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Federal Estate Tax: The Reciprocal Trust Device

William R. Frazier

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The language of the court in the principal case, ". . . and provide it as soon as it does for applicants of any other groups . . .,"¹¹ indicates that equality is not provided if the Negro must wait until a separate institution is established.

Mandamus is the proper remedy to enforce compliance with the mandate of an appellate court.¹² However, the issue developed is solely whether the district court's order was in compliance with the United States Supreme Court's mandate. Apparently the section of the order which petitioner attacks as a violation of the mandate is that which permitted the Board of Regents to enroll the petitioner in a separate school, petitioner evidently taking the position that such an alternative could not provide equal educational facilities. Inasmuch as the order required that the facilities be substantially equal, and since the only issue raised by the present motion was the validity of the order, the decision of the court was clearly correct.¹³

The district court has retained jurisdiction to hear any issue arising from its order.¹⁴ Therefore, if the petitioner desires to raise the question of whether, in fact, substantially equal facilities were provided by the Board of Regents acting under the state district court's order, a proper procedure would be contempt proceedings in the district court.¹⁵

WILLIAM REECE SMITH, JR.

FEDERAL ESTATE TAX: THE RECIPROCAL TRUST DEVICE

In re Leuders' Estate, 164 F.2d 316 (C. C. A. 3rd 1947)

In 1930 the husband of the decedent created an irrevocable trust by the terms of which decedent was to receive the income for life, with the power in her as beneficiary to terminate the trust and take the corpus. Some fifteen months later the decedent created a reciprocal trust of identi-

¹¹Fisher v. Hurst, 68 Sup. Ct. 389 (1948).

¹²Favour v. Hill, 136 F.2d 489 (C. C. A. 9th 1943); Wrighten v. Board of Trustees, 72 F. Supp. 948 (1947).

¹³Cases cited *supra* note 7.

¹⁴See opinion p. 390.

¹⁵CRANDALL, FLORIDA COMMON LAW PRACTICE §471 at pp. 637, 651 (1st ed. 1928).

cal terms. Upon her death the Commissioner of Internal Revenue determined an estate tax deficiency by including in the decedent's gross estate the value at death of the trust created in decedent's favor by her husband. A divided Tax Court sustained the Commissioner¹ on the authority of *Lehman v. Commissioner of Internal Revenue*.² On appeal, HELD, in the absence of a finding of an agreement, expressed or implied, to make a reciprocal transfer of property, the Tax Court's finding that the trust created by the husband constituted consideration for the wife's trust was without substantial basis. Judgment reversed.

The Internal Revenue Code provides that a trust in which the settlor retains the power to alter, amend, or revoke shall be included in the taxable estate of the settlor.³ The Lehman doctrine, founded upon a settled rule of trusts, provides that a person who furnishes the consideration for the creation of a trust is the settlor, though in form the trust is created by another.⁴ Consideration is the decisive factor and must be present in order to make the Lehman Doctrine applicable.⁵ The majority of the court considered that the failure of the Tax Court to make a specific finding of fact that an understanding or agreement to make reciprocal transfers existed, made its ultimate finding that the decedent had furnished the consideration for her trust without substantial basis in evidence, in view of the fact that the trusts were created fifteen months apart.

Cases in which the Lehman Doctrine has been squarely before the courts indicate that the following factors are important in determining whether or not an agreement existed to execute reciprocal trusts: simul-

¹*In re Leuders' Estate*, 6 T. C. 587 (1946).

²*Lehman v. Commissioner*, 109 F.2d 99 (C. C. A. 2d 1940), *cert. denied*, 310 U. S. 637 (1940); Note, 24 MINN. L. REV. 884 (1940); Note 52 HARV. L. REV. 1015 (1939).

³INT. REV. CODE §811. "The value of the gross estate of the decedent shall be determined by including the value at time of his death of all property . . . to the extent of any interest . . . the decedent . . . made transfer . . . where enjoyment thereof was subject at date of his death to any change through the exercise of a power . . . to alter, amend, or revoke . . ."

⁴*Blackman v. United States*, 48 F. Supp. 362 (1943); *Estate of George W. Sweeney*, 4 T. C. 265 (1944); *Iversen v. Commissioner*, 3 T. C. 756, 774 (1944); 1 SCOTT, TRUSTS §156.3 (1939).

⁵*McLean v. Commissioner*, 41 B. T. A. 1266 (1940).