THE CASE OF THE CONFUSED GIVER

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'Cheshire-Puss,' she began, rather timidly, as she did not know at all whether it would like the name; however, it only grinned a little wider. 'Come, it's pleased so far,' thought Alice, and she went on: 'Would you tell me, please, which way I ought to go from here?'

'That depends a good deal on where you want to get to,' said the cat.

'I don't much care where—' said Alice.

'Then it doesn't matter which way you go,' said the cat.

'—so long as I get somewhere,' *Alice added as an explanation.*

'Oh, you're sure to do that,' said the cat, 'if you only walk long enough.'

The author of this delightful little colloquy was a professor of mathematics at Oxford, by real name Charles L. Dodgson, but immortally remembered as the Lewis Carroll of *Alice in Wonderland.* He wrote in a vein of humor to the eternal pleasure of little children, mostly girls, but with a note of satire which probably delighted such of their parents as were *au courant* of the political and social foibles of the day. *Dehors* the satire, and viewed from the adult standpoint, it was, however, pure nonsense.

But is it much different from the sort of thing a serious estate planner is obliged, from time to time, to hand out to an inquiring client? Take, for example, the field of inter vivos trust giving. The following dialogue might well take place today:

'Counselor,' says the client, 'I'm in the high income and estate tax brackets. I have three minor children. My wife is dead. I'm interested in saving taxes. How about it?'

'Well,' says the lawyer, perhaps even grinning like the Cheshire Cat, 'have you thought of giving some of your wealth to your children?'

'I've given some thought to it, but the Government hits you with a gift tax, doesn't it?'

'Yes,' says the advisor, 'but gift tax rates are lower than estate tax rates and, what's more important, you can play the one off against the other and take advantage of lower brackets and combined exemptions. Furthermore, you save income taxes.'

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'That's something,' answers the client, 'but, my children are young. I don't want to turn over any great wealth to them at their ages. You can understand that.'

'Then why not try a gift in trust? They won't be able to fritter that away.'

'Can you set up a trust which will give them income until they reach majority or later and then, perhaps, in my discretion, turn the principal over to them?'

'Suppose they died before the principal was paid over?'

'Then I'd want the money back. And, of course, since the bulk of my wealth is tied up in my own corporation, I'd have to have voting control of the stock.'

'Well, you're getting into deep waters, now.'

'But, counsellor,' asks the client, 'Why can't we do this? Set up a trust for the kids, with me as trustee. Pay them the income until they come of age and then turn the principal over to them, if I feel they're able to handle it. If not, keep on paying them the income, unless one goes completely sour. Then, of course, I'd want to cut him off entirely. If I haven't turned the principal over to them by the time I die, they can have it then. If any one of them should die before I do, I'd want the principal back. What would my taxes be on that sort of arrangement?'

At this point the lawyer ought to call time out for a look at the law. If, after examining it, he has the temerity to approach his prospective client at all, the interview might run about like this:

'Counsellor,' says the client, 'you've had lots of time to examine my plan. What about it?'

'Well, it sounds like a good idea, but it won't help you taxwise.'

'What do you mean? You told me that I'd save money by giving it away. Isn't that what I'm doing?'

'Well, yes and no.'

'What do you mean by that?'

'You'll pay a gift tax when you create the trusts, but that probably will not save you income taxes because you'll still have to pay them on the trust income—'

The client interrupts—'That's not too bad. I'm paying those anyway.'

'That's not all, however,' continues the lawyer. 'Since the income is yours, you'll pay a gift tax on it when it is paid over to the children.'

'That still isn't too bad. It won't be much more than $3000 apiece each year.'

'You probably won't get the $3000 exclusion as long as your children are minors.'

The client settles back in his chair—'At least, I'll save on death taxes.'

'Probably not, since the principal of the trust will be considered part of your estate when you die.'

'You mean to say that if I go through with this plan, I'll have to pay four sets of taxes, while I'm only paying two as things stand now?'

'Well, there are some credits which will reduce your ultimate bill.'

The client rises and puts on his hat. 'Thanks a lot, counsellor. If you'll let me know what I owe you for this advice, I'll send you a check.'

Unlike our Cheshire Cat, the estate planning counsellor could not assure the client that if he only walked long enough, he would get somewhere.

Although it may seem logical to assume that a transfer during life, so incomplete as to leave its subject matter in the gross estate of the transferor on his death, should not be regarded as a complete gift for gift tax purposes, this is not the case. Nor is the reverse true. Furthermore, how complete a transfer is for the purpose of gift or estate taxes matters not a whit where the income tax is concerned. Each seems to have its own criteria of what constitutes a gift. And none bears any real relation to the long standing common law concept of a taxable gift.

In short, therefore, words mean nothing, and logical intendment, either of Congress or of the courts, even less. Any attempts to argue from these points are voices crying out in the wilderness. As was said by the Court of Appeals for the Second Circuit:

> At the bottom of respondents' contentions is this implied assumption: the same transaction cannot be a completed gift for one purpose and an incomplete gift for another. Of course, that is not true, as the cases . . . make clear. Perhaps to assuage the feelings and aid the understanding of affected taxpayers, Congress might use different symbols to describe the taxable conduct in the several statutes, calling it a 'gift' in the gift tax law, a 'gaft' in the income tax law, and a 'geft' in the estate tax law.[1]

In other words, although the federal gift, estate and income taxes are all part of the same revenue code, and in it the term

1. Commissioner v. Beck's Estate, 129 F.2d 243, 246 (2d Cir. 1942).

"gift" frequently occurs, it does not mean the same thing for all purposes. It has to be considered in the particular context in which it appears, complicating the taxpayer's problem beyond all reason.

THE NATURE OF A GIFT

The answer to the question—what is a gift—should be simplicity itself, and at common law it probably was. Devoid of legalisms, a gift may be defined as a voluntary transfer, without consideration or compensation.[2] Its two overriding characteristics are its gratuitous character and a present transfer of its subject matter.[3] Both have been challenged in tax cases.

For purposes of the federal estate tax, transfers made for an adequate and full consideration in money or money's worth during the transferor's life are not a part of his gross estate, whereas their gratuitous counterparts may well be. These include transfers in contemplation of death, those taking effect in possession or enjoyment at or after death, those with a life estate reserved, revocable transfers and joint interests.[4] For purposes of deduction from the gross estate in arriving at the net estate, claims based on an adequate and full consideration in money or money's worth are allowable.[5]

The estate tax blends into or, more precisely, collides with the gift tax at both the points of consideration and transfer. Where there is no consideration for a transfer it would ordinarily be considered a gift, subject to the gift tax. However, the element of transfer is the mark of a gift, and transfers during life which are brought under the pale of estate tax inclusion are, in most cases, less than complete. At least they are taxed as substitutes for testamentary disposition, and the inference should be that they are less than final.

On the income tax side, there are numerous situations where it is essential to determine whether a bona fide gift has been

2. Gray v. Barton, 55 N.Y. 68, 72 (1873).

3. Matter of Van Alstyne, 207 N.Y. 298, 100 N.E. 802 (1913). See as illustrative of some of the problems which confront the common law donor: Miller v. Silvermann, 247 N.Y. 447, 160 N.E. 910 (1928); Farmer's Loan Trust Co. v. Winthrop, 238 N.Y. 472, 144 N.E. 769, *cert. denied*, 266 U.S. 333 (1924); *In re* Mill's Estate, 172 App. Div. 530, 158 N.Y.Supp. 1100 (1st Dept.), *aff'd*, 219 N.Y. 642, 114 N.E. 1072 (1916); Newman v. Borst, 122 N.C. 524, 29 S.E. 848 (1898); Hillebrant v. Brewer, 6 Tex. 45 (1891); Cochrane v. Moore, 25 Q.B.D. 57 (1890).

4. INT. REV. CODE, §§ 811(c)-811(i).

5. INT. REV. CODE, § 812(b).

made. For example, where property is sold at a gain by one who has received it as a gift, the basis of that property for the purpose of determining the gain is the cost to the last person who acquired it by means other than gift. In this connection, the existence of consideration for the intermediate transfers involved is significant. The presence of a transfer is also important in dealing with attribution of income. In other words, a transfer which is not complete or final should not be a sufficient divestiture to relieve the transferor of income tax liability on the yield of the property transferred. Typical of this type of situation are trusts in which the settlor retains various types of controls over the subject matter. Different answers flow from those previsions of the Code relating to the income tax consequences of these dealings than from the equivalent gift or estate tax provisions.

TRUST GIVING

The present federal income tax law made its debut in 1913,[6] followed three years later by the federal estate tax.[7] Although in passing the latter Congress was probably motivated by defense necessities of the moment, longer-range objectives were evident at the outset. However, the first estate tax law bore little evidence of correlation with the existing income tax law. At the time, it was probably unnecessary because, in the simplified and somewhat conceptual approach taken by both, there was little likelihood of conflict and, accordingly, small reason for correlation.

Nonetheless, the inter vivos gift as a means of evading the estate tax must have been apprehended by the draftsmen of the initial estate tax law. They provided that gifts made within two years of death were deemed in contemplation of death and, hence, taxable as a part of a decedent's estate.[8] The two-year limitation was the result of a compromise with advocates of a provision covering transfers made within four years preceding death.[9] That lifetime giving was even then considered a definite threat to satisfactory estate tax collections was further indicated by a provision covering jointly owned property in the 1916 Act,[10]

6. Tariff Act of 1913, § 13, 38 STAT. 166 (1913).
7. Revenue Act of 1916, 39 STAT. 756 (1916).
8. Revenue Act of 1916, § 202(b), 39 STAT. 777 (1916).
9. H.R.Rep. No. 1200, 64th Cong., 1st Sess. (1916) (Amendment No. 128), 1939-1 CUM. BULL. (Part 2) 38.
10. Revenue Act of 1916, § 202(c), 39 STAT. 778 (1916).

and one in the 1918 Act including, as part of the gross estate, gifts taking effect in possession or enjoyment at or after death.[11]

This legislative awareness of the vitiating effect of inter vivos giving upon the estate tax had, under the peripheral provisions described above, manifested itself by way of capturing only those transfers which were considered as substitutes for testamentary disposition. Difficult of enforcement, to say nothing of interpretation and administration, they were spotty in the most general sense. Nothing was done about the out-and-out gift which smacked in no way of testamentary schemes.

The only realistic approach would seem to be to tax gifts during life in the same manner and on the same scale as their death-generated opposite numbers. In 1921 a proposed gift tax measure had a brief encounter upon the legislative scene. Gift tax provisions were included in the Revenue Bill of 1921, laying a tax at graduated rates upon gifts of property in excess of $20,000 per year. These were passed by the Senate,[12] but were omitted in conference, and failed to become part of the Revenue Act of 1921.[13]

In 1924 a clash between Secretary of the Treasury Mellon, a traditional advocate of low taxes, and then Congressman John Nance Garner, even at this stage an exponent of the more revenue-conscious school, brought forth the enactment of the first gift tax law.[14] The House Ways and Means Committee had favored the low tax position of Secretary Mellon, but the Democratic minority secured House adoption of a higher rate schedule. To protect it, a gift tax law was enacted in mild form, limited to gifts of over $50,000 in any one year. Although stricken out by the Finance Committee of the Senate,[15] further debate on the floor resulted in its reinstatement,[16] and it became law on June 2, 1924, as part of the Revenue Act of that year.[17]

One noteworthy feature of the first gift tax legislation was the very clear indication on the part of Congress that this tax was

11. Revenue Act of 1918, §§ 402(b) and (c), 40 STAT. 1097 (1918).
12. 61 CONG. REC. 7485-87 (1921).
13. H.R.Rep. No. 486, 67th Cong., 1st Sess. (1921) (Amendment No. 622), 1939-1 CUM. BULL. (Part 2) 231.
14. Magill, *The Federal Gift Tax*, 40 COL. L. REV. 773 (1940).
15. Sen. Rep. No. 398, 68th Cong., 1st Sess. (1924), 1939-1 CUM. BULL. (Part 2) 271.
16. H.R.Rep. No. 844, 68th Cong., 1st Sess. (1924) (Amendment No. 179), 1939-1 CUM. BULL. (Part 2) 310.
17. Revenue Act of 1924, § 319 *et seq.*, 43 STAT. 313 (1924).

intended to supplement and protect the income tax, by preventing the loss of surtax revenue by the splitting up of large estates. It was also said to have been designed to prevent the evasion of estate taxes through lifetime gifts.[18]

More intrinsic correlation was evident in the latter regard. The 1924 Act amended the estate tax law to provide a gift tax credit[19] and extended the prior-taxed property deduction, heretofore confined to property which had been the subject of a previous estate tax, to property which had been the subject of a gift tax within five years of the death of a decedent.[20] The graduated rate schedules and the exemptions for the gift tax were the same as in the case of estate tax rates on testamentary transfers.[21]

The 1924 gift tax law was not a popular measure with anyone, including Congress, from the outset. Even before its enactment, it had been criticized as a further "levy on capital," as "entirely ineffective" and "impossible of effective administration."[22] It was repealed in 1926[23] with the laconic report, "Its administrative difficulties are numerous; the revenue return is small; and it is easily evaded."[24]

The necessity for protecting the surtax revenue was apparently completely forgotten with the repeal of the gift tax provisions. But even in death, its correlation with the estate tax provisions of the revenue system lingered. In 1926, estate tax rates had been retroactively reduced, and a similar retroactive reduction was made in the rates of tax on gifts made under the 1924 Act prior to its repeal.[25] More significant, however, was the imposition of a "substitute gift tax" in the form of a more stringent contemplation of death feature of the law.

It will be recalled that the 1916 Act had contained a rebuttable presumption that any transfer made within two years of death

18. 65 CONG. REC. 3120, 3172-73, 8095-96 (1924). These are the comments of Congressman Green (Chairman of the Ways and Means Committee), Congressman Garner, Senator Walsh and Senator Simmons.
19. Revenue Act of 1924, § 322, 43 STAT. 315-316 (1924).
20. *Ibid.*
21. See note 17 *supra*. See also Heiner v. Donnan, 285 U.S. 312, 333 (1932) (dissenting opinion of Stone, J.).
22. See note 15 *supra*.
23. Revenue Act of 1926, § 1200(a), 44 STAT. (Part 2) 125 (1926).
24. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1925), 1939-1 CUM. BULL. (Part 2) 339.
25. Revenue Act of 1926, § 324(a), 44 STAT. (Part 2) 86-87 (1926).

was deemed to be in contemplation of death. This had been continued in the Acts of 1918, 1921 and 1924. It had always proved very ineffective in practical administration, and the difficulty of its enforcement in the light of the repeal of the gift tax was felt to be insurmountable.[26] Accordingly, it was replaced with a conclusive presumption that all gifts within two years of death were to be considered part of the decedent's estate.[27]

Retroactive application was denied the 1924 gift tax law in two decisions,[28] in one of which the court split evenly on the constitutionality of the law itself.[29] A later decision laid to rest any doubts of constitutionality, resolving them in its favor.[30] In still another case, the Government found itself arguing that no estate tax could be effective without some means of taxing inter vivos transfers made to evade it, that no one expected any revenue from the gift tax, and that it would supplement the estate tax, making the latter effective.[31] Mr. Justice Brandeis espoused this approach in a dissenting opinion and added what had, for all practical purposes been by-passed for some time, namely that the evasion of the income tax was also curtailed by a gift tax measure to discourage the splitting up of large estates.[32]

From this uneventful, albeit somewhat strange, history of the first gift tax measure, about all that emerge are its potentialities. It could certainly be an effective counterpoint to the estate tax law, and it could serve the same purposes insofar as the income tax is concerned. Its role is one of rescue.[33] That was all it was, and all it would probably ever need to be. But the "Era of Wonderful Nonsense" was no time to test its effectiveness, and the tax unconsciousness of the "Roaring Twenties" no stage on which to expect it to play an effective part. With a balanced budget and two chickens in every pot, no policeman was needed for the tax system.

However, when *Heiner v. Donnan*[34] decided, on March 21,

26. H.R. Rep. No. 1, 69th Cong., 1st Sess. (1925), 1939-1 CUM. BULL. (Part 2) 325.
27. Revenue Act of 1926, § 302(c), 44 STAT. (Part 2) 70 (1926).
28. Untermeyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927).
29. Blodgett v. Holden 275 U.S. 142 (1927).
30. Bromley v. McCaughan, 280 U.S. 124 (1929).
31. Heiner v. Donnan, 285 U.S. 312, 313 (1932).
32. Untermeyer v. Anderson, 276 U.S. 440, 450 (1928).
33. 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 1056 (1942).
34. See note 31 *supra.*

1932, that the conclusive presumption that all gifts made within two years of death were in contemplation of death violated the due process requirement, the scenery had been shifted on the economic stage. Large fortunes and breadlines did not go well together. The guardians of the revenue decided that, absent a conclusive presumption with respect to contemplation of death transfers, a new gift tax law was needed. Furthermore, the revenue bill contemplated for 1932 increased both income and estate tax rates.[35]

Both sources of the revenue were therefore in need of protection. The House Ways and Means Committee, and the Senate Finance Committee fell over each other in pointing out that a gift tax was the needed safeguard.[36] However, mere lip service was paid to the gift tax as an offset to the income tax. The only substantial correlation achieved was in the estate-gift tax field. Graduated rates for the gift tax[37] (roughly analogous to the estate tax rates), a gift tax credit,[38] a prior-taxed property deduction feature,[39] and a return to the contemplation of death two-year rebuttable presumption[40] earmarked the new law.

The approach continued to be unrealistic however. The 1932 gift tax was hardly more of an attempt at correlation with the estate tax than was its 1924 counterpart. Except for increasing the cost of lifetime gifts to save income taxes, no more correlation or integration with this tax was present. In fact, the new tax scheme contained several ludicrous features, which have remained, in greater or lesser degree, to plague donors at the present time.

There would seem to be two fundamental approaches to the problem of lifetime giving. The gift tax is either a protective shroud, blanketing both the estate and income tax laws, or it is a measure designed to reach substitutes for testamentary disposion. These are inconsistent objectives. With the former, there

35. Revenue Act of 1932, 47 STAT. 245 (1932).
36. H.R. Rep. No. 708, 72nd Cong. 1st Sess. (1932), 1939-1 CUM. BULL. (Part 2) 462; Sen. Rep. No. 665, 72nd Cong. 1st Sess. (1932), 1939-1 CUM. BULL. (Part 2) 504; H.R. Rep. No. 708, 72nd Cong. 1st Sess. (1932), 1939-1 CUM. BULL. (Part 2) 477; Sen. Rep. No. 665, 72nd Cong. 1st Sess. (1932), 1939-1 CUM. BULL. (Part 2) 525.
37. Revenue Act of 1932, § 502, 47 STAT. 246 (1932).
38. Revenue Act of 1932, § 801(b), 47 STAT. 278 (1932).
39. Revenue Act of 1932, § 806, 47 STAT. 281 (1932).
40. See note 8 *supra.*

is no need for the latter; the latter presupposes that the former is unnecessary.

To say that the decision of the Supreme Court in *Heiner v. Donnan*,[41] striking down the conclusive presumption in the contemplation of death feature of the Estate Tax Law of 1926, necessitated the enactment of a law taxing all life-time gifts, is a complete *non sequitur*. Even though the dissent[42] in that case, upholding the validity of this approach, is regarded as more nearly approximating current constitutional concepts,[43] the result of the majority decision did not require relief so drastic as a gift tax law. Prior to the gift tax of 1924, the tax system had contained a mere rebuttable presumption. It had not even been denounced as ineffective until denunciation became a cliché for the repeal of the gift tax.

On the other hand, to enact a gift tax law and, in the same breath, to restore the admittedly ineffective rebuttable presumption as to contemplation of death, was equally a *non sequitur*. The same might be said of the retention, in the estate tax law, of all of the complicated provisions which sought to reach substitutes for testamentary disposition.

These provisions deal with jointly held property, transfers in contemplation of death, transfers taking effect in possession or enjoyment at or after death, transfers with life estates reserved and revocable transfers. They have been a source of some of this country's most complicated and self-contradictory litigation. To tax substitutes for testamentary disposition as part of a decedent's estate, while still imposing a tax on any lifetime transfers which he may make, whether they be testamentary in nature or not, is to impose an unwarranted and undue burden on both the government and the taxpayer. The result has approximated chaos.

GIVING AND THE GIFT TAX

The 1924 gift tax law cast no light on what was meant by the word "gift," and the decisions under it assimilated many of the common law concepts. These were described as including an

41. See note 31 *supra*.
42. Heiner v. Donnan, 285 U.S. 312, 333 (1932).
43. See Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 90 (1935): "The test of validity in respect of due process of law is whether the means adopted are appropriate to the end." See also, Helvering v. Bullard, 303 U.S. 297 (1938); Helvering v. Bowers, 303 U.S. 618 (1938).

intention to deliver gratuitously and an actual or constructive delivery.[44] Acceptance by the donee was soon added,[45] and, as time went on, the decisions became more prolix in specifying the requirements.[46]

The questions which had plagued the common law courts in deciding upon the validity of gifts soon confronted the federal courts in deciding tax cases. It was, for example, decided that after a gift is completed a donor may retain possession of the donated property.[47] Various types of instruments of gift were upheld as effective vehicles of transfer, even though the property itself was not delivered.[48] In this manner, gifts of personal property subject to liens or pledges were possible.[49] As with the common law, promises to make gifts in the future were not upheld for gift tax purposes.[50]

However, departures were also making themselves felt. As might be anticipated, there was an effort on the part of the Commissioner to get away from subjective elements of giving. Thus it was pointed out that the mere absence of a legal duty to pay was not conclusive on the question of a gift.[51] More and more the tax courts sought ritualistic or ceremonial conduct evincing a relinquishment of control in the donor as being determinative of a gift,[52] despite the fact that so-called "symbolic delivery" had long since ceased to be the true test at common law.[53]

With the 1932 Act, some light was cast by the committee reports on what Congress had in mind when it used the term "gift" in a gift tax measure. It was pointed out that the words "property," "transfer," "gift" and "indirectly" were used in their

44. Parrot v. Noel, 8 F.2d 368, 370 (E.D. Va. 1925), *rev'd*, 15 F.2d 669 (4th Cir. 1926), *cert. denied*, 273 U.S. 754 (1927).

45. Estate of David R. Daly, 3 B.T.A. 1042 (1926).

46. Blair v. Rosseter, 33 F.2d 286 (9th Cir. 1929); Naomi Towle Bucholz, 13 T.C. 201 (1949); Augustus E. Staley, 41 B.T.A. 752 (1940); Blanche S. Ross, 28 B.T.A. 39 (1933).

47. Edson v. Lucas, 40 F.2d 398 (8th Cir. 1930).

48. Kate R. DeForest, 27 B.T.A. 373 (1932).

49. Froley v. Allen, 170 F.2d 434 (5th Cir. 1948).

50. Farmers Loan & Trust Co. v. Winthrop, 238 N.Y. 472, 144 N.E. 769, *cert. denied*, 266 U.S. 333 (1924).

51. Bass v. Hawley, 62 F.2d 721 (5th Cir. 1933).

52. Richardson v. Commissioner, 126 F.2d 562, 569 (2d Cir. 1942).

53. 1 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 216, 221 (1st ed. 1947).

"broadest and most comprehensive" sense.[54] They were designed to cover and comprehend all transactions to the extent that property or a property right was donatively passed to or conferred upon another, regardless of the means or the device employed in the accomplishment.[55]

Perusal of the law itself indicates that the tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.[56] Some sections of the gift tax law are at direct variance with common law standards. For example, transfers for less than an adequate and full consideration in money or money's worth are treated as gifts, or *pro tanto* gifts to the extent that their value exceeds the consideration received.[57]

Thus, while some of the common law elements of giving may be important as determinants of an effective gift for gift tax purposes, they are by no means conclusive. Perhaps they would have been had Congress used the term "gift" in its colloquial sense. The courts chose to find a considerably larger legislative intent and one, which as indicated above, did not involve the ascertainment of what was too often an elusive state of mind on the part of a recalcitrant taxpayer.[58]

Therefore, little help should be sought or expected from state court opinions based on common law principles. The decisions in the tax field make the determination dependent upon the circumstances surrounding each case,[59] the customary functional approach all too frequently found in fiscal matters. As one court aptly put it, "We are not here compelled . . . to play the role of ventriloquist's dummy to the courts of some particular state."[60]

THE GIFT IN TRUST

Nowhere is the failure to integrate or correlate the income, estate and gift taxes more evident than in the area of trust giving. As previously noted, a lifetime transfer may well result

54. H.R. Rep. No. 708, 72nd Cong., 1st Sess. (1932), 1939-1 CUM. BULL. (Part 2) 476; Sen. Rep. No. 665, 72nd Cong., 1st Sess. (1932), 1939-1 CUM. BULL. (Part 2) 524.
55. *Ibid.*
56. INT. REV. CODE § 1000(b).
57. INT. REV. CODE § 1002; U.S. Treas. Reg. 108, §§ 86.1, 86.8 (1940).
58. Commissioner v. Weymss, 324 U.S. 303 (1945).
59. Roberts v. Commissioner, 176 F.2d 221, 223 (9th Cir. 1949).
60. Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1949).

in the transferor's paying a gift tax on the subject of the transfer, an income tax on its yield, another gift tax on the income turned over to the beneficiary, and, finally, an estate tax on the subject matter of the trust. While the gift tax credit and the prior-taxed property deduction may afford a measure of relief from the estate tax, there is no such relief with respect to the income tax. Even in the estate tax, the relief given is inadequate and extremely difficult of ascertainment. A scheme of taxation which makes it difficult, if not impossible, to predict the tax incidents of a transaction at its inception is hardly satisfactory.

Trust Giving and the Gift Tax

Earlier decisions took the position, quite logical in itself, that the mere failure to deprive the settlor of all the benefits upon a purported transfer would not mean that it would not be considered a taxable gift.[61] However, a line of authority soon developed which indicated, with some reservations, that the basic purpose of the gift tax law was to tax transfers that had been consummated.[62] Under this theory, a transfer was not consummated until it had been put beyond recall. Thus, trust deeds containing a power of revocation were not completed gifts until these powers had been relinquished.[63]

Such decisions as this found a legislative intent that the gift and estate tax laws should be considered *in pari materia.* Their rationale was applied to a situation in which a settlor had reserved the power to alter a disposition previously made.[64] They were not followed, however, where a reversion remained in a settlor by operation of law.[65] At this point there was anything but crystal clarity in the field, and the need for definitive decision was paramount.

Estate of Sanford v. Commissioner[66] and *Rasquin v. Humphreys,*[67] represent the best, and perhaps the last, efforts of the Supreme Court to achieve integration or correlation in the field

61. *E.g.,* Bingham v. White, 31 F.2d 574 (D.C. Mass. 1929).
62. Burnet v. Guggenheim, 288 U.S. 280, 286 (1933).
63. *Ibid.*
64. Hesslein v. Hoey, 91 F.2d 954 (2d Cir.), *cert. denied,* 302 U.S. 756 (1937).
65. Hughes v. Commissioner, 104 F.2d 144 (9th Cir. 1939). See also Orrin G. Wood, 40 B.T.A. 905 (1939).
66. 308 U.S. 39 (1939).
67. *Id.* at 54.

of trust giving. Both involved lifetime transfers of property in trust, with the reservation of the power to designate new beneficiaries other than the settlor. In both it was held that the gift was incomplete until the reserved power had been relinquished. The decisions were bottomed on the proposition that the gift tax supplemented the estate tax, and that Congress could not have intended to tax as gifts transfers which were so incomplete as to be subject to an estate tax.

The logic of this reasoning seems inescapable, but shreds of doubt remained. The Supreme Court had to concede that the two taxes were not always mutually exclusive; otherwise it would have been compelled to ignore entirely the gift tax credit and the contemplation of death features of the estate tax law. It had difficulty in handling both and had virtually to concede lack of correlation in the contemplation of death field. However, with respect to other transfers, which under the estate tax law were regarded as substitutes for testamentary disposition, it stated quite forcibly that two taxes could not have been contemplated upon the same transaction.

TRUST GIVING AND THE ESTATE TAX

The *Sanford* and *Rasquin* cases were less than a year old when the *Hallock*[68] case was decided by the Supreme Court. Prior to this decision there was an aura of doubt as to the extent to which a settlor need divest himself of control in a lifetime transfer to absolve his estate of death taxes on the subject matter of the transfer. The *Hallock* case resolved the doubt in favor of inclusion.

The effect of the *Hallock* case was to include as a part of the gross estate any transfer which was not immediate, out-and-out, and entirely unaffected by the subsequent death of the settlor. In other words, if, in creating a living trust the settlor retained any present legal title, or any right to possess or enjoy the property then or thereafter, the transfer was not complete for estate tax purposes.

ESTATE VIS-A-VIS GIFT TAXES

If the *Hallock* case was a bitter pill for taxpayers to swallow, it was, perhaps, even more bitter for the Commissioner and the

68. Helvering v. Hallock, 309 U.S. 106 (1940).

courts in gift tax cases. There they would be confronted with the taxpayer's contention that, since the merest string was retained, the gift was not complete under the *Hallock* rationale and hence, not taxable under the *Sanford* and *Rasquin* cases. But the retention of the merest string, such as, for example, a reversion, as in the *Hallock*-type case, was a good deal less than reserving a power to designate new beneficiaries, as in the *Sanford* and *Rasquin* decisions. Should anything so slight be permitted to defeat the Government's claim for revenue from what was otherwise a complete transfer?

Some courts hewed to the line laid down by the *Sanford* and *Rasquin* decisions and refused to regard the gift as being complete, even where the merest expectancy had been retained.[69] There was even indication, by way of the purest dicta, that the Supreme Court itself might go along on this proposition.[70] However, other courts choked at so slight an interest depriving the Government of its gift tax due. Some frankly admitted that double taxation was involved.[71] Others used weasel words, seeking to distinguish between an expectancy capable of resolution by the donor himself during life—the *Sanford* situation—and an expectancy which is resolved by the grim reaper mowing down the potential remaindermen before the death of the donor—analogous to *Hallock*.[72] A realistic few admitted that the problem was too much for them, and called upon Congress and the Supreme Court for relief.[73]

The Supreme Court answered the call, but in a tone of voice which might better have been used by its legislative fellows. In *Smith v. Shaughnessy*,[74] a seventy-two year old settlor made an irrevocable transfer of over half a million dollars in securities, the income to go to his forty-four year old wife for life. Should she predecease him, the securities were to be returned to him; if not, as she by will directed, and, in default, to her intestate suc-

69. Emily Trevor, 40 B.T.A. 1241 (1939).
70. "A gift to a trustee reserving to the donor the economic benefit of the trust or the power of its disposition involves no taxable gift." Helvering v. Hutchings, 312 U.S. 393, 396 (1941).
71. Herzog v. Commissioner, 116 F.2d 591 (2d Cir. 1941).
72. Commissioner v. Marshall, 125 F.2d 943 (2d Cir. 1942).
73. Commissioner v. McLean, 127 F.2d 942 (5th Cir. 1942); Higgins v. Commissioner, 129 F.2d 237 (1st Cir.), *cert. denied*, 317 U.S. 658 (1942).
74. 318 U.S. 176 (1943), *affirming and modifying*, 128 F.2d 742 (2d Cir. 1942), *reversing*, 40 F. Supp. 19 (N.D.N.Y. 1941).

cessors under New York law. A gift tax was paid on the property transferred. Since it seemed apparent, under the *Hallock* decision that the proceeds of this trust must be included in the settlor's estate at death, a refund of the gift tax was sought.

The district court held that a completed gift had been made of the life estate, but not of the remainder. The court of appeals reversed and dismissed. The Supreme Court granted certiorari because of alleged conflict between the *Sanford* and *Hallock* cases. Before that Court it was conceded that the life estate was subject to the gift tax and that the reversionary interest in the settlor was not. The taxpayer argued that, since the *Hallock* decision would tax the corpus as part of the gross estate, it could not also be taxed as a lifetime gift, since the *Sanford* case had intimated a general policy against allowing the same property to be taxed as a gift and also as part of the estate.

The Supreme Court rejected this argument and held that the remainder was taxable as a gift. The taxpayer, it was said, had misunderstood the *Sanford* case, which had quite clearly stated that the gift and estate taxes were not always mutually exclusive. The Court then proceeded to develop the so-called "down-payment" test, pointing out that in some cases the payment of the gift tax was in the nature of earnest money, to secure the eventual payment of the estate tax. It also looked with favor upon the dubious distinction made by the lower courts between a transfer reserving rights which could be exercised by the donor during his life and one in which the only question was who should die first.

Conflicting claims of taxability often produce strange and unintended results. Nowhere is this more evident than in the cases under consideration. The *Hallock* rule has had every ounce of persuasion contained in it utilized by the Commissioner to tax transfers in which the slightest string has been reserved. This was accomplished first by the *Hallock* Regulations,[75] and, as if they did not go far enough, by the impetus contained in the *Church-Spiegel* decisions[76] of the Supreme Court. These latter decisions extended the doctrine to what, it developed, was the

75. U.S. Treas. Reg. 105, §§ 81.17, 81.18 and 81.19 (1939), as amended by T.D. 5741, approved Sept. 6, 1949.

76. Commissioner v. Estate of F.L.Church, 335 U.S. 632 (1949); Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949).

Congressional breaking point, by holding that a possibility of reverter arising by operation of law met the "slightest string" test of the *Hallock* decision. Following the Treasury regulations issued under these cases,[77] there was no doubt but that a gift had to be a complete divestiture, in every sense, to avert estate tax includibility.

The gift tax did not keep pace. Perhaps it need not have done so, for the doom of integration and correlation had been sealed by the *Smith* case. If any question remained, its companion, *Robinette v. Helvering,*[78] answered it by holding that a reversionary interest, existing by operation of law and incapable of actuarial valuation, but one that nonetheless would result in estate tax includibility under the *Spiegel* case, was not sufficient to impede a completed gift of the remainder. The mandate of these cases was clear, if not coherent, and a ready answer to the argument of double inclusion was at hand. Courts no longer need trouble themselves with double inclusion, correlation or integration. It was inherent in the expressions of the Supreme Court that transfers in trust could be subjected to an immediate gift tax despite the retention of an interest which would also subject them to the estate tax.[79] It was no answer either way to argue that the transfer was covered by another tax.[80]

Congress has, it is true, somewhat ameliorated the strict interpretation of the *Hallock* case. The Technical Changes Act of 1949 dealt with the troublesome question of reversions.[81] As to pre-October 7, 1949 transfers, the reversion must be express and must exceed in value more than five per cent of the property transferred. Post-October 7, 1949 transfers are now guided by a definition of what is meant by a transfer taking effect in possession or enjoyment at or after death. Survivorship of the settlor is evidently the sole test. Although the law may have helped the taxpayer in the *Smith* case, a result dependent on the

77. See note 74 *supra.*
78. 318 U.S. 184 (1943).
79. Estate of Lester Field, 2 T.C. 21 (1943), *rev'd,* Field v. Commissioner, 144 F.2d 62 (2d Cir. 1944), *rev'd and Tax Court aff'd,* 324 U.S. 113 (1945).
80. Daisy B. Plummer, 2 T.C. 263 (1943); Commissioner v. Proctor, 142 F.2d 824 (4th Cir.), *rehearing denied,* 142 F.2d 828 (4th Cir.), *cert. denied,* 323 U.S. 756 (1944), *further hearing* 4 T.C.M. 359, *aff'd,* 151 F.2d 603 (4th Cir. 1945), *cert. denied,* 327 U.S. 785 (1946).
81. INT. REV. CODE § 811(c) as amended by Publ. L. 378, 81st Cong., 1st Sess., § 7 (Oct. 25, 1949).

actuarial valuation of the various interests involved, it has afforded no solution to the problem. In effect, it may have cut down what may be included in a decedent's gross estate. It did not bring gift tax concepts up to that level.

TRUST GIVING AND THE INCOME TAX

The problem in this field involves those trusts in which for one reason or another the income, although payable to beneficiaries other than the settlor, remains taxable to him. The enactment of Section 166 of the Code, taxing the income of a revocable trust to its grantor, and Section 167, taxing the grantor where the income may be used for his benefit, introduced the problem. It did not become acute until it was decided in *Helvering v. Clifford*,[82] and further amplified in *Helvering v. Stuart*,[83] that these sections were not the only criteria by which the income of a trust could be taxed to the settlor. The broad language of Section 22, defining income itself, could be employed to tax to the grantor the income from a trust, not covered by Section 166 or 167, where the economic benefits of the income were enjoyed by the grantor, although the income itself was not received by him.

The manifestations and expectations of the Treasury as to its new found powers under the *Clifford* case were embodied in the so-called "Clifford Regulations,"[84] issued under Section 22. Inordinately complicated, they laid down three general tests for taxing income of a trust to the settlor—reversion after a relatively short term, right to disposition of beneficial enjoyment of corpus or income, and retention of administrative controls over corpus or income. If any of these tests were met, the income from the trust could be taxed to the grantor.

Even this brief survey of the *Clifford* tests probably indicates that they are not the same as those applied to determine the includibility of the corpus of a living trust in the estate of the grantor for estate tax purposes. There is respectable authority for the conclusion that a *Clifford*-type trust is not, *ipso facto*, included in the gross estate of its creator.[85] However, no one can

82. 309 U.S. 331 (1940).
83. 317 U.S. 154 (1942).
84. U.S. Treas. Regs. 111, §§ 29.22(a)-21, 29.22(a)-22 (1943). See also, Alexandre, *A Case Method Restatement of the New Clifford Regulations*, 3 TAX L. REV. 189 (1948).
85. *See*, Greenbaum, *Is the Clifford Concept Applicable for Estate and*

gainsay that there may be areas in which the two will overlap. Where they do, could the argument be made that, since the income remains taxable to the grantor and the corpus will be included in his gross estate, he should not be subject to the gift tax when he makes the transfer in trust? Or, disregarding all questions of whether, because a trust is of the *Clifford*-type, it is includible in the settlor's estate, could it be argued that merely because the income remains taxable to the grantor, the gift cannot be complete enough to justify a gift tax on the creation of the trust?

Unfortunately, *Clifford*-type trusts were not in the picture when the 1924 or 1932 gift tax laws were enacted, so it is not to be expected that they should have been in the legislative mind at that time. However, when the problem did arise courts were reluctant to concede that a gift tax was not payable, even though the income remained taxable to the grantor under the *Clifford* case. In other words, these courts took the view that the gift tax was not sufficiently integrated with the income tax so that decisions like the *Clifford* case, or statutory provisions like Sections 166 and 167, need be read as holding that no gift tax was payable upon the creation of the trust.[86] As one court put it, ". . . any correlation that may exist is purely coincidental."[87]

GIFT TAXES ON INCOME PAYMENTS

Assume that a Section 166, Section 167 or *Clifford*-type trust is established. A gift tax is paid and the income remains taxable to the grantor. However, that income is not paid to the grantor; it goes to the beneficiaries. Must the grantor pay a gift tax on the increments of income paid to them? Two cases bear on the problem.

In *Commissioner v. Warner*,[88] the grantor retained the power to revest the trust property in himself. The Court of Appeals for the Ninth Circuit concluded that there was no complete gift of

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Gift Tax Purposes?, NEW YORK UNIVERSITY NINTH ANNUAL INSTITUTE ON FEDERAL TAXATION 289 (1951).

86. Commissioner v. Beck's Estate, 129 F.2d 243 (2d Cir. 1942); Commissioner v. Prouty, 115 F.2d 331 (1st Cir. 1940).

87. Lockard v. Commissioner, 166 F.2d 409 (1st Cir. 1948). See also Commonwealth Trust Co. of Pittsburgh v. United States, 96 F.Supp. 712 (W.D. Pa. 1951); Commissioner v. Blum, 187 F.2d 177 (7th Cir. 1951).

88. 127 F.2d 913 (9th Cir. 1942).

the corpus of the trust and that the payments of income to the beneficiaries amounted to gifts from the settlor.

In *Commissioner v. Hogle,*[89] a stock trading trust was created, income payable to the settlor's designated beneficiaries, with the settlor having the power to carry on marginal trading operations. After litigation, it was held that the income resulting from the trading was taxable to the grantor.[90] The Commissioner then asserted that the settlor was liable for a gift tax on the income accruing to the trusts and paid to the beneficiaries.

The Court of Appeals for the Tenth Circuit refused to sanction such a tax. Its reasoning, based upon the feeling that there had not been a completed gift, was not very persuasive in the absence of evidence that any strings were attached to the *income* paid to the beneficiaries. Perhaps, since the taxpayer had already been beaten on one point, the Court felt that the Commissioner was kicking a man when he was down. However, one is inclined to agree with the writer who commented on the *Hogle* case with the words ". . . decisions may come and decisions may go, but the incongruity goes on forever."[91]

CONCLUSION

It is still too early to predict with certainty whether the Commissioner will prevail in his attempt to collect the fourth tax in this situation—*i.e.*, the gift tax upon the income of the *Clifford*-type trust, which is paid to the beneficiary but considered income to the grantor. However, he has attempted to do so and has convinced at least one court that such a tax could be imposed. There is little doubt of his ability to collect a gift tax when this type of trust is set up, and, under some circumstances, he will be able to assert a tax upon the gross estate of the settlor for the amount of the corpus of the trust. The argument that such a result could not possibly be intended or that it is beyond the wildest dreams of the legislative imagination must fall on deaf ears.

Nor would an argument addressed to the constitutional aspects of this dilemma fare any better. It is entirely competent for Congress to treat certain types of inter vivos transfers as testa-

89. 165 F.2d 352 (10th Cir. 1947).
90. Hogle v. Commissioner, 132 F.2d 66 (10th Cir. 1942).
91. Note, 21 So. CALIF. L. REV. 312 (1948).

mentary and tax them as such.[92] The fact that multiple taxation may result is no bar to their enforcement. The Supreme Court has pointed out that double taxation, if clearly the intention of the Congress, is concededly constitutional and may properly be collected.[93]

A plethora of suggestions for altering this situation have, from time to time, been advanced. Countless decisions have echoed the words of the Supreme Court that, "Correlation of the gift and the estate tax still requires legislative intervention."[94] Proposals and counter-proposals have been made. Committees have been appointed and have reported. The Treasury Department has concurred as to the necessity for a revision and has acquiesced in a plan for it. Congress has considered measures granting some relief. Mark Twain's comment concerning the weather is most appropriate at this point.

To combine inheritance, income and gift taxes into one single tax, treating all such acquisitions as, for example, income, might perhaps seem far-fetched on the basis of our present standards of tax thinking. However, the Income Tax Act of 1894 taxed inheritances as income.[95] A partial effort at integration was made in 1938, with a Treasury recommendation that exemptions under the gift and estate taxes be combined so that they would be available under the estate tax only to the extent that they had not been applied against previous gifts. This proposal received the approval of the Committee on Ways and Means and was adopted by the House. However, it was eliminated by the Senate Finance Committee and died in conference.[96]

In 1940, a proposal was made for the integration of the estate and gift taxes by the imposition of a single, cumulative transfer tax, much in the nature of the present gift tax with the final transfer under it being the one made at death.[97] The need for coordination was recognized by other writers in the same year.[98]

92. Porter v. Commissioner, 288 U.S. 436 (1933).
93. Hellmich v. Hellman, 276 U.S. 233 (1928); King v. United States, 79 F.2d 453, 455 (4th Cir. 1935).
94. Merrill v. Fahs, 324 U.S. 308, 313 (1945).
95. Income Tax Act of 1894, 28 STAT, 553 (1894).
96. Sen. Rep. No. 1567, 75th Cong., 3rd Sess. 40 (1938); H.R. Rep. No. 2330, 75th Cong., 3rd Sess. 49 (1938) (Amendment No. 167).
97. Altman, *Integration of the Estate and Gift Taxes*, LAW AND CONTEMP. PROB. 331 (1940).
98. Magill, *The Federal Gift Tax*, 40 COL. L. REV. 773 (1940).

In the next year it was suggested that the income tax be woven into a single, cumulative transfer tax picture. The underlying theory would be that where there had been a reservation of control under existing concepts, there would not be a present transfer tax, the grantor remaining taxable on the income and the transfer tax being postponed until his death.[99]

The failure of the Revenue Act of 1942 to provide any relief in this situation evoked a number of responses.[100] One authority commented,[101] "The law as it now stands is fully beyond the comprehension of any but experts, and the most that they can do in many situations is to express doubts." He also proposed what would seem a fairly workable scheme. All tests of taxability —income, estate, and gift—would be included in one section, the writer choosing Section 166 of the Internal Revenue Code, which relates to trusts the income upon which remains taxable to the grantor. The gift and estate tax section would be then amended to refer back to the master section. If a transfer were complete under that section, a gift tax would be immediately payable, but no prospective income or estate tax liability would attach. If not thus complete, there would be a gift tax, but the grantor would continue to be taxable on the income, and the property would be subject to tax as a part of his estate on his death.

Discussion of the need for reform along streamlined and modernized lines continues, with writer after writer directing attention to the existing deficiencies and the pressing need for relief.[102] The Treasury Department itself appeared more than willing to cooperate and a joint advisory committee was designated to work with its office of the Tax Legislative Counsel on a program. The result of this carefully considered study was a proposal for a single transfer tax covering testamentary and inter vivos transfers, eliminating the contemplation of death transfer, imposing the tax at the point of completed transfer, providing there would

99. Warren, *Correlation of Gift and Estate Taxes*, 55 HARV. L. REV. 1 (1941).

100. *E.g.*, 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 1056 (1942); Kauper, *The Revenue Act of 1942; Federal Estate and Gift Taxation*, 41 MICH. L. REV. 369 (1942).

101. Griswold, *A Plan for the Coordination of the Income, Estate and Gift Tax Provisions with Respect to Trusts and Other Transfers*, 56 HARV. L. REV. 337 (1942).

102. See, *e.g.*, Eisenstein, *Modernizing Estate and Gift Taxes*, 24 TAXES 870 (1946).

be no tax upon such a transfer until that time and no income tax to the transferor thereafter, with the test of completeness being the possibility of actual control.[103] The plan seemed exceedingly well thought out and appeared workable, although not above criticism at some points.[104]

The Revenue Revision Bill of 1948, far from being an attempt at correlation or integration in these fields, did stab at a few of the problems.[105] Congress recognized the need for revision, with at least a tacit admission that the proposed measure fell short of what was called for.[106] The bill was passed by the House, but was not considered by the Senate prior to adjournment.

On January 23, 1950, President Truman, in his Tax Message to Congress, indicated that some correlation between the gift and estate tax was required, not only in the interest of revenue, but fairness as well. He said:

> To strengthen the estate and gift tax laws, several steps are necessary. The laws concerning the taxation of transfers by gift and by bequest, by outright disposition and through life estates, need to be coordinated to provide uniform treatment and a base for more effective taxation. In addition the present exemption should be reduced and the rates should be revised. These changes will not only bring in more revenue, but they will improve the fairness of the estate and gift tax laws and bring these taxes nearer to their proper long term place in our tax system.[107]

Secretary of the Treasury Snyder followed this up with detailed suggestions along the lines of the Joint Advisory Committee Legislative Counsel's Office Report of 1947.[108] Korea threw these suggestions into the future reference file, but even with the wartime demands for increased revenue, they have not been forgotten.[109]

There is always danger in departing from established standards. Lawyers, while perhaps denying it, are essentially con-

103. FEDERAL ESTATE AND GIFT TAXES, A PROPOSAL FOR INTEGRATION AND CORRELATION WITH THE INCOME TAX (U.S. Gov't. P.O. 1947).

104. See *e.g.*, Alexander, *A Summary of the Treasury's Study in Integration and Correlation*, 25 TAXES 955 (1947); Platt, *Integration and Correlation—the Treasury Proposal*, 3 TAX L. REV. 59 (1947).

105. H.R. Rep. No. 6712, 80th Cong., 2d Sess. (1948).

106. H.R. Rep. No. 2087, 80th Cong., 2d Sess. (1948).

107. 37 CCH FED. TAX REP. No. 7 (1950).

108. 28 CCH FEDERAL EST. AND GIFT TAX REP. (Part 1) 8 (1950).

109. Allusion was made to this problem by the President in his tax recommendations of February 2, 1951, and considerably amplified by Secretary Snyder before the House Ways and Means Committee on February 5, 1951.

ceptual thinkers. They can probably render the greatest service to their clients when advising on the basis of precedent. For this reason, pause is usually given to any schemes which would work a wholesale revision of income, estate and gift tax laws along the lines discussed above.

In the area of trust giving, however, the precedent currently existing is merely confusion. All an estate planner can say to a client is that he make an out-and-out gift, with no strings attached, pay the gift tax and hope that he live the three years necessary to bar the Government's contention that the transfer was in contemplation of death. Even the simplest gifts in trust may be suspect, and the type of a trust gift to be made for a minor beneficiary is even more risky. To embark upon the field of trust giving with reserved powers of any kind is the task of an expert.

Correlation and integration, however, involve certain sacrifices. Among these is the loss of a favorite current pastime—playing the gift tax against the estate tax, taking advantage of the annual exclusion of the gift tax and the exemptions of both, with the added incentive of the lower gift tax rates. In the long run, however, rate adjustment must be the only answer to the Government's need and the taxpayer's demand for relief. Meanwhile, both equity and good practice would be best served by a system which permits of a ready and certain answer.

At the present time only the venturesome counsellor would deign to answer a client's query "What is a gift?" Were he to ask the same question himself, he would be justified in emulating the jesting Pilate, and turn aside without waiting for a reply.