

Washington University Law Review

Volume 1950 | Issue 2

January 1950

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Recommended Citation

Joseph Hawley Murphy, *Marital Settlements and Federal Taxation*, 1950 WASH. U. L. Q. 179 (1950).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol1950/iss2/1

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WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1950

SPRING, 1950

Number 2

MARITAL SETTLEMENTS AND FEDERAL TAXATION

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Legal problems emanating from the marital relationship have always been enigmatic and perplexing even, perhaps, as the relationship itself. Matters of domicile, jurisdiction and conflicts of laws, to mention a few, have harassed the general practitioner since the early days of our jurisprudence. Many of these difficulties have been projected into the tax field, and to them have been added the incongruities indigenous to that area of law, a result no doubt anticipated by experts in both branches. Problems have multiplied so that a general practitioner, with one eye on antagonistic or anxious clients haggling over the provisions of a marital settlement or antenuptial agreement, and the other on the Internal Revenue Code, might well echo the words of Cicero "*Quo usque tandem abutere . . . potentia nostra? Quam diu etiam furor iste tuus nos eludet?*"

It is doubtful that this article will do much to allay the confusion presently existing. Tax law is a field in which even experts are well advised to express doubts. Attempt will be made to discuss some of the consequences of antenuptial agreements and marital settlements from the standpoint of Federal Estate, Gift and Income Taxes. Perhaps the reader may learn some pitfalls to be encountered, albeit not avoided. It is hoped that he may have some idea of what a sympathetic Congress might do by way of smoothing the path for the legal advisor.

Essentially, the problem is the same in the field of estate, gift and income taxation. It is the extent to which marriage and marital rights constitute consideration for transfers made

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pursuant to matrimonial settlements, either by the potential or the disgusted husband or, for that matter, by his female counterpart, equally anxious or fed up. Like the astute legal examiner, the tax collector can continue to use the same questions but require a different answer.

Citation of authority is unnecessary for the proposition that the surrender of dower or curtesy rights or their statutory equivalents, such as the right to elect against the will of one's spouse, the right of a wife to support from her husband and similar attributes of the matrimonial bond, constitutes a consideration valid to support most common law transactions. However, when recourse is had to the problems of the tax collector, it is quite apparent that something more than natural love and affection or even the marital rights attendant upon such love and affection translated into a more enduring bond—the so-called “ties that bind”—is necessary if schemes of tax avoidance are not to flourish.

In the present provisions of the Internal Revenue Code, transfers made or obligations incurred “for an adequate and full consideration in money or money's worth” are excluded from the gross estate as transfers in contemplation of death,¹ as transfers taking effect in possession or enjoyment at or after death,² as revocable transfers,³ as jointly owned interests,⁴ as powers of appointment,⁵ and as insurance.⁶ The question of sufficiency of consideration on partially taxable transfers under these sections is also dealt with in *haec verba*⁷ and the important matter of estate tax deductions for claims hinges upon this phrase.⁸ The only attempt at defining a “gift” in the gift tax law, and this by negative implication, is couched in the same language.⁹ Important income tax consequences rest upon whether property was given¹⁰ or transferred for consideration.¹¹ Naturally, it is vital from the point of view of the Treasury

1. INT. REV. CODE, § 811 (c) (1) (A).

2. INT. REV. CODE, § 811 (c) (1) (B).

3. INT. REV. CODE, § 811 (d).

4. INT. REV. CODE, § 811 (e).

5. INT. REV. CODE, § 811 (f).

6. INT. REV. CODE, § 811 (g) (3).

7. INT. REV. CODE, § 811 (i).

8. INT. REV. CODE, § 812 (b).

9. INT. REV. CODE, § 1002.

10. INT. REV. CODE, § 113 (a).

11. INT. REV. CODE, § 113 (a) (2).

Department and the Congress, with, of course, judicial aid, to insure that tax avoidance in these important particulars is minimized. It is in the attempt to achieve this result that many anomalies in these major fields of taxation have developed.

THE FEDERAL ESTATE TAX

Decisions antedating the present Federal Estate Tax had jostled with the problem of consideration. For example, one law taxed conveyances "without valuable and adequate consideration," and it was held that a deed of gift as an advancement against the ultimate share of the donee in his father's estate did not meet the statutory test.¹² The court stated:

The "valuable and adequate consideration" referred to . . . must be held to mean either money paid or some present legal interest or estate parted with or charged, or services rendered to the value of the property received.¹³

A Massachusetts succession tax requiring "full consideration in money or money's worth" was said to cover "the value in money or the equivalent in money of the property transferred."¹⁴ These decisions seem particularly significant because of the similarity of the statutory language involved to present day law and the seeming judicial tendency toward tangibility and concreteness in meeting the tests imposed.

The initial Federal Estate Tax, as far as its present continuous history is concerned, dealt with the question of consideration only with respect to transfers and not deductions. It included transfers in contemplation of death or taking effect in possession or enjoyment at or after death, "except a bona fide sale for a fair consideration in money or money's worth."¹⁵ The question arose as to whether dower, curtesy and like interests were included as part of a decedent's estate within this definition, and some doubt was occasioned by reason of state court holdings that a surviving spouse takes property upon the basis of rights arising from the matrimonial relationship and not by reason of testate or intestate succession.¹⁶ Under such a rationale it could be argued, *inter alia*, that the transfer of

12. *United States v. Banks*, 17 Fed. 322 (S.D.N.Y. 1883).

13. *Id.* at 323.

14. *State Street Trust Co. v. Stevens*, 209 Mass. 373, 95 N.E. 851 (1911).

15. Revenue Act of 1916, § 202 (b), 39 STAT. 777 (1916).

16. *E.g.*, *Matter of Starbuck*, 137 App. Div. 866, 122 N.Y. Supp. 584 (2d Dep't 1910), *aff'd mem.*, 201 N.Y. 513, 94 N.E. 1092 (1911).

property to a spouse upon death of the mate was in satisfaction of these marital rights.

The argument was tenuous at best, but the Congress sought to cover it by an amendment to the law. While it was felt that these marital rights were mere expectations and properly a part of the gross estate,¹⁷ dower, curtesy and other marital rights in the decedent's property were specifically included in the gross estate by a 1918 amendment.¹⁸ This change was intended to clarify existing law.¹⁹ While it was probably an excess of caution in the light of later decisions,²⁰ it serves as an illustration of the position which dower, curtesy and other marital rights occupied in the general concept of separability of property interests for tax purposes.

The element of consideration as a requisite of estate tax deductions based upon claims was not part of the first laws. The act of 1916 permitted deduction of claims against the estate "allowed by the laws of the jurisdiction . . . under which the estate is being administered."²¹ This treatment was continued under the 1918²² and 1921²³ acts. Because of the wide latitude in this provision it was felt desirable to require that claims against an estate, to be allowable as deductions, be supported by the same consideration as transfers.²⁴ The 1924 Act, therefore, limited deductible claims to those supported by "a fair consideration in money or money's worth."²⁵

Realizing that dower, curtesy and like interests were considered mere expectations passing in the same manner as other estate property, it might seem logical to assume that they would not be interpreted as consideration within the language used. This, however, was not to be. A few cases arose in which the Commissioner sought to argue that certain transfers, either antenuptial or post-marital in nature, and in consideration of the release of dower, curtesy and like rights, were not supported by "a fair consideration in money or money's worth." In each

17. H. R. REP. No. 767, 65th Cong., 2d Sess. 21 (1918).

18. Revenue Act of 1918, § 402 (b), 40 STAT. 1077 (1918).

19. H. R. REP. No. 767, 65th Cong., 2d Sess. 21 (1918).

20. *E.g.*, *Mayer v. Reinecke*, 130 F.2d 350 (7th Cir. 1942), *cert. denied*, 317 U.S. 684 (1942)

21. Revenue Act of 1916, § 203 (a) (1), 39 STAT. 778 (1916).

22. Revenue Act of 1918, § 403 (a) (1), 40 STAT. 1098 (1918).

23. Revenue Act of 1921, § 403 (a) (1), 42 STAT. 279 (1921).

24. H. R. REP. No. 179, 68th Cong., 1st Sess. 28, 66 (1924).

25. Revenue Act of 1924, § 303 (a) (1), 43 STAT. 305 (1924).

instance he was defeated, the courts adhering strictly to established concepts of common law and holding that such a transfer was a bona fide sale for a fair consideration in money or money's worth.²⁶ It is especially interesting to note these cases involved the transfer sections of the law in which dower, curtesy and similar interests had been treated by the Congress²⁷ and the courts²⁸ as gossamer possibilities, having no status independent from tangible estate property.

Further tightening of the concept of consideration was in order. The 1926 Act changed the phrase to read "for an adequate and full consideration in money or money's worth,"²⁹ a combination, perhaps, of the tighter aspects of the language interpreted in *United States v. Banks*³⁰ and *State Street Trust Co. v. Stevens*.³¹ The present Code provisions³² have uniformly retained this definition. As the Supreme Court said:

There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims . . .³³

The Board of Tax Appeals interpreted this amendment in *Empire Trust Co., et al., Executors*,³⁴ in which an antenuptial agreement, which called for the surrender of dower and statutory rights by a wife, was the basis for a claim against the estate of a decedent who died in 1931. The Board disallowed the deduction with an opinion which pointed out that dower was a portion of the gross estate and its inclusion could not be nullified by agreement. The Fourth Circuit affirmed, pointing out that statutory history called for this result.³⁵ However, other decisions were not as clear, and doubts were raised.³⁶

26. *McCaughan v. Carver*, 19 F.2d 126 (3rd Cir. 1927); *Ferguson v. Dickson*, 300 Fed. 961 (3rd Cir. 1924); *Stubblefield v. United States*, 79 Ct. Cl. 268, 6 F.Supp. 440 (1934); *Mason et al. v. United States*, 17 F.2d 317 (S.D. Fla. 1926).

27. H. R. REP. No. 767, 65th Cong., 2d Sess. 21 (1918).

28. *E.g.*, *Mayer v. Reinecke*, 130 F.2d 350 (7th Cir. 1942), *cert. denied*, 317 U.S. 684 (1942).

29. *E.g.* Revenue Act of 1926, § 303 (a) (1), 44 STAT. 72 (1926).

30. 17 Fed. 322 (S.D.N.Y. 1883).

31. 209 Mass. 373, 95 N.E. 851 (1911).

32. See notes 1, 2, 3, 4, 5, 6, 7 and 8, *supra*.

33. *Taft v. Commissioner*, 304 U.S. 351, 356 (1938).

34. *Empire Trust Co. et al. Executor v. Commissioner*, 35 B.T.A. 866 (1937).

35. *Empire Trust Co. et al. v. Commissioner*, 94 F.2d 307 (4th Cir. 1938).

36. *E.g.*, *Commissioner v. Kelly's Estate*, 84 F.2d 958 (7th Cir. 1936), *cert. denied*, 299 U.S. 603 (1936).

In 1932 the Congress felt that further clarification was called for because, if the value of relinquished marital rights "in whole or in part constitute a consideration for an otherwise taxable transfer . . . or an otherwise allowable deduction from the gross estate the effect produced amounts to a subversion of the legislative intent."³⁷ Accordingly the following paragraph now covering the estate tax was added:³⁸

For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."³⁹

It is notable that while this provision appears in the section relating to deductible claims, its express terms make it applicable to the whole estate tax title of which that section is a part and it covers transfer as well.⁴⁰

It was recognized that this amendment was not intended to cover, nor did it purport to cover, claims for support by children of a decedent, and deductions based upon such claims, which, if in fact in satisfaction of legal obligations to support, were allowable.⁴¹ It was likewise quite clear that where dower, curtesy or similar statutory rights were surrendered, either before or after marriage, in return for an agreement to pay money or transfer property, the amount by which the decedent became obligated was not a deductible claim against his estate.⁴²

Between these poles were many variants. It was not always clear where the obligation to support children ended and dower, curtesy or statutory rights of the spouse began. It would seem that the Commissioner's nonacquiescence in *Estate of Eben B.*

37. H. R. REP. No. 708, 72d Cong., 1st Sess. 47 (1932); SEN. REP. No. 665, 72nd Cong., 1st Sess. 50 (1932).

38. INT. REV. CODE, § 812 (b).

39. Revenue Act of 1932, § 804, 47 STAT. 169 (1932).

40. *Sheets v. Commissioner*, 95 F.2d 727 (8th Cir. 1938).

41. *William Weiser, Executor v. Commissioner*, 39 B.T.A. 1144 (1939), *aff'd sub nom. Commissioner v. Weiser*, 113 F.2d 486 (10th Cir. 1940); *Helvering v. United States Trust Co.*, 111 F.2d 576 (2d Cir. 1940), *cert. denied*, 311 U.S. 678 (1940); *Estate of Eben B. Phillips v. Commissioner*, 36 B.T.A. 752 (1937), *nonacq.*, E.T., 1938-1 CUM. BULL. 52.

42. *Meyer's Estate v. Commissioner*, 110 F.2d 367 (2d Cir. 1940), *cert. denied*, 310 U.S. 651 (1940); *Adriance v. Higgins*, 113 F.2d 1013 (2d Cir. 1940); *Markwell's Estate v. Commissioner*, 112 F.2d 253 (7th Cir. 1940); *Estate of Rosalean B. Ottmann v. Commissioner*, 12 T.C. 118 (1949); *Nantke v. United States*, 35 F.Supp. 450 (W.D. N.Y. 1940); and cases cited note 41, *supra*.

*Phillips*⁴³ was probably based on his contention that the taxpayer's proof did not properly delineate between the two or support the former. So too, in *Estate of George Tuttle Brokaw*,⁴⁴ the Board took the position that the obligation to support the children was sufficient to sustain a deduction for the whole amount called for by the agreement, although the release of dower and statutory rights was clearly involved. On appeal, however, the Second Circuit reversed, distinguishing between the two.⁴⁵

What of support of the spouse? Most marital settlements provide sums for the wife which would be analogous to the alimony or maintenance provisions of a court decree. Is the commuted value of such payments a deductible claim? If covered at all by Section 812(b) of the Internal Revenue Code, since this is not dower, curtesy or their statutory equivalents, it must be by the catch-all phrase "other marital rights in the decedent's property or estate."

In *Estate of Silas B. Mason*,⁴⁶ the Board allowed a deduction based upon payments due under a separation agreement incorporated in a decree. While the decision could have rested upon another ground, namely, as an obligation founded on court decree, the Board appeared to base its decision on the fact that this was an obligation imposed by law, that of a husband to support his wife, and not upon a "promise or agreement" as described in Section 812(b). While the Commissioner registered nonacquiescence,⁴⁷ he did not prosecute the appeal he embarked upon. In *Rogan v. Riggle*,⁴⁸ the Ninth Circuit inferred that a spouse's support rights might stand on a footing different from dower, curtesy or statutory interests, although it disallowed a claimed deduction on the ground that the taxpayer had failed in proof.

However, in the Second and Seventh Circuits, the Commissioner has had more success with his contention that support

43. *Estate of Eben B. Phillips v. Commissioner*, 36 B.T.A. 752 (1937), *nonacq.*, E.T., 1938-1 CUM. BULL. 52.

44. *Estate of George Tuttle Brokaw v. Commissioner*, 39 B.T.A. 783 (1939).

45. *Helvering v. United States Trust Co.*, 111 F.2d 576 (2d Cir. 1940).

46. *Estate of Silas B. Mason v. Commissioner*, 43 B.T.A. 813 (1941), *app. dismissed*, (6th Cir.) 5-14-42.

47. E.T., 1942-1 CUM. BULL. 26.

48. 128 F.2d 118 (9th Cir. 1942).

rights are included within the phrase, "other marital rights in the decedent's property or estate." In *Meyer's Estate v. Commissioner*⁴⁹ it was said:

That part of the consideration which was the giving up by the wife of her right to support is also fairly within the phrase "other marital rights in the decedent's property or estate" though not of the same nature as dower . . . the right of the wife to support and maintenance from her husband is what she gave up in addition to her relinquishment of dower.⁵⁰

Judge Hand, who dissented, was forced to define what "other marital rights" meant, if not support and maintenance. He wrote, rather lamely it would seem, "It is true that I cannot think of any, but that seems to me neither conclusive nor important; statutory draughtsmen often provide against possibilities which have not yet arisen."⁵¹ In *Markwell's Estate v. Commissioner*⁵² concurrence with the view of the majority in the *Meyer's* case could be inferred.

Another danger to be avoided by the tax practitioner arises from a dichotomy which has arisen when a court decree, *vis a vis* a mere interspousal agreement, has imposed the financial burden. Again the words "founded upon a promise or agreement," contained in Section 812(b) come into play because this is the type of indebtedness which must meet the "adequate and full consideration" test. It seems quite clear that a court decree is not a promise or agreement and hence a claim founded on it is deductible.⁵³ However, is the same rule applicable to an agreement incorporated in a decree? Does it apply to the situation where the decree follows an agreement, but neither incorporates nor refers to it, leaving financial matters to rest on the agreement? Lastly, does not such a distinction forsake realities for formalisms?

In *Edythe C. Young*,⁵⁴ an agreement was incorporated in a decree which, on the death of the husband, was settled by the payment of a lump sum pursuant to another decree. The Board

49. 110 F.2d 367 (2d Cir. 1940), *cert. denied*, 310 U.S. 651 (1940).

50. *Id.* at 363-369.

51. *Ibid.*

52. 112 F.2d 253 (7th Cir. 1940).

53. *Estate of Francis Browne, Grinnell v. Commissioner*, 44 B.T.A. 1286 (1941), *aff'd sub nom. Commissioner v. State Street Trust Co.*, 128 F.2d 618 (1st Cir. 1942).

54. *Edythe C. Young v. Commissioner*, 39 B.T.A. 230 (1939).

permitted deduction of this sum from the gross estate and the Commissioner noted his nonacquiescence.⁵⁵ The same result was reached in a district court case,⁵⁶ affirmed by the Fourth Circuit,⁵⁷ which reiterated its position in a later case.⁵⁸ However, the *Markwell* and *Meyer's Estate* opinions, as well as *Wm. Weiser*⁵⁹ discussed above, had also involved agreements followed by decrees. They were distinguished on the ground that the decree did not adopt or incorporate the agreement. In *Commissioner v. Maresi*⁶⁰ the agreement was incorporated in the decree and the Second Circuit allowed a deduction from the gross estate under Section 812(b) adhering to the cleavage heretofore made and remarking:

At first blush the distinction may appear to be a little formal but on consideration it appears to be sound.⁶¹

An agreement covering support for spouse and children, and a release of dower, curtesy, or statutory rights will not constitute a valid deduction for estate tax purposes except as to children's support. If incorporated in a decree, all items are deductible. When one realizes the ease with which such decrees are obtained, rather than appearing to be a little formal, it seems to be a distinction without a difference and the Commissioner's nonacquiescence is understandable. However, the confusion in the whole field of marital obligation deductions for estate tax purposes, a problem which has been with the taxpayer far too long,⁶² seems to call for clarifying action by the Supreme Court or the Congress.

THE FEDERAL GIFT TAX

When the first Federal Gift Tax law was enacted in 1924 there were classified as gifts all sales or exchanges for less than "a fair consideration in money or money's worth."⁶³ In adopting this test the Congress utilized the then current

55. E.T., 1939-1 CUM. BULL. (Part 1) 69.

56. *Fleming v. Yoke*, 53 F.Supp. 552 (N.D. W.Va. 1944).

57. *Yoke v. Fleming*, 145 F.2d 472 (4th Cir. 1944).

58. *Commissioner v. Estate of Swink*, 155 F.2d 723 (4th Cir. 1946).

59. *William Weiser, Executor, v. Commissioner*, 39 B.T.A. 1144 (1939), *aff'd sub nom. Commissioner v. Weiser*, 113 F.2d 486 (10th Cir. 1940).

60. 156 F.2d 929 (2d Cir. 1946).

61. *Id.* at 931.

62. *See, e.g., Hines, Tax Aspects of Property Settlement Agreement*, 12 So. CALIF. L. REV. 386 (1939).

63. Revenue Act of 1924, § 320, 43 STAT. 314 (1924).

definition of consideration as it had originated in the transfer sections of the estate tax provisions of the 1916 and later acts⁶⁴ and as it had been picked up in the deduction section of the 1924 Act.⁶⁵ The indication that the test should be the same seemed abundantly clear from this procedure and, of course, the infirmities under those tests followed their transposition to the new gift tax law.

However, the continuity of the estate tax provisions was not present in the case of the gift tax. The Gift Tax Law of 1924, being the first foray into the field, was an unpopular measure with the Congress from the outset,⁶⁶ and it was finally approved only after a bitter floor debate in which the Democratic Minority prevailed.⁶⁷ It was acknowledged a failure⁶⁸ and repealed in 1926.⁶⁹

In 1932 a revenue-conscious Congress,⁷⁰ spurred on no doubt by the decision of the Supreme Court in *Heiner v. Donnan*⁷¹ holding that the conclusive presumption in the 1926 Act as to gifts in contemplation of death violated due process, re-enacted a gift tax measure.⁷² It dealt with the question of consideration in the terms of the 1926 estate tax changes⁷³ and in the same language presently appearing in Section 1002 of the Code:

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.⁷⁴

However, the gift tax law did not contain a counterpart of that portion of Section 812(b) added in 1932 which specified that "a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or

64. Revenue Act of 1916, § 202 (b), 39 STAT. 777 (1916); Revenue Act of 1918, § 402 (b), 40 STAT. 1077 (1918).

65. Revenue Act of 1924, § 303 (a) (1), 43 STAT. 305 (1924).

66. SEN. REP. No. 398, 68th Cong., 1st Sess. (Amend. No. 179) (1924).

67. 65 CONG. REC. 3120, 3172-73, 8095-96 (1924).

68. SEN. REP. No. 52, 69th Cong., 1st Sess. 339 (1925).

69. Revenue Act of 1926, § 1200 (a), 44 STAT. (Part 2) 1278 (1926).

70. H. R. REP. No. 708, 72 Cong., 1st Sess. 462 (1932).

71. 285 U.S. 312 (1932).

72. Revenue Act of 1932, § 501-532, 47 STAT. 245 (1932).

73. Revenue Act of 1926, § 303 (a) (1), 44 STAT. 72 (1926).

74. Revenue Act of 1932 § 503, 47 STAT. 247 (1932).

curtesy, or of other marital rights in the decedent's property or estate shall not be considered to any extent a consideration in 'money or money's worth',"⁷⁵ nor does the phrase concerning claims "founded upon a promise or agreement," also contained in Section 812(b), have an opposite number in Section 1002 since it is concerned with transfers, whatever the consideration. The Regulations do contain a sentence covering this matter, though in a somewhat different manner:

A consideration not reducible to money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.⁷⁶

This description had been the subject of earlier regulations.⁷⁷

It seemed evident that the Congress was endeavoring to apply the same treatment, conceptually speaking, to consideration for the gift tax as it had for the estate tax. However, it perhaps is to be criticized for failure to particularize, as is the Treasury for failing to do so in its regulations. The issue was first presented in cases involving antenuptial agreements under which a woman, prior to marriage, surrendered dower and statutory rights in her prospective husband's property in consideration for his transferring money to or settling payments upon her.

In *John D. Archbold*,⁷⁸ a transfer by the husband was held to be a gift because the taxpayer failed to prove that she had dower rights which approximated the value of the transfer to her. In *Bennett B. Bristol*⁷⁹ the Board held that a transfer of such rights was good consideration and, accordingly, that no gift tax liability was incurred by the husband by reason of his payment. The Board reasoned that the gift and estate tax laws were not in *pari materia* so that the estate tax provisions specifically relating to dower, curtesy and statutory rights could be imported into the gift tax law. The First Circuit, however, reversed this decision, holding that the two laws should be read together on this point.⁸⁰ The theory adopted seemed to rest on the basic purposes of the first estate

75. Revenue Act of 1932, § 804, 47 STAT. 169 (1932).

76. U.S. Treas. Reg. 108, § 86.8 and § 86.11 (1943).

77. U.S. Treas. Reg. 79, Art. 8 (1936).

78. *John D. Archbold v. Commissioner*, 42 B.T.A. 453 (1940).

79. *Bennett B. Bristol v. Commissioner*, 42 B.T.A. 263 (1940).

80. *Commissioner v. Bristol*, 121 F.2d 129 (1st Cir. 1941).

tax laws and because a contrary holding "would permit an untaxed transfer by gift of property which would normally be subject to the estate tax upon the husband's death."⁸¹

However, these decisions hardly settled the matter. In *Albert D. Lasker*⁸² a wife released her future property rights in her husband's estate and promised to live with him during his life in return for his promise to provide for her in his will. After marriage she released these contractual rights for \$375,000. The Tax Court, adhering to its position in the *Bristol* case, nonetheless held that a taxable gift had been made, pointing out that the wife had no marital rights to release and all she did release were contractual rights not shown to have a value in money or money's worth. The Seventh Circuit reversed, following the reasoning of the Board in the *Bristol* case, in holding that there was no gift.⁸³ It refused to follow the First Circuit in the *Bristol* case.

These decisions set the stage for the Supreme Court opinions which laid this problem to rest. In *William H. Weymss*⁸⁴ a putative husband, with a large estate, was anxious to marry a woman who had an income of her own so long as she did not remarry. An antenuptial agreement was made under which she released her right of dower and recognized that she was losing her other source of income, in return for which property was transferred to her. In *Merrill v. Fahs*⁸⁵ a man whose worth was estimated at \$5,300,000 transferred \$300,000 in trust for his fiancée under an antenuptial agreement by which she released such rights as she might acquire as his wife or widow. In the *Weymss* case the Tax Court held that the transfer was a gift, pointing out that the wife's loss of income was not consideration flowing to her husband. In the *Merrill* case the District Court refused to follow the First Circuit in the *Bristol* case, and permitted a refund on the theory that there had been no gift.

81. *Id.* at 136.

82. *Albert D. Lasker v. Commissioner*, 1 T.C. 208 (1942).

83. *Lasker v. Commissioner*, 138 F.2d 989 (7th Cir. 1943).

84. *Wemyss v. Commissioner*, 2 T.C. 876 (1943); cf. *Commissioner v. Kelly's Estate*, 84 F.2d 958 (7th Cir. 1936), *cert. denied*, 299 U.S. 603 (1936), where it was said "This does not mean that the 'consideration in money or money's worth' must have passed to the decedent in order to make such indebtedness deductible."

85. 51 F. Supp. 120 (S.D. Fla. 1943).

The Sixth Circuit reversed the Tax Court in *Weymss v. Commissioner*,⁸⁶ placing reliance on the surrender of the wife's other source of income, but definitely favoring the result reached by the Seventh Circuit in the *Lasker* case to the effect that the surrender of marital rights constituted valuable consideration. The Fifth Circuit reversed the District Court in *Fahs v. Merrill*,⁸⁷ holding that the transfer amounted to a gift and that there was no consideration in money or money's worth.

Certiorari was granted in both cases. In *Commissioner v. Wemyss*⁸⁸ the holding of the Sixth Circuit was reversed and in *Merrill v. Fahs*⁸⁹ the holding of the Fifth Circuit was affirmed, with the result that the Treasury's position was upheld and both transfers considered taxable as gifts, the surrender of the rights acquired as wife or widow not being considered an adequate and full consideration in money or money's worth. In the *Wemyss* opinion the Court's reviewing powers were then subject to the self-imposed limitations of the rule of *Dobson v. Commissioner*,⁹⁰ but it did point out:

If we are to isolate as an independently reviewable question of law the view of the Tax Court that money consideration must benefit the donor to relieve the transfer by him from being a gift, we think the Tax Court was correct.⁹¹

The Court also emphasized that the Congress intended a much broader interpretation of the word "gift" than was customary at common law.

The Court in the *Merrill* case, which had come up *via* the District Court, was not thus circumscribed. Its opinion emphasized that, under *Estate of Sanford v. Commissioner*,⁹² the gift tax was supplementary to the estate tax, in *pari materia* with it and that the two should be construed together. The Court then analyzed statutory history in the two fields and, in what has been called "statutory interpretation at its finest,"⁹³ concluded that recourse to the particularity of the

86. 144 F.2d 78 (6th Cir. 1944).

87. 142 F.2d 651 (5th Cir. 1942).

88. 324 U.S. 303 (1945).

89. 324 U.S. 308 (1945).

90. 320 U.S. 489 (1943).

91. *Commissioner v. Wemyss*, 324 U.S. 303, 307 (1945).

92. 308 U.S. 39 (1939).

93. PAUL, FEDERAL ESTATE AND GIFT TAXATION (1946 SUPP.) 716.

estate tax law could be had in determining what was meant by the phrase "an adequate and full consideration in money or money's worth."⁹⁴

The result in both cases seems sound, if for no other reason than that it appears consistent with Congressional intent and is more at ease with logical interpretation. However, in the light of present day law, it is specious to reach such a result in reliance upon the theory that the gift tax supplemented the estate tax or was to be construed in *pari materia* with it. That this is hardly the case is apparent in the light of an opinion, such as *Smith v. Shaughnessy*,⁹⁵ in which the Court rejected a contention by a taxpayer that a transfer, incomplete for purposes of the estate tax should also be considered incomplete for gift tax purposes. It would seem quite clear that any judicial attempt to import integration or correlation of the estate tax into the gift tax ceased with the *Sanford* case, and, as the Court admitted in the *Merrill* case: "Correlation of the gift tax and the estate tax still requires legislative intervention."⁹⁶

In a Churchillian sense, the battle over antenuptial agreements had ended, and the battle over post-matrimonial settlements had begun. In fact, it was well underway. In other areas the Commissioner had, on occasion, contended that various types of family settlements were gifts. In *Alice H. Lester*⁹⁷ the death of a father left an incompetent child in a position of wealthy independence. Pursuant to agreement and to local law, which imposed an obligation of support on the father's estate, a court ordered further payments from the estate to the child's committee. The Board held that since these were pursuant to local law and under court decree, they were not gifts. The Commissioner argued that, since they were entirely unnecessary, they should be considered gifts. The Ninth Circuit adopted this line and reversed the Board.⁹⁸ In *Clarissa H. Thompson*,⁹⁹ even the Tax Court had to concur with the Commissioner's contention that a property settlement in sat-

94. *Merrill v. Fahs*, 324 U.S. 308, 311 (1945).

95. 318 U.S. 176 (1943).

96. *Merrill v. Fahs*, 324 U.S. 308, 313 (1945).

97. *Alice H. Lester v. Commissioner*, 41 B.T.A. 515 (1940).

98. *Commissioner v. Greene*, 119 F.2d 383 (9th Cir. 1941), *cert. denied*, 314 U.S. 641 (1941).

99. 6 T.C.M. 822 (1947).

isfaction of a husband's marital and support rights lacked consideration, where the wife conceded that, under applicable local law, his curtesy rights were not items of any value.

However, the problems revolving about post-marital settlement agreements under which the wife released dower and statutory interests in the husband's estate, together with her rights to support for a consideration flowing from the husband, were being pressed. At first the Commissioner took the position, as he had in estate tax cases, that these transfers were gifts. In *Herbert Jones*,¹⁰⁰ the Tax Court, relying to a certain extent upon the opinion of its predecessor, the Board, in *Bennet B. Bristol*,¹⁰¹ although acknowledging its later reversal,¹⁰² held that no gift resulted from such a transaction. It distinguished antenuptial from postnuptial settlements stating, in the case of the former, "the purpose to exact a *quid pro quo* may be lacking."¹⁰³ The Commissioner, who had attempted to distinguish between a voluntary settlement and one pursuant to court decree, and who had also contended that there was no proof of the value of the wife's support rights, nonacquiesced.¹⁰⁴

In *Clarence B. Mitchell*,¹⁰⁵ property was transferred to a wife, in contemplation of divorce and in settlement of the support obligation. The agreement was later incorporated in a Nevada decree. The Commissioner argued for taxability as a gift contending that *Herbert Jones* had ceased to be sound law in the light of the *Merrill*¹⁰⁶ and *Weymss*¹⁰⁷ cases. The Tax Court held that the transfer was not a gift, relying upon the *Jones* and *Lasker*¹⁰⁸ cases and upon *Edmund C. Converse*,¹⁰⁹ subsequently reviewed by the Second Circuit in an opinion to be discussed later, reaching the same result. There were

100. *Herbert Jones v. Commissioner*, 1 T.C. 1207 (1943), *pet. for rev. dismissed*, (7th Cir.) 5-1-44.

101. *Bennett B. Bristol v. Commissioner*, 42 B.T.A. 263 (1940).

102. *Commissioner v. Bristol*, 121 F.2d 129 (1st Cir. 1941).

103. *Herbert Jones v. Commissioner*, 1 T.C. 1207, 1210 (1943).

104. G.T., 1943-17 CUM. BULL. 1.

105. *Clarence B. Mitchell v. Commissioner*, 6 T.C. 159 (1946), *pet. for rev. dismissed*, (7th Cir.) 10-7-46.

106. 324 U.S. 308 (1945).

107. 324 U.S. 303 (1945).

108. *Lasker v. Commissioner*, 138 F.2d 989 (7th Cir. 1943).

109. *Edmund C. Converse v. Commissioner*, 5 T.C. 1014 (1945), *nonacq. G.T.*, 1946-1 CUM. BULL. 5, *aff'd* on other reasoning *sub nom.* *Commissioner v. Converse*, 163 F.2d 131 (2d Cir. 1947).

dissents in line with the Commissioner's contentions and he noted a nonacquiescence to the decision.¹¹⁰

Thereafter, affairs took a somewhat incongruous turn, with the Commissioner issuing *E.T.* 19,¹¹¹ which provides, in part, as follows:

Transfers of property pursuant to an agreement incident to a divorce or legal separation are not made for an adequate and full consideration in money or money's worth to the extent that they are made in consideration of the relinquishment or promised relinquishment of dower, curtesy or of a statutory estate created in lieu of dower or curtesy, or other marital rights in the transferrer's property or estate; to the extent that the transfers are made in the satisfaction of support rights the transfers are held to be for an adequate and full consideration. . . .

Since the *Mitchell* case involved support rights, the nonacquiescence was withdrawn and acquiescence registered.¹¹²

Thus there was imported into the gift tax picture, virtually in *haec verba*, but with some minor adjustments to content, the specification contained in the Estate Tax Section 812(b) that a relinquishment or promised relinquishment of dower, curtesy, or their statutory equivalents is not an adequate and full consideration in money or money's worth. It is to be noted, too, that the phrase "or other marital rights in the transferrer's property" appears in the same ruling, but that support rights are specifically excepted. What those other rights are, if not support, is certainly a matter of conjecture, but it lends some credence to Judge Hand's dissent in *Meyer's Estate v. Commissioner*.¹¹³ It also raises a question as to what has become of the Commissioner's position, if such there was, that the phrase "other marital rights" included support, a stand adopted in the *Meyer's* opinion and intimated in *Markwell's Estate v. Commissioner*.¹¹⁴

The Tax Court, like an unreconstructed rebel, continued in the course which it had set for itself in the *Jones* case. In *Matthew Lahti*,¹¹⁵ *Albert C. Moore*,¹¹⁶ *Norman Tawrog*,¹¹⁷ and

110. G.T., 1946-1 CUM. BULL. 5.

111. 1946-2 CUM. BULL. 166.

112. 1946-2 CUM. BULL. 4.

113. 110 F.2d 367 (2d Cir. 1940), *cert. denied*, 310 U.S. 651 (1940).

114. 112 F.2d 253 (7th Cir. 1940).

115. *Matthew Lahti v. Commissioner*, 6 T.C. 7 (1946), *nonacq.* G.T., 1946-2 CUM. BULL. 6.

Edward B. McLean,¹¹⁸ it had before it cases in which a pre-divorce agreement was entered into which was later incorporated into a decree. Under the agreement the wife, in consideration of the husband making financial provisions for her, surrendered her rights of support and of sharing in his property. In each case the Tax Court held that no gift had been made, theorizing on the basis of the *Converse* and *Jones* decisions of the same tribunal. In each case the Commissioner registered nonacquiescence. In each case the disregard of *E.T.* 19 was quite evident.

In *William Barclay Harding*,¹¹⁹ a separation agreement provided for the immediate cash payment to a wife of \$350,000, in addition to periodic payments until she should die or remarry. By agreement, she released all support rights for herself and her children, dower rights and all other marital rights in her husband's property. At the time the agreement was made, divorce was contemplated and the agreement was to be binding whether or not there was a divorce. A Nevada divorce was obtained two years after the agreement, which ordered compliance with the agreement. The Court held that the transfer was not a gift, citing most of the aforementioned cases. There was the same dissent as in the previous cases, based on the *Merrill* and *Weymss* decisions. Yet the Commissioner acquiesced.¹²⁰ One can only conjecture that the presence of support provisions or the palpability of the decree resulted in this action.

The views of the Tax Court on this question are puzzling,¹²¹ but the decisions reached by the Courts of Appeal which have considered the question are, perhaps, even more so. In *Edmund C. Converse*,¹²² which has been alluded to previously, a husband and wife executed a separation agreement in 1941 by the terms of which the husband provided for a minor child

116. *Albert C. Moore v. Commissioner*, 10 T.C. 393 (1948), *nonacq.* G.T., 1948-1 CUM. BULL. 4.

117. *Norman Taurog v. Commissioner*, 11 T.C. 1016 (1948), *nonacq.* 1949 INT. REV. BULL. No. 8 at 13,060.

118. *Edward B. McLean v. Commissioner*, 11 T.C. 543 (1948), *nonacq.* G.T., 1949-1 CUM. BULL. 6.

119. *W. B. Harding v. Commissioner*, 11 T.C. 1051 (1948).

120. G.T., 1949-1 CUM. BULL. 2.

121. PAUL, FEDERAL ESTATE AND GIFT TAXATION (1946 SUPP.) 716.

122. *Edmund C. Converse v. Commissioner*, 5 T.C. 1014 (1945), *nonacq.* G.T., 1946-1 CUM. BULL. 5, *aff'd.*, on other reasoning *sub nom.* *Commissioner v. Converse*, 163 F.2d 131 (2d Cir. 1947).

and promised to pay the wife \$1200 a month for her release of marital rights. She then sued in Nevada for a divorce and he contested on the ground that the property settlement was unfair. The Nevada Court decreed that the wife receive \$625,000 in cash in lieu of monthly payments and in full discharge of all her rights. The Tax Court held it was not a gift, making a distinction between antenuptial and postnuptial agreements. The Second Circuit affirmed, but rejected this distinction, pointing out that the real delineation was between a voluntary settlement and one founded upon a money judgment which would have been a claim against the husband's estate under cases such as *Commissioner v. State Street Trust Co.*,¹²³ and *Commissioner v. Maresi*.¹²⁴

In *Roland M. Hooker*¹²⁵ a husband and wife, having two children, made a separation agreement, transferring to the wife securities worth about \$50,000, of which no mention was made in the agreement and \$15,000 in cash which was stated to be in full settlement of the obligations to the wife. The husband also executed two trusts, one for each child, to which he promised to transfer one-sixth of what he received from the estate of his mother. A Nevada decree incorporated the agreement. On the death of his mother, the husband was forced to make a transfer to the trusts for the children. The Tax Court held the transfers gifts to the extent that they exceeded the obligation to support, expressly disavowing the holding of the Second Circuit in the *Converse* case, as far as it held that a decree prevented a transfer from being a gift, if it otherwise were such. It added "but the absence of a donative intent and the presence of an adequate consideration in money or money's worth may not be presumed in prenuptial agreements and transfers for the benefit of minor children."¹²⁶ The Fifth Circuit affirmed in accordance with the general tenor of *E.T.* 19.¹²⁷

123. *Estate of Francis Browne Grinnell v. Commissioner*, 44 B.T.A. 1286 (1941), *aff'd sub nom.* *Commissioner v. State Street Trust Co.*, 128 F.2d 618 (1st Cir. 1942).

124. 156 F.2d 929 (2d Cir. 1946); but see, *Edythe C. Young v. Commissioner*, 39 B.T.A. 230 (1939); *Fleming v. Yoke*, 53 F. Supp. 552 (N.D. W. Va. 1944); *Commissioner v. Estate of Swink*, 155 F.2d 723 (4th Cir. 1946); Revenue Act of 1924 § 303 (a) (1), 43 STAT. 305 (1924).

125. *Roland M. Hooker v. Commissioner*, 10 T.C. 388 (1948).

126. *Id.* at 392.

127. *Hooker v. Commissioner*, 174 F.2d 863 (5th Cir. 1949).

In *Estate of Josephine C. Barnard*,¹²⁸ a wife paid her husband \$50,000 to release his marital claims under a separation agreement and agreed to set up a trust of \$50,000 more when she got a divorce. The divorce ratified the agreement, but did not mention the second \$50,000. The wife made the payment. The Tax Court, following its usual line, held that the first transfer was supported by consideration and that the second was a gift. The Second Circuit reversed, holding that the first transfer was also a gift.¹²⁹ The distinction between a prenuptial and post-marital settlement, as to the presence of a business purpose, was said to be "fanciful." The Court added:

This distinction without a difference seems to have developed in the Tax Court which early become committed to a different view—see *Jones v. Commissioner*, 1 T.C. 1207—and then felt unwilling to accept what we think is the clear import of the Supreme Court's analysis. Accordingly in a series of decisions of which the present is one, the Tax Court has applied this distinction. But this view has not been without dissent; thus we regard the vigorous dissents of Judge Disney . . . as stating the necessary and correct principles after *Merrill v. Fahs*, supra.¹³⁰

The Court felt that the *Converse* case had been "cited beyond its scope" because the decree itself created a debt, and that the *Maresi*¹³¹ case did not pass upon the point at issue.

In *Cornelia Harris*,¹³² a wife paid money in a property settlement adopted in a divorce decree. Following the reasoning of the *Barnard* case in the Tax Court, the payment was held not to be a gift. The Second Circuit reversed, holding that the mere approval of an agreement by a court does not prevent it from being a gift.¹³³ The *Maresi* case was again distinguished with the language:

The decision stands for no more than that, when the validity of the settlement is made conditional on its adoption by the decree, and when it does not by its terms survive the decree, the payments are not "founded" upon the "promise or agreement."¹³⁴

128. *Estate of J. C. Barnard v. Commissioner*, 9 T.C. 61 (1947).

129. *Commissioner v. Barnard's Estate*, 176 F.2d 233 (2d Cir. 1949).

130. *Id.* at 235-236.

131. *Commissioner v. Maresi*, 156 F.2d 929 (2d Cir. 1946).

132. *Cornelia Harris v. Commissioner*, 10 T.C. 741 (1948).

133. *Cornelia Harris v. Commissioner*, 178 F.2d 861 (2d Cir. 1950).

134. *Id.* at 864; see also *Krause v. Yoke*, 89 F.Supp. 91 (N.D. W.Va. 1950).

Probably there is little doubt that the Tax Court was grasping at straws in seeking to fly in the face of the *Merrill* and *Wemyss* decision. In the light of the estate tax interpretation it is to be doubted that its distinction between antenuptial and postnuptial agreements was valid.¹³⁵ However, to cling to the delineation between an agreement "adopted" by a decree and one of independent insertion by a court seems equally untenable because of the ease with which consent arrangements can be made. At any rate, there is some hope that this problem may be clarified in the near future for the Supreme Court granted a petition for a writ of Certiorari in the *Harris* case on March 27, 1950, consenting to review these issues.

Nonetheless, the insistence of the Commissioner on his position that by "giving all to love" no consideration is involved could lead to ridiculous extremes. The betrothal ceremony, even in this enlightened era, entails considerable giving—the meretricious relationship of philanderer and mistress perhaps even more so.¹³⁶ Were the Commissioner to press for a gift tax in cases of this nature, he would be donning the stole of the father confessor. It seems dubious that tax collection would be carried this far.

THE INCOME TAX

The problem in this field arises in ascertaining the basis upon which property received under an antenuptial or post-marital agreement is deemed to have been taken. If it is considered a gift—which seems to be true under the gift and estate tax laws—basis is usually the cost to the last person who acquired it by other than gift unless a lesser loss will result from taking it at its transfer value.¹³⁷ On the other hand, if consideration was given, the basis is value at the time of transfer and the gain is ascertained on that ground.¹³⁸

The cases in the income tax field seem a world apart from concepts heretofore considered. In *L. W. Mesta*¹³⁹ a husband transferred securities to his wife under a post-marital property settlement. The Commissioner treated the transaction

135. Note, *Are Transfers of Property Pursuant to Separation Agreements Gifts?* 5 TAX L. REV. 90 (1949).

136. Rudick, *Marriage, Divorce and Taxes*, 2 TAX L. REV. 123 (1947).

137. INT. REV. CODE, § 113 (a) (2).

138. INT. REV. CODE, § 113 (a).

139. *L. W. Mesta v. Commissioner*, 42 B.T.A. 933 (1940).

as a sale of the securities for marital rights. The Board held that such rights had no value and, while the transaction was not a gift in the eyes of the income tax law, no gain was realizable. The Third Circuit reversed, holding that a sale had been made and a capital gain realized.¹⁴⁰ A similar result by the Board¹⁴¹ and a reversal on similar grounds by the Second Circuit followed one year later.¹⁴²

In a relatively recent case a taxpayer who had received securities under an antenuptial settlement sold them after divorce. They had greatly increased in value between the time when the husband originally acquired them and when he transferred them to her. She sought to use the latter as her basis. The Tax Court held the transfer a gift, under the theory of the *Merrill* and *Weymss* cases, calling for the use of the cost to her spouse.¹⁴³ The Second Circuit held that value at the time of transfer governed¹⁴⁴ and said:

In our opinion the income tax provisions are not to be construed as though they were in *pari materia* with either the estate tax law or the gift tax statutes.¹⁴⁵

So too, where a wife forced a cash settlement of her dower rights before consenting to a sale of her husband's land, the amount paid to her was not treated as part of the purchase price flowing to her husband.¹⁴⁶ Decisions may come and go but it would seem that incongruities go on forever.

CONCLUSION

Some of the principles hereinbefore described seem quite clearly out of line. Satisfaction of obligations arising out of the family relationship are surely based upon consideration,¹⁴⁷ to which reason and common sense must testify. Marriage is a compelling inducement for many things and it seems almost juvenile to claim that the obligations growing out of

140. *Commissioner v. Mesta*, 123 F.2d 986 (3d Cir. 1941), *cert. denied*, 316 U.S. 695 (1941).

141. *Walter S. Halliwell v. Commissioner*, 44 B.T.A. 740 (1941).

142. *Commissioner v. Halliwell*, 131 F.2d 642 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1942).

143. *Farid-es-Sultaneh v. Commissioner*, 6 T.C. 652 (1946).

144. *Farid-es-Sultaneh v. Commissioner*, 160 F.2d 812 (2d Cir. 1947).

145. *Id.* at 814.

146. *Yost v. O'Malley*, 88 F.Supp. 626 (D.C. Neb. 1950).

147. *Seaman v. United States*, 156 F.2d 719 (7th Cir. 1946).

the matrimonial relationship are valueless,¹⁴⁸ even for tax law purposes. The obligation to support one's wife is a real one, which most errant husbands must admit.¹⁴⁹ It seems unrealistic to treat it otherwise.

In such an uncharted sea, care must be taken to avoid the rocks and shoals of specious reasoning. The facts of each case should be examined, by tax collector even as by tax counsel. Artificial logic should be averted by both. Once the realities of the situation are agreed upon, the course should be set and adhered to. Both the government and the taxpayer would thus be adequately forewarned and forearmed. Until that happy day when non-Emersonian consistency is a touchstone of tax law, however, it would seem to be the better part of wisdom for tax counsel to draw marital agreements with an eye toward a tax collector who, with few exceptions, tends to consider all transfers made under them as gifts.¹⁵⁰

148. *Catherine S. Beveridge v. Commissioner*, 10 T.C. 915 (1948).

149. *Douglas v. Wilcuts*, 296 U.S. 1 (1935); *Helvering v. Fuller*, 310 U.S. 69 (1940).

150. See Seidman, *DIVORCE AND GIFT TAXES*, 28 TAXES 105 (1950).