

# Federal Taxes on Estates, Trusts and Gifts, 1938-1939 (Book Review)

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tutional.<sup>11</sup> The author of the handbook might have discussed more thoroughly the expanding powers of states to tax income and its implications.

As a handbook the Second Edition continues to be an outstanding textbook and work of reference. One hundred twenty-four pages have been added to the original book. The arrangement of the material continues to be ideal for students. In each chapter the principles are succinctly stated in bold-face type followed by the author's clarifying elaboration with copious references to cases and sources. The publisher's contribution of an attractive red cover should also be mentioned.

BENJAMIN HARROW.\*

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FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS, 1938-1939. By Robert H. Montgomery. New York: Ronald Press Co., 1938, pp. xi, 511.

In 1935 there first appeared a *Handbook on Federal Taxes on Estates, Trusts and Gifts* under the co-authorship of Robert H. Montgomery and Roswell Magill. The reader can think of no other two persons better qualified to write such a handbook. A Second Edition appeared in 1936 and after a lapse of one year, tax practitioners will be pleased to learn that a Third Edition may now be added to their library.

The author explains that Professor Magill was unable to collaborate in the preparation of this edition for the reason that he served as Under-Secretary to the Treasurer of the United States from 1937 to September, 1938.

The present edition follows the same plan of the previous editions of discussing the current status of the law as it affects the Estate Tax, the Gift Tax, and the Income Tax on estates and trusts. There is also a valuable contribution on planning the distribution of an estate.

The basic problems of an estate tax are not difficult to understand. The complications arise primarily in connection with *inter vivos* transfers that are made taxable upon the death of the grantor. Property to which a decedent has absolutely no legal title is included as a basis of taxation, as if such property actually were legally owned by the decedent at death. This system of make-believe which turns accepted legal principles topsy-turvy is responsible for chaos in legal reasoning and whimsical decisions on the part of courts. For example, a decedent transfers property in contemplation of death. This property is included in the donor's estate at death, the tax being based on the value of such property at the date of death.

Again, there has been considerable litigation on the question of whether or not a gift has been made in contemplation of death. Most cases before the courts have been lost by the Treasury Department. Inasmuch as *inter vivos* transfers are today subject to a gift tax, the author is of the opinion that the contemplation of death provision might readily be repealed with corresponding benefits in the reduction of litigation and simplification of administration.

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<sup>11</sup> *Colgate v. Harvey*, 296 U. S. 404, 56 Sup. Ct. 252 (1935); *The Taxing Power—State Income Taxation* by Walter K. Tuller, published by Callaghan & Co., 1937, *passim*.

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The Treasury Department is adding to the confusion by a recent ruling which holds that the proceeds of insurance policies previously assigned or transferred in contemplation of death are now to be included under Section 302-c, which section taxes transfers intended to take effect in possession or enjoyment at or after death.

In the 1935 Act, Congress finally attempted to mitigate the hardship caused by basing the tax on market values at the date of death. It did this by giving the executor the option of valuing the gross estate as of a date one year after the decedent's death. This election is available only at the time the return is filed. The author points out that if the Treasury Department differs from the executor in his valuations, the executor should not be held to this election. The language of the statute, however, supports the Treasury Department's position that the election cannot be rescinded. This obviously is inequitable.

The problem of valuations remains one of the most difficult ones in the administration of the Estate Tax Law. In several recent cases the courts have permitted the adoption of a so-called blockage rule, whereby a large block of stock need not, under special circumstances, be valued at the market value in the same way as a small lot might be valued. In the case of close corporations and particularly where a business has been carried on at a loss, the writer feels that some substantial allowance should be made in determining the value of such stock or such a business by a determination of a "negative goodwill" element. Several recent state court decisions seem to find a basis for this in the law, and taxpayers should press the issue.

Considering the lack of an extensive bibliography on the Estate Tax Law, this book is especially valuable.

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RESTATEMENT OF THE LAW OF TORTS. Volume III. St. Paul: American Law Institute Publishers, 1938, pp. xxvi, 759.

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An attempt to review the most recent volume of a set being published piecemeal ought not to be made without regard to the previous books.

In the first two volumes of the *Restatement of Torts*, the "pattern" or plan being followed consisted of a development of intentional torts in Volume I, and of negligence in Volume II. This enabled a teacher to make an historical and genetic approach to torts through the two main forms of trespass: Volume I lending itself to treatment as generally containing the modern law descended to us through the various forms of trespass *vi et armis*; and Volume II permitting a presentation of negligence law as a main part of what has come to us through the writ of trespass on the case.

Volume III is largely a restatement of other parts of our inheritance from case. Thus the teacher may continue his use of the *Restatement* since the

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