. Thus, expenses of litigating in preserving the estate intact are proper deductions, while litigation by distributees over their respective interests will have no effect on the size of the estate to be distributed. This fails to be adequate as a general rule, since it does not deal with the expenses of a distributee involved in litigation with the estate. This clearly will affect the size of the estate, and yet it will not be deductible.

There was a popular view a few decades ago that the expenses of such litigation by the personal representative were deductible where the expense resulted in more taxes for the state. The opinion in *Connell v. Crosby* [110] centered on this point. The successful defense there against an attack on the will saved a considerable amount of tax for the state, so that in effect the estate was partly fighting the state's battle, and should be entitled to a deduction. *People v. Klein,*[111] decided by the same court, involved a similar situation, but the court held that the fact that the state profited by the successful defense of the will was merely incidental. The court also reinterpreted its decision in *Connell v. Crosby*:

> "[T]he primary reason for upholding the deduction in that case was that the defense made by the executors in the proceeding to contest the will was for the purpose of upholding and maintaining the bequest in favor of the college and it is the duty of the executor to defend the will." [112]

No longer is the self-interest of the state itself the principal factor in granting or denying deductions for expenses of a will contest.

Pennsylvania has adopted a minority rule on this problem. It holds that

106. Shelton v. Campbell, 109 Tenn. 690, 696, 72 S. W. 112, 113 (1902).
107. Connell v. Crosby, 210 Ill. 380, 71 N. E. 350 (1904). *Contra*: *In re* Taber's Estate, 257 Pa. 81, 101 Atl. 311 (1917).
108. *In re* Gihon's Estate, 169 N. Y. 443, 62 N. E. 561 (1902).
109. 66 Misc. 395, 123 N. Y. Supp. 284 (Surr. Ct. 1910).
110. 210 Ill. 380, 71 N. E. 350 (1904).
111. 359 Ill. 31, 34, 193 N. E. 460, 461 (1934).
112. *Ibid.*

an executor is not bound to defend the testator's will, and if he undertakes to do so, he must act as agent and for the benefit of those who will profit by his success.[113] Therefore, the executor must look to those benefited for the expenses incurred. The court indicates that the estate has no interest in winning or compromising a contest. This does not seem correct, since it is the executor's duty to carry out the testamentary plan of the decedent. The majority rule in this situation is overwhelming in its persuasiveness.

As to the expenses of the contestants in fighting a will contest or reaching a compromise agreement, the courts show little doubt that these expenses are not deductible for inheritance tax purposes. Since the inheritance tax is imposed on the tranfer by will or intestacy as of the time of death, any expenditures by the beneficiaries in preserving their rights at a later date can have no effect on the assessment of the tax.[114] It is unfortunate that the transfer embroiled the beneficiary in expensive litigation, but that is his problem alone.[115] The amounts spent are for the protection of one's property rights.[116] In effect, the legacy which the beneficiary has received is property encumbered by the threat of litigation, and the expense of removing that encumbrance is not deductible. Here, as in the other category of cases, the increased taxes accruing to the state are incidental, and the mere fact that a successful attack on the will by a beneficiary brings more inheritance tax does not mean that his expenses, which bring profit to the state as well as himself, are deductible.[117] Any contrary rule would be an invitation to all parties concerned to litigate until the whole estate was consumed by the costs, and neither the interested parties nor the state would get anything.[118] For these rcasons, no state has seen fit to allow for the deduction of these expenses.

(3) *Conclusions*

In discussing the effect of renunciations and compromises on state death taxes, four general situations arise: (a) a simple renunciation, (b) a successful attack on the will, (c) a compromise agreement, (d) a compromise agreement embodied in a decree of distribution. As to the first two, there is no serious controversy in the law today—in both situations, the tax is applied to the transfers to the ultimate beneficiaries, regardless of what the transfers would have been under the will. The third and fourth situations bring out the conflict of authority. The majority rule would tax the property as it passed under the will in both cases. The minority rule taxes the transfers to the ultimate bene-

113. *In re* Taber's Estate, 257 Pa. 81, 101 Atl. 311 (1917).
114. *In re* Westurn's Estate, 152 N. Y. 93, 46 N. E. 315 (1897).
115. *Ibid.*
116. *In re* Sanford's Estate, 66 Misc. 395, 123 N. Y. Supp. 284 (Surr. Ct. 1910).
117. People v. Klein, 359 Ill. 31, 193 N. E. 460 (1934).
118. *In re* Sanford's Estate, 66 Misc. 395, 123 N. Y. Supp. 284 (Surr. Ct. 1910).

ficiaries in both cases. The intermediate Nebraska rule follows the majority on the third and the minority on the fourth.

Of these three approaches, the minority view is the most desirable, despite the fact that the majority view is sounder in theory, particularly with reference to the doctrine of partial renunciation. The advantages of the minority view may be summarized briefly as follows:

(1) It has the advantage of uniformity. These four situations are all very similar, one blending into the other, and much litigation will be avoided if all are treated alike.

(2) It applies the inheritance tax as the legislature intended so far as exemptions and rates are concerned. The purpose of exemptions and varying rates is defeated by a contrary rule.

(3) The contestants of a will are subjected to the tax at their own rates whether they fight the case through to a victory or compromise. Avoidance of inheritance tax will not be an incentive to compromise at any cost.

(4) The loss of revenue as a result of the rule, while it may be substantial, is not unfair to the state. The tax is assessed according to how the property passes, giving the basis of the tax some legal significance. The loss of revenue under a contrary rule would depend on chance, and would mean that some beneficiaries would get a windfall gain.

(5) While the rule may tend to encourage fraud and collusion, this can be supervised and investigated. Fraud can be taken care of where fraud is practiced; it is not necessary to gear an inheritance tax law to the potential dishonesty of a few beneficiaries.

These are the important considerations in selecting the minority rule as the most desirable. The best way to withdraw all these problems from litigation is by writing the rules expressly into the inheritance tax statutes. Very few of the states have found the need urgent enough to justify any amendatory legislation of this sort. Pending such action by the states, the present conflict of authority will continue.

III. Federal Taxes

(1) *Estate Tax*

Renunciations and compromises may affect the amount of Federal estate tax in various ways. Where either the renouncing party or the ultimate beneficiary of a renunciation is a charitable organization, the tax consequences may be very significant, since certain charitable bequests are deductible under section 812 (d) of the Internal Revenue Code. A similar situation is presented where either party is a surviving spouse, since the marital deduction provisions of section 812 (e) would be applicable. There is also an estate tax problem in this field bearing a close resemblance to the gift tax considerations which will be discussed later: can a renunciation of a legacy be a gift in contemplation of death for estate tax purposes? These three areas produce most of the estate tax litigation relating to renunciations and compromises.

(a) *Charitable Deduction*

Section 812 (d) of the Internal Revenue Code, which provides for the charitable deduction, has statutory provisions pertaining to renunciations and compromises:

> "Sec. 812. NET ESTATE. For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—. . . .
>
> "(d) TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES—The amount of all bequests, legacies, devises, or transfers, (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return, or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944), to or for the use of . . . ."

Thus, where a legatee under a will renounces, and the legacy thereby falls into the residuary estate, which has been bequeathed to a charity, the statute expressly provides for the renounced legacy to be deductible. There are certain requirements established by the section. First, there must be an "irrevocable disclaimer." In *Selig v. United States,*[119] there was a disclaimer by the life tenant in favor of a charity, but the life tenant reserved the right to "consume the assets of this estate." The court held that this did not constitute an irrevocable disclaimer, and no deduction was allowed. Secondly, there is a time limit set up by the statute, requiring that the disclaimer be made prior to the date prescribed for the filing of the estate tax return.

This provision in section 812 (d) relating to disclaimers was added by an amendment in 1942. However, eases based on facts relating to the period before 1942 have been decided the same way.[120] The Second Circuit stated that the effect of the new amendment "so far as it related to disclaimers, was only to clarify the existing statute." [121]

Section 812 (d) and the cases decided under it are in accord with the treatment of renunciations by the state courts; the tax is imposed on the basis of who eventually received the legacy, and not on the basis of who was legatee under the provisions of the will.[122] This approach is not limited merely to renunciations in the charitable deduction field, since payments under compromise agreements are also deductible if made to charitable organizations.[123]

119. 73 F. Supp. 886 (E. D. Pa. 1947), *aff'd per curiam,* 166 F. 2d 299 (3d Cir. 1948).
120. Commissioner v. Macaulay's Estate, 150 F. 2d 847 (2d Cir. 1945); Smith v Commissioner, 78 F. 2d 897 (1st Cir. 1935); James N. Schoonmaker, 6 T. C. 404 (1946).
121. Commissioner v. Macaulay's Estate, 150 F. 2d 847, 849 (2d Cir. 1945).
122. Ida F. Doane, 10 T. C. 1258 (1948).
123. Dumont's Estate v. Commissioner, 150 F. 2d 691 (3d Cir. 1945). *Contra*: William A. Carey, 9 T. C. 1047 (1947).

The Federal law on death taxes is in accord with that of the minority view states in this respect.

Although the reverse situation—*i.e.,* where a charitable organization renounces in favor of an heir, or compromises with an heir—is not covered by the provisions of section 812 (d), the courts have handled these cases the same way.[124] The deduction is computed on the basis of what the charity actually received, and not on the basis of what is provided in the will of the decedent.[125] This result has been justified by applying the principle of *Lyeth v. Hoey,*[126] which may be traced throughout the field of federal taxation. *Lyeth v. Hoey* held that property received under a compromise agreement was taken "by inheritance," and therefore was not taxable income. The courts have expressed the view that if such property constitutes "inheritance" for income tax purposes, it is logical that it is also "inheritance" for estate tax purposes.[127] It is recognized that there are areas both of gap and overlap in our tax system, but the theory underlying *Lyeth v. Hoey* is applicable to both the income tax and the estate tax. Therefore, any property which an heir receives from a charity in a compromise under a will is not deductible under section 812 (d).

(b) *Marital Deductions*

The Revenue Act of 1948 introduced a new concept to federal taxation, the marital deduction. This innovation would have raised renunciation and compromise problems, if the statute had not included express provisions to cover these contingencies. There are two applicable sections in the Code regarding disclaimers. The first, section 812 (e) (4) (A), treats disclaimer by a surviving spouse:

> "If under this subsection an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse then such interest shall, for the purposes of this subsection, be considered as passing to a person or persons entitled to receive such interest as a result of the disclaimer."

This is a statutory enactment of the usual rule on renunciations; the tax is imposed on the ultimate taker under the renunciation, rather than the renouncing legatee. No property renounced by the surviving spouse falls within the marital deduction. The Treasury has indicated that a disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled, and

124. Thompson's Estate v. Commissioner, 123 F. 2d 816 (2d Cir. 1941); *In re* Sage's Estate, 122 F. 2d 480 (3d Cir. 1941); John J. Toeller, 6 T. C. 832 (1946); Estate of Gilbert, 4 T. C. 1006 (1945). *Contra:* Continental Illinois National Bank and Trust Co. of Chicago, 38 B. T. A. 220 (1938), in which the Commissioner did not acquiesce.

125. Heim v. Nee, 40 F. Supp. 594 (W. D. Mo. 1937).

126. 305 U. S. 188, 59 Sup. Ct. 155, 83 L. Ed. 119, 119 A. L. R. 410 (1938).

127. Thompson's Estate v. Commissioner, 123 F. 2d 816 (2d Cir. 1941); *In re* Sage's Estate, 122 F. 2d 480 (3d Cir. 1941).

distinguishes this from the case of a surviving spouse's acceptance and subsequent disposal of a property interest.[128]

The effect on the marital deduction of a payment under a compromise agreement by the surviving spouse is the same as the effect of a renunciation.

> "If as a result of a controversy involving the decedent's will, or involving any bequest, or devise thereunder, his surviving spouse assigns or surrenders a property interest in settlement of such controversy, the interest so assigned or surrendered is not considered as having 'passed from the decedent to his surviving spouse.'"[129]

Thus, if a widow pays a sum of money to the husband's heirs to prevent litigation, the marital deduction will be reduced by that amount.[130]

The other applicable section of the Code, section 812 (e) (4) (B), sets up a contrary rule for disclaimer by any person other than a surviving spouse:

> "If under this subsection an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for the purposes of this subsection, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made."

Where a man has left certain property to his son and the residue to his wife, this provision prevents the son from disclaiming in order to take advantage of the marital deduction, and the wife later transferring the disclaimed property back to the son.[131] Such a plan would not be successful taxwise because under section 812 (e) (4) (B), the property is still considered to have passed to the son, despite the disclaimer.

Section 812 (e) (4) (B) makes it unnecessary to distinguish between a disclaimer by a person other than a surviving spouse and a transfer by such person, because so far as the marital deduction is concerned, they are treated alike.[132]

A payment to a surviving spouse under a compromise will qualify for the marital deduction only if the payment was a "bona fide recoguition of enforceable rights of the surviving spouse in the decedent's estate."[133] The Treasury considers a bona fide recoguition to be a "decision of a local court upon the merits in an adversary proceeding following a genuine and active contest."[134] This means that each case must be examined as to its own facts to see if there

128. U. S. Treas. Reg. 105, § 81.47a(e) (1949).
129. *Id.* § 81.47a(g).
130. ALEXANDRE, GREENFIELD AND LEWIS, MARITAL DEDUCTIONS, SPLIT INCOME, AND THE REVENUE ACT OF 1948, 56 (1948).
131. *Id.* at 57.
132. U. S. Treas. Reg. 105, § 81.47a(e) (1949).
133. *Id.* § 81.47a(g).
134. *Ibid.*

was a real controversy. If there was not, then section 812 (e) (4) (B) prevents the parties from obtaining an increased marital deduction.

This is a field of tax law that is just beginning to develop, with the marital deduction provisions of the Code as a foundation. When cases under these provisions begin to reach the courts, the problems discussed here will become clarified.

(c) *Gifts in Contemplation of Death*

This problem is presented in its simplest form in *Brown v. Routzahn*.[135] In this case, the decedent in 1920 renounced certain legacies under the will of his wife who died in 1912. No part of these renounced legacies was included in his estate, even though the renunciation had been in contemplation of death. The court held that the decedent had never had control over the property, had never owned the property, and therefore any tax would have been a tax upon the exercise of a right to refuse a gift of property.[136]

This case is now of limited application. It was a case which arose before the enactment of a gift tax. The rigid common law concepts have been weakened in the gift tax field, and control has become the important factor today rather than theoretical title. The decedent in *Brown v. Routzahn* did have control over the property, although the court stated otherwise. It is doubtful that this pre-gift-tax case involving the estate tax would be followed by the courts today.

(2) *Gift Tax*

There is no doubt that a large percentage of renunciations and disclaimers are made with donative intent. Therefore, it is not surprising that the Commissioner of Internal Revenue considers these acts as gifts for tax purposes. Case authority is slight, but *Housman v. Commissioner*[137] indicates the attitude of the courts in recent years. This case involved a compromise agreement between a widow with a life interest and her son who agreed not to contest the will. The court held that these payments were essentially donative in character and therefore subject to a gift tax. The decision in this case is very doubtful, particularly in light of a very persuasive dissent by Learned Hand.[138] Its authority is strictly limited by the fact that the court found that the parties were not dealing at arm's length and were not compromising a bona fide will contest. But this decision warrants the conclusion that if the court considers this compromise agreement a taxable gift, an ordinary renunciation of donative character becomes an *a fortiori* case. And the vigorous dissent in the *Housman* case would indicate that the Commissioner will not be successful

135. 63 F. 2d 914 (6th Cir. 1933).
136. *Id.* at 916.
137. 105 F. 2d 973 (2d Cir. 1939), *cert. denied*, 309 U. S. 656 (1940).
138. *Id.* at 976.

very often in imposing a gift tax on compromise payments in the absence of extreme facts; a bona fide compromise is not made with donative intent, and the sweeping doctrine of *Lyeth v. Hoey* requires that the payment under a compromise agreement be regarded as "inheritance."

The Revenue Act of 1948 has raised other gift tax problems.[139] Section 812 (e) (4) (A) makes it reasonably clear that renunciation by a surviving spouse is not a taxable gift. The renunciation by a child of a legacy or his statutory share is more doubtful. There seems to be no reason not to apply the gift tax to such a renunciation; it is doubtful that courts today would try to make any distinction between action by the child and non-action.[140] Where the child does not claim his statutory share, the doctrine of constructive receipt must be employed in order for the child to have any property with which to make a taxable gift. Modern tax theories emphasize control rather than title, and the child has control of the statutory share whether or not he exercises this control to his own advantage. Therefore, there is great possibility of a gift tax even where the child exercises his control in the most negative sort of way by doing nothing.[141]

An assignment of a legacy is a taxable gift and although under the common law of property, a renunciation is quite different, since title never passes to the legatee, the courts today would not make the taxability of a transfer depend on such a technicality. This is but another example of a part of the law of taxation where the technicalities of the old property rules may be pushed aside in an effort to get at the substance of a situation.

The whole problem of gift taxes on renunciations and compromises moves now in a shadowy area of Federal taxation. The scholar and practitioner can only make an informed guess as to how the law will be developed by the courts, but a perusal of the developing tax philosophies of our times indicates a broad application of the gift tax in this field.

139. See Note, *Will Renunciation of a Bequest or Failure to Claim a Statutory Share Constitute a Taxable Gift?* 2 VAND. L. REV. 287 (1949), for a more detailed discussion of these problems.

140. *Ibid.*

141. Bowe, *Gifts and Taxes,* 18 U. OF CIN. L. REV. 237, 253 (1949). Income tax cases depend on similar theories of control. Cerf v. Commissioner, 141 F. 2d 564 (3d Cir. 1944); Jergens v. Commissioner, 136 F. 2d 497 (5th Cir. 1943); Richardson v. Commissioner, 121 F. 2d 1 (2d Cir. 1941). Also consider the treatment of the release of a general power of appointment as a taxable gift in section 1000(c) of the Code.