

PART II. MAJOR PROBLEMS

A. SELF-DEALING

(1) *The existing situation*

Existing law does not prohibit donor-foundation transactions. As a result, it is presently possible for a donor to enter into a number of transactions with a foundation to which he has made substantial contributions. For example, he may borrow the foundation's funds or have the foundation lend its funds to a business which he controls. He may have the foundation use its liquid assets to purchase either his property or property owned by others which he wishes to keep from being acquired by competitors or other unfriendly parties. He may have his foundation rent its property to him. He may purchase the foundation's assets.

The lack of a prohibition upon donor-foundation transactions has led some donors to believe that although the foundation has legal title to assets which they have contributed, such assets still "belong" to them. Such a donor often thinks of a foundation as "his" foundation and feels free to engage in any transaction with it that does not shock the conscience—and even some that do. This same belief may be shared by some foundation officials who do not object when the donor wishes to engage in financial transactions with "his" own foundation. These officials apparently feel that the foundation's funds belong to the donor and should be handled in the manner which the donor wishes, rather than in the manner which would benefit the public.

(2) *Consequences of existing situation*

The ability of a donor to deal with his foundation has several undesirable consequences. First, the donor's knowledge that he may call upon his foundation's assets for his personal purposes will often affect the exercise of his discretion as an official of the foundation in determining how much of the foundation's income and corpus should be distributed to charity on a current basis. The extent to which the failure of some private foundations to distribute their entire income to public charities is traceable to the desires of their trustees to have funds available for the needs of the donor is unascertainable. However, it is likely that it is not an unimportant consideration in some cases.

Second, transactions between a donor and his foundation often provide subtle private advantages to the donor. For example, even if a donor who borrows the foundation's funds is willing to pay the same rate of interest and to provide the same security as would be required by a bank, he usually can be sure that the foundation would not request a detailed financial statement or ask the personal and often embarrassing questions, such as the use to which the funds will be put, that are usually asked when one borrows from a bank. In addition, it is likely that the foundation will always be willing to lend its funds to the donor and process the donor's "loan application" without any of the delay which might take place if the donor were to