THE MEANING OF GIFT IN GIFT TAX LAW

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The precise definition of "gift" for gift tax purposes is difficult to state. Federal legislative enactments are, in the main, responsible for this difficulty since they have generated much confusion in this area of the law. I believe that in order to avoid further confusion it is most important to clarify as much as possible this meaning and for this purpose I propose to examine in turn, the common-law meaning and requirements of lifetime gifts, the federal legislation relating to these gifts as well as the decisions rendered in the light of the common law and the statutes. I shall also examine the question of the law applicable in the determination of the meaning of gift for gift tax purposes.

I. *Common-Law Meaning and Requirements of Gift.*

Gift has been defined legally as:

> . . . the transfer of property from one person to another when it is done without recompense, as opposed to a sale or barter.[1]

Instantly one recognizes little difference between this judicial definition of gift and that which might be given to it by an ordinary layman.

Clearly the essence of a gift is the absence of consideration. The donor, or giver, receives nothing for the transfer, either from the receiver or any other person. Hence it can be stated that the very foundation of every gift is charity. A gift is a benevolent bestowal.

At common law there have always been certain prerequisities to a gift. These may be summarized as follows:

1. *Parties.* There must be a donor and donee who are capable in law of giving and receiving. For instance, it is beyond the competence of a lunatic to authorize his committee to make a gift of

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[1] Earl Jowitt, The Dictionary of English Law, Sweet and Maxwell, (1959), p. 864.

his property.[2] Some cases hold that an infant can make a gift but that the gift is voidable when the child reaches majority.[3] It is hard to agree with this conclusion since it patently contradicts the prerequisite of irrevocability of a true "gift". In other words, it is inconsistent with the notion of gift to say an infant may make a gift but repudiate it at twenty-one. I am of the opinion that an infant is not legally competent to make a gift.

The notion that parties must be competent to make a gift also refers to the ownership of property. Obviously only the party who owns property can give it away. In the discussion below it will be seen that this rule may instigate a completely new concept in gift tax cases between husband and wife.

It has been held that there can be no gift unless the donee or person to receive it is ascertained.[4]

2. *Intention.* The donor must have a clear and unmistakeable intention to make a gift. Intention here takes us back to the concept of charity upon which all gifts are based. The mere fact that a person's intention to make a gift is coupled with an ulterior motive, such as ingratiation with his friends, does not make the transfer any the less a gift.

3. *Transfer.* The donor must transfer ownership of the property to be given to the donee; otherwise, there is no gift since a mere promise to make a gift is unenforceable and of no legal effect.[5] The courts must be able to find something in the nature of a giving and taking. Lord Esher M.R., once stated the principle this way:

> I have come to the conclusion that in ordinary English language and in legal effect there cannot be a "gift" without a giving and a taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a "gift". They are a necessary part of the proposition that there has been a "gift". They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift.

The word "contemporaneous" as used by Lord Esher probably meant "as part of the same transaction" and not at the same moment in time.[7] In truth the requirement of the transfer of ownership gives life to the requirement of intention. The transfer bears witness to intention.

[2] *Rourke* v. *Halford* (1916), 37 O.L.R. 92, 31 D.L.R. 371 (C.A.).
[3] *Murray* v. *McKenzie* (1911), 23 O.L.R. 287 (C.A.).
[4] *Roberts* v. *Roberts* (1865), 11 Jur. N.S. 992, 14 W.R. 123, rev'd. on other grounds 15 L.T. 260, 12 Jur. N.S. 971.
[5] *Shower* v. *Pilck* (1849), 4 Ex. 478, 19 L.J. Ex. 113; *Re Innis* v. *Innis*, [1910] 1 Ch. 188, 79 L.J. Ch. 174.
[6] *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57, at p. 76, 59 L.J. Q.B. 377, at p. 387.
[7] Goodeve on Personal Property (9th ed., 1949), p. 148.

Sometimes it is said that the donor must transfer possession or dominion as well as ownership. This is not a strict rule since one might loan a thing to another and subsequently make a gift of it. In this case no possession would be transferred as the other party already has possession.

4. *Delivery.* The donor, or someone acting for him, must make such delivery as the property is capable of, to the donee or someone acting on his behalf. Long ago it was decided that gifts *inter vivos* could be made either (1) by deed, or (2) by delivery of possession of the thing to be given.[8] Obviously problems will be kept at a minimum if deeds of gift are used. Difficulties do, however, arise when manual delivery is relied on.

Some property is incapable of manual delivery. For example, where A makes a gift of a one-quarter interest in a race horse to B, it would be clearly impractical to require A to quarter the horse and make delivery to B. Or a person may make a gift of an interest in a partnership to another. In these cases the courts say only such delivery as the property is capable of is required.[9] Constructive delivery will also suffice. Thus, where A makes a gift of the contents of a certain trunk to B and hands B the key there has been a constructive delivery. Similarly with the key to an automobile.

A gift may be imperfect for want of necessary delivery. An imperfect gift will be perfected on the death of the donor if the donee is made executor under his will or, if he left no will, the donee is appointed administrator. One writer states the rationale of this rule together with his criticisms as follows:

> In the case of an executor, it can be said that the donor himself perfects the gift, by appointing the donee as his executor, but the extension of the principle to an administrator is not so easy to reconcile with the earlier authorities since the donor has no control over the appointment.[10]

With regard to its merits it will be appreciated that this doctrine has interesting implications for gift and estate tax purposes.

5. *Acceptance.* Until there is acceptance by the donee there is no gift.[11] As a rule acceptance is implied unless the donee rejects the property. Acceptance need not be contemporaneous with delivery. It might follow or precede it. Generally the question whether a gift has been accepted will depend on the knowledge of the donee. Does he know of the intended gift is the vital point.

[8] *Irons* v. *Smallpiece* (1819), 2 B & Ald. 551, 106 E.R. 467.
[9] *Cochrane* v. *Moore*, *supra*, footnote 6; *Kiplin* v. *Ratley*, [1892] 1 Q.B. 582.
[10] Goodeve, *op. cit.*, footnote 7, p. 150.
[11] *Hill* v. *Wilson* (1873), 8 Ch. App. 888, 42 L.J. Ch. 817.

Trust distinguished from gift. Although at law a man may make a gift in trust, a trust and gift are two separate and distinct legal concepts. Sir George Jessel M.R., outlined the differences and similarities of a gift and a trust when he said:

> A man may transfer his property without valuable consideration in one of two ways; he may either do such acts as amount in law to a conveyance or assignment of his property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or in trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it from that time forward on trust for the other person . . . . The distinction appears to me to be plain and beyond dispute; for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's hands for any purpose fiduciary or otherwise.
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> These two methods of transferring such property are, it should be added, wholly distinct from one another . . . . There is, however, one feature common to the two methods of transfer, namely, that in both cases the donor or grantor must have by complete gift or transfer in the one case, or by acts which admit of no other interpretation in the other case, parted with the beneficial interest in the subject matter of the gift.[12]

It is not intended to expand on the differences between a trust and a gift as set out by Sir George Jessel M.R. This task would more properly constitute the subject-matter for a separate article. All we need to note here is that primarily a trust and a gift differ in their native characteristics.

Courts often reiterate the rule that they will not perfect an imperfect gift. If a transaction is meant to take effect as a transfer by gift, and it fails for some reason, the courts will not give effect to it by calling it a declaration of trust.[13] This doctrine is based on the theory that if a man really intends to make a gift he will do everything that is necessary to be done by him.[14] On the other hand, courts have held at times that it would be inequitable, because of the donor's subsequent conduct, not to declare a gift and have accordingly done so. For example, where A gives B a piece of land, but that gift is incomplete and B, to A's knowledge and consent,

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[12] *Richards* v. *Debridge* (1874), 18 Eq. 11, at p. 14, 43 L.J. Ch. 459, at p. 461.

[13] *Milroy* v. *Lord* (1862), 4 De. G.F. & J. 264, 31 L.J. Ch. 798.

[14] *Milroy* v. *Lord, ibid.*, *Anning* v. *Anning* (1907), 4 C.L.R. (Part II) 1049.

builds on it, the court will hold that B is entitled to the land.[15] Courts have extended this doctrine to the extent that an imperfect assignment by deed, without consideration, of certain bank accounts was declared a good gift *inter vivos* on the ground that the donor made the conveyance intending to make a gift and therefore there was an implied covenant never to exercise any rights of ownership over the property again.[16]

Donatio mortis causa distinguished from gifts inter vivos. This is a gift of personal property made in contemplation of death, intended to take effect at death, but which is accomplished by immediate delivery to the donee. If the donor recovers, the gift is revoked.[17] Some things, such as shares of stock, cannot be the subject of a *donatio mortis causa* because property in them does not pass by delivery.[18]

A *donatio mortis causa* differs from a will in that it may be made without the formalities of a will, and secondly, property passes at death without probate or the executors consent.[19] It differs from a gift *inter vivos* in that, (1) a gift *inter vivos* takes effect immediately and cannot be revoked, (2) it need not be made in contemplation of death, (3) it may be a gift of things which do not pass by mere delivery.

II. *Legislation Dealing with Gifts.*

Part IV of the Income Tax Act is headed "Gift Tax". Logically one should expect to find the provisions relating to the meaning of gift under this part. However, this is not so. True, section 111(2) is under the caption "Gift defined" but this is only part of the story. Pursuant to section 137(2), (3), certain transactions which result in the conferring of a benefit on one person by another may be taxed as gifts. And, as though this legislation were not sufficiently confusing, because gifts *inter vivos*, within three years of death, are brought back into the estate,[20] some provisions of the Estate Tax Act deem certain transactions to be gifts *inter vivos*.[21] These provisions put teeth into the Estate Tax Act. In the absence of an Estate Tax Act definition some transactions, not caught by

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[15] *Dillwyn* v. *Llewellyn* (1862), 4 De. G.F. & J. 517, at p. 521, 31 L.J. Ch. 659.

[16] *Anning* v. *Anning*, *supra*. footnote 14. See also *Kekewick* v. *Manning* (1851), 42 E.R. 519, 1 De G.M. & G. 176.

[17] *Bunn* v. *Markham* (1816), 7 Taut. 224, 129 E.R. 90.

[18] *Re Mead* (1880), 15 Ch. D. 651, 50 L.J. Ch. 30.

[19] *Re Hawkins; Watts* v. *Nash*, [1924] 2 Ch. 47, 93 L.J. Ch. 319.

[20] Estate Tax Act, S.C., 1958, c. 29, s. 3 (1)(c).

[21] *Ibid.*, s. 3(3).

section 111(2) or 137(2)(3), might escape estate tax as well as gift tax.

1. *The meaning of "gift" pursuant to section 111(2) of the Income Tax Act.* Immediately on looking at section 111(2) three principal *methods* of making a gift appear. It is stated that for the *purpose of this section* gift includes, (1) a transfer, (2) an assignment, (3) other disposition. All three methods require "property" as their subject. The location of the property is immaterial. The transfer, assignment or other disposition of property must be "by way of gift". At the outset it appears that a gift includes dealing with property "by way of gift".

Adding to the confusion in section 111(2)(a) and "without limiting the generality of the foregoing", the Act states that gift *includes* the creation of a trust of property, or of an interest in property "by way of gift". Furthermore, gift *includes* the direct or indirect disposal by a person of property "by way of gift".

Clearly the Act is obscure. This definition leaves something to be desired in point of certainty and suggests no principle. In fact no definition of gift ever emerges. The nearest we get to a definition is that a gift *includes* certain things *by way of gift.* And the use of the word "includes" rather than "is" or "means" after the word gift is intentional and designed to set up a dragnet. This conclusion follows from statutory interpretation of the word "includes".

In *R.* v. *Beru*,[22] Robertson J., quoting Lord Watson in *Dilworth* v. *Commr. of Stamps* stated:[23]

> The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive definition of the meaning which, for purposes of the Act, must invariably be attached to these words or expressions.

It seems clear from this definition that the word "includes" as used in section 111, imposes a shotgun pattern, making it difficult for any taxpayer to get out of range.

[22] *R.* v. *Beru*, [1936] 2 W.W.R. 574, at pp. 575-576, [1936] 4 D.L.R. 805, at p. 806; see also *Richard* v. *Lord*, [1941] S.C.R. 1, [1941] 1 D.L.R. 536.

[23] [1899] A.C. 99.

The words "by way of gift" are a geometric *necessity*. They complete a circle. Although necessary in the context of this method of "defining" gift, these words do not clarify the meaning in any way. If the words were not there, many legitimate commercial transactions might be considered gifts. Yet, although the words "by way of gift" do not shed light on the meaning of gift they are the most important words of the section. They add spirit to the body of the section. They are a clear admonition that the transfer, assignment, other disposition, creation of a trust, or of an interest in, or the direct or indirect disposal of, property must be done with the spirit of gift. In effect, the words "by way of gift" command a "purpose" from the transactions which they modify.

2. *Gifts inter vivos and donatio mortis causa distinguished under section 112(4).* This section exempts a *donatio mortis causa* from gift tax. However, it will be appreciated that such gifts are caught by the Estate Tax Act so that they do not escape taxation.[24] Because a *donatio mortis causa* resembles a testamentary disposition, it is obviously more logical that it should be within the ambit of estate taxes than lifetime gift taxes.

3. *Transactions deemed to be gifts.* The provisions just outlined were intended (ostensibly) to define "gift" with some particularity. However, one other section of the Income Tax Act, must be considered. As previously stated section 137(2) deems the amount of the benefit conferred by one person on another as the result of one or more sales, exchanges, declarations of trust, or other transactions of any kind whatsoever to be a payment, which, in turn, is depending on the circumstances, "deemed to be a disposition by way of gift". Some of the sting is removed from this section by section 137(3) which grants relief to parties dealing *bona fides* and at arms length.

Again section 137(2) gives no clue to the meaning of gift. It seems that its real effect, so far as it relates to gifts, is to amplify the words "other disposition" as used in section 111.

4. *Estate tax provisions on the meaning of gift.* The pertinent sections of the Estate Tax Act have been referred to above. It is proposed to deal with that Act throughout this article merely on a cautionary basis, pointing out, when deemed necessary, that certain transactions require consideration in the light of estate tax problems as well as gift tax.

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[24] Estate Tax Act, *supra*, footnote 20, s. 3(1)(b).

III. *Case Law Dealing with Gifts.*

1. *Introduction.* It will be recognized immediately that the Gift Tax Act "definition" of "gift" hardly resembles the common-law definition. Why is this? I am of the opinion that the reason lies in the desire of the tax gatherer to insure a minimum of avoidance. A strict definition might prove costly to the Department—and it knows this. However, the anxiety is unwarranted, since the common-law definition of gift is broad enough to cover all "gifts". In other words, the Department has attempted to plug a hole which does not exist; or, if it does exist, the hole is too small for the plug.

The majority of gift tax cases arise among tax payers in non-arm's length transactions. Literally, the entire Income Tax Act glistens with sections opposing non-arm's length transactions. In practice this statutory pre-occupation stimulates a departmental policy of careful scrutiny where non-arm's length transactions are involved. Judicial decisions, it is safe to say, reveal an awareness of this policy and at times actively labour to sustain it. Because gift tax cases are, in the main, concerned with non-arm's length transactions and because of the superimposed policy of scrutiny in such transactions, many seemingly unorthodox decisions in this area can easily be rationalized. Let us now consider some of the cases and the principles, if any, which they establish.

2. *Consideration.* In *McKerrall* v. *M.N.R.*,[25] a father, shortly before his death in 1954 or 1955, transferred property to his son by deed which stated the usual consideration of $1.00. After the father's death, the Department attempted to assess the son for income tax under section 17(2).[26] On appeal to the Board the taxpayer was successful. Both the son and the deceased's solicitor appeared and testified that the father had wanted to make a gift. The transfer was done by bill of sale reciting a consideration of $1.00 at the instigation of the solicitor.

The Board was impressed with the taxpayer's evidence. Mr. W. S. Fisher, Q.C. said that the *facts* revealed these transfers were not sales but gifts. Section 17(2) did not apply because, in spite of the bill of sale, there was in *fact* no consideration. It is worth noting that no mention is made by Mr. Fisher of the definition of "gift" set out in the Act. The case can be cited as authority for the proposition that nominal consideration is no consideration

[25] (1957), 57 D.T.C. 191, 17 Tax A.B.C. 38.

[26] S. 17(2) states that where one person transfers property to another with whom he does not deal at arm's length for inadequate consideration the difference between the fair market value of the property at the time of transfer and the amount paid for it is taxable income to the transferor.

for gift tax purposes. (We shall not ask how nominal must nominal consideration be to be nominal!) The decision really rests on the broader principle that it is the substance of a transaction which, for tax purposes, impresses the court, and not its form.

Other tax cases deal with the problem of "partial consideration". As a general proposition of law, courts will not inquire into the adequacy of consideration. Thus, if A agrees to sell his house, worth $25,000.00 to B for $10,000.00 (in the absence of fraud, duress or some other circumstance), this is a perfectly valid contract. But to the tax collector the contract is too favourable to B and therefore A "may" be liable to "gift tax". The reason being that A has received only $10,000.00 for $25,000.00 value, thereby enriching B by $15,000.00.

That the tax assessors think A has made a gift to B on the above facts is not contrary to the ordinary rules of law relating to gifts. However, it would be necessary in such a case to show A "intended" to make a gift to B. And where A and B are dealing at arm's length it would be difficult, in the absence of special circumstances, to attribute such an intention to A. Obviously this kind of gift will most frequently arise in a non-arm's length transaction where intention will generally be presumed.

Thus, in *Gagnon* v. *M.N.R.*,[27] where a widow sold to her sons a farm with a value of $75,000.00 for the sum of $40,000.00, the Board held she had made a gift of $35,000.00. This case is interesting because the farm was sold by the four sons for approximately $324,500.00 shortly after they acquired it. The taxpayer adduced evidence that the value was $75,000.00. The Minister called no evidence and the Board accepted that of the taxpayer. Possibly, the Minister thought that the subsequent sale price would be sufficient evidence for his purposes! The Minister may yet be vindicated since an Appeal was filed in the Exchequer Court in August 1960. It should also be pointed out that the *Gagnon* case may be fitted within the confines of section 137(2)(b) or section 111 of the Income Tax Act.

If consideration is given it must be valuable. The taxpayer's argument that "natural love and affection" constituted consideration for the thing transferred will not succeed in avoiding gift tax.[28]

3. *Intention.* Intention is a necessary element of a gift. It is to be distinguished from motive.[29] This principle applies to the extent

[27] (1960), 60 D.T.C. 347, 24 Tax A.B.C. 309.
[28] Canada Tax Service, Vol. B, pp. 111-103.
[29] *Bernett* v. *M.N.R.* (1957), 57 D.T.C. 242, 17 Tax A.B.C. 131.

that a gift may be made without the knowledge of the donee. However, the donee may repudiate when he learns of it.[30] Hence where A pays B's debt to C without B's knowledge or consent, A will have made a gift to B.[31]

The notion that the donor must do everything to be done by him in order to complete a gift goes hand in hand with that of intention. It will be appreciated that if a person's intention is really to make a gift he will, as a general rule, do all that is necessary to effectuate it. However, this is not always so and the results which accrue because of it are sometimes disastrous.

In *D'Esterre* v. *Minister of National Revenue*,[32] the Minister assessed gift tax under the following circumstances. In 1954 the appellant and his partner admitted their sons to the partnership under a written agreement. The two sons were to get a salary but were not to share in partnership profits. In each of the years 1948, 1950 and 1951 the appellant told his son that he was giving him a portion of his partnership share. In each of these years the appellant reported a $4,000.00 gift. However, it was not until 1953 that the partnership books showed the new capital allocation. In this year the Minister assessed gift tax on $12,000.00 less applicable exemptions, and the Tax Appeal Board confirmed the assessment.

Speaking for the Board, Mr. Synder said although for purposes of the partnership an interest might be transferred by word of mouth, without more, this did not satisfy the Income Tax Act. He recognized the intention of the appellant in 1948, 1950 and 1951. But in spite of these good intentions there was no "gift" until 1953 when the capital allocation was actually made on the books. Approaching the problem through the back door, Mr. Synder questioned the position of the appellant's son with respect to the alleged "gift" before 1953. He thought it "questionable" whether the son could have "established or vindicated ownership" to these gifts if the appellant had changed his mind or died before 1953.

This decision is difficult to accept. The appellant had informed his son of each "gift" and the son accepted. On the authority of the *Anning* case,[33] it would seem that in the circumstances the appellant would have been estopped from denying that he parted

[30] *Horne* v. *Huston Merchant Bank* (1919), 16 O.W.N. 173, aff'd. 17 O.W.N. 2 (C.A.); *Standing* v. *Bowring* (1885), 31 Ch. D. 282, 55 L.J. Ch. 218.

[31] *Kuge* v. *Palm*, [1922] 3 W.W.R. 109, 68 D.L.R. 482.

[32] (1956), 56 D.T.C. 398, 15 Tax A.B.C. 356.

[33] *Anning* v. *Anning*, *supra*, footnote 14.

with legal ownership. It is true that in *Anning* v. *Anning* there was a deed of gift. But the fact remains that in each case not everything necessary to be done by the donor had been done to complete the gift. It is to be noted that Mr. Synder alluded to the fact that there was no written record of these gifts other than the appellant's tax returns. These, he said, would not have been available to the son for the purpose of enforcing the gift. One last thing to note is that this case was decided on common-law rules. The Board made no mention of the gift tax sections of the Act.

In some cases intention may override what appears to be a completed gift and save the taxpayer from the tax collector's reach. For instance, in *Parton* v. *M.N.R.*[34] a father and son entered into a partnership agreement in 1947. Capital contributions were six-sevenths and one-seventh in favor of the father. The agreement provided for a fifty-fifty division of capital but the son was prohibited from withdrawing capital in the father's lifetime. The son was the *active* partner. On appeal from the Minister's assessment for gift tax the father stated he had not the "faintest idea or intention" of making a gift. The Board found in favor of the appellant. The assessment was made pursuant to section 88(2) and (7) of the Income War Tax Act. This was the old gift tax provision and according to section 88(7)(a) the Minister had power to determine, "that any transfer of property on the basis of a quid pro quo is nevertheless a gift". Mr. Synder referred to *MacDonald Estate* v. *M.N.R.*[35] in construing this section. He quoted in part from the *MacDonald* case as follows:

> By a transfer is meant the passing of ownership in property from one person to another by virtue of an act done by the transferor with the intention of so conveying ownership in property . . . .[36]

Relying on this definition, Mr. Synder decided there was no "transfer" in this case. His prime reason for the decision was the wording of the agreement which restricted the son from withdrawing partnership capital until the father's death. One presumes for estate tax purposes, or even under former succession duty law, on the father's death within the restricted three year period, there would be an assessable "gift" *inter vivos* to the son.

Reconciliation of the *Parton* and *D'Esterre* cases is difficult if approached from basic principles. After all, what more could Mr. Parton do to complete a gift to his son. If, for instance, in spite

[34] (1955), 55 D.T.C. 81, 12 Tax A.B.C. 155.
[35] (1950), 50 D.T.C. 109, 1 Tax A.B.C. 250.
[36] *Supra*, footnote 34, at pp. 84 (D.T.C.), 160 (Tax A.B.C.).

of the original agreement, the parties had later agreed to dissolve the partnership, can it be denied that the younger Parton would have been entitled to one-half of the partnership assets? It is arguable that the Board accepted Mr. Parton's statement that he never intended to make a gift. But if intention itself is to prevail it is clear that the taxpayer in the *D'Esterre* case certainly intended to make a gift. In point of fact little weight was attached to the stated intention of the taxpayer in the *Parton* case. Moreover, it defies reconciliation with the principle of presumption of intention to make a gift where parties in certain relationship transfer property from one to the other for no consideration. The classic illustration, for tax purposes, is where a husband pays for property which is taken in his name and that of his wife as joint tenants. Here the law presumes that the husband made a gift to his wife in the amount of one-half the value of the property.[37] And if the property is later enhanced in value through funds supplied by the husband, another gift is presumed.[38]

The presumption of gift may be rebutted. For example, in *Kelsey* v. *Varco; Kelsey* v. *Klein*,[39] a wife claimed that her husband had made a gift to her of all the farm chattels during his last illness. The court held that the written evidence of gift was insufficient. The possession shown by the widow was insufficient as against the estate to entitle her to the chattels. There can be gifts of chattels where the parties are living together, since *delivery* is not so much a matter of "delivery" as of possession.[40] In the *Kelsey* case the court disbelieved the wife.

In *Brooks* v. *M.N.R.*[41] the Board agreed that the presumption of gift may be rebutted. In this case a husband took property jointly with his wife on the advice of a solicitor. On appeal from the assessment he argued that there was no *intention* to make a gift, but only to develop his estate plan. Citing *Halsbury* the Board decided that intention to make a gift could be presumed. It went on to point out that:

> The presumption of advancement may be rebutted by showing that there was no present intention to benefit or by a contemporaneous declaration by the alleged donor, but declarations by him subsequent to the purchase or transfer, if they are not so connected with it as to be reasonably regarded as contemporaneous, cannot effect the pre-

[37] (1953), 53 D.T.C. 248, 8 Tax A.B.C. 356.
[38] The effect of the Income Tax Act, R.S.C., 1952, c. 148, s. 112(4)(5) should be reviewed in connection with this problem.
[39] (1916), 9 Sask. L.R. 294, 30 D.L.R. 561 (C.A.).
[40] *Standard Trusts Co.* v. *Hill*, [1922] 2 W.W.R. 1003 (Alta. C.A.).
[41] (1957), 57 D.T.C. 167, 17 Tax A.B.C. 12.

sumption. Otherwise having made a gift he would be able to take it away.[42]

The Board found no sufficient evidence to rebut the gift and therefore dismissed the appeal.

It is clear that merely alleging a mistake was made when property was taken in joint tenancy with a wife will not rebut the presumption of gift. In *Bosh Estate* v. *M.N.R.*,[43] a husband argued that land taken jointly with his wife in 1951 was due to a mistake of his solicitor. The Board ruled that regardless of intention it is what "actually occurs" that is important. This was an unfortunate statement of law by the Board. It virtually nullifies what was said in the *Brooks* case concerning the rebuttal of the presumption of intention to make a gift. The statement went beyond the needs of the Board since it could have found there was *insufficient* evidence to rebut the presumption of gift.

Although in some circumstances the law presumes a gift, there are other cases where it makes no such presumption. For example, where a brother transfers property to a sister there is no presumption of gift.[44] This general principle would seem to be different under the Income Tax Act. A review of section 137 (2)(3) and the definition of non-arm's length in section 139(5) shows that the Act may presume a gift whenever a benefit is conferred as a result of certain transactions. The only relief from the apparent disastrous consequences of section 137(2) is contained in the words "depending on the circumstances" also contained in the section. If these words are intended to subject a section 137(2) transaction to the definition of gift then, possibly, the various legal presumptions will come into play. Again one cannot know precisely what the words "by way of gift" used in sections 137 and 111 really mean. Possibly they mean "in the nature of" or "similar to" a gift.

Where a taxpayer shows an advance was by way of loan this evidence will rebut the presumption of gift. Thus, where a wife obtained money from her husband to build a home, title to which was taken in her name, it was held that there was a *bona fide* loan and this despite the fact that there was no written evidence.[45] The taxpayer said because of the relationship between husband and wife he hardly thought it necessary to get a promissory note from her. Mr. Fisher accepted this argument and said:

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[42] *Ibid.*, at pp. 170 (D.T.C.), 16 (Tax A.B.C.).
[43] (1961), 61 D.T.C. 292, 26 Tax A.B.C. 385.
[44] *National Trust Co.* v. *Ayton*, [1934] 1 W.W.R. 285, [1934] 2 D.L.R. 404 (Man. C.A.).
[45] (1955), 55 D.T.C. 221, 12 Tax A.B.C. 382.

> While it would be advisable for the appellant to have some evidence of the indebtedness from his wife in respect to the $10,300.00 loan, I am accepting his statement that no such evidence had been requested by him in view of the relationship existing between them.[46]

In a case where a father advanced $35,000.00 to his son and arrangements were made to repay at $100.00 *per* month, up to $20,000.00, the Board held there was a loan of $15,000.00.[47]

Once the intention to make a gift is established it is not open to the taxpayer to argue that he did not intend to make a gift of that specific amount. Thus, where property with a value of $7,000.00 is transferred by a taxpayer and the Minister assesses gift tax, the taxpayer cannot successfully argue he only intended to make a gift, if at all, of $4,000.00. In other words, intention relates to gift and not to the value of property given.[48] This is not to say, however, that a taxpayer may not debate the value of the property. It means simply that once value is established he cannot say he did not intend to give it *all*.

4. *Gift, Wages or Death Benefits.* Sometimes the tax collector is not satisfied to tax a would-be giver, at gift tax rates. He prefers to tax the receiver at ordinary income rates as if the amount received were wages. For example, in *Ste. Marie* v. *M.N.R.*,[49] two sons had worked on the farm for many years helping their father. When a younger son attained the age where he could manage the farm the older sons asked their father if they could go out on their own. At their request he put up approximately $11,500.00 on the purchase price of a $15,000.00 farm. The Minister assessed each son on half of the $11,500.00 as wages. The Board held that the sons were not employees. No employer-employee relation was shown, and in a court of law they would have no enforceable rights against their father arising out of this relation. The amount was a gift, by the father in appreciation of his sons' labours. The Board did not allude to it but in this case there would be a presumption that the sons were helping their father gratuitously.[50] This presumption is important as illustrated by *Mr. C.* v. *M.N.R.*[51] Here a judge claimed that $15,000.00 received by him for sitting as Chairman of a Royal Commission was not a fee but an hon-

[46] *Ibid.*, at pp. 222 (D.T.C.), 384 (Tax A.B.C.).
[47] *Beuhler* v. *M.N.R.* (1950), 50 D.T.C. 119, 15 Tax A.B.C. 200.
[48] *Rothman* v. *M.N.R.* (1953), 53 D.T.C. 467, 9 Tax A.B.C. 337; see also Income Tax Act, *supra*, footnote 38, s. 20(6)(d), which deems that property transferred by way of gift was disposed of at fair market value. Note that this rule applies to gift tax also because of s. 115(1).
[49] (1956), 56 D.T.C. 211, 15 Tax A.B.C. 46.
[50] *Campbell* v. *Fenwick*, [1934] O.R. 692, [1934] 4 D.L.R. 787 (C.A.).
[51] (1950), 50 D.T.C. 206, 2 Tax A.B.C. 6.

orarium. The Board held an honorarium is simply a "fee" paid to professional men and as such is taxable. It is to be noted that by section 38 of the Judges Act,[52] a judge was prohibited from receiving any further remuneration than that paid to him as judge. He was statute barred from any legal right to claim for this fee. Recall that in *Ste. Marie,*[53] the Board emphasized the fact that the two sons would have no legal right to collect wages from their father. The distinction between these cases rests on the notion of presumption of gift between parties not at arm's length; while parties at arm's length are presumed as between themselves not to make gifts.

Another instance where issue over the question of gift arises is when an employer makes a payment to an employee's widow. Section 6(1)(a)(vi) includes "death benefits" in income, and section 139(1)(j) defines death benefits as amounts received in a taxation year by *any* person upon or after the death of an employee in *recognition of his services* in an office or employment. The section also provides certain reliefs to the taxation of death benefits but we are not concerned with these.[54] Our problem is to decide whether or not a particular payment is a "gift" or a "death benefit".

In the United States this problem has arisen many times. Recently in *Commissioner of Internal Revenue* v. *Duberstein,*[55] the Supreme Court of the United States laid down the guiding principles in defining gifts. In this case a widow claimed payments received from her deceased husband's employer were gifts. The Supreme Court disagreed and said the payments were taxable. The principles of the *Duberstein* case have been summarized as follows:

1. The fact that a transfer is made without consideration does not necessarily mean that it is a gift.
2. If the payments proceed primarily from the impulsion of a moral or legal duty or from the incentive of anticipated economic benefit, they are not gifts.
3. A true gift proceeds from a "detached and disinterested generosity or out of the feelings of affection, respect, admiration, charity, or like impulses".
4. The way in which the parties characterize the transaction is not determinative of its real nature.

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[52] R.S.C., 1927, c. 105. [53] *Supra,* footnote 49.

[54] S. 139(1)(j) of the Income Tax Act, *supra,* footnote 38, provides that a "death benefit" is the amount received minus certain amounts which vary depending upon whether the recipient is or is not a widow.

[55] (1961), 363 U.S. 278.

5. The primary consideration is the transferor's intention.[56]

A similar case yielding a similar result has been decided by the Tax Appeal Board. In *Robinson Estate* v. *M.N.R.*,[57] the Minister sought to increase the aggregate net value of an estate by claiming a certain payment made by T. Eaton Company to the deceased's widow was a death benefit under section 3(1)(1) of the Estate Tax Act. The payment was $2,200.00 *per* annum. Board Member Fordham, with deep regrets, upheld the assessment. He found the payment was in "recognition of services" of the deceased employee.

The judgment approaches the problem in the negative. Mr. Fordham was of the opinion that the T. Eaton Company would *not* make such a payment unless it was in recognition of services. In other words, the company could not really possess the "intention" to make a gift. With the joy of a satisfied customer Mr. Fordham said:

> Certainly, Eatons hardly would have taken any interest in Mrs. Robinson's financial position or plight if her husband had not been one of their valued employees for many years. Why should they have done so? Eatons, a splendid entity though it be, is neither expected to nor does make grants, indiscriminately, to the widows of individuals with whom it has had no business relationship of any kind. That comes more within the sphere of some charitable organization than within the ambit of a purely commercial concern's activities.[58]

On this basis it seems that any payment made by an employer to a deceased employee's widow will never qualify as a gift. The ratio appears to be that the employer's benefaction is stimulated by the past services of the deceased employee and does not really intend to make a gift. If the decision meant to go as far as that, it is unfortunate. Surely, an employer can possess the necessary intention to make a gift. It will, of course, be true in each case that his charity is stimulated by the fact that the widow's deceased husband worked for him. But the gift may be made in recognition of the widow's *circumstances* and not her deceased husband's services.

5. *Purchase by one person for another.* Where A pays C for an item which C transfers to B, then A in the absence of other considerations, has made a gift to B, the mere fact that the property came from C does not alter the effect of the transaction even where the taxpayer did not know the transaction was a gift.[59] Also where a taxpayer transfers assets to a corporation for which the corporation issues shares to her sons, she is deemed to have made

[56] C.C.H. U.S. Fed. Tax Reporter (1962), para. 644.472, p. 17097.
[57] (1961), 61 D.T.C. 336, 26 Tax A.B.C. 379.
[58] *Ibid.*, at pp. 338 (D.T.C.), 381-382 (Tax A.B.C.).
[59] *MacKinlay* v. *M.N.R.* (1958), 58 D.T.C. 479, 20 Tax A.B.C. 44.

a gift.[60] In such cases the courts view the transaction as though the taxpayer had brought the property into his own hands and transferred it to the other party. The principle derivable from these cases is simply that you cannot accomplish indirectly what you cannot accomplish directly.

6. *Disclaimers.* It has been stated that:

> A renunciation or disclaimer by a beneficiary of an estate in favor of a specific person is considered to be a gift. A general renunciation or disclaimer is not.[61]

Thus, where A leaves his estate in trust, with income to B, C and D for life, remainder to E, a disclaimer by B of his portion of life income in favor of C and D will constitute a gift. However, in the above case if B merely disclaimed the income with complete indifference as to its ultimate destination no gift would be made. The rule is that:

> . . . a disclaimer properly so called connotes a refusal on the part of the intended recipient of a bequest, say, to receive it and his indifference as to what becomes of it as a consequence.[62]

In *Bulman (T.R.)* v. *M.N.R.*[62A] a father and mother entitled under the British Columbia Administration Act to the estate of a deceased son who died intestate executed a disclaimer in favor of a son and daughter. Under the British Columbia Act intestate property devolved on brothers and sisters failing fathers and mothers. The Board held the father and mother had made a gift. It was argued that the remaining brother and sister were entitled to the property as a matter of law once the father and mother disclaimed. The Board stated this had not been established as a matter of law and therefore the property went to the living children as a gift. The suggestion in this case is that if, as a matter of law, the son and daughter would have obtained the property on the execution of a general disclaimer there would have been no gift. In such a case the property would pass by law and not by gift. In other cases the property may pass as a result of a will. In *M.N.R.* v. *E.H. Smith and Montreal Trust Co. et al.*[62B] a testator gave property to his wife with the right to dispose of it before her death, and, if there be no disposal by her the property to vest in A and B. It was held that a disclaimer by the wife in favor of A and B did not constitute a gift. This was a Quebec case where A and B were

[60] *Antoinette Guay* v. *M.N.R.* (1959), 59 D.T.C. 12, 21 Tax A.B.C. 97.
[61] *Op. cit., supra,* footnote 28.
[62] *Plaxton* v. *M.N.R.* (1960), 14 D.T.C. 38, at p. 40, 23 Tax A.B.C. 257, at p. 260.
[62A] (1962), 16 D.T.C. 593, 30 Tax A.B.C. 290.
[62B] (1960), 60 D.T.C. 1102, [1960] S.C.R. 477.

treated as fiduciary substitutes, the court holding that they were entitled under the will of the grantor irrespective of the disclaimer.

In my opinion the question of gifts and gift tax where a disclaimer is involved does not depend on whether the disclaimer is general or specific. More basic than this question is whether the person who ultimately obtains the property obtains it as a direct consequence of the disclaimer, or by operation of law, or by the testator's will. If it is by operation of law or by will then no gift is made even though the disclaimer is specific. The rule may be stated as follows: Where the causal relation between disclaimer and receipt of property is direct, then a gift is made and gift tax may be exacted.

7. *Legal obligation to transfer.* There is no gift where a party transfers property under a legal obligation. Where A guarantees a loan for B and B defaults, the guarantee paid by A is not a gift to B. This simple notion might be used to effect lifetime transfers between husband and wife. For example to effect a lifetime transfer free of gift tax, a wife might borrow a large sum either from a lending institution or an individual. The husband would guarantee the loan. Repayment could be on a short term basis. The wife defaults and the husband pays pursuant to his guarantee. Since there was a legal obligation on him to pay, no gift tax arises. He still has a legally enforceable right against his wife. But he may allow the limitation period to run against him so that it becomes unenforceable. Since the limitation period does not extinguish the "right" to recover but bars the remedy there would be no gift tax at the date the limitation period expires and provided the husband lives three years past the effective limitation date no estate tax accrues under section 3(3)(c).

8. *No gift if no ownership.* It is open to a taxpayer assessed for gift tax to show he did not own the property allegedly given by him. The rule is that "one does not give what one does not own". Hence, where a mother executed a deed of gift to a son, and the deed was registered, but never delivered it was held there was no gift. Therefore, when the son believing he was not the owner of the property executed a deed at his mother's request reconveying it he was not liable to gift tax.[63] This case illustrates also the necessity for completion of gifts. Non-delivery of the deed constituted non-completion of the gift.

The principle under consideration here becomes of great im-

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[63] *Tuma (Reginald)* v. *M.N.R.* (1959), 59 D.T.C. 580, 23 Tax A.B.C. 100.

portance in cases involving husband and wife. In *Brunell* v. *M.N.R.*,[64] a husband incorporated a business. He transferred assets to the corporation for which the corporation issued shares to him and his wife. The Minister assessed gift tax on the value of the shares received by the wife. So far the case seems simple enough. However, the evidence revealed the wife had worked with her husband over the years and helped to accumulate the assets. The taxpayer argued he and his wife owned these assets in common and therefore the shares issued to her by the company were not a gift from him.

Replying to this argument the Board said "no commercial partnership" was established and therefore it was presumed the husband owned all the property since it was in his name.

With respect I must reject this decision as unsound. There was no necessity to find a "commercial partnership" to sustain the taxpayer. Indeed, although the Income Tax Act allows commercial partnerships between husband and wife it looks at them with a jaundiced eye.

The Board could have found for the taxpayer on the principle enunciated in *S.* v *S.* by Mr. Justice Campbell when he said:

> I find that both contributed to this common fund or pool, although possibly not in equal amounts. This inequality, however, is immaterial. Sufficient to say the wife's contribution was substantial in both work and money. I take the view that when spouses have a common purse and a common bank account, and pool their resources, the husband's earnings, even if they be more than those of the wife, are on behalf of both of them, and the idea that years afterwards one can dissect the contents of the fund by taking an elaborate account as to how much was paid in by each is inconsistent with the idea of a joint bank account or common pool in so far as husband and wife are concerned.[65]

English cases have reiterated the same principle.[66] Moreover, in *Thompson* v. *Thompson*, the Supreme Court of Canada gave recognition to the principle.[67]

The decision in the *Brunell* case was to some extent based on *No. 138* v. *M.N.R.*[68] In that case a taxpayer claimed he and his wife were *partners* for the purpose of splitting income. The Board thought there was insufficient evidence to establish a partnership. And even if a partnership had been established, section 21(4) of the Income Tax Act (1948) still faced the taxpayer. This section

[64] (1958), 58 D.T.C. 545, 20 Tax A.B.C. 163.
[65] (1952), 5 W.W.R. (N.S.) 523 (Man.), at p. 526.
[66] *Jones* v. *Maynard*, [1951] Ch. 573, [1951] 1 All E.R. 802; dissenting judgment of Denning L.J., in *Hoddinott* v. *Hoddinott*, [1949] 2 K.B. 406, 65 L.T.R. 266.
[67] *Thompson* v. *Thompson*, [1961] S.C.R. 1, (1961), 26 D.L.R. (2d) 1.
[68] (1954), 54 D.T.C. 42, 9 Tax A.B.C. 419.

(which is the same today) gave the Minister discretion in allocating partnership income where husband and wife were partners. *No. 138* in no way dealt with the issue raised in the *Brunell* case.

Common ownership of property where both husband and wife contribute is a doctrine which the Tax Appeal Board may have accepted—even if unconsciously. In *Pilipchuk Estate* v. *M.N.R.*,[69] the taxpayer resisted a gift tax assessment. In 1954 the taxpayer and her husband lived in a small town. The husband worked in a paper mill and she kept an inn, title to which was in her name. In 1955 the inn was sold. With the proceeds an apartment house was purchased and title taken jointly. Cash payment was $40,000.00. The taxpayer loaned her husband $15,000.00 to help pay his share. In 1956 the apartment house was sold and proceeds were used to buy shares in a small company. Except for two, all the shares were registered in the husband's name. The shares were held in escrow by the seller until the purchase price was paid in full. The Minister claimed gift tax from the wife. An appeal to the Board was successful. Board Member Maurice Boisvert, Q.C. said:

> At the hearing of the present appeal, the husband declared that everything he and his wife owned was held in common—half and half, as he stated on several occasions. As husband and wife, they put all their eggs in one basket, as people often do. The inn the wife operated at Smooth Rock Falls until 1955 was in her name; however, the profits arising from that operation were deposited in the same bank account as the husband's wages. Hence, when Ethel Pilipchuk collected $18,000.00 in cash from the sale of the said property—part of that amount was the property of her husband, together with hers—she used that sum for cash payment to be made on the purchase price of a Toronto property. And since the amount was not sufficient, the husband stated in his testimony that he borrowed $5,000.00 from a friend and the rest from his daughter (about $150.00).[70]

If the doctrine of common ownership referred to in *S.* v. *S.*[71] is accepted in tax litigation, its consequences will be far reaching. Although the doctrine has received its most frequent application on dissolution of a marriage, I suggest its scope is much broader. It can also be applied during the marriage for tax purposes.[72] There are obvious estate tax advantages accruing from this doctrine since it is like a "built in" community of property law to the common-law provinces. The advantages are even more distinctly seen

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[69] (1961), 61 D.T.C. 279, 26 Tax A.B.C. 341.
[70] *Ibid.*, at pp. 281 (D.T.C.), 349 (Tax A.B.C.).
[71] *Supra*, footnote 65.
[72] See Married Women's Property Act, R.S.N.B., 1952, c. 140, s. 7, which gives court jurisdiction to settle property disputes between husband and wife. Other provinces have similar legislation.

when one considers no attempt will be made to *apportion* the shares contributed by husband and wife. That is to say, where a wife contributes, be it ever so slightly, she is entitled to one half. One can state with accuracy that the doctrine will not be accepted by the Department. But whether it is or is not accepted by the judiciary will depend on the law to be applied. This question will be considered later.

9. *Completion of gift and accumulations.* A requisite of a transaction at common law intended as a gift is that it be *complete.* This essential is of importance in what may be termed "accumulation" cases.

In *Moret* v. *M.N.R.*,[73] the taxpayer reported a gift of $4,000.00 in each of the years 1950, 1951 and 1952 to his son and daughter-in-law. The total amount $12,000.00 was intended to equal the value of certain property to which he gave a formal deed in 1953. The Minister assessed gift tax on the total value in 1953 and was upheld by the Tax Appeal Board. The Board said that until 1953 the gift was incomplete. The taxpayer had in effect accumulated $12,000.00 in his *own* hands and then paid it over. Clearly this case resembles the *D'Esterre* case.[74] However, it differs in that the taxpayer here actually received the income from the property for the three years.

It seems the taxpayer was misadvised in the above case. He obviously intended to make a gift of the property without paying gift tax. By spreading the entire gift over a three year period he hoped to achieve this result. Had he in fact conveyed the property in 1950 taking back a mortgage for $12,000.00, plus the projected rents for three years, his object would have been realized. In each of the next three years his son as mortgagor could have reduced the mortgage by the amount of the rent received and the father as taxpayer could have forgiven $4,000.00 on the mortgage debt. At the end of the third year the son and daughter-in-law would have received the property and the father the income without paying a gift tax.

The more recent case of *Gibsone* v. *M.N.R.*[75] demonstrates the concept of accumulation more clearly. Here a taxpayer deposited each year from 1942 to 1957 the sum of $4,000.00 in a personal bank account. In each year he reported a gift of this amount. In 1948 he withdrew the funds in the account and purchased securities in the name of his daughter and grandsons. More funds were

[73] (1956), 56 D.T.C. 443, 15 Tax A.B.C. 422.
[74] *Supra*, footnote 32.
[75] (1961), 61 D.T.C. 297, 26 Tax A.B.C. 387.

accumulated in the account and in 1951, 1955 and 1956 they were withdrawn to purchase securities for the same persons.

On the above facts the Minister assessed gift tax for 1948, 1951, 1955 and 1956. Tax was claimed on the basis that the so-called "annual gifts" were not gifts at all. Rather the "gifts" were made when securities were purchased. On the other hand, the taxpayer argued these were *donatio mortis causa* and therefore not taxable. Alternatively, he argued that a trust of $4,000.00 each year had been established, or, that the deposits were valid gifts *inter vivos*.

After a short review of the law the Board upheld the assessment on the basis of incomplete gifts. No quarrel can be taken with this judgment. However, the case is of some interest and may prove futile or embarrassing to many taxpayers. Take, for example, the taxpayer who has been accumulating funds in a joint account with his wife who does not herself contribute to the account. Over a period of five years the fund accumulates to $40,000.00. In each of those years the taxpayer reports a $4,000.00 gift. At the end of the fifth year, or at the beginning of the sixth year, the taxpayer, as one of the members of the joint account, withdraws all of the funds and purchases bonds which are placed in the joint names of himself and his wife, or, better still, one half of the bonds is placed in his wife's name and one half in his own name as sole owners.

The question which arises at the time of the purchase is whether there was a gift made by the husband to the wife of $20,000.00 or, will the accumulation in the joint bank account and the reporting of a $4,000.00 gift for each of the past five years be held by the tax department to be a valid gift.

There are some points of distinction between this hypothetical example and the *Gibsone* case. The first being that the wife would be *sui juris*, whereas the daughter and grandsons in the *Gibsone* case were minors. Secondly, in the *Gibsone* case the annual gifts were deposited in a bank account to which only the taxpayer had access. On the other hand, in the hypothetical example, the wife would, as a member of the joint account, have access to the total funds. Thirdly, there is a well-recognized presumption that when a husband places funds in a joint bank account with his wife, a gift is presumed and, unless the contrary is shown, the wife will be entitled to one half of the amount. Bearing these distinctions in mind one suggests the husband will not be subject to gift tax at the time the bonds are purchased.

IV. *The Proper Law Applicable to the Determination of a Gift.* Since the Act does not define "gift", it is important for the taxpayer to know what law will be applied in reaching a definition. It could be that the success or failure of many schemes, devices and transactions designed to circumvent taxes rests on the determination of this problem.

Pointing up the problem is the fact that in Canada each of the ten provinces has power under the British North America Act to regulate "property and civil rights" within the province. On the other hand, gift tax is imposed by the federal government under an Act written in common-law terms. The question arises under what law is the Act to be *interpreted.* For instance, when the tax case arises in New Brunswick, is the Board or court to use New Brunswick law in the interpretation of the word "gift"? The same question repeats itself when the case arises in any other province.

It will be appreciated that in a unitary system of government, such as England, this problem is relatively unimportant. But in a federal system like Canada or the United States there is need to investigate the issues in this area.

In the United States the courts uniformly hold that for tax purposes state law governs the *nature* of the transaction.[76] If the Internal Revenue Code seeks to levy a tax on a particular transaction, it can only exact such a tax when that transaction occurs according to state law. This result follows from the rule in *Erie R. Co.* v. *Tompkins*, which held that there are as many common laws as there are states in the United States.[77] A gift in the United States might have fifty meanings—depending on the state where the donor exercises his generosity.

The Canadian position on this question is not as clear as that of the United States. It has been said:

> Nor have we pondered as yet on the question of whether there should be, in Canada, one general common law (whether Civil law of Common law *stricto sensu*) or a plurality of separate and autonomous common law systems—what is called in the United States the *Erie Railroad* v. *Tompkins* rule.[78]

[76] *Blair* v. *Commissioner* (1937), 300 U.S. 5; *Rhodes* v. *Comm.* (1940), 41 B.T.A. 62. See also interesting Note, (1947-48), 61 Harv. L. Rev. 1033.

[77] *Erie R. Co.* v. *Tompkins* (1938), 58 Sup. Ct. 817, 304 U.S. 64; The rule of the *Erie* case is stated in 15 C.J.S., p. 630, s. 16 as follows: "There is no common law of the United States as distinguished from the individual states, a common statement of the rule being that there is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."

[78] Canadian Jurisprudence, The Civil and Common Law in Canada, edited by Edward McWhinney (1958), pp. 19-20.

We have no clear and definite statement on what law is to be applied in deciding the nature of a transaction for tax purposes. There are some decisions which, when considered together, are not especially enlightening. Statements from some of these cases will illustrate the point.

In *Weiser* v. *M.N.R.*, the Board said:

> While this provision of the law of the Province of Quebec is one to be taken in consideration, nevertheless I am of the opinion that if a husband in that province under similar circumstances did in fact make a gift to his wife contrary to the provisions of the Civil Code he *might* still be liable for Gift Tax upon such a gift under the provisions of the Income Tax Law of Canada.[79]

In another case relating to a problem under marriage contracts in Quebec law, Counsel for the Minister argued that:

> The Act clearly shows that it is not interested in taxing what is known in general law as a gift, but that it intends to tax gifts as it defines them itself.[80]

To this argument Mr. Monet, speaking for the Board, replied:

> I cannot accept that contention. The provisions of section 100 (2) do not define the word "gift" but merely provide that for the purpose of section 100 of the Act and besides its ordinary meaning, the word "gift" shall include "a transfer, assignment or other disposition of property . . . by way of gift".[81]

The above cases are in obvious conflict on statement of principle.

In the *Gibsone* case, Board member, Maurice Boisvert, said:[82]

> If a certain term or expression is not defined by the Act, the usually accepted meaning must be given to it.

And quoting Simon's *Income Tax*,[83] Mr. Boisvert said:

> Taxation law does not exist *in vacuo*. It has regard to situations and transactions the exact force and effect of which are determined and regulated by the general law; in all cases, it is essential always to bear in mind that, unless there is express statutory provision to the contrary the transactions to which the taxation statutes apply depend for their true nature and effect on the general law of the land.[84]

Continuing Mr. Boisvert said:

> Individuals enter into contracts in accordance with the laws which apply to their place of domicile. The donors and the donee in this case being from the Province of Quebec, the nature and character of the

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[79] *Supra*, footnote 45, at pp. 222 (D.T.C.), 383-384 (Tax A.B.C.).
[80] *Houghton* v. *M.N.R.* (1956), 56 D.T.C. 339, at p. 344, 15 Tax A.B.C. 246, at p. 254.
[81] *Ibid.*
[82] *Supra*, footnote 75, at pp. 299 (D.T.C.), 398 (Tax A.B.C.).
[83] (2nd ed., 1952), Vol. 1, pp. 48-49.
[84] *Supra*, footnote 69, at pp. 299 (D.T.C.), 399 (Tax A.B.C.).

> gifts made must be determined in accordance with the *Civil Code* of that Province.[85]

At another time, Mr. Boisvert reiterated the same rule.[86] But then he went on to contradict himself when he stated:

> If a taxpayer, by any direct or indirect transaction, transfers property by way of gift to someone else, whether related or not, it is a gift within the meaning of the *Income Tax Act* regardless of whether such gift is valid under Provincial law.[87]

This judgment presents an open conflict on its face.

It has been suggested in relation to this problem that:

> . . . the safest view would appear to be that the rules of provincial law relating to gifts are to be considered, but are not conclusive of gift tax liability, except to the extent that they are adopted by the Board or the courts in the course of dealing with gift tax cases.[88]

It is difficult to accept this conclusion from the cases. Many of them turn on common law or Civil Code requirements for certain transactions. Recently the Supreme Court of Canada has impliedly recognized the principle that provincial laws determine the nature of a transaction or relationship.[89] *Sura* v. *M.N.R.* made an exhaustive analysis of community of property rights relative to the problem of income splitting. If provincial laws were only incidental in determining tax questions, surely the Supreme Court could have decided the *Sura* case with little ceremony by relying on the intent and purport of section 21. That it choose to minutely consider community of property law rights under provincial law is most revealing. In another case, counsel successfully argued that the position of the parties was to be determined under Quebec law.[90]

If there is one argument more cogent than another for contending that provincial laws are not conclusive in determining whether or not a transaction is a gift, it is in the Act itself. The words "by means of gift" in section 111 suggest that a transaction which is "similar" or "like" a gift would be taxable. Considering this point, gift under the Act is really defined by the "quantum of resemblance" to gifts at common law. If this is so, it is most unsatisfactory and invites subtle and perhaps obscure questions of degree. For example, if an employer, aware of a definite gain to

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[85] *Ibid.*, at pp. 300 (D.T.C.), 400 (Tax A.B.C.).
[86] *Antionette Guay* v. *M.N.R.*, *supra*, footnote 60, at pp. 14 (D.T.C.), 115 (Tax A.B.C.).
[87] *Ibid.*, at pp. 19 (D.T.C.), 123-124 (Tax A.B.C.).
[88] C.C.H. Estate and Gift Tax Reporter, Vol. 1, p. 9503, para. 3432.
[89] *Sura* v. *M.N.R.* (1962), 62 D.T.C. 1005, [1962] C.T.C. 1.
[90] *Dobell* v. *M.N.R.* (1950), 50 D.T.C. 767, [1950] C.T.C. 379.

be made on a certain stock, gives this information to an employee and guarantees a bank loan to enable the employee to undertake the transaction, will the employer be deemed to have made a gift of the resulting gain to the employee? If not, then the death benefit provisions previously considered might well be circumscribed. One sees in this kind of example the complexities inherent in section 111.

To summarize, it may be said even though the Act suggests that provincial laws are not conclusive in defining a transaction, the weight of "judicial opinion", either consciously or unconsciously, is opposed to this view. A perusal of the cases will show that where a taxpayer's appeal from a gift tax assessment is upheld it is because the so-called "gift" lacked either Civil Code or common law prerequisities. Conversely, when the Minister is successful all the prerequisities for gifts are present. The courts hold that in gift tax cases the usual presumption of correctness of an assessment applies only *after* the Minister shows there was in fact a gift, or shows "the elements of proof justifying his administrative action".[91] Assuming the cases reveal these conclusions, one suggests that the Act becomes relatively unimportant in gift tax cases. Joining Jerome Frank's school of legal realism one can say it is, after all, what the courts do in fact which will be of vital interest to every taxpayer.

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[91] *Pilipchuk Estate* v. *M.N.R.*, *supra*, footnote 69, at pp. 282 (D.T.C.), 350 (Tax A.B.C.); see also *T. Tuma* (*J.M.*) v. *M.N.R.* (1959), 59 D.T.C. 583, 23 Tax A.B.C. 97.