

BRIEN MCMAHON
ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington

June 17, 1937.



MEMORANDUM FOR THE ATTORNEY GENERAL

I have closely followed the progress of the Anti-Lynching Bill. The Sub-Committee of the Senate Judiciary Committee has met and has agreed to report to the full Committee within a few days the bill which we considered in so much detail.

I am glad to report that the Committee substituted the word "maiming" for the words "serious injury" which were contained in the original draft. This, as you will recollect, will restrict the bill to the real purpose which it is intended to accomplish. All in all I think the matter is in good shape.

Brien M. Mahon

Brien McMahon,
Assistant Attorney General.

OFFICE OF
THE ATTORNEY GENERAL



Jan 21/
37

Dear Mr. President:

The attached
will be of interest I
am sure.

Truman

JOSEPH B. KEENAN
THE ASSISTANT TO THE ATTORNEY GENERAL

file Department of Justice

Washington

June 19, 1937



MEMORANDUM FOR THE ATTORNEY GENERAL

Senator F. Ryan Duffy called on a departmental matter, and later on the conversation drifted to a discussion of the court.

During this conversation, he exhibited a genuine regard for the President personally and a desire to go along with him. He seems to feel that he faces a rather serious situation for reelection in Wisconsin, because of the La Follette group and the strong "old guard" Republican vote, and feels that voting with the President may cost him 30,000 or 40,000 votes in the State. However his calculation may be about this, he said he intended to go along, but that he felt that if there is to be a compromise he would rather hold for a flat eleven than the Hatch amendment. He told me that he had told Senator Robinson he would vote for any amendment that he thought he could get through. He is, however, very strong for a raise in the court to eleven.

Respectfully,

Joseph B. Keenan

Joseph B. Keenan

file

July 13, 1937.

Dear Cecilia:-

Missy has shown me your letter to her and I just want to tell you that I hope very much you will get a good rest now that you have the opportunity. I was sorry to know that you have not been feeling well.

All goes well here in spite of the fights on the Hill.

We all miss you and will be glad to see you when you return. Do have a grand time.

Always sincerely,

Mrs. Homer S. Cummings,
Hotel George V,
Paris,
France.

MEMORANDUM

Monday, July 26, 1937.

About noon today I had an interview with Congressman Fred M. Vinson of Kentucky, in Room 1201 of the New House Office Building. I spent about an hour with him. He is entirely sympathetic to the President's Plan. I discussed with him the necessity of legislation on five points.

1. Court Reform.
2. Wages and Hours.
3. Housing.
4. Executive Reorganization.
5. Loop-hole Legislation.

He is friendly to all of these proposed measures and also believes that they should be disposed of this year. He said that the Wages and Hours Legislation would make a great deal of trouble. Indeed he thought that it had a good deal to do with the stiffening of the opposition against the Court Bill, and might easily have been the turning point in that matter.

With regard to Housing, he said there would be no difficulty with it.

With regard to Loop-hole Legislation, he said there would be no real trouble in getting through a fair bill.

With regard to Executive Reorganization, he thought that ~~the proposals were~~ that a bill of some sort could be passed although it would probably not go all the way. He suggested that they were considering the creation of an Auditor General to take care of post audits and that all questions of law upon which the Comptroller General and the Auditor General did not agree, should be referred to the Attorney General. Apparently he has devised a bill of his own ~~on this suggestion~~, and naturally thinks it is a good bill.

With regard to Court Reform, he did not think it likely that anything could be done about the Supreme Court this year at least. He did think that the House might be willing to pass the President's Bill so far as it related to the inferior Courts. He talked at some length about Congressman Sumners speech. Indeed he has prepared an answer to it but is awaiting the proper time to deliver it. He says that Congressman Sumners never mentioned the Supreme Court or the Judiciary Bill in any meetings of the Judiciary Committee, and that when Congressman Sumners assumed to speak for the Committee, it irritated quite a number of the members thereof.

Mr. Vinson said that the Judiciary Committee is made up of 19 Democrats and 6 Republicans making 25 in all. He said that he felt sure that we could count upon the following members namely: Celler, Weaver, Ramsay, Walter, Chandler, Citron, Creal, Hill and Byrne, making 9 sure votes. In addition to these 9 he claims the following as doubtful namely: Miller, Healy, Murdock, Tolson and O'Brien making 5 in all. This leaves 5 Democrats and 6 Republicans, 11 in all opposed to the bill. He is thoroughly in accord with the idea that Congress should consider all this legislation this year ^{and} his personal view is that it would be best to have a recess and come back again on the first of October or shortly thereafter. He felt that it would take off the strain and would give an opportunity for reforming of lines, and would give the members a little rest, and would bring them back at a more favorable season of the year, and would not interrupt their summer plans, and above all, would give them a chance to have contact with the people back home.

With regard to the status of the Court Bill, he said that originally we had a majority in the House of about 75. He thinks that we had ~~at the~~ at the most just before the recent breakup in the Senate, a majority of about 30. In view of the Senate attitude, it may be that the present situation is doubtful. The argument would be used that there is no advantage in the House taking action if the Senate is determined to kill the measure, and that there is a disposition to hide behind the Senate action. Indeed, generally speaking, the House would not want to go to the trouble of enacting legislation which the Senate would set aside. These things make it difficult and indeed probably inadvisable to revive the Supreme Court issue this year. He does think, however, that something could be done about the lower Courts.

I talked to him a long time about a proctor, the method of appointment and a *flexible* system, and that apparently the Senate Judiciary Committee was making plans to sabotage the entire bill. Mr. Vinson said that it was a pity that the vote in the Senate on the motion to recommit was so overwhelming. He understands how it happened but he thinks it was a mistake and that there should have been a line-up showing that the division was pretty close after all. He said that would have increased chances of favorable House action. He said, however, that a good many members of the House were irritated by the manner in which the Bill had been treated in the Senate.

He has no patience with the idea that particular measures split the Party. He said that the split is in the heart and that we have had divisions on many measures and yet the Party has not split.

He is evidently disgusted with Congressman Sumners' speech.

With regard to a caucus, he said that he did not look upon it with much favor. He said he had never seen a caucus that did any good. They are ordinarily engineered by members of the House who represent a minority, ~~and~~ who are generally regarded as unreasonable or irregular, and that such leadership cannot accomplish much in a caucus. Moreover, when a movement of this kind is in charge of such leadership, the bulk of the House is not disposed to go along no matter what the merits of the controversy may be. He said that a caucus never does anything constructive. He said there would probably be no difficulty in getting the caucus to pass a resolution putting itself on record as in favor of considering and disposing of the legislation covered by the five points, ~~he~~ he doubted whether it would go on record as approving of the five points. He said that when you endeavor to get an approval of so many points, differences arise, compromises are made and you get into a dangerous situation. He said no doubt the caucus would gladly approve of a resolution laudatory of the President's leadership. He said everyone would vote for that but after all, that would not mean much because known opponents of the President's Plan would vote for it, and then claim that they were supporting the President. Moreover the newspapers would give but little attention to any such resolution. He frankly said that the Wages and Hours Legislation would make the chief difficulty in getting caucus action. He repeated that the Wages and Hours Legislation had killed the Court Plan and that most members were getting protests which bound together opposition to both measures.

Hence he thought that the caucus might agree to consider and dispose of these bills, but might not be willing to approve of them in principle. He thought that the reorganization of Executive Departments might better be submitted to the Congress immediately after the recess. Indeed, his general idea seemed to be that matters that were to take up much time could be held over until after the recess, and that work could be done on them in the meantime, and that they could be taken up with zeal when Congress re-assembled.

I then took up with him the question of the technique of the caucus. He said that 55 members had signed the call for a caucus, and that he would let me know later in the day whether the petition had been filed with Mr. Doughton who is Chairman of the caucus. ~~He~~ He also asked him to let me know how many members it took to call a caucus. He said it took 25. I told him I was under the impression that it took 50. He said he would let me know later in the day. I also asked him to let me know what the rule was as to the time within which a caucus had to be called.

3 p. m. ✓

Received a telephone call from Congressman Vinson who said that the rules had been changed and that it now took 50 to call a caucus where as formerly it took only 25, but that there were 55 names actually on the petition. He said he had some difficulty in finding out what the rule is concerning the time within which a caucus must be assembled. After inquiries he found that there was no rule on the subject.

He also informed me that the petition did not ask to have the caucus called at any particular time. He informed me that he had taken up the matter with the Parliamentarian who was inclined to believe that where the petition ~~was~~ not fix the time for a caucus and where the rules made no provision, it was the duty of the Chairman of the caucus to call a caucus within a reasonable time. He said he had talked to Sam Rayburn about the caucus matter and that Mr. Rayburn had discussed the matter with Congressman William D. McFarlane of Texas who has possession of the petition. The petition has not yet been filed with Chairman Doughton and Mr. Rayburn asked Mr. McFarlane not to file it for the present until he, Rayburn, could feel out the situation and get his feet under him. It appeared that Mr. Rayburn had been away and had just returned. It also appears that the petition asks the caucus to consider the following matters:

1. Court Reform.
2. Wages and Hours.
3. Housing.
4. Executive Reorganization.
5. Farm Bill.

It will be noted that the petition does not refer to Loop-hole Legislation but does include Farm Legislation. Mr. Vinson thought that Loop-hole Legislation had been left out because the petitioners assumed that it would be passed in any event.

[Harmon Cummings]

MEMORANDUM NUMBER 2.

*file
James Cummings
personal*

Monday, July 26, 1937.

5:00 P. M.

Had an interview at my office with Congressman Jere Cooper. He said he could not give me much information as to the status of any of the projected legislation except the "loop-hole" legislation. He said that was going along very well and he thought the bill would be brought out in a couple of weeks.

With regard to the Court Reform, he said he was not in a position to give much valuable advice. He did not think there would be any chance of doing anything if it contained any reference to the Supreme Court. Even as to the rest of the bill he had some doubt. He said the Members of Congress realize that thirty Senators can pretty nearly always destroy a bill and that the psychology at the present time was that they wanted to go home and there would be a strong feeling amongst many Members that it would be a vain gesture to do anything about the Court Bill this year. The Members would probably take the position that the Senate, having passed, after long debate and great delay, a particular bill, that it might as well be accepted and let the matter go in that fashion. He said this was specially true in view of the attitude of Congressman Summers.

He said that Congressman Summers is very popular and has a large following in the House, and that there were so many obstacles to overcome that he doubted whether the House would want to undertake the fight. He did not think much of the proposed caucus, nor did he feel it would get anywhere. He said that the Leadership was of such a kind that the majority of the Democrats would not follow it no matter what the merits of the proposition might be.

He said if the Judiciary Committee of the House could be induced to restore to the bill, after the Senate passed it, the provisions the President wanted in the matter of the Lower Courts, there was a chance that after all the Senate might accept it, but he felt this was a rather long chance.

The only particular suggestion he made was that Sam Rayburn should contact Summers and see whether there was any hope in that direction and that perhaps thereafter I could see Summers personally and make an effort to get him to go along with at least that part of the President's program.

July 26, 1937.

In the matter of adjournment he felt it would be best to stick on the job. He thought that one month more would be sufficient and that then, when the adjournment took place, it could be without any idea of returning in the Fall. He argued that if there were a recess until the first of October, it would mean that Congress would be here October, November and December - a matter of three months - whereas one month now would enable Congress to finish up the business. He called attention to the fact that Congress adjourned last year on ~~October~~^{August} 26, and he said "even if we stayed through the month of August, it would be less of a hardship than to come back and devote October, November and December to the Congressional work." He made clear that he was expressing only his own views.

[Homer Cummings]



HOTEL
GEORGE V

PS
Justice
Cummings

31. AVENUE GEORGE V - PARIS

TÉLÉPH. ÉLYSÉES 89-71

July 29, 1937.

Dear Mr. President.

I was delighted to receive
your note & to learn that all
goes well, excepting the fights on
the Hill. Fights on the Hill are
getting in a class with Death and
Taxes and they're not as pleasant
as either of these unpleasant
inseparables.

Perhaps it's a good thing
for my health I'm not in Washington

because my blood pressure shoots up
sky high just reading about those
unigades. Marty's creatures. What makes
me so mad is putting it in such
a lofty plane - "for the good of
their country" - Tallyrand always
used the same excuse when he
wanted to slide out, too.

The day after I arrived,
July 21, ambassador Bullitt had a
very interesting luncheon party &
Franklin, Jr., Mr. Otis and myself
drove out to the chalet which has
leased at Chantilly. Mrs. Roosevelt
had eaten too much rich sauces the
night before & Franklin thought she

ought to stay in to rest as they were
leaving the next day. The former Premier
& his wife M. de Nieu Blume, the
present Premier & his wife, M. de Nieu,
Chamberlains & the Minister of Foreign
Affairs, M. De Bors were the other guests.

You and Mrs. Roosevelt would
have been so proud of Franklin.
He asked the most interesting &
intelligent questions of these men and
impressed them most favorably. He
has developed amazingly since I
last saw him that week-end on the
boat and is missed our bear garden.
Everyone thought he looked so much
like you, Mr. President.

Driving back to town he
was bubbling over with the experience.

I now remember the lady who
knit so constantly during the
chopping of heads - Mrs. LaFarge,
wasn't it?

I'm sailing from Havre on Washington
August 12th arriving August 19th -
and will certainly be glad to see
a certain British officer.

Since the 4 weeks cure at Filobad
& 2 weeks after cure at Badgastein
I feel 100% better & 17 lbs. lighter.

Just at this point June
Harr: How Rhodes appeared when I
told her I was writing you a
letter she donated the enclosed. "Jealous
cat!" - We had dinner together "Sid"
the Exposition & sat on the Champs-
Elysees until 1:30 talking politics



HOTEL
GEORGE V

31, AVENUE GEORGE V - PARIS

TÉLÉPH. ÉLYSÉES 89-71

Dear Mr President. Cecilia is
a cypher and utterly incompetent.
I'm here making as usual and
will turn in my annual report
when I return. I'm and best
wishes - Do send that enigma
home soon - for your sake not theirs
Sincerely
Jane



HOTEL
GEORGE V

31, AVENUE GEORGE V - PARIS

TÉLÉPH. ÉLYSÉES 89-71

& crossing out certain individuals -
she over one of the French concoctions
made of lime leaves or boiled hay
& I love cafe crème. You can't
imagine how excited Jimmie & I can
get over such non-intoxicating
beverages. We sent via Thought
waves many good wishes to you
& perfidiously to all your enemies.
As always my kindest
wishes & best to Mickey.

Give even topped smoking -
Can you think of a couple of lady-like
vices?

Scilla.





Office of the Attorney General
Washington, D. C.

August 14, 1937.

*file
president
PSF
Justice
Cummings*

The President,
The White House.

My dear Mr. President:

With regard to the United States Marshal in Alaska, Division # 4, it strikes me that it would be best to take no action for the present. If it can go over until the next session it will give Delegate Dimond an opportunity to work out the situation. The incumbent, Joseph A. McDonald, is an efficient officer and we have no complaint to make of the manner in which he has discharged his duties. Unless, therefore, you have wishes to the contrary I shall give no further thought to the subject during this session of Congress.

With regard to the United States Marshal for the Eastern District of New York, I had a talk with Mr. Farley. I think he desires the appointment of James E. Healy, vice Albert Benninger, deceased. The difficulty, however, is that Healy could probably not be confirmed. A Deputy is acting efficiently at the present time and Mr. Farley thinks it would be best to take no action at the present session of Congress. Unless you have wishes to the contrary, I shall assume you are willing to let the matter rest as it is.

With the elimination of the foregoing matters from immediate consideration there remain only the following, which ought to have consideration.

1. U. S. Circuit Court of Appeals for the Seventh Circuit, vice Samuel Alschuler, retired. It would be highly desirable, from the standpoint of the Court, to fill this vacancy if it is feasible to do so. I understand the difficulties and gathered from what you said yesterday that you thought the matter would have to go over to the next session of Congress.
2. U. S. Court of Appeals for the District of Columbia, vice Josiah A. Van Orsdel, deceased. This is a highly important matter and if at all possible should be disposed of at this session.
3. U. S. District Judge in Kentucky. This matter is being considered along the lines you suggested yesterday.

Sincerely yours,

Wm Cummings

THE ATTORNEY GENERAL
WASHINGTON

August 18, 1937

6:00 P. M.

My dear Mr. President:

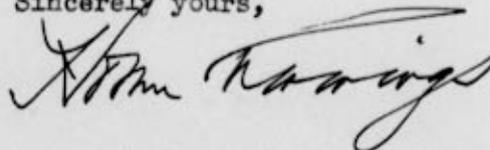
I am having an awful time trying to locate Dean Clark. I have talked with his secretary at the Yale Law School and find that Dean Clark is probably on an automobile trip. There is a bare possibility that he may be at Oxford today.

I have tried to reach him on the telephone by paging the different hotels. This was without success. I also heard that he has previously visited Professor Harold J. Laski in London and that he will return to London on the 20th of August, presumably stopping at Oxford on the way. This is what gives me the idea he may be in Oxford now.

He will sail for the United States from Havre on the S.S. Manhattan on the 26th of August. I have also given instructions to have my previous cable to him delivered to Professor Laski's home. Of course a message may come from him at any time.

If it is not received by the time you desire to act the question is presented as to whether or not you could take a chance and send in the name anyway. It is highly probable that he would accept and indeed such a course might relieve him of the necessity of consulting with various people about it. He could truthfully say that he had been drafted. There are, of course, objections to this procedure but it strikes me that it is well worth thinking over.

Sincerely yours,



The President,
The White House.

PSF
Justice
Cummings

THE ATTORNEY GENERAL
WASHINGTON

August 20, 1937.

file
private

Dear Missy:

Enclosed herewith is a memorandum
for the personal and confidential attention
of the President.

Sincerely yours,

Wm Cummings

Miss Marguerite LeHand,
The White House.

OFFICE OF
THE ATTORNEY GENERAL

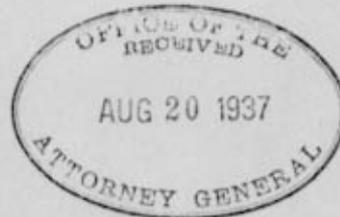


Aug 20/37

Dear Mr President:
The attached is
for your confidential
information - Please
read it all -

HS C

Department of Justice
Washington



August 19, 1937

MEMORANDUM FOR THE ATTORNEY GENERAL

About two weeks ago, while dealing with the subject of reappointments of United States Attorneys, the name of Carl Sackett of Wyoming came up. You asked me to ascertain from Senator O'Mahoney and Senator Schwartz their feelings in this matter, as to whether they would want to endorse Sackett for reappointment. This you will recall was in accordance with the method of procedure in each instance regardless of the state involved. Senator Schwartz stated that he had no objection to the reappointment of U. S. Attorney Sackett, and that his reappointment would be satisfactory; Senator O'Mahoney likewise expressed satisfaction with Sackett and his approval of his appointment.

Senator Schwartz called in about a week ago, in person, and after a lengthy conference indicated that he felt the interests of the Administration and the Government would be best served by allowing the matter to remain in its present status, without any action for the time being.

Since both Senators were not entirely in accord that the reappointment should be made at this time, the matter was held in abeyance.

Senator O'Mahoney called me this afternoon on the telephone and reminded me of the fact that I had consulted him (not that he had consulted this Department) about the Sackett reappointment and said that he was quite disturbed that it had not been made. He further said that he understood that I had made the statement to Senator Schwartz that he could appoint anyone he wanted. I told him there was utterly no warrant for such a statement (and I felt sure the Senator made no such statement) nor had I discussed the matter with anyone other than yourself.

Senator O'Mahoney said in substance that he believed it was inconceivable that there should be any reprisals; that he felt no animus; that the court bill is a bygone affair or, as he put it, "water over the dam" and he thought it would be a "nice gesture" to have Sackett's name sent in. He further stated that Sackett had written him but because of his situation he had not replied.

Memo to the Attorney General.

2.

I told Senator O'Mahoney that these appointments were being considered one after another and that I would in the course of time bring this to your attention, although you were today out of the city and I expected to leave for my vacation.

Respectfully,

Joseph B. Keenan

JOSEPH B. KEENAN

The Assistant to the Attorney General.

Department of Justice
Washington

August 19, 1937

~~CONFIDENTIAL~~

MEMORANDUM FOR THE ATTORNEY GENERAL

In my talk with Senator Schwartz he indicated that a cabal was in the making between Governor Miller, Senator O'Mahoney and McCracken, a newspaper publisher of decidedly Anti-New Deal tendencies. This effort is to be launched at the Bar Association meeting for the State of Wyoming at Yellowstone National Park; the principal speakers to be Stinchfield, vituperative critic of Roosevelt and President of the American Bar Association, Senator Wheeler and Senator O'Mahoney.

Senator Schwartz stated he and Congressman Greever were steadfastly behind the President and his program.

Respectfully,

J.B.K.

JOSEPH B. KEENAN
The Assistant to the Attorney General.

THE WHITE HOUSE
WASHINGTON

file
personal.

Aug 20/37

Dear Mr President:

Attached is the memo.
of Mr. Reed concern-^{ing} pending
Tax cases in Supreme Court;
and is well worth reading.

Washings

P.S. ~~It~~ shows the issues
involved - & the
attitude of

Treasury

Def

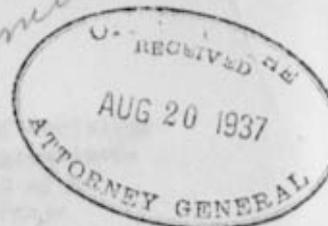
War

+
Interior



Office of the Solicitor General
Washington, D. C.

August 20, 1937



MEMORANDUM FOR THE ATTORNEY GENERAL

In re: Fox v. Dravo Contracting Co.
Silas Mason Co. v. Tax Commission
Ryan v. State of Washington.

Preliminary. These three cases are suits by contractors to enjoin collection of state gross receipts taxes. In the Dravo case, a three judge Federal District Court granted an injunction against the West Virginia Tax Commissioner. In the Silas Mason and Ryan cases, the Supreme Court of Washington refused relief. Neither the United States nor any of its officers are parties or have appeared heretofore as amicus curiae. All three cases are now in the Supreme Court of the United States, having been argued last spring. On June 1, the Court set the cases down for reargument next fall, requesting the Attorney General of the United States to present the views of the Government upon the two questions involved.

The Questions Involved. The contractors in all three cases are engaged in the construction of dams for the United States. The States of West Virginia and Washington impose a tax upon all contractors measured by a percentage of their gross receipts (2% in West Virginia, 1/2% in Washington). The contractors here claim immunity upon two grounds:

1. They assert that since they are performing services for the Federal Government, a tax upon their gross receipts from that source is constitutionally exempt from state taxation, since it would impose an invalid burden upon the United States.

2. The lands upon which the work is done, except for the river beds, have been purchased by the United States. Accordingly, the contractors contend that, pursuant to pertinent state legislation either ceding jurisdiction over those lands to the United States or consenting to the acquisition by the United States of those lands, the Federal Government has exclusive legislative jurisdiction and all state statutes, including tax measures, can have no application therein.

DISCUSSION

1. The exemption issue.

It has long been felt that the existence of a tax exempt class such as Government bondholders, Government employees, etc., is undesirable and inequitable. There has been threatened an extension of this exemption to securities of quasi-Governmental entities, such

as the Port of New York Authority. Yet through a series of decisions over a long period of years, the Supreme Court has been progressively expanding the field of immunity, over the vigorous protests of a persistent minority. The Court now holds the salaries of State employees engaged in governmental, as distinguished from proprietary, activities exempt; sales to states and their subdivisions exempt; Federal salaries exempt from State income taxes, etc. It is believed that these three cases afford a suitable vehicle to reverse the trend and to begin to narrow the tax exempt groups.

Undoubtedly, if these taxes are sustained, they will be reflected in higher bids for Government contracts in the future. The increased cost to the United States will be offset at least in part, though this would be slight, since the United States does not employ sales taxes often, by comparable taxes which the Federal Government will be able to collect from those who sell goods to states.

Possibility of increased cost to one sovereignty is not a valid reason for holding invalid a tax of another. Minimum wages, maximum hours, manufacturers' taxes (upheld in Liggett and Myers v. United States), regulations as to doing business directly or indirectly affect cost.

Existing precedents have turned on the formula of preservation of the dual system and require as complete freedom as practical to the operations of the respective governments. This has been carried to the extent of exempting privately owned ore extracted by concessionaires from Indian lands.

Freely accepting the desirability of preserving the dual system, it is our contention that non-discriminatory taxes do not interfere with the dual system and should be sustained.)

The Treasury feels the important thing is not what additional cost these particular taxes may entail to the United States, but rather that a decision upholding them should be viewed as the first step in a long range program of eliminating generally this type of immunity (except, of course, where the tax may be discriminatory).)

Both the War and Interior Departments, however, feel otherwise. They view these taxes as imposing an additional cost upon their operations, and would like to see them declared invalid. Such taxes, they say, impose a direct burden upon their functions.

There has been expressed, also, the fear that since a decision based on such a concession on our part would make it constitutionally possible for every State to levy non-discriminatory gross receipts taxes, the States would abuse the opportunity. Taxes might be levied which would approach prohibitory levels. If non-discriminatory taxes on independent contractors are valid, why not regulatory)

legislation, wages, hours, sanitation, etc. These are dangers, but dangers within our general control, since the United States might itself carry on the operation, and also the rule against frustration of Federal activities would apply.

I think it may fairly be said that those opposed approve the restriction of the tax exempt groups but believe that they should include governmental employees, sales and receipt taxes affecting government contracts. This reasoning would maintain the present status and render futile further efforts to narrow exemptions.

I believe with the Treasury that the question must be viewed broadly in terms of establishing ultimately a fair and equitable system of taxation, and that we should seize upon this opportunity to work toward that end, even though there may be an additional cost to the Government in so doing.

2. The jurisdiction issue.

All departments are agreed as to the position to be taken by the Government in the West Virginia case - namely, that the United States does have exclusive jurisdiction over the river banks but not over the river bed, since as to the latter it does not have title but rather merely a dominant servitude.

As to the Washington cases, involving Grand Coulee, it would seem that the United States could legally have exclusive jurisdiction over the river banks. In fact, however, it has not exercised that power. The State of Washington continues to furnish police protection, etc. in that territory. Further, Interior says that it does not want the exclusive jurisdiction - it does not want the burden of maintaining schools, furnishing police and fire protection, etc. Under these circumstances it is believed desirable to permit the jurisdiction to remain in the State of Washington if a sound legal theory would support that result. The approach that we plan to urge is that consent by the United States is necessary wherever it is to acquire jurisdiction from the states, and that such consent is presumed unless circumstances affirmatively show that the United States does not wish to accept such jurisdiction. The circumstances showing a rejection of jurisdiction herein are found in the continuing supervision by the State of Washington, acquiesced in by Congress, which has specifically ratified the contracts. The other departments have not expressed any disapproval of this view.

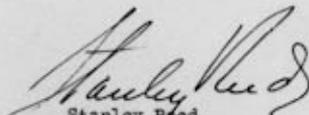
3. Federal Reservations.

There would be no concession by the United States that a State tax could be levied on operations carried on in reservations under the exclusive legislative jurisdiction of the United States, e. g., Quantico.

4. Departmental interests.

These views have been given War, Interior and Treasury for consideration on Thursday, August 19th. These Departments were apprised of the problems in June, and all of them have written us as of August 1st and have had conferences. I said you would probably mention the matter at a Cabinet meeting, stating our position and seeing that the attitude was approved.

No one can estimate the extra cost, but it will amount to a considerable number of millions.


Stanley Reed,
Solicitor General.

TELEGRAM

The White House
Washington

lwumo 19 cable 7a

London 1054a Aug.20,1937.

(LC) The President.

Deeply appreciate regret distance precludes personal discussion
but still feel declination should stand.

Charles Clark.

*file
personal
Homer Cummings*



Office of the Attorney General
Washington, D. C.

August 18, 1937.

The President,

The White House.

My dear Mr. President:

I submit herewith the nomination papers for a successor to Mr. Justice Van Orsdel.

I ascertained that Dean Clark was in Europe and I have cabled him as per copy attached hereto. Up to the present moment no reply has been received and I, therefore, do not know what his attitude is. As soon as an answer is received I shall, of course, let you know.

In view of the fact that I am leaving tonight to go to New York to meet Cecilia and will not be back in Washington until about 8:25 P. M. tomorrow, I also submit to you the nomination of Dean Justin Miller so that it may be immediately available should the answer from Dean Clark be adverse.

Sincerely yours,

Wm. H. Taft

STRAIGHT CABLE

WASHINGTON D C AUGUST 18 1937

HONORABLE CHARLES E CLARK
C/O AMEXCO
LONDON

WOULD BE GREATLY PLEASED IF YOU WOULD ACCEPT APPOINTMENT ASSOCIATE
JUSTICE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA STOP
THIS COURT AS YOU KNOW IS OF EQUAL RANK WITH CIRCUIT COURTS OF APPEALS
AND IN NUMBER AND IMPORTANCE OF CONSTITUTIONAL QUESTIONS CONSIDERED
PROBABLY RANKS NEXT TO SUPREME COURT STOP SALARY TWELVE THOUSAND FIVE
HUNDRED WITH LIFE TENURE STOP MATTER IMMINENT CABLE IMMEDIATELY

HOMER CUMMINGS

ATTORNEY GENERAL



Office of the Attorney General
Washington, D. C.

August 17, 1937.

Dear Mr. President:

I have the honor to inclose herewith a nomination in favor of Honorable Charles E. Clark, of Connecticut, to be an Associate Justice of the United States Court of Appeals for the District of Columbia, vice Honorable Josiah A. Van Orsdal, deceased.

Dean Clark is 48 years of age, and married; was born in Woodbridge, Connecticut; received the degree of Bachelor of Arts from Yale University in 1911, the degree of Bachelor of Laws from that institution in 1913; also the recipient of honorary degrees from Yale University, the University of Colorado, Gettysburg College, and Tulane University; was admitted to the bar of Connecticut in 1913 and was engaged in the practice of law at New Haven until 1919; was successively assistant and associate professor of law, professor and Lines Professor, 1919-1929, Sterling Professor and Dean of the School of Law, Yale University, since 1929; visiting professor at Columbia University, Cornell University, and University of Colorado between 1924 and 1934; member of the Connecticut House of Representatives, 1917-1918; Connecticut Judicial Council, 1929-1931; has been serving as a member and the reporter of the Advisory Committee to the United States Supreme Court on Federal Civil Procedure since 1935 and as vice-chairman of the Commission on Reorganization of State Departments in Connecticut. He is the author of many accepted works on legal subjects.

Dean Clark is a lawyer and gentleman of excellent reputation, ability, and experience, and has attained eminence in the fields of law and legal education in the United States.

I recommend the nomination.

Respectfully,

Attorney General.

The President,
The White House.

*Home
Cummings*

WHITE HOUSE

DEVON LODGE, SEP 1 9 28 AM '37
ADDISON BRIDGE PLACE, RECEIVED

W. 14.

PULHAM 2444.

London, Aug. 20, 1937

Dear Mr. President: -

I feel that I owe you a statement, and yet I find it difficult to express myself. You have paid me the highest of compliments and I seemingly have made such a poor response. Believe me, it has been difficult indeed to decide, and I cannot be sure of my decision. In fact the speed of my action made necessary by the circumstances has troubled me; I was forced to make my initial decision during the course of a telephone conversation with the Attorney General's assistant on Thursday.

Since I have so thoroughly sympathized with your desire to appoint forward-looking judges, I did feel some obligation when you showed that you considered me worthy to be considered of that class. And I felt that the personal sacrifice involved should be met. What deterred me, however, was

the feeling that once I had taken the veil,
not to speak, my independence of action and
freedom of expression & thought, which I prize so
highly, would be gone. This should be relinquished
if the need is great; but frankly the position of
associate on that court did not seem to me a
sufficient justification. True the court ought to
be a great one; but its lack of extensive jurisdic-
tion will, I fear, tend to limit it.

A subordinate factor was that I am proud of
the Yale Law School and desire to see it maintain
its forward movement. I realize I am not
essential to its success; but I could not with-
draw suddenly - the news being announced while
I am abroad - without endangering things I
believe in greatly and disturbing my younger
colleagues who have committed themselves
to support of a new era. With more time I think
I could make a transition at the School easier.

I am not confident that I am correct in
my attitude towards public service and my
response to this and to other opportunities which
your associates, as well as you have been
willing to place before me. If the matter
remains at all of any further interest to you, I
shall be glad to call upon you at any time
after my return to America on Sept. 2nd, and
discuss it with you in person.

With assurances of my very great respects,
I am, sincerely yours,
Charles E. Clark



THE DAY

The President,
The White House,
Washington,
D.C., U.S.A.

HSC:MOB

October 8, 1937.

My dear Mr. Presidents:

Sometime ago Professor Corwin, of Princeton, sent me a copy of a letter written by Mr. Justice Miller to William Pitt Ballinger, on March 18, 1877, which I enclose herewith. Mr. Ballinger was a brother-in-law of Mr. Justice Miller - hence the intimacy of the letter which I found very amusing. Mr. Ballinger became a leading lawyer in the Southwest and resided in Galveston, Texas.

Sincerely yours,

Signed

HOMER CUMMINGS

The President,
The White House.

THE ATTORNEY GENERAL
WASHINGTON

October 8, 1937.

My dear Mr. President:

Sometime ago Professor Corwin, of Princeton, sent me a copy of a letter written by Mr. Justice Miller to William Pitt Ballinger, on March 18, 1877, which I enclose herewith. Mr. Ballinger was a brother-in-law of Mr. Justice Miller - hence the intimacy of the letter which I found very amusing. Mr. Ballinger became a leading lawyer in the Southwest and resided in Galveston, Texas.

Sincerely yours,

Wm. Jennings

The President,
The White House.

Prof. Chas *Fairman* ran into
this in the Miller papers at
Harvard Law School.

ESC'

Justice Miller to William Pitt Ballinger, March 18; 1877,
apropos of the suggestion that former Justice John A Campbell
be reappointed to the Bench, to fill the vacancy caused by the
resignation of Justice Davis:

.

"There is no man on the bench of the Supreme Court
more interested in the character and efficiency of its
personel than I am. If I live so long, it will still be
nine years before I can retire with the salary. I have
already been there longer than any man but two, both of whom
are over seventy.

"Within five years from this time three other of the
present Judges will be over seventy. Strong is now in his
sixty ninth, Hunt in his sixty eighth, and broken down with
gout, and Bradley is in feeble health and in his sixty sixth
year.

"In the name of God what do I and Waite and Field
all men in our sixty first year want of another old, old man
on the Bench. . . I have already told the Attorney General
that if an old man was appointed we should have within five
years a majority of old imbeciles on the bench, for in the
hard work we have to do no man ought to be there after he is
seventy. But they will not resign. Neither Swayne nor
Clifford whose mental failure is obvious to all the Court, who
have come to do nothing but write garrulous opinions and clamor
for more of that work have any thought of resigning."

THE ATTORNEY GENERAL
WASHINGTON

The President

THE WHITE HOUSE

00435

THE ATTORNEY GENERAL
WASHINGTON

October 12, 1937.

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Lil's
Personal

My dear Mr. President:

I saw Dean Clark yesterday. He is still interested. I discussed the situation quite fully and frankly with him.

I assume the matter is to be held in abeyance until we see whether Justice Robb will retire when he reaches the age limit, which will be, I believe, on the fourteenth of next month. I hope that he will do so and I am endeavoring as diplomatically as I can to bring about that result.

Sincerely yours,

Norman Thaw

The President,

The White House

PSF: Justice
file
Chambers's files
(S) Drabner 1-37

THE WHITE HOUSE
WASHINGTON

CONFIDENTIAL

Hyde Park, N. Y.,
October 29, 1937.

MEMORANDUM FOR
THE ATTORNEY GENERAL

Are you getting any pressure
from any source directed against
United States District Attorney
Milligan of Kansas City?

F. D. R.

THE PRESIDENT
THE VICE PRESIDENT
THE SECRETARY OF STATE
THE DEPARTMENT OF JUSTICE
THE DEPARTMENT OF THE ARMY
THE DEPARTMENT OF THE NAVY
THE DEPARTMENT OF THE INTERIOR
THE DEPARTMENT OF AGRICULTURE
THE DEPARTMENT OF COMMERCE
THE DEPARTMENT OF LABOR
THE DEPARTMENT OF EDUCATION
THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THE DEPARTMENT OF TRANSPORTATION
THE DEPARTMENT OF ENERGY

THE ATTORNEY GENERAL
WASHINGTON

THE WHITE HOUSE

Nov 29 31 AM '37

November 1, 1937. RECEIVED

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removed
St. Cummings*

My dear Mr. President:

This answers your memorandum of the 29th of October, in which you ask me whether I am getting any pressure from any source directed against United States Attorney Milligan of Kansas City.

I have heard indirectly that there is a good deal of opposition to him amongst the powers that be in Missouri. I have seen clippings from various newspapers of that state which indicate that the Pendergast organization is against his renomination and that this organization, through the two Senators, will attempt to have him replaced by some other appointee. Mr. Milligan was appointed February 3, 1934, and his present term will, therefore, expire on the third of next February. Apparently the newspapers are making a good deal of the gossip and it is suggested that the real reason for the opposition to Milligan grows out of the vigor with which he prosecuted election frauds in Kansas City.

Answering specifically your question, I can say that I have not heard one word from either Senator on the subject, or from any other person in authority adverse to Mr. Milligan.

Sincerely yours,

Wm. Howard Taft

The President,

The White House.

THE WHITE HOUSE
WASHINGTON

~~CONFIDENTIAL~~

Hyde Park, N. Y.,
November 3, 1937.

MEMORANDUM FOR

THE ATTORNEY GENERAL

Thank you for the information about Milligan. I have very good reason to believe that he ought to be reappointed, and I think if you and I from now on take the position that we have heard no valid reason against his reappointment, it will help him to be confirmed next February.

McAdoo is in all kinds of hot water over his insistence that Hall be not reappointed, and if either of the Missouri Senators were to oppose Milligan it is my judgment that it would hurt them and the Democratic Party in the same way.

F. D. R.

file
Personal
BF Justice
Governor
Homer Cummings
(S) Drawer 1-37.
1937

Dear Mr. President-

Thank you so
much for your
charming telegram
on my birth day.

I was beginning
to be afraid that
you had forgotten
me - with The Duckers

and Congress coming
along.

I'm glad the
Duchess is not going
to sit next to you
at tea, because
if her noises
a Cardinal were
something phenomenal.
I'm sure you'd blame
it on me.

The party was a
great success - about
50 guests - including
Judge John J. Parker
and Judge Sofer,
Judge Groner and
Judge Stephens - yes,
"all is forgiven" if
not forgotten. None
of the Supreme Court
came - & none were
invited. We wanted
to have a merry time.

A telegram was
also received from
Senator Borah - but
I like you best!

As ever (as you can
see)

Cecilia.

THE ATTORNEY GENERAL
WASHINGTON

December 6, 1937.

py.
Cummings

My dear Mr. President:

Will wonders never cease! Today's
favorable decision in the Aluminum Company matter
was written by Mr. Justice McReynolds. See
copy enclosed.

Sincerely yours,

Wm Howard Taft

The President,
The White House.

RECORDED
DEC 10 1937

SUPREME COURT OF THE UNITED STATES.

No. 281.—OCTOBER TERM, 1937.

Aluminum Company of America, Appellant, vs. The United States of America.	} Appeal from the District Court of the United States for the Western District of Pennsylvania.
--	--

[December 6, 1937.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

This appeal brings up a final decree of the District Court, Western District of Pennsylvania, three judges sitting, which vacated a preliminary injunction and refused to restrain law officers of the United States from conducting a proceeding against appellant in another district.

June 9, 1912, in the present cause—"Pennsylvania Suit"—when appellant was the only defendant, a consent decree cancelled certain restrictive provisions of designated contracts and forbade future violations of the anti-trust laws by it, its officers, agents and representatives. With certain modifications (1922) presently unimportant this decree remains in force.

April 23, 1937, the United States through their law officers, defendants here, instituted a proceeding in the Southern District of New York—"New York Suit"—wherein the appellant, its officers, agents, stockholders and others (sixty-three in all), were named as defendants. All of these were charged with violating the anti-trust laws and appropriate relief through injunctions, dissolution of appellant, rearrangement of its properties, etc., was asked.

April 29, 1937, in the "Pennsylvania Suit" appellant asked and the District Court entered an ex parte order directing the law officers concerned with the New York suit to appear as defendants. It then filed the petition now before us wherein it prayed for an injunction restraining these officers from proceeding further in New York against it, its wholly owned subsidiaries, officers and directors.

The petition charged that prosecution of the later suit would subject appellant to the peril of concurrent decrees on the same subject matter by two courts; also that there was the possibility of conflicting decrees and unseemly conflict. The prayer for relief rested essentially upon the assertion that the suit embraced subject mat-

ters and issues substantially identical with those previously presented and adjudicated by the consent decree of 1912.

The law officers appeared specially and answered; the Attorney General filed an expediting certificate under the Act of February 11, 1903, as amended, 15 U. S. C. A. 28, 29; a court of three judges assembled, heard evidence, made findings of fact and denied relief. Errors were assigned; this appeal followed.

Plainly, and there is no suggestion to the contrary, appellant cannot succeed unless the Pennsylvania and New York suits are substantially identical in subject matter and issues. It says that comparison of the petitions in the two causes reveals this fact. Also that comparison of the petition in the later suit with the prohibitions of the 1912 consent decree shows the alleged identity, since each charging paragraph of the petition sets up violations of the anti-trust laws inhibited by the decree.

On the other hand, counsel for the United States submit that the two suits differ in substantial respects—defendants, charges and relief prayed.

The court below found: "The subject matter, parties, issues and relief sought in the New York suit differ substantially from those in the 1912 suit. The New York suit does not attack the affirmative provisions of the 1912 decree or seek to reverse any action taken by the District Court for the Western District of Pennsylvania in the suit of 1912. The New York suit does not subject Aluminum Company to the peril of two conflicting decrees. Aluminum Company will not suffer irreparable injury by being compelled to defend the suit in the Southern District of New York. . . ." It concluded that the two suits were dissimilar in respect of parties defendant, subject matter, issues and relief sought, and that no basis for an injunction had been shown.

We have heard counsel, examined the record and briefs, and are unable to say that the court below erred either in respect of its findings or conclusion. The findings are adequately supported and the conclusion reached, we think, is proper. For us again to analyze the pleadings, evidence and decrees and point out the differences and necessary inferences would serve no useful purpose. This was adequately done below.

The challenged decree must be

Affirmed.

The CHIEF Justice and Mr. Justice STONE took no part in the consideration or decision of this cause.

THE ATTORNEY GENERAL
WASHINGTON

December 6, 1937.

P. G. Campbell

My dear Mr. President:

The nominations for places on the United States Court of Appeals for the District of Columbia seem to have been widely approved by friend and foe alike.

The Groner nomination has been confirmed and, after some preliminary skirmishes, the nominations of Edgerton and Vinson were approved by the Sub-Committee and by the full Judiciary Committee. Senator King, acting for the Committee, was ready to report the names favorably today when word came from Senator McCarran, who is in Nevada. He asked to have the matter held up for a week. Senator King objected but finally agreed to hold the matter until Wednesday. There it rests for the present.

Sincerely yours,

Wm. C. Clegg

The President,
The White House.

THE ATTORNEY GENERAL
WASHINGTON

December 8, 1937.

My dear Mr. President:

Yesterday I encountered Senator O'Mahoney and had a brief conversation with him relative to the bill that he and Senator Borah recently introduced dealing with the subject of Federal licensing of inter-state corporations. I gathered from what Senator O'Mahoney said that neither he nor Senator Borah was wedded to any particular part of the bill and that they would be glad of an opportunity to discuss the question of anti-trust legislation with representatives of the administration at any time and without being committed in advance to any particular program. Indeed I rather thought he was eager for such a conference.

Sincerely yours,

Wm. Knowlton

The President,
The White House.



Office of the Attorney General
Washington, D.C.

December 9, 1937.

*File
Personal*

The President,
The White House.

My dear Mr. President:

I have information that leads me to believe that the Supreme Court may, and probably will, promulgate the new Supreme Court Rules on or about the twentieth of this month. As you know the Supreme Court was authorized by Act of Congress to formulate rules with a view to simplifying Federal procedure. The Act was passed on the nineteenth day of June, 1934.

As no doubt you recall, I began the agitation for this law in March in a speech in which I stressed the fact that you endorsed the project. Thereafter I urged its passage in Congress without the assistance of any bar association endorsements, or other help in that quarter. In fact the bar associations, although favorable to the project, had concluded that it never could be passed. It was in fact passed about ninety days thereafter. From that time to this an enormous amount of work has gone forward in connection with these rules. I appointed a Committee and the Chief Justice appointed a Committee. These groups more or less coalesced and the work has been going forward intensively. The Committee has reported to the Supreme Court and that Court has been working on these rules for some time.

As above stated they will probably be promulgated before the month is over. I sincerely hope so. It will then be my duty, under the specific provision of the law, to submit the new rules to Congress at the beginning of the session in January. If all things go off as per schedule, it will, in my judgment, mark one of the most constructive pieces of work in the improvement of Federal judicial machinery that has occurred in a generation.

Sincerely yours,

Norman Thawing

THE ATTORNEY GENERAL
WASHINGTON

December 10, 1937.

R.F.

My dear Mr. President:

Today at Cabinet Meeting you asked me to supply you with a brief memorandum relative to the outcome of the Mellon Tax case in the Board of Tax Appeals. I submit such a memorandum herewith, which I think covers the points you chiefly had in mind.

I also enclose a printed copy of the rather elaborate opinions and dissents.

Sincerely yours,

Wm. H. Taft

The President,
The White House.

December 10, 1937

MEMORANDUM.

Re: Decision of the Board of Tax Appeals in the Case of Andrew Mellon, Petitioners, v. The Commissioner of Internal Revenue, Respondent.

- - - -

This case was decided on December 7, 1937. The deficiency involved in the petitioner's income tax related to the calendar year 1931 and was alleged by the Government to be \$1,319,080.90, together with a penalty of 50 percent. The petitioner filed his petition with the Board asking a re-determination of the deficiency, denied fraud and claimed an over-payment in the amount of \$139,045.17. The respondent by an amended answer asserted an increased deficiency in the amount of \$2,059,507.49 plus a penalty of 50 percent, or a total deficiency in the tax and penalty of \$3,089,261.24.

The issues involved were grouped into seven separate items, the principal one being the stock sales and charges of fraud in connection with the transfer of the Pittsburgh Coal Company, Common Stock, to the Union Trust Company. The following eight members of the Board constituted the majority: Smith, Sternhagen, Arundell, Van Fossan, Black, Tyson, Leech and Murdock. The majority held that the petitioner did not file a false and fraudulent return with the purpose of evading taxes and that no part of the deficiency was due to fraud with intent to evade taxes. This opinion finds a tax liability on the part of the petitioner variously estimated at from \$400,000 to \$750,000.

The seven dissenting members of the Board, Turner writing the opinion, were: Turner, Mellott, Arnold, Hill, Disney, Harron and Kern. While they did not find that there was fraud, they did conclude that the evidence in the record refuted the claim of the petitioner that he had made a bona fide sale of the stock to the Union Trust Company and that the evidence submitted by him (the petitioner) did not clear away those doubts. In other words it found that the sales were not bona fide.

Under the Turner opinion, and apart from the penalty for fraud, the Government would have recovered approximately \$2,000,000.00. It should be noted that Tyson, the latest New Deal appointee to the Board, voted with the majority.

Attached is a copy of the opinion. Your attention is directed to Turner's dissenting opinion at page 107, et seq., particularly at the marked passages on pages 107, 108 and 109.

PSF
Justice
Cummings

UNITED STATES BOARD OF TAX APPEALS

A. W. MELLON, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.¹

Docket No. 76499. Promulgated December 7, 1937.

1. The sale by petitioner of stock of the Pittsburgh Coal Co. to the Union Trust Co. of Pittsburgh was a complete and valid sale, giving rise to a legal deduction.

2. Respondent disallowed a deduction claimed on account of loss on sale of stock of the Western Public Service Corporation, on the ground that "the disposal of these stocks do not appear to be transactions on which losses may be recognized for income tax purposes." Petitioner in his petition affirmatively alleged that petitioner did not, within "thirty days before or after the date of such sales, enter into any contract or option to purchase or acquire any shares of the said stock of said corporation." The evidence shows that the stock was reacquired 37 days after the sale but does not establish when the contract to reacquire was entered into. *Held*, the petitioner had the burden of proving no contract or option was entered into within thirty days of the sale. The deduction is disallowed for failure of such proof.

3. Sales of stock by petitioner to a corporation, all of the stock of which was owned by his daughter, were valid sales and, under the law as it existed in 1931, gave rise to legal deductions.

4. Petitioner did not file a false and fraudulent return with intention to evade taxes.

5. Petitioner was not, in 1931, the owner of any bank stocks.

6. In the summer of 1930 the Bethlehem Steel Corporation began negotiations with the McClintic-Marshall Corporation for the acquisition of approximately one-third of the assets of the latter. After terms were generally agreed on the two corporations instructed their attorneys to draw the contracts so as to prevent, if possible, the recognition of gain to McClintic-Marshall or its stockholders. Under the plan of procedure worked out McClintic-Marshall on January 15 transferred the assets omitted from the Bethlehem transaction to the Union Construction Co., a new corporation, for 4,900 of its total 5,000 shares of authorized stock, which stock was issued directly to the stockholders of the McClintic-Marshall Corporation. On February 10, 1931, the McClintic-Marshall Corporation transferred the assets covered by its

¹This proceeding was heard before a special Division of the Board consisting of Van Fossan, presiding, Trammell, and Turner. Trammell resigned from the Board after completion of the testimony but before the final submission of the case. By direction of the Board the opinion is written in part by Van Fossan and in part by Turner.

agreement with the Bethlehem Steel Corporation to three of the latter's subsidiary corporations for 240,000 shares of the common stock of the Bethlehem Steel Corporation and \$8,200,000, face value, of its bonds, the said stock and bonds being distributed directly to the stockholders of the McClintic-Marshall Corporation. *Held*, that the Bethlehem Steel Corporation did not acquire substantially all of the assets of the McClintic-Marshall Corporation so as to constitute the transaction a reorganization within the meaning of section 112 (1) (1) (A) of the Revenue Act of 1928; *held, further*, that the Bethlehem Steel Corporation was not a corporation a party to a reorganization and the gain to the petitioner on the distribution to him of the Bethlehem stock and bonds is to be recognized. *Groman v. Commissioner*, — U. S. —.

7. Though the Union Construction Co.—Koppers Co. reorganization, the Union Construction Co.—Pitt Securities Corporation reorganization, and the Pitt Securities Corporation liquidation were parts in a single plan for the liquidation of Union, the successive distributions by Union to its stockholders of the stock of Koppers and Pitt were distributions within section 112 (g) and the basis of petitioner's Union stock is to be apportioned among Koppers, Pitt, and Union in determining the gain to petitioner from the liquidation of Union. *Rudolph Boehringer*, 29 B. T. A. 8, and *North American Utility Securities Corporation*, 36 B. T. A. 320, followed.

8. Certain payments by the Union Construction Co. and Pitt Securities Corporation for the account of petitioner *held* to be dividends.

9. The fair market value of the stock of the McClintic-Marshall Construction Co. on March 1, 1913, determined to be \$300 per share.

10. The A. W. Mellon Educational and Charitable Trust was, in 1931, a valid existing trust, organized and operated exclusively for educational and charitable purposes. The transfer by petitioner to the trust of certain paintings in 1931 was a complete and valid gift.

Frank J. Hogan, Esq., William A. Seifert, Esq., Maynard Teall, Esq., Paul G. Rodewald, Esq., W. W. Booth, Esq., Nelson T. Hartson, Esq., Donald D. Shepard, Esq., and A. G. Wallerstedt, Esq., for the petitioner.

Robert H. Jackson, Esq., F. R. Shearer, Esq., David R. Shelton, Esq., and E. L. Updike, Esq., for the respondent.

The respondent determined a deficiency in petitioner's income tax for the calendar year 1931 in the amount of \$1,319,080.90, together with a penalty of 50 percent under section 293 (b) of the Revenue Act of 1928. Petitioner filed his petition with the Board asking redetermination of the deficiency, denying fraud, and claiming an overpayment in the amount of \$139,045.17. By his answer, as amended, respondent asserted an increased deficiency in the amount of \$2,059,507.49, plus a penalty of 50 percent, or a total deficiency in tax and penalty of \$3,089,261.24.

The several issues involved in the case have been grouped as follows in the findings of fact, and, with the exception of the issue as to

the McClintic-Marshall-Bethlehem reorganization, will be considered in the opinion in the order indicated:

- I. The stock sales and the charge of fraud.
- II. The ownership of the bank stocks.
- III. The McClintic-Marshall Corporation-Bethlehem Steel Corporation transaction.
- IV. The liquidation of Union Construction Co.
- V. The payments by Union Construction Co. and Pitt Securities Corporation for the account of petitioner.
- VI. The valuation of the stock of McClintic-Marshall Construction Co.
- VII. The contributions issue.

FINDINGS OF FACT.

I.—*The Stock Sales.*

Pittsburgh Coal Co. Stock.—On December 30, 1931, petitioner was the owner of 123,622 shares of the common stock of the Pittsburgh Coal Co., all but 125 shares of which had been owned by him for more than two years prior to 1931. Of the total of 123,622 shares of Pittsburgh Coal Co. stock, 76,822 shares which had been carried in the "Joint Account" of A. W. and R. B. Mellon were transferred to the personal account of petitioner on December 30, 1931, and showed a cost of \$3,863,777.75. The total cost to petitioner of the 123,622 shares was \$6,177,847.75.

During the year 1931 petitioner had realized large capital gains. Sometime in December of that year he discussed with H. M. Johnson, his financial secretary, the matter of his income tax return and which securities might best be sold to establish capital losses with the purpose of claiming such losses as deductions in his return. Petitioner determined that the common stock of the Pittsburgh Coal Co. would be the most suitable for the purpose.

Petitioner accordingly approached H. G. McEldowney, president of the Union Trust Co. of Pittsburgh (hereinafter called the Union Trust Co.), and proposed a sale to the Union Trust Co. of the above mentioned block of common stock of the Pittsburgh Coal Co. McEldowney inquired the amount of the stock and the price. Upon being informed of the number of shares and that the price was \$500,000 for the block, McEldowney told petitioner to send the stock over and the Union Trust Co. would take it.

Petitioner thereupon directed Johnson to gather together the certificates representing his common stock holdings in the Pittsburgh Coal Co. and deliver them to the Union Trust Co. On December 30, 1931, Johnson delivered certificates representing 123,622 shares of common stock of the Pittsburgh Coal Co. to the Union Trust Co. and received therefor the check of that company for \$500,000.

The Union Trust Co. issued a formal confirmation of the transaction, as follows:

THE UNION TRUST COMPANY OF PITTSBURGH

Pittsburgh, Pennsylvania

Purchased from A. W. Mellon, Date Dec. 30, 1931
 c/o H. M. Johnson,
 Mellon National Bank,
 No. P. 65234 Fifth Ave. and Smithfield Street, IN—Account
 Pittsburgh, Pennsylvania

Quantity	Description	Price	Amount
123,622 shares.....	PITTSBURGH COAL COMPANY COMMON CAPITAL STOCK (\$100. PAR VALUE)	4.0445875	\$500,000.00
Settlement Date Dec. 30, 1931.		M	

We are pleased to confirm purchase from you of the within described securities. Payment will be made on above settlement date, to which time interest has been calculated. Securities should be in our possession on that date, when interest thereon will cease.

Upon receipt of the Pittsburgh Coal Co. stock the Union Trust Co. had the shares transferred to the name of Acly Co., a partnership composed of certain officers of the Union Trust Co., which had been formed for the purpose of holding title to securities owned by the Union Trust Co. and to facilitate their transfer on disposition but which, in 1931, held title to securities representing the investment account, the trading account, the trust department, the loan department, and securities held for customers. The officers of the Union Trust Co. had also formed a second partnership called Clay & Co., to hold title to securities held for customers. At that time the Union Trust Co. had no Pittsburgh Coal Co. common stock among its investments and the name of that stock was not printed on its investment sheet forms. It was, however, listed by typewriter on the investment lists issued during the period the stock was held by the Union Trust Co.

In accordance with instructions previously received from petitioner, Johnson, after receipt of the check for \$500,000 from the Union Trust Co., drew a check on petitioner's personal account payable to the Union Trust Co. for a similar amount and delivered that check on December 30, 1931, as a payment on petitioner's note for \$1,000,000 held by that company.

Petitioner never reacquired any part of such stock and thereafter never owned any common stock of the Pittsburgh Coal Co.

Toward the end of March or during the first part of April 1932, McEldowney issued instructions to Carl R. Korb, a vice president of the Union Trust Co., to dispose of the 123,622 shares of common stock of the Pittsburgh Coal Co., acquired as above indicated, if and when a fair return on the investment of the Union Trust Co. therein could be secured. On or about the date of receiving this instruction, Korb approached Johnson, the petitioner's secretary, and inquired about a possible purchaser. Johnson advised him that he knew of no one interested at that time. Korb made no further inquiries and did not look elsewhere for a purchaser. Later in the month of April, he made a similar inquiry of Johnson and Johnson asked Korb to quote a price. Korb had a memorandum prepared which read as follows:

Figured for April 25, 1932.

A. W. MELLON

Dec. 30, 1931, 123,622 shares Pittsburgh Coal Company Common stock (\$100 par value) at 4.0445875.....	\$500,000.00
Cost	\$500,000.00
Interest—118 days at 6%.....	9,833.33
Stock Transfer Stamps.....	4,944.88
Penna. Five Mill Tax.....	2,500.00
	\$517,278.21
Average price figured on \$517,278.21.....	\$4.18435399

Upon being advised of the price, Johnson told Korb that the price was all right and that the stock would be purchased by the Coalesced Co. Up to that time Korb was not advised as to the name of the party represented by Johnson in making the purchase.

At 2 p.m. on the same date a special meeting of the board of directors of the Coalesced Co. was held, at which the following resolution was adopted:

RESOLVED:

That the proper officers of the Company purchase from the Union Trust Company of Pittsburgh 123,622 shares of the common capital stock of the Pittsburgh Coal Company at \$4.18435399 a share, for the account of the Coalesced Company; that in effecting the purchase of said stock they pay to the said, the Union Trust Company of Pittsburgh \$117,278.21 out of funds of the Corporation, and that they give the Union Trust Company the Company's note for \$400,000; and that in connection with giving the note for the purchase of said stock that said officers give the necessary stock powers and that they arrange from time to time for the reduction of said note out of funds of the Corporation, and arrange for the renewal of the note.

The stock was paid for by check of the Coalesced Co. also dated April 25, 1932, in the amount of \$517,278.21 drawn on funds provided as shown in the resolution. As collateral for the \$400,000 note, the

Coalesced Co. deposited the Pittsburgh Coal Co. common stock so acquired. Within a few days, at the request of the Union Trust Co., it deposited as further collateral Republic of Poland bonds having \$500,000 par value.

The Union Trust Co. issued a formal confirmation of sale to the Coalesced Co. as follows:

THE UNION TRUST COMPANY OF PITTSBURGH

Pittsburgh, Pennsylvania.

Sold to The Coalesced Company

Date Apr. 25, 1932

Box 1139,

Pittsburgh, Pa.

In..... Account

No. S106917

Quantity	Description	Price	Amount
123,622 shares.....	PITTSBURGH COAL COMPANY COMMON STOCK (\$100 PAR VALUE)	4 18435399 FLAT	\$517, 278. 21
Settlement Date Apr. 25, 1932		KORB	

We are pleased to confirm sale to you of the within described securities. Payment is due on the above settlement date, to which time interest has been calculated. If unable to call on settlement date, please forward check and securities will be held for your convenience or shipped as desired. If payment is delayed, interest to date of payment will be charged. Kindly advise disposition of securities, if you have not already done so. We appreciate this business and thank you for it.

At the time of the sale of the stock to the Coalesced Co. petitioner was in England. He had no knowledge of the sale until his return to the United States in July 1932.

The Coalesced Co. was organized by petitioner on December 2, 1929, under the laws of Delaware. Its authorized stock was of one class and consisted of 300,000 shares of no par value stock. The petitioner was originally the sole stockholder, having received 94,460 shares of the said stock in exchange for securities and real estate as follows:

Securities and other property	Cost or other basis to petitioner	Value at which taken on books of Coalesced Co.
1,500 shares Montreal Light, Heating & Power, Consolidated.....	\$2,500.00	\$171,000.00
4,940 shares of Shawinigan Water & Power Co.....	171,201.95	395,440.00
102,904 shares of Aluminum, Ltd.....	804,594.00	1,434,232.00
Lots 4, 80, and 81, East Liberty, Pa.....	99,085.00	182,000.00
30 shares Sparks Supply Co.....	3,000.00	3,000.00
31,386 shares U. S. Steel Corporation.....	2,847,865.90	5,115,918.00

On December 18, 1931, the Coalesced Co. was reorganized with authorized capital stock of 250,000 shares of \$100 par value preferred stock and 250,000 shares of \$1 par value common stock. Two hundred thousand shares of preferred stock and 200,000 shares of the common stock were issued to the petitioner in exchange for the original stock of the Coalesced Co. and additional securities as follows:

Securities and other property	Cost or other basis to petitioner	Value at which taken on books of Coalesced Co.
100,000 shares Aluminum Co. of America, preferred stock.....	\$3,783,961.20	\$6,500,000.00
50,000 shares Aluminum Co. of America, preferred stock.....	1,891,980.50	3,250,000.00
450,000 shares Gulf Oil Corporation.....	7,517,322.86	12,150,000.00
100,000 shares Carborundum Co.....	1,038,094.00	6,500,000.00
2,500 shares Clay District Coal Co.....	5,687,395.22	5,687,395.22
550,000 shares Gulf Oil Corporation.....	9,187,851.20	14,850,000.00
500,000 shares Koppers Co. common stock.....	1,175,341.52	7,500,000.00
\$500,000 par-value 7% Republic of Poland bonds.....	452,500.00	257,500.00
Singer-Mashey Real estate, Pittsburgh.....	331,307.05	331,307.05
1,500 shares Wharton Coal Co.....	1,660,382.48	1,660,382.48

The above securities were taken upon the books of Coalesced Co. at their fair market value, as determined by the officers of Coalesced Co. On December 31, 1931, the balance sheet of the Coalesced Co. showed assets aggregating \$61,978,686. Of this amount \$61,055,184.70 represented securities received from petitioner.

At various times prior to, during and subsequent to the taxable year petitioner made large gifts of securities and other property to his two children, Ailsa Mellon Bruce, wife of David K. E. Bruce, and Paul Mellon.

On December 25, 1931, the petitioner made a gift of all of the common stock of the Coalesced Co. to his children, Ailsa and Paul, giving to each 100,000 shares. With the stock the petitioner sent the following letter to his daughter, Ailsa Mellon Bruce:

DECEMBER 25th, 1931.

DEAR AILSA: In the past from time to time I have transferred to you and to Paul as gifts certain investments, chiefly in properties with the management or control of which I have in the past been long associated, and as you both with David are becoming interested and acquainted with these businesses and taking care of your and my interests to my satisfaction and gratification, I am now at Christmas time transferring to you and to Paul each of you one hundred thousand (100,000) shares of the common capital stock of The Coalesced Company which company holds and owns stock and securities largely of the same companies in which you are already interested as you know from your acquaintance with the company and the information I have given you concerning it and the properties.

With best wishes to you and for a most enjoyable Christmas and with much love,

Your affectionate father,

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A letter of similar purport was written to Paul Mellon.

The petitioner has owned no common stock of the Coalesced Co. since December 25, 1931, but has continued to own the preferred stock. The preferred stock is entitled to a 6 percent dividend per annum out of the net assets of the corporation in excess of its capital and out of its net profits, payable quarterly, and is subject to redemption at any quarterly dividend date at \$105 per share plus accrued dividends. The common stock has all voting rights unless dividends on the preferred remain unpaid for four quarterly dividend dates, whether or not successive, in which case voting powers vest exclusively in the preferred. No dividends can be paid on the common stock unless the dividends accrued on the preferred are paid and then only by making certain prescribed provisions for the redemption of preferred stock. During the year 1932 the Coalesced Co. paid only one quarterly dividend on the preferred stock of \$300,000, and that was paid in cash. In 1933 it paid two quarterly dividends amounting to \$600,000 in cash and gave demand notes for the balance of the accumulated dividends for 1932 and 1933. Its earnings were not sufficient to pay the dividends in cash.

After the transfer of securities made at the time of reorganization, up to the close of the year 1933, the Coalesced Co. acquired additional securities which were taken upon its books at approximately \$31,600,000. Substantially all of these securities were acquired from Ailsa Mellon Bruce and Paul Mellon, after they had been received as gifts from the petitioner, or were securities which had been sold by the petitioner at a loss, either to the Union Trust Co. or through the brokerage firm of Moore, Leonard & Lynch. In some instances the Coalesced Co. placed matched orders for the securities sold by petitioner through Moore, Leonard & Lynch.

The officers of the Coalesced Co. from January 14, 1931, to May 29, 1933, were as follows:

President—Henry A. Phillips, senior employee of the A. W. and R. B. Mellon Joint Account.

Vice president—Paul Mellon, son of petitioner.

Secretary and assistant treasurer—D. D. Shepard, petitioner's personal attorney.

Treasurer and assistant secretary—H. M. Johnson, petitioner's financial secretary.

On May 29, 1933, Ailsa Mellon Bruce resigned from the board of directors and her husband, David K. E. Bruce, was elected in her place. At a special meeting of the board of directors on May 31, 1933, Paul Mellon was elected president and Bruce was elected vice

president. During the years 1931 and 1932 the Coalesced Co. paid no salaries to its officers.

The capital stock of the Pittsburgh Coal Co. was divided into two classes, 400,000 shares of common stock and 350,000 shares of 6 per cent cumulative preferred stock, both having a par value of \$100 per share. The preferred stock shares with the common in the earnings of the company after the payment of a 6 per cent dividend on both classes of stock. It also had equal voting rights with the common stock. The stock of the company is listed on both the New York and Pittsburgh Stock Exchanges. During the year 1930 the total sales of the common stock on the Exchanges amounted to 52,100 shares at prices ranging from a high of $78\frac{1}{2}$ per share in January to a low of $17\frac{1}{2}$ per share in December. In 1931 similar sales amounted to 29,100 shares at prices ranging from a high of $28\frac{1}{2}$ in January to a low of 4 in December. During the month of December 1931, a total of 2,900 shares were sold on the Exchanges, the highest price paid being $6\frac{7}{8}$. On December 28, 100 shares sold at $4\frac{1}{4}$. No sales occurred on December 29. The bid and asked prices on that date were 4 and $4\frac{1}{4}$, respectively; on December 30, 200 shares at 4. In April 1932, 500 shares were sold at prices ranging from a high of $4\frac{3}{4}$ to a low of $3\frac{7}{8}$. On April 23, the last business date preceding that on which the Coalesced Co. acquired the stock from the Union Trust Co., $3\frac{7}{8}$ was the bid price and 4 was the asked price. In May the Exchange prices ranged from a high of 6 to a low of 3, with 400 shares sold. In June 700 shares were sold at prices ranging from 3 to $3\frac{1}{2}$.

At December 30, 1931, the Pittsburgh Coal Co. had paid no dividends on its common stock for a number of years because of lack of earnings. For the same reason the dividends on preferred stock had not been paid in full, and on the date mentioned the accrued but unpaid dividends on preferred stock had reached such a large aggregate per share that the common stock had no prospects as a dividend producer. Its value was speculative. The petitioner's block of 123,622 shares was the largest single block of Pittsburgh Coal Co. stock outstanding and its value lay largely in the strategic position of the holder for voting purposes.

On March 23, 1932, the petitioner gave 34,000 shares of preferred stock of the Pittsburgh Coal Co. to his son and daughter jointly. They immediately contributed the said stock to the Coalesced Co.

The Union Trust Co. was originally formed as a companion company of the Fidelity Title & Trust Co. of Pittsburgh, the purpose being to create a second company which could legally indulge in business matters connected with the affairs of trusts and estates for which the Fidelity Title & Trust Co. was acting. The petitioner became its

first president. Shortly thereafter, various investors in the Union Trust Co. became dissatisfied with the earnings of the company, and the petitioner advocated the opening of banking offices and the entry of the company into a general banking business. This course was opposed by certain of the officers, and petitioner agreed to purchase the stock of all of those who had become dissatisfied. As a result his stockholdings in the Union Trust Co. were substantially increased. About 1898 James A. McKain, the president of the Union Trust Co., died and, at petitioner's insistence and over the protest of numerous officers and stockholders, H. C. McEldowney was named president, in which capacity he continued until his death in 1935. At the time McEldowney was named president of the Union Trust Co. he was assistant cashier of the National Bank of Commerce in Pittsburgh. During the years 1931 and 1932 R. B. Mellon, the petitioner's brother, was a vice president and director of the Union Trust Co. and was also a member of its executive committee. Richard K. Mellon and W. L. Mellon, nephews of the petitioner, were members of the board of directors during the same period, and in 1932 petitioner's son, Paul Mellon, was also elected to membership. A large number of the remaining members of the board were, and had been, closely associated with petitioner in the operation and management of the various business corporations in which petitioner had his chief interests.

In 1869 petitioner's father, Thomas Mellon, established the banking house of T. Mellon & Sons. Upon completion of his studies at the University of Pittsburgh, petitioner went immediately into the bank as an employee. A few months later the father gave petitioner a one-fifth interest in the business of the bank. Some time later Thomas Mellon wrote and signed the following letter:

PITTSBURGH, January 5, 1882.

Proposition to son Andrew for services past, and future.

He to have the entire net profits of the Bank from January 1, 1881, including my salary. The books to be readjusted accordingly. From 1st January instant. He to have entire net profits of bank and pay me an annual salary of two thousand dollars as its attorney and fifteen hundred per annum rent for the banking room; and I to allow him forty-five hundred per annum for attending to my private affairs and estate, selling lots, collecting rents, a/c as done heretofore.

This arrangement to last till superseded by another or annuled by either party.

THOS. MELLON.

After a few years petitioner made a gift to his brother, R. B. Mellon, of a half interest in the bank, the business being thereafter

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carried on as a partnership under the name of T. Mellon & Sons. No writing evidencing the gift was executed.

In 1902 the Mellon National Bank was organized and acquired in exchange for its capital stock the private banking business of the partnership. Petitioner and his brother, R. B. Mellon, immediately exchanged the stock so received for stock of the Union Trust Co. The latter company has continued as the owner of 98 percent or more of the stock of the Mellon National Bank down to the present date. Upon its organization the petitioner became the president of the Mellon National Bank and continued to serve in that capacity until shortly before he became Secretary of the Treasury on March 4, 1921.

In December of 1932 petitioner had under discussion with Johnson the matter of his income tax return for that year, and Johnson presented a list of securities and recommended their sale. Petitioner directed that they be sold. On December 29, 1932, Johnson having first discussed the matter with H. C. McEldowney, delivered the securities to Carl R. Korb, a vice president of the Union Trust Co. Korb took the matter up with McEldowney and was told that he had agreed to purchase the securities at the market. Korb accepted delivery of the certificates and issued formal confirmation of the purchases and delivered Union Trust Co. checks covering the purchase price.

In February 1933 Korb received instructions from McEldowney to dispose of the securities acquired from the petitioner in December. The instructions were to sell at the market price. Korb called Johnson and made inquiries about a purchaser. Johnson asked that he quote him a price. On receiving the quotations from Korb, Johnson objected to the price at which 40,000 shares of American Locomotive Co. common stock were quoted. These shares had been priced at \$200,000 in the December transaction, but were quoted by Korb at \$240,000. Johnson agreed to pay \$215,000, or 5-3/8 per share, instead of \$6 per share, the price at which the shares were then quoted on the Exchange. After consultation with McEldowney, Korb was instructed to accept Johnson's proposal. As a result the entire block of securities in question was sold to the Coalesced Co. under date of February 28, 1933, for a total sum of \$318,859.63. Part of the purchase price of the securities was paid by the Coalesced Co. out of funds then on hand, while the remainder was paid from the proceeds of a loan from the Union Trust Co. in the amount of \$218,859.63. The securities acquired were posted as collateral. The prices received by the petitioner from the Union Trust Co. in December, the prices paid to the Union Trust Co. by the Coalesced Co. in February, and the amount at which the securities in question were taken by

the Union Trust Co. as collateral for the Coalesced Co.'s loan, are shown as follows:

Name of security	Price paid to petitioner by Union Trust Co.	Price paid to Union Trust Co. by Coalesced Co.	Value as collateral to loan from Union Trust Co.
40,000 shares of American Locomotive Co., common.....	\$200,000.00	\$215,000.00	\$240,000.00
5,500 shares Missouri Pacific R. R. Co., preferred.....	19,937.50	19,250.00	16,500.00
5,500 shares United Porto Rican Sugar Co., preferred.....	6,500.00	6,500.00	No value.
\$208,000 par value United Porto Rican Sugar Co. gold notes.....	10,400.00	8,320.00	4,160.00
\$219,000 par value Missouri Pacific R. R. Co. gold bonds.....	¹ 16,698.75	¹ 13,687.50	13,140.00
1,250 shares Aluminum Co. of America, preferred.....	50,000.00	52,187.50	50,000.00

¹ Plus accrued interest.

The 1,250 shares of Aluminum Co. of America preferred stock represented 1,000 shares belonging to Paul Mellon and 250 shares belonging to his mother.

All of the securities included in the above transaction were listed securities except the Sugar Co. stocks. At the time of the transaction with the Union Trust Co. on December 29, 1932, the United Porto Rican Sugar Co. gold notes were in default.

In December of 1933, Johnson again conferred with petitioner in regard to the sale of certain securities then on hand. The securities selected were \$247,000 par value German Government external 7 percent bonds due in 1949; \$33,000 par value Aluminum Limited 5 percent bonds due in 1948; \$196,000 par value Interboro Rapid Transit 5 percent bonds due in 1966; \$17,000 par value B. & O. convertible 4½ percent bonds due in 1960. Johnson advised the petitioner that it had been agreed by the directors of the Coalesced Co. that that company could use the securities in question, and after some discussion it was agreed that the petitioner should sell the bonds in question through the brokerage firm of Moore, Leonard & Lynch and that a matched order to buy the bonds should be placed with the same firm at the same price on behalf of the Coalesced Co.

Accordingly, on December 28, 1933, the bonds were sold through Moore, Leonard & Lynch for the petitioner and at the same time purchased through the same firm for the Coalesced Co. The petitioner sustained a loss on the transaction in the amount of \$63,533.23. The bonds were delivered to the brokerage firm by Scott and Wynkoop, the former being an employee of petitioner and the latter an employee of Coalesced Co. The same bonds were delivered by the brokers to Scott and Wynkoop for delivery to the Coalesced Co.

All of the securities acquired by the Coalesced Co. during the years 1931, 1932, and 1933 from the Union Trust Co. were securities which petitioner had sold to the Union Trust Co. at a loss, preliminary to

the preparation of his income tax return for the year or years in which the transaction with the Union Trust Co. occurred, except the block of 1,250 shares of Aluminum Co. of America preferred stock, which had belonged to Paul Mellon and his mother and which had been included with the securities transferred by petitioner to the Union Trust Co. on December 29, 1932.

Over a period of years prior to the incorporation of the Mellon National Bank, and independent of the banking business, petitioner and his brother, R. B. Mellon, had invested jointly in real estate and in large amounts of securities. The records of these investments were kept in a set of books referred to as the "Joint Account" and, prior to the incorporation of the bank, specifically designated as "A. W. Mellon & R. B. Mellon." After the incorporation of the bank the Joint Account was known as "T. Mellon & Sons" until March 1, 1918, when the following memorandum of agreement was entered into between petitioner and R. B. Mellon:

WHEREAS, A. W. MELLON and R. B. MELLON have, for many years past, owned jointly certain real estate, stocks, bonds and other securities, and interests in real estate, the same being enumerated in the Schedule hereto annexed, and, for their own convenience in handling such investment, they have adopted and used the name of T. MELLON & SONS, under which name the properties have been carried; and

WHEREAS, the understanding between the parties respecting their interests in said properties is evidenced only by the books of account, which have been kept respecting the same, and they are desirous now by written agreement, of evidencing the arrangement under which said properties are owned, their respective interests therein, and also changing the name used to identify said accounts from T. Mellon & Sons to A. W. Mellon & R. B. Mellon, so as to avoid any significance of partnership liability, obligation or power.

Now, THEREFORE, it is agreed between the parties as follows:

(1) The moneys with which to acquire a part of the said properties having been advanced in unequal proportions by the respective parties, the understanding has been and is that, in the joint account, credit shall be given to each of the parties for their respective individual advancements of moneys to the purposes of the joint account, and interest shall be allowed thereon in accordance with the practice heretofore existing.

(2) Additional properties may be purchased and added to said joint account by the concurrence of both parties hereto, and in like manner further advancements for the purpose of making such purchases, or for the protection of any investment carried in said joint account may be made by either party hereto, and the same shall be added to and treated in the same manner as advancements heretofore made.

(3) The properties so owned jointly and the income therefrom shall be liable for the re-payment to the parties respectively of all such advancements, together with interest; and also for the payment or performance of all obligations incurred by the parties hereto in connection with the properties so owned jointly. For the purpose of securing such repayment and performance, all shares of stock and securities so owned jointly shall be kept separate and apart from the other securities and properties owned by the parties hereto, and shall be placed in the

custody of such party or parties as may, from time to time, be mutually arranged by the parties hereto, and all shares of stock, securities and properties belonging to said joint account shall be deemed charged with a lien and pledged to secure the payment to the parties of their respective advancements (with interest) and the payment or performance of the other obligations mentioned.

(4) For the convenience of the parties the custody and handling all of said properties so owned shall be carried on in the names of the parties hereto, jointly, viz: A. W. Mellon and R. B. Mellon.

(5) It is distinctly stipulated and agreed that the arrangement heretofore existing and now defined by this present agreement exists entirely for the convenience of the parties, shall not constitute a partnership, shall not be deemed to give to either party the powers of a partner nor authorize the carrying on of any trade or business, but the relation is limited strictly to the custody, protection and handling of the properties herein mentioned, owned jointly by the parties hereto, and their respective rights therein.

(6) Subject to the payment to the respective parties of their advancements (with interest) as above mentioned, the interest of the parties in the said properties and the income and proceeds thereof is an undivided one-half interest to each of said parties.

WITNESS the due execution hereof this 1st day of March, 1918.

After the execution of the above agreement, petitioner and his brother continued as theretofore to invest equally in real estate and various securities. At no time did they engage in business as dealers. Title to real estate was carried in a single name for convenience while securities were carried in the name of petitioner and his brother, separately, one-half in the name of each, or in the names of their nominees. In making purchases or sales for the Joint Account the interest of each owner was indicated. The bank account of the Joint Account was carried in both names. Petitioner and his brother each gave the other a written plenary power of attorney and both names were used in executing necessary documents.

The certificates representing securities carried in the Joint Account were, so far as possible, equally divided, one-half to each, petitioner and R. B. Mellon, and placed in two separate pouches marked with the initials of the respective owner, the pouches both being kept in a safety deposit box held in the name of A. W. & R. B. Mellon. When money was required it was supplied one-half by each owner. At the end of each year statements were prepared and furnished the owners showing all receipts and expenditures and the holdings of each owner in the Joint Account. If either petitioner or his brother borrowed from the Joint Account, interest was charged on such loan.

During the taxable year the Joint Account was largely managed by R. B. Mellon through H. A. Phillips, an employee, who acted under a power of attorney.

No partnership returns were ever filed as to the Joint Account, and petitioner and his brother, each in his individual return, reported

half the income and claimed deductions of half the expenses and half the losses arising from the transactions carried in the Joint Account.

The relationship between A. W. Mellon and R. B. Mellon, evidenced by the Joint Account, was not a partnership.

In his tax return for 1931 petitioner deducted as a capital loss the sum of \$5,672,189.95, and as an ordinary loss the sum of \$5,766.30 on account of the above described sale of common stock of the Pittsburgh Coal Co. Respondent disallowed the deductions, assigning as a reason that "the disposal of these stocks do not appear to be transactions on which losses may be recognized for income tax purposes." In his answer in this proceeding respondent charged that the above sale was fraudulent.

The sale by petitioner of 123,622 shares of the common stock of the Pittsburgh Coal Co. was a completed valid sale.

Western Public Service Corporation Stock.—In December 1928 petitioner and his brother, R. B. Mellon, by subscription each acquired 7,500 shares of stock in the Western Public Service Corporation at \$15 per share, or at a cost to petitioner of \$112,500, a check for \$225,000 on the Joint Account being given to cover the purchases of both. In February 1929 petitioner and his brother each acquired from the Union Trust Co. 20,000 shares of Western Public Service Corporation at \$22 per share, or at a cost to petitioner of \$440,000. On December 12, 1930, petitioner and his brother each acquired, by subscription, 4,500 additional shares at \$15 per share, or at a cost to petitioner of \$67,500. Payment was made through the Joint Account in each instance and thereafter the securities were carried in such account, one-half in the name of each, the petitioner and his brother. The total cost to petitioner of the 32,000 shares thus acquired was \$620,000. Thereafter petitioner and his brother each disposed of 5,000 shares out of those purchased in February 1929 to various of their employees at cost, leaving 27,000 shares owned by each on December 2, 1931.

On December 2, 1931, R. B. Mellon, acting for himself and his brother, petitioner here, sold the 54,000 shares of Western Public Service Corporation stock to the Union Trust Co. for \$4 per share, or a total of \$216,000. The transaction was arranged with H. C. McEldowney. The delivery of the stock was made to S. S. Liggett, a vice president of the Union Trust Co. The Trust Co. issued formal confirmation of the purchase. The check for the purchase price was deposited in the Joint Account of A. W. and R. B. Mellon.

The Western Public Service Corporation common stock was listed on the Pittsburgh Stock Exchange and during 1931 the total sales amounted to 247,000 shares, ranging from a high of $14\frac{1}{2}$ to a low of $2\frac{1}{8}$ per share. In December 54,595 shares were sold at prices rang-

ing from $4\frac{1}{2}$ per share down to $2\frac{7}{8}$. During the first four days of December, a total of 8,140 shares were sold at prices ranging from $4\frac{3}{8}$ per share to a low of 4. In January 1932, 6,310 shares were sold at prices ranging from a high of $4\frac{1}{2}$ to a low of $3\frac{1}{4}$ per share. In February, 4,727 shares were sold at prices ranging from a high of \$5 per share to a low of \$4.

On January 8, 1932, R. B. Mellon, acting for himself and his brother, purchased 54,000 shares of Western Public Service Corporation stock from the Union Trust Co., paying \$4.075 per share, or \$220,050 for the lot. The check in payment was drawn on the Joint Account.

Thereafter the stock was placed in the Joint Account, being held 27,000 shares in the name of H. A. Phillips and 27,000 shares in the name of J. F. Sturgeon. Phillips and Sturgeon were employees and nominees of petitioner and his brother, in whose names stocks were often held.

As to 4,500 shares purchased December 12, 1930, at a cost of \$67,500 and sold for \$18,000, petitioner, in his return for 1931, claimed an ordinary loss of \$49,500. As to the remainder, 22,500 shares, having a cost to him of \$442,500, he claimed a capital loss of \$352,500. Respondent disallowed the losses claimed, assigning the same reason as in the case of the stock of Pittsburgh Coal Co., "the disposal of these stocks do not appear to be transactions on which losses may be recognized for income tax purposes." In his answer in this proceeding respondent charged that the sale was fraudulent.

Both at the time of the sale to the Union Trust Co. and of the sale by the Union Trust Co., R. B. Mellon was a vice president of the Union Trust Co. He was also a director and member of the executive committee of the Union Trust Co. and, as such, was present at the meetings of each body when approval of the above transactions was voted.

In at least four or five other instances the Union Trust Co. bought securities and between thirty and ninety days thereafter sold them back to the person from whom it had purchased them. This usually occurred in the months of December and January. The above transaction involving Western Public Service Corporation stock is the only instance in the record in which R. B. Mellon, acting for petitioner, sold stock to the Union Trust Co. and, after the expiration of 30 days, purchased the same, or substantially identical, property.

R. B. Mellon had full authority to act on behalf of petitioner in the above transaction, but petitioner had no personal knowledge of the sale or purchase until 1933, when his 1931 tax return was being questioned.

The sale by R. B. Mellon, acting for petitioner and himself, of 54,000 shares of the stock of Western Public Service Corporation was a valid legal sale.

Sales to the Ascalot Co.—On December 1, 1931, petitioner owned 6,200 shares of American Locomotive Co. stock acquired by purchase in 1930 and 1931 at a cost of \$230,292.50; 3,900 shares of Texas Gulf Sulphur Co. stock acquired by purchase in 1930 at a cost of \$209,420; 1,900 shares of United Light & Power Co. preferred stock acquired by purchase, 1,400 shares on November 7, 1929, at a cost of \$131,780, and 500 shares on November 14, 1930, at a cost of \$49,100; and 2,500 shares of Westinghouse Electric & Manufacturing Co. stock acquired by purchase in May 1931 at a cost of \$153,212.50. The aggregate cost of all the above stock was \$773,805.

On December 1, 1931, petitioner sold the above shares of stock to the Ascalot Co. at the following prices:

6,200 shares American Locomotive.....	\$49,600
3,900 shares Texas Gulf Sulphur.....	100,400
500 shares United Light & Power.....	25,000
1,400 shares United Light & Power.....	70,000
2,500 shares Westinghouse Electric & Mfg.....	82,500
Total	328,500

The prices at which the above stocks were sold were, in each instance, the fair market price of the stock on the date of sale.

The losses so sustained were claimed by petitioner as deductions in his 1931 tax return. These deductions were disallowed by respondent and in his answer it is charged that the sales were fraudulent. In his brief and on oral argument respondent abandoned the charge of fraud as to these transactions with the Ascalot Co.

The Ascalot Co. was incorporated under the laws of Delaware on July 11, 1930, with an authorized issue of 2,000 shares of stock of an aggregate par value of \$200,000. On July 12, 1930, Ailsa Mellon Bruce, daughter of petitioner, exchanged securities having a face value of approximately \$7,000,000 for all of the capital stock of the Ascalot Co. At all times since organization Ailsa Mellon Bruce has been the sole stockholder in the Ascalot Co. At various other times she contributed other securities to the company, substantially all of the securities so contributed having come into her possession as gifts from petitioner. A relatively small number were acquired by purchase.

At the organization meeting the following were elected directors and officers:

D. K. E. Bruce, president
Paul Mellon, vice president

36 B. T. A.

Ailsa Mellon Bruce, treasurer
H. M. Johnson, assistant treasurer
D. D. Shepard, secretary

On January 21, 1931, H. A. Phillips was elected assistant secretary. The executive committee consisted of Bruce, Johnson, and Shepard.

Petitioner has never owned any stock, nor been an officer or director, nor had any part in the direction or management of the Ascalot Co.

All of the earnings of the Ascalot Co. have been absorbed by its sole stockholder, Ailsa Mellon Bruce.

Petitioner entered into no contract or option within 30 days before or after the sale on December 1, 1931, to reacquire any of the above mentioned stocks and never reacquired any interest in the American Locomotive, Texas Gulf Sulphur, or United Light & Power stocks. On July 1, 1933, petitioner bought from the Ascalot Co. at the then market price, 2,500 shares of Westinghouse Electric & Manufacturing Co. stock, paying \$118,125 therefor, this sale resulting in a profit of \$35,725 to the Ascalot Co. Petitioner still owns the Westinghouse stock then acquired.

The above sales by petitioner of stock of the American Locomotive Co., Texas Gulf Sulphur Co., United Light & Power Co., and Westinghouse Electric & Manufacturing Co. to the Ascalot Co. were valid and bona fide sales.

II.—*The Ownership of the Bank Stocks.*

On March 4, 1921, petitioner became Secretary of the Treasury of the United States. On or about January 25, 1921, petitioner was advised by counsel that, as a prerequisite to accepting the above position, by virtue of which he would become, *ex officio*, chairman of the Federal Reserve Board, it would be necessary for him to divest himself of the ownership of all bank stocks. At that time he was the owner of a large block of stock of the Union Trust Co. and lesser amounts of stock in other banks. On February 7, 1921, petitioner purchased 82 shares of stock of the Union Trust Co. at a price of \$2,750 per share. These shares had formerly been owned by the estate of H. C. Frick. At the same time petitioner's brother, R. B. Mellon, bought 185 shares of the same stock. The two purchases brought petitioner's holdings in stock of the Union Trust Co. to 3,300 shares and those of R. B. Mellon to 1,000 shares.

On March 1, 1921, petitioner and his brother, R. B. Mellon, executed a contract of sale in the following form:

AGREEMENT, Made this first day of March, A. D. 1921, between ANDREW W. MELLON, of the City of Pittsburgh, Pennsylvania, of the first part, and RICHARD B. MELLON, of the same City, of the second part:

36 B. T. A.

WITNESSETH:

That the first party hereby sells to the second party for the consideration hereinafter set forth, the following shares of stock in the several corporations enumerated, and for the prices per share set opposite to each block of stocks, as shown in an exhibit hereto attached initialed by the parties hereto.

The second party agrees to pay to the first party the several amounts set opposite each block of stock, aggregating the total sum of Ten million, five hundred twenty thousand, four hundred ninety five and no one-hundredths (\$10,520,495.00) Dollars, in six months after demand for such payment by said first party, or his legal representatives, and to pay interest thereon at the rate of five and one-third per centum, annually, in quarterly installments.

As there are accruing upon said shares dividends maturing and payable at different dates, therefore, for expediency, it is agreed that the first party shall be paid the accruing dividend when paid by each of the said companies, and interest upon the portion of the purchase price represented by said block of stock shall begin to run from the date of payment of said dividend.

Payments may be made by the second party on account of the principal debt at any time prior to the demand for payment as aforesaid.

The certificates for said shares of stock shall be transferred upon the books of the companies to said second party, shall by him be endorsed in blank, in due form, and shall be deposited with the Union Trust Company of Pittsburgh, as custodian, to secure the payment of the consideration, under an authority, duly executed by both parties, reciting the trust under which said shares are held.

It is further agreed between the parties that in the event of the death or legal disability of the first party before payment of the consideration, the second party may relieve himself of the obligation of this agreement by returning the said shares of stock to the legal representatives of the first party and adjusting the unpaid interest and accruing dividends, and thereupon the obligation of the second party under this agreement shall be terminated, except for an adjustment of interest and dividends accruing.

It is further agreed between the parties hereto that in the event of the death or legal disability of the second party, his legal representatives may in like manner terminate this agreement by delivering the certificates of stock to the first party, or his legal representatives, and thereupon the obligation of the second party shall be terminated, except for an adjustment of interest and dividends accruing.

It is further agreed between the parties hereto that in the event of the death or legal disability of the second party, the first party, or his legal representatives, shall have the option to terminate this agreement by re-taking the shares of stock hereinbefore set forth and delivering an acquittance to the second party's legal representatives of obligation for the purchase money aforesaid, due adjustment being made between interest unpaid and accruing dividends.

Witness:

[Signed] H. M. JOHNSON

[Signed] A. W. MELLON

R. B. MELLON

There was appended a list showing the number of shares, the price per share, the selling price of each stock, and the aggregate selling price of the entire list of stocks in 24 banks.

On the same date there was executed between petitioner, his brother, and the Union Trust Co. an agreement providing for the deposit of

the stocks sold with the Union Trust Co. as custodian and agent of petitioner, the Union Trust Co. to hold the stock as pledge and security for the payment of the principal and interest provided in the agreement above referred to. The certificates were to be endorsed in blank. The agreement provided for the sale of the security in event of default of payment of principal or interest and the accounting for the proceeds. It also provided for the release of any part of the stock on written notice by petitioner and his brother.

The two above agreements were drawn by counsel for petitioner and R. B. Mellon and were prepared after a proposed plan of exchanging the bank stocks for other types of stocks was abandoned due to the difficulty of fixing the exchange value of the other stocks.

After the agreements were executed appropriate entries were made in the books of the parties reflecting a sale and purchase. In petitioner's books these entries were made in the "R. B. Mellon" account. Entries were likewise made from time to time thereafter in R. B. Mellon's books to reflect interest paid to petitioner and dividends received by R. B. Mellon, and in petitioner's books to record interest received.

In his tax return for 1921 petitioner reported gains and losses arising from the sale of the bank stocks covered by the agreement of March 1, 1921, the net result being a loss of \$23,805.83. Upon audit by the Bureau of Internal Revenue various changes were made, resulting in a net profit from the March 1, 1921, transaction of \$206,325. This adjustment, with others made in the 1921 return, resulted in an additional tax of \$132,836.21, which was paid by petitioner.

On April 1, 1927, the dividend rate on stock of the Union Trust Co. was increased from 35 percent to 50 percent. Shortly thereafter, without petitioner's knowledge, petitioner's financial secretary suggested to R. B. Mellon that the interest rate provided by the agreement for sale of the bank stocks should be increased. R. B. Mellon agreed to the proposal and the interest rate was changed from 5 $\frac{1}{2}$ percent to 7 percent, effective July 1, 1927. In the year 1929 the interest rate was increased from 7 percent to 8 percent, effective April 1, 1929.

At various times petitioner loaned R. B. Mellon money to make investments and for other business purposes. The amounts of such loans were charged to the R. B. Mellon account in petitioner's books and subsequent repayments were there credited. During the period from 1921 to 1930 R. B. Mellon used some of the money thus borrowed to purchase additional bank stocks. The stocks so purchased were deposited with the trustee as collateral under the agreement of March 1, 1921. Other amounts loaned were used to purchase additional

stock upon the exercise of stock rights, such new stock being deposited as additional collateral. New stock arising from stock dividends on the stock so held was likewise deposited.

Under date of June 20, 1930, petitioner, R. B. Mellon, Paul Mellon, and the Union Trust Co. executed an agreement by the terms of which R. B. Mellon sold, assigned, and transferred to Paul Mellon all his rights under the two agreements of March 1, 1921, and in and to all securities subject to such agreements. Paul Mellon, on his part, assumed all the obligations and liabilities of R. B. Mellon under such agreements, including the obligation to pay the purchase price of \$10,520,495, with interest thereon. Petitioner consented to the assignment and transfer and acknowledged receipt of all interest due to date from R. B. Mellon. The substitution of Paul Mellon for R. B. Mellon in the indebtedness was made at the request of R. B. Mellon.

Appropriate book entries were made in petitioner's accounts to reflect the release of R. B. Mellon from the obligation and the assumption thereof by Paul Mellon. On the same day, June 20, 1930, Paul Mellon was charged and R. B. Mellon credited with two items, one of \$253,000, a second of \$17,900, on account of funds loaned by petitioner to R. B. Mellon, such funds having been used to acquire additional bank stocks and the loans being unpaid. Under date of July 2, 1930, R. B. Mellon paid the sum of \$351,346.46, which amount was entered on petitioner's books as "Interest—final payment." With the payment of this sum the amounts received by R. B. Mellon as dividends and the amounts paid to petitioner as interest were brought into exact balance. The payment was made without the knowledge of petitioner and arose from the desire of R. B. Mellon not to profit by the 1921 transaction.

After June 20, 1930, Paul Mellon paid petitioner interest on the obligation at the rate of 7 percent. All dividends paid during 1931 were paid to Paul Mellon and accounted for by him in his tax return. All interest received by petitioner, in the taxable year and prior years, was returned by him for taxation. No demand was ever made for payment of the principal sum nor was any payment on account thereof made.

On March 23, 1932, petitioner, by an instrument in writing, forgave Paul Mellon all indebtedness owed by him to petitioner excepting the sum of \$2,000,000 which was to be represented by 40 promissory notes. The notes, bearing the above date, consisted of two series, the first of 20 notes of \$45,000 each and the second of 20 notes for \$55,000 each, all maturing quarterly. Appropriate entries were made to reflect the forgiveness of the debt in the amount of \$8,791,395 and the conversion of the remaining indebtedness into serial notes.

On March 25, 1932, Paul Mellon caused a corporation, named Smithfield Securities Corporation, to be organized under the laws of Delaware. He transferred to this corporation all of the bank stocks owned by him, excepting 1,300 shares of the Union Trust Co., in consideration for 1,000 shares of stock of the Smithfield Securities Corporation. A short time later, acting on petitioner's suggestion, Paul Mellon gave his sister, Ailsa Mellon Bruce, one-half of the 1,000 shares owned by him in the Smithfield Securities Corporation. Thereafter Paul Mellon and his sister each exchanged the 500 shares of Smithfield for 10,000 shares each of Coalesced common stock. On May 10, 1932, petitioner transferred to his children, Paul and Ailsa, as a gift an account receivable of \$1,250,000 owed to him by R. B. Mellon. They immediately contributed the same to Smithfield.

Petitioner has never been a stockholder, officer, or director in the Smithfield Securities Corporation.

On April 4, 1932, Paul Mellon paid petitioner \$250,000, an amount sufficient to equalize the difference between the dividends received by him on the bank stocks and the interest paid to petitioner. This payment was made voluntarily and without the personal knowledge of petitioner. The payment was entered on petitioner's books as "Interest in full to 3/23/32" and reported by petitioner in his 1932 tax return.

On January 30, 1933, Paul Mellon filed a claim for refund of taxes paid for the taxable year 1931, in which he asserted that he had erroneously failed to claim deductions on account of the worthlessness of certain bank stocks owned by him in that year. The claim was allowed in part and rejected in part. A certificate of overassessment for \$375 was issued and paid, with interest of \$32.86. The stock as to which the certificate of overassessment was issued consisted of 12½ shares of the Farmers & Merchants Bank of West Newton, Pennsylvania, acquired by Paul Mellon by the transaction of June 20, 1930.

By amendment of his answer respondent alleged in effect that in 1931 petitioner was the owner of the above bank stocks; that he received, actually or constructively, dividends in the amount of \$804,466; that he did not report such sum as dividends but reported the sum of \$755,397.64 thereof as interest received; that petitioner was entitled to a deduction which he did not claim on account of the worthlessness of the stock of the Farmers & Merchants Bank in the amount of \$1,875; that accordingly he understated his income in the amount of \$47,193.36.

During the taxable year 1931 petitioner was not the owner of the bank stocks listed in the contract of March 1, 1921.

III.—*The McClintic-Marshall Corporation—Bethlehem Steel Corporation Transaction.*

The McClintic-Marshall Construction Co. was incorporated under the laws of Pennsylvania, on March 20, 1900, for the purpose of engaging in the business of fabricating and erecting structural steel, a business commonly referred to hereinafter as the fabricating business. Its incorporators were A. W. Mellon, R. B. Mellon, H. H. McClintic, and C. D. Marshall. On March 1, 1913, the corporation had outstanding 30,600 shares of common stock and 3,791 shares of preferred stock, of which the petitioner owned 9,030 and 600 shares, respectively. On December 8, 1921, a 100 percent dividend was declared on both the common and preferred stock, increasing the stock of the petitioner to 18,060 shares of common stock and 1,200 shares of preferred stock.

On December 14, 1922, a dividend of 3,885 shares of preferred stock was declared on the outstanding common stock. On the 18,060 shares of common stock then held by him, the petitioner received 1,147 shares of the preferred stock so distributed. It is stipulated by the parties that, solely for the purpose of apportioning the basis of petitioner's 18,060 shares of common stock between those shares and the 1,147 shares of preferred stock on the date of distribution of the latter and wholly without prejudice to the right of either party to prove or contend otherwise in any other proceeding or for any other purpose in this proceeding, the 18,060 shares of common stock and the 1,147 shares of preferred stock had a fair market value of the same amount per share and that accordingly the correct amount of petitioner's basis prior to the distribution of the 1,147 shares of preferred stock for determining gain or loss upon the subsequent sale or other disposition of the shares of common stock is to be apportioned between the 1,147 shares of preferred stock and the 18,060 shares of common stock in the proportion of 5.97178 per centum and 94.02822 per centum, respectively.

For a number of years the McClintic-Marshall Construction Co., commonly referred to hereafter as the Construction Co., operated its business directly. Later, however, its operations were carried on to a large degree through subsidiary companies which it had acquired or organized. In the course of its operations it had accumulated substantial properties and assets not used directly in the fabricating business. These assets included corporate stocks and bonds, accounts with various corporations, and cash. Some of the securities had been acquired as compensation for work done under various construction contracts.

In the annual report of C. D. Marshall to the stockholders of the Construction Co., under date of February 24, 1920, the following

statement appears: "As a number of our investments do not have any direct bearing on the manufacturing operation of the McClintic-Marshall Construction Company, and the Riter-Conley Manufacturing Company, I recommend that the following investments be sold at actual cost to the McClintic-Marshall Corporation, to be organized as a holding company, and for the purpose of taking care of investments that it may be to our interest to acquire in the future." The stocks of five companies were listed at a cost or value totaling \$5,667,104.

The McClintic-Marshall Corporation, hereinafter referred to as McClintic-Marshall, was organized under the laws of Delaware on December 24, 1926. It issued its capital stock, both common and preferred, on December 29, 1926, to the respective holders of the common and preferred stock of the McClintic-Marshall Construction Co., share for share, the petitioner receiving for his stock in the Construction Co. 18,060 shares of common stock and 2,347 shares of preferred stock of McClintic-Marshall. The preferred stock was 6 percent participating stock. On December 21, 1928, at an adjourned meeting of the stockholders, the certificate of incorporation was amended so as to provide for two issues of preferred stock. The preferred stock then outstanding constituted the first issue and was subject to redemption at the option of the company at \$100 per share, or book value if the book value exceeded that amount. The second issue was 6 percent nonparticipating stock and was redeemable at the option of the company at \$105 per share.

Shortly after the amendment of the certificate of incorporation the preferred stock outstanding, all first issue stock, was called for redemption at \$323.21 per share, represented by the company to be the book value. In the alternative the holders of preferred shares outstanding were given the privilege of exchanging their shares for preferred shares of the second issue, at the rate of 3.2321 new shares for each of the old shares. All of the preferred stockholders accepted the offer and made the exchange, except the estate of George W. Corbett, owner of 500 shares. Instead of surrendering the stock in accordance with the call, the estate instituted suit in a chancery court in Delaware alleging that the call price fixed by the board of directors did not truly reflect book value, that if the assets were properly shown on the books the book value of the stock would be at least \$1,250 per share, and praying that McClintic-Marshall be required to prepare and file a true and correct statement of assets and liabilities and that a decree be entered establishing the proper redemption price. This suit was pending throughout the year 1930 and was not settled until July 22, 1931.

The petitioner exercised the option to exchange his preferred stock of the first issue for preferred stock of the second issue and received

7,585 shares of the latter. In late December 1930 or in January 1931, he acquired by purchase from McClintic-Marshall 131 additional shares of the second issue, at a cost of \$130 per share.

Upon its organization in 1926, McClintic-Marshall acquired from the Construction Co. the stock of its operating subsidiaries. It also acquired all other assets of the Construction Co., including the securities and assets not directly used in the fabricating business, except such properties as were retained by the Construction Co. for direct operation. At June 30, 1930, McClintic-Marshall owned the stock of sixteen companies, including operating companies, to the extent of 100 percent.

Along in June or July of 1930, Eugene G. Grace, president of the Bethlehem Steel Corporation, hereinafter referred to as Bethlehem, suggested to C. D. Marshall, chairman of the board of directors of the McClintic-Marshall Corporation, the idea of the acquisition by Bethlehem of the fabricating business and the assets connected therewith of the McClintic-Marshall Corporation and its subsidiaries. Bethlehem owned directly and indirectly the stocks of a large group of affiliated corporations, sixty or more in 1931, carrying on various businesses such as coal mining, iron mining, the manufacture, production, and fabricating of steel and steel products, transportation, and shipbuilding. At that time the fabricating business of the Bethlehem group was third in size in the United States and it was the desire of Bethlehem to expand that business by the acquisition of the fabricating business and assets of McClintic-Marshall. There was no suggestion or desire on the part of Grace for the acquisition of what may be termed as the investment or nonfabricating assets of McClintic-Marshall. The discussions continued from time to time during the summer of 1930 and as the result of a meeting held at Bethlehem, Pennsylvania, in August, Price, Waterhouse & Co. was instructed to make an examination of the books and accounts of McClintic-Marshall and its subsidiaries and to prepare a consolidated statement of the assets and liabilities of the group as at June 30, 1930, and a consolidated profit and loss statement for the three years ended December 31, 1929, and the six months ended June 30, 1930. This examination and report was to be made for the purpose of supplying data from which a figure might be obtained at which Bethlehem would acquire and McClintic-Marshall would dispose of the fabricating business and assets.

The original report was submitted under date of September 13, 1930, and supplemental reports were made under dates of September 17 and 25 and October 6, 1930. The examinations made and the reports submitted did not cover the assets and liabilities or the profits and losses of the subsidiary and affiliated companies in which Bethlehem was not interested. Certain other assets, including investments

in stocks and bonds, advances to subsidiary or affiliated companies, the income therefrom, and the related items of expenses were also excluded from the examinations and reports.

Before the end of October 1930, it was understood in general terms that Bethlehem or nominees, subject to the drafting of the contracts and the working out of the details of the transaction, would acquire the fabricating business and the assets connected therewith of McClintic-Marshall and its subsidiary companies and would pay therefor 240,000 shares of Bethlehem common stock and \$8,200,000, face value, of Bethlehem 4½ percent serial gold bonds and would assume the liabilities properly allocable to the fabricating business of McClintic-Marshall and its subsidiaries and an outstanding \$12,000,000 bond issue of the McClintic-Marshall Construction Co. It was also agreed that McClintic-Marshall should have the dividends and interest on the Bethlehem stock and bonds from October 1, 1930. After the general understanding was reached in October of 1930, the attorneys for the parties were instructed to prepare the necessary contracts. They were further instructed to prepare the contracts in such a way, if possible, as to avoid any tax to McClintic-Marshall or its stockholders.

It was the understanding that pending the drafting of the contracts there should be no changes in the business and assets of McClintic-Marshall except such changes as should take place in the ordinary course of business. At some date prior to December 5, 1930, however, representatives of McClintic-Marshall stated to Bethlehem that it was advisable for "Pennsylvania tax reasons" to retain Pennsylvania real estate of substantial value and suggested that a parcel of real estate owned by the Kenilworth Land Co. in the city of Pittsburgh and known as the Water Street property was most suitable for that purpose. It was proposed that this property be conveyed to McClintic-Marshall and cash in an amount equivalent to its value substituted among the assets Bethlehem was to receive.

The plan of procedure originally contemplated was that the McClintic-Marshall Corporation should transfer that portion of its assets which Bethlehem was to acquire to a new corporation in exchange for the capital stock of the new corporation and the new corporation would then transfer the assets so received to Bethlehem for the consideration which had been agreed upon, and immediately thereafter would distribute the Bethlehem stock and bonds so received to its stockholders and be dissolved.

On the 27th day of October 1930, the Union Construction Co., sometimes referred to as Union, was organized under the laws of Delaware as the new corporation to be used in effecting the transfer of the fabricating business and assets, under the agreement with Bethle-

hem. Its authorized capital stock was 50 shares, which had a par value of \$100 per share. At the time of organization McClintic-Marshall subscribed for 10 shares of stock for cash at par.

The attorneys proceeded with the drafting of the contracts in an effort to set forth what they understood to be the agreement of the parties. Under the earlier drafts of the contracts it was provided that the assets of McClintic-Marshall in which Bethlehem was interested should be conveyed to the Union Construction Co. for 40 of its 50 authorized shares of capital stock, which 40 shares should be issued directly to the stockholders of McClintic-Marshall, and thereafter the Union Construction Co. should transfer the assets so received to Bethlehem or "nominees" for the consideration previously stated and should in turn distribute to its stockholders the Bethlehem stocks and bonds acquired in that transfer. In the case of certain of the subsidiary companies, seven in number, it was provided that the properties and assets, and not the stock, should be acquired. It was also provided that all acts of the Union Construction Co. and the seven subsidiary companies, except as otherwise provided, relating to dissolution and liquidation should be subject to approval of counsel for Bethlehem.

In addition to the preparation of the contracts covering the transaction in general between Bethlehem and McClintic-Marshall, the attorneys proceeded with the preparation of forms of conveyance to be executed in respect of the real estate located in the various sections of the United States and standing in the name of McClintic-Marshall and seven of its subsidiary companies. By December 20, 1930, the drafting of these deeds had been nearly completed.

On or about December 1, 1930, Price, Waterhouse & Co. was asked to extend its examination of the affairs of McClintic-Marshall for the purpose of making a certified balance sheet. On previous occasions its investigations had covered only the assets included in the Bethlehem transaction and it had been denied access to the records covering the investment assets, or "Omitted Assets," as they were usually referred to in the conferences and papers of the parties. This further report was ordered at the instance of Bethlehem counsel for the purpose of furnishing information as to the "Omitted Assets" and the liabilities of McClintic-Marshall. The report was submitted to the directors of McClintic-Marshall under date of January 5, 1931, and in addition to the balance sheet included a statement designated "Contingent or undetermined liabilities as at June 30, 1930," and listed ten items of possible liabilities.

At some time between December 18 and December 27, 1930, the plan for effecting the transfer of the fabricating business and assets was changed. It was decided to transfer the nonfabricating assets or

"Omitted Assets" to the Union Construction Co. and to transfer the fabricating business and assets direct from McClintic-Marshall to Bethlehem or "nominees." This change of plan was communicated by Smith, chief counsel for McClintic-Marshall, to Moore, chief counsel for Bethlehem, in a letter dated December 27, 1930. On December 31, 1930, Moore wrote Smith expressing approval of the change in the plan of procedure, and on the same date Smith wrote Moore suggesting a conference in Moore's office on January 6, for the purpose of getting all of the papers in final form.

At or about the same time Marshall instructed Patterson, secretary of McClintic-Marshall, to call in all of the preferred stock of that corporation from employees and to pay therefor \$130 per share. The stock so called covered all of the preferred stock outstanding except that held by the four common stockholders, A. W. Mellon, R. B. Mellon, C. D. Marshall, and H. H. McClintic, and excepting, of course, the 500 shares of first issue preferred then the subject matter of litigation with the Corbett estate. Some of the preferred stock so called in from employees was issued to certain of the four common stockholders at the call price of \$130 per share and thereafter the stock of the McClintic-Marshall Corporation, both common and preferred, was owned by the original organizers of the Construction Co. in the following proportions:

A. W. Mellon.....	30 percent
R. B. Mellon.....	30 percent
H. H. McClintic.....	20 percent
C. D. Marshall.....	20 percent

With reference to seven of the wholly owned subsidiaries of McClintic-Marshall, namely the McClintic-Marshall Construction Co., McClintic-Marshall Construction Co. of Illinois, McClintic-Marshall Construction Co. of New York, Inc., McClintic-Marshall Co. of California, McClintic-Marshall Steel Supply Co., McClintic-Marshall Export Co., and McClintic-Marshall Co., it was understood that Bethlehem or "nominees" were to acquire the properties and assets, but not the shares of stock. Accordingly, in further preparation for the transfer of its fabricating business and assets under the agreement with Bethlehem, McClintic-Marshall, under date of December 31, 1930, addressed a letter to each of the above named subsidiaries, advising each corporation that if it would declare a liquidating dividend consisting of its assets, McClintic-Marshall "would assume and pay or perform all * * * indebtedness, liabilities, obligations and contracts, including those incurred between the date of declaration of such dividend and the actual transfer of * * * assets pursuant to said dividend."

The letters of December 31, 1930, to the above named subsidiaries suggesting the declaration of liquidating dividends were authorized at a special meeting of the board of directors of the McClintic-Marshall Corporation held in the principal offices of that corporation in the Henry W. Oliver Building, Pittsburgh, Pennsylvania, at 3:30 p. m., on December 31, 1930. C. D. Marshall, H. H. McClintic, E. J. Patterson, and E. A. Gibbs, a majority of the board of directors, were present. At the same meeting resolutions were also adopted (1) authorizing the execution of proxies to vote the stock of the seven subsidiaries on resolutions declaring the liquidating dividends previously mentioned; (2) approving the purchase, in the name of the corporation, by its officers of 11,365 shares of its preferred stock at prices not in excess of \$130 per share and the sale of 131 shares each to A. W. and R. B. Mellon, and one share to H. H. McClintic, and further declaring a dividend of 11,100 shares of the said preferred stock on the common stock of the corporation; (3) authorizing the execution of proxies to vote the stock of the Union Construction Co. at a meeting to be held for the purpose of increasing the capital stock of said company from 50 shares to 5,000 shares, and authorizing the board of directors to issue all or any part of said stock, and (4) approving a proposal to transfer certain assets of McClintic-Marshall to the Union Construction Co. for 4,990 shares of the capital stock of said company. With reference to the transfer of assets to the Union Construction Co., the minutes read in part as follows:

The Chairman then presented to the meeting a plan of reorganization. On motion, it was unanimously resolved that said plan of reorganization should be copied into the minutes of the meeting, a copy of which plan is as follows:

PLAN OF REORGANIZATION

McClintic-Marshall Corporation, being the owner of all of the outstanding capital stock of Union Construction Company, that is to say, ten (10) shares, will transfer to Union Construction Company certain assets in exchange for four thousand nine hundred ninety (4,990) shares of the capital stock of Union Construction Company, Union Construction Company assuming and agreeing to pay or satisfy and perform certain indebtedness, liabilities and obligations of McClintic-Marshall Corporation. The said four thousand nine hundred ninety (4,990) shares of capital stock of Union Construction Company will be immediately distributed as a dividend to the common stockholders of McClintic-Marshall Corporation, the corporation's surplus being in excess of the book value of the assets conveyed to Union Construction Company.

On motion, the following resolution was unanimously adopted:

RESOLVED that the plan of reorganization read and ordered spread upon the minutes of this meeting be and the same is hereby approved and adopted.

Special meetings of the stockholders of the McClintic-Marshall Construction Co., McClintic-Marshall Steel Supply Co., McClintic-

Marshall Co., and McClintic-Marshall Export Co. were held in Pittsburgh during the interval from 4:30 p. m. to 5:50 p. m. on December 31, 1930. C. D. Marshall, H. H. McClintic, E. J. Patterson, and E. A. Gibbs were present, with Patterson holding the proxy of McClintic-Marshall. Resolutions were adopted declaring the liquidating dividends suggested in the letter authorized that day at the special meeting of the directors of McClintic-Marshall. In each instance the stockholders' meeting was immediately followed by a special meeting of the board of directors. The minutes indicate that in the case of the McClintic-Marshall Construction Co. of New York, Inc., the special stockholders' meeting was held in Buffalo, New York, at 4:30 p. m., eastern standard time, with Welles V. Moot and S. Fay Carr as proxies for McClintic-Marshall. The special meeting of the stockholders of the McClintic-Marshall Construction Co. of Illinois was held in Chicago, according to the minutes, at 4 p. m., central standard time. The special meeting of the McClintic-Marshall Co. of California was held in San Francisco at 3 p. m., Pacific standard time, with A. G. Kazebeer, A. B. Charlton, J. G. McClure, and E. F. Gohl present, and H. H. McClintic and the McClintic-Marshall Corporation present by proxies. Special meetings of the directors of the McClintic-Marshall Construction Co. of New York, Inc., and McClintic-Marshall Construction Co. of Illinois were held in Pittsburgh at 5:50 p. m and 6 p. m., eastern standard time, respectively, with C. D. Marshall, H. H. McClintic, E. J. Patterson, and E. A. Gibbs present.

The meetings of the various corporations were held under verbal instructions from counsel and without written notices. All preparations for the meetings had been made by counsel and Rodewald, of the firm of Smith, Buchanan, Scott & Gordon, brought to the meetings a memorandum of procedure and the votes that were taken were in accordance with that memorandum. The procedure followed was that the various motions and documents were read at the first meeting of the day, some probably not in full, and thereafter it was the understanding that the same action would be taken at the other meetings. In so far as the minutes recite that the various meetings of the stockholders were called by the directors at the request of the stockholders, the minutes are incorrect. There had been no previous meetings of directors calling special meetings of the stockholders except possibly in the case of the McClintic-Marshall Co. of California, where a special directors' meeting immediately preceded the special stockholders' meeting. The minutes of the directors' meeting of the Illinois company reciting the reading of the minutes of the stockholders' meeting just held are also incorrect. No such minutes were read and no such minutes were at the meeting.

The seven subsidiary companies of McClintic-Marshall continued to operate the various properties after December 31, 1930, as they previously had done. McClintic-Marshall, which was authorized to do business in Pennsylvania, took no steps to operate the properties nor to be registered to do business in any of the states in which the subsidiaries operated. Seven documents executed by McClintic-Marshall under date of February 7, 1931, recited the assumption of liabilities of each of the seven subsidiaries in consideration of the declaration of liquidating dividends previously described.

According to the minutes of the Union Construction Co., a meeting of the board of directors was held at 3:45 p. m., eastern standard time, on December 31, 1930, at the Henry W. Oliver Building in Pittsburgh, with C. D. Marshall, H. H. McClintic, and E. J. Patterson, a majority of the board of directors, present. A resolution was adopted calling for a special meeting of stockholders at 4 p. m., to be held on the same date and at the same place for the purpose of increasing the capital stock of the company from 50 shares to 5,000 shares. At 4 p. m. the special stockholders' meeting was held with the same individuals present and representing all the outstanding stock of the company, either directly or by proxy. At that meeting a resolution was adopted increasing the authorized capital stock of the corporation from 50 shares to 5,000 shares. A further resolution was adopted authorizing the board of directors at their discretion to issue any or all of the stock "for such consideration and to such persons or bodies corporate (whether stockholders of this corporation or otherwise) as may be permitted by law and by the terms of certificate of incorporation as amended and as to the said directors may seem advisable." The minutes also show a second meeting of the board of directors at 4:15 p. m. on the same date and at the same place, at which a resolution was adopted in the same terms and words as that adopted earlier in the day by the board of directors of McClintic-Marshall providing for the transfer by McClintic-Marshall of certain of its assets to the Union Construction Co. for 4,990 shares of the capital stock of the latter. A resolution was also adopted approving the purchase of the Water Street property from the Kenilworth Land Co. for the sum of \$130,132.55, and the giving of an option to that company for its repurchase within a period of two years. The officers were authorized to purchase from McClintic-Marshall the 10 shares of the Union Construction Co. stock subscribed for by that corporation for cash at the time the Union Construction Co. was organized.

Prior to the date or dates on which the minutes of the various meetings of the seven subsidiaries and the Union Construction Co. were put in final form and entered in the minute books, drafts thereof were sent to counsel for Bethlehem for suggestions.

In accordance with the suggestion made in Smith's letter to Moore on December 31, 1930, counsel for McClintic-Marshall and Bethlehem met in New York on January 6, 1931. McMath, vice president of Bethlehem, was also present. The only substantial difficulty had to do with the clause covering the assumption of liabilities. McMath and counsel for Bethlehem objected to the insertion in the contracts of a clause of general assumption by Bethlehem of the liabilities of the fabricating business of McClintic-Marshall without full disclosure on the part of McClintic-Marshall of the nature and extent of all liabilities not reflected in the McClintic-Marshall balance sheets. They were afraid that the undisclosed liabilities might include liabilities of an extraordinary nature, not to be expected in the ordinary course of the fabricating business, and on the information before them, were unwilling to write the provision sought by McClintic-Marshall into the contracts. Smith insisted that the purchase of the fabricating business and the assumption of the liabilities thereof included the contingent and unknown liabilities and in keeping with instructions received by him from the common stockholders of McClintic-Marshall at a conference in Pittsburgh in the forenoon of December 31, 1930, insisted upon the blanket assumption of liabilities. As a result of this difference the work on the contracts came to a halt and C. D. Marshall and Eugene G. Grace were advised. Grace conferred with Marshall as to the fears expressed to him of hidden or abnormal liabilities and, upon being advised by Marshall that there was nothing abnormal about the contingent liabilities of McClintic-Marshall, instructed Bethlehem's counsel to proceed with the contracts along the lines desired by counsel for McClintic-Marshall.

The above conferences continued through January 8. After that date no further meetings were held until February 10, the date of delivery of the consideration and the various instruments of assignment and conveyance. During the interval between January 8 and February 10, counsel for the parties were in communication with each other by mail and telephone.

After the conferences on January 6, 7, and 8, Moore caused Schlottman to be sent to Pittsburgh to make an examination, the purpose of which was to make certain that the fabricating assets to be received under the agreement with McClintic-Marshall were not depleted in any way. Moore was particularly interested in seeing that any money which had accrued by way of profits to the fabricating business from and after June 1, 1930, would be transferred with the business and not invested in some way other than in the business itself. Schlottman proceeded to Pittsburgh on or about January 12, where he spent several days making the check desired by Moore. During that time

he made an audit of the list of assets which had been drawn up by Pittenger for transfer to the Union Construction Co. He also worked out with Pittenger a division of the cash between the fabricating assets which Bethlehem or its "nominees" were to receive and the nonfabricating assets which were to be transferred to Union. According to the agreement between the parties, the McClintic-Marshall stockholders were to retain all dividends declared on McClintic-Marshall stock on or before October 1, 1930, and from and after that date McClintic-Marshall was to receive the dividends and interest on the Bethlehem stocks and bonds which were to be exchanged for its fabricating assets and business. The dividends on the 240,000 shares of stock were not actually paid over to McClintic-Marshall, but it was permitted to deplete the fabricating assets in an amount equal to the dividends on the 240,000 shares of Bethlehem stock from and after October 1, 1930. This was taken into consideration by Schlottman in making his check of the assets to be transferred to the Union Construction Co. and those to be transferred under the contract with Bethlehem. The fabricating assets to be transferred were also diminished to make allowance for the interest on the \$8,200,000 in Bethlehem bonds, and this item was also taken into consideration by Schlottman in making his check of the assets which were to be transferred to Union. On January 14, 1931, Moore was advised by Rodewald that Schlottman and Pittenger had agreed upon the division of the assets and that the transfer to Union would be made on the basis of that division. Schlottman's report of the examination was relayed to Moore by Schick, comptroller for Bethlehem, under date of January 21, 1931. Price, Waterhouse & Co. made two reports to Bethlehem under the same date covering the transactions of McClintic-Marshall and its subsidiaries from July 1, 1930, to November 30, 1930.

On January 15, 1931, an indenture between McClintic-Marshall and the Union Construction Co., bearing date of December 31, 1930, was executed. By the terms of the agreement McClintic-Marshall transferred the "Omitted Assets" to Union for 4,990 of the total 5,000 shares of Union stock and the assumption by Union of certain of McClintic-Marshall's liabilities outlined in the agreement.

It is stipulated by the parties that, except for the purpose of determining the amount of the earnings, profits, or income of McClintic-Marshall, the fair market value of all net assets of the McClintic-Marshall Corporation, including the property transferred to the Union Construction Co. and prior to giving effect to the reissuance of the 263 shares of preferred stock sold to common stockholders above described, was, at the time of the transfer to Union, \$66,078,260.12. It was further stipulated that the value stated is apportionable to the common and preferred stocks of the McClintic-Mar-

shall Corporation and to the capital stock of the Union Construction Co. as follows:

To preferred stock of McClintic-Marshall Corporation, 25,457 shares at \$130 per share.....	\$3,309,410.00
To 60,200 shares of common stock of McClintic-Marshall Corporation.....	18,523,590.00
To 4,990 shares of capital stock of Union Construction Co.....	44,245,260.12
	66,078,260.12

The ratios existing at that time, on the basis of such apportionment, between the fair market value of petitioner's 18,060 shares of common stock of the McClintic-Marshall Corporation and petitioner's 1,497 shares of common stock of the Union Construction Co. were 29.5108 per centum and 70.4892 per centum, respectively.

McClintic-Marshall and Union both kept their books on the accrual basis. Entries thereon reflecting the above transaction were dated December 31, 1930, but were actually written in the following month. Several of the checks relating to the book entries were delivered and paid on January 22, 1931. The certificate of the Union charter amendment, increasing its capital stock, was signed on December 31, 1930, and filed for recordation in Delaware on January 15, 1931. On the same date the Kenilworth Land Co. conveyed the Water Street Property to Union and Union executed in favor of Kenilworth the option to repurchase. Stock transfer notices covering the transfer of stock from McClintic-Marshall to Union were dated January 16, 1931, and mailed January 17, 1931. Transfer stamp vouchers were dated January 16, 1931. Notices to debtors whose accounts were transferred by McClintic-Marshall to Union were dated December 31, 1930, and certified January 15, 1931.

Certificates for the 4,990 shares of Union stock dated December 31, 1930, were made out and delivered to the four common stockholders of McClintic-Marshall in the following month. Petitioner received 1,497 such shares. He entered the transaction in his books under date of January 1, 1931. On January 3, 1931, and shortly thereafter, dividends and interest were received on the securities later transferred by McClintic-Marshall to Union and the checks therefor were deposited to the credit of Union on the date received.

The agreement reached by Grace and Marshall on or about January 8, 1931, was followed by a written contract dated January 22, 1931. In the preliminary paragraphs of the agreement were representations by McClintic-Marshall as to its properties and financial condition. Among the representations made were the following:

* * * Except for the sale, assignment and transfer of certain property, copies of the instruments covering which have been delivered to Bethlehem, and for the payment by McClintic-Marshall of certain cash dividends which

are mentioned in paragraph (e) of these representations of fact and a dividend paid in the stock of another corporation owned by it, no substantial change was made in the properties and assets of McClintic-Marshall and/or the Subsidiary Companies between June 30, 1930 and the date hereof, except such changes as were made in the ordinary course of the business of McClintic-Marshall and/or the Subsidiary Companies. * * *

Other portions of the agreement describing the properties to be acquired and the consideration therefor read in part as follows:

The parties hereto desire that McClintic-Marshall shall be reorganized through the acquisition by Bethlehem of all the properties and assets owned by McClintic-Marshall (but none of its capital stock) at the time the transaction covered by this Agreement (hereinafter called the Transaction) shall be closed (which shall then include the properties and assets, but not the shares of stock, of the first seven of the Subsidiary Companies as listed in said Appendix A), the immediate distribution of the bonds and shares of stock of Bethlehem which are to be delivered by it to McClintic-Marshall pursuant to the provisions of this Agreement and the dissolution as soon as practicable of McClintic-Marshall and of said first seven of the Subsidiary Companies whose properties and assets are to be acquired by Bethlehem, and to that end the parties hereto have agreed upon the plan of reorganization which is evidenced by this Agreement.

FIRST. Upon the terms and conditions hereinafter set forth McClintic-Marshall agrees that, in exchange for \$8,200,000, principal amount, of the bonds of Bethlehem, hereinafter described and hereinafter sometimes called the New Bonds, and 240,000 shares of the Common Stock of Bethlehem of the same class, nature and description as the Common Stock of Bethlehem now outstanding and listed on the New York Stock Exchange, McClintic-Marshall will convey, assign and transfer, or cause to be conveyed, assigned and transferred, to Bethlehem, or to one or more nominees of Bethlehem as Bethlehem shall elect (a) all the properties and assets of every nature and description of McClintic-Marshall, including its good will and the right to use its corporate name, but not including any shares of its capital stock or the shares of stock of said first seven of the Subsidiary Companies, and (b) all the properties and assets of every nature and description of said first seven of the Subsidiary Companies, including their respective good wills and the right to use their respective corporate names; and Bethlehem, relying upon the representations of fact of McClintic-Marshall hereinabove set forth, agrees that, in exchange for said properties and assets, Bethlehem will execute, issue and deliver to McClintic-Marshall said \$8,200,000, principal amount, of the New Bonds and certificates for said 240,000 shares of said Common stock.

With certain specified exceptions Bethlehem agreed to assume all the liabilities of McClintic-Marshall. Among the obligations assumed was an item of \$12,000,000 in outstanding bonds of the McClintic-Marshall Construction Co., which bond issue was secured by the pledge of 160,000 shares of 6 percent cumulative preferred stock of the Aluminum Co. of America, owned by A. W. Mellon and R. B. Mellon and loaned to the McClintic-Marshall Construction Co. for such purpose. Bethlehem agreed that other collateral satisfactory to

the trustee would be deposited in lieu of such Aluminum Co. stock and that the owners of such stock would be paid \$50,000 per year for the use thereof during the period the Aluminum Co. stock should remain pledged. It was further provided:

* * * All deeds, assignments and other instruments of conveyance by which the properties and assets to be conveyed, assigned and transferred to Bethlehem as aforesaid shall be so conveyed, assigned and transferred shall provide that they shall take effect as of January 31, 1931, whether or not actually executed and delivered on that date.

It was also provided:

As a part of this plan of reorganization, all of the New Bonds of Bethlehem to be received by McClintic-Marshall under the provisions of this Agreement and all of said 240,000 shares of its Common Stock shall be distributed to the stockholders of McClintic-Marshall.

The agreement provided that the transaction should be closed on February 3, 1931, which date was later extended to February 10, 1931.

On January 23, 1931, Grace, acting for Bethlehem, and on January 27, 1931, Marshall, acting for McClintic-Marshall, signed the above agreement bearing the date of January 22, 1931.

The agreement was placed before the board of directors of McClintic-Marshall at a special meeting held in Pittsburgh on January 26, 1931, and a resolution was adopted authorizing and directing the officers to execute the instrument for and on behalf of the corporation. Preliminary to the adoption of the resolution mentioned, the minutes show the following:

The Chairman then presented and read to the meeting a plan of reorganization. On motion, it was unanimously resolved that said plan of reorganization shall be copied into the minutes of the meeting, a copy of which plan is as follows:

PLAN OF REORGANIZATION

Bethlehem Steel Corporation will acquire from McClintic-Marshall Corporation all the properties and assets owned by McClintic-Marshall Corporation (but none of its capital stock) at the time the transaction covered by the reorganization agreement shall be closed (which shall then include the properties and assets, but not the shares of stock of McClintic-Marshall Construction Company, a Pennsylvania corporation, McClintic-Marshall Construction Company of Illinois, an Illinois corporation, McClintic-Marshall Construction Company of New York, Inc., a New York corporation, McClintic-Marshall Company of California, a California corporation, McClintic-Marshall Steel Supply Company, a Pennsylvania corporation, McClintic-Marshall Export Company, a Delaware corporation, and McClintic-Marshall Company, a Delaware corporation, each of which companies has heretofore declared a liquidating dividend of all of its assets and properties pursuant to which McClintic-Marshall Corporation has become entitled through stock ownership or by assignment to all such assets and properties.) The bonds and shares of stock of Bethlehem Steel Corporation which are to be delivered by it to McClintic-Marshall Cor-

poration pursuant to the provisions of the reorganization agreement will be distributed immediately to the stockholders of McClintic-Marshall Corporation, and McClintic-Marshall Corporation and the seven subsidiary companies above mentioned will be dissolved as soon thereafter as practicable.

On motion, the following resolution was unanimously adopted:

RESOLVED: that the plan of reorganization which the Chairman has presented and read to this meeting and which this Board has directed to be copied into the minutes of this meeting be, and the same is hereby, approved and adopted.

Resolutions were also adopted authorizing and directing the seven subsidiary corporations to execute instruments of conveyance of their properties to Bethlehem or such other corporations as it might designate. By a further resolution a liquidating dividend was declared of all the Bethlehem stock and bonds to be received in exchange for McClintic-Marshall's fabricating business and assets. In connection with the liquidating dividend the officers were authorized and directed to require from the stockholders refunding bonds or other security which "as to said officers may seem desirable for the purpose of protecting the corporation from any and all claims or liabilities, contingent, accrued or otherwise, which have been or may be asserted against it." The meeting was conducted from a memorandum, in the same manner as the meetings of December 31, 1930.

On January 30, 1931, at a further meeting, the board passed a resolution to change the name of the McClintic-Marshall Corporation to William Penn Corporation. A resolution was also adopted directing that the stock and bonds of Bethlehem to be received for the fabricating business and assets of McClintic-Marshall be issued directly to the holders of the common capital stock of McClintic-Marshall in proportion to their respective holdings, and authorizing and directing the secretary or assistant secretary of McClintic-Marshall to deliver a certified copy of the resolution to Bethlehem. The resolution named C. D. Marshall to receive the Bethlehem stock and the bonds for the stockholders. The stockholders approved the amendment changing the name of the corporation to William Penn Corporation at a special meeting held on February 3, 1931.

Also on January 30, 1931, the name of the McClintic-Marshall Constuction Co. was changed to William Penn Construction Co. The certificate of the Secretary of State of Pennsylvania showing the change of name bears the date of February 24, 1931. On February 6, 1931, the capital stock was reduced from 50,000 shares having a par value of \$100 per share, to 100 shares having a par value of \$100 per share. On February 7, 1931, McClintic-Marshall sold the stock of the Construction Co. to its four stockholders, A. W. Mellon, R. B. Mellon, C. D. Marshall, and H. H. McClintic, for the sum of one dollar, the 100 shares being divided 30 shares each to A. W. Mellon

and R. B. Mellon and 20 shares each to C. D. Marshall and H. H. McClintic.

On January 29, 1931, the board of directors of the Bethlehem Steel Corporation, at its regular quarterly meeting held in New York City, ratified, confirmed, and approved the action taken by its president, Eugene G. Grace, in executing the above agreement with McClintic-Marshall.

The Bethlehem Steel Corporation was organized December 10, 1904, under the laws of New Jersey, and is the owner of the stock of fifty or sixty corporations, sometimes referred to as the Bethlehem group. The business of the group is that of carrying on an integrated steel business. Bethlehem itself operates no properties. Among the companies owned by Bethlehem in 1930 and 1931 were the Bethlehem Steel Co., a Pennsylvania corporation, Bethlehem Mines Corporation, a Delaware corporation, Beth-Mary Steel Corporation, a Maryland corporation, Pacific Coast Steel Corporation, a Delaware corporation, and Midvale Steel Co., a Pennsylvania corporation. The largest of the operating companies in the Bethlehem group is the Bethlehem Steel Co. It operates the steel producing properties in the East, while similar properties in the West are operated by the Pacific Coast Steel Corporation. These operations include the production of structural steel, steel plate, tin plate, rolling mill equipment, and other steel products and the operation of blast furnaces. The Bethlehem Mines Corporation operates coal mines, ore mines, quarries, and properties of similar character. The Beth-Mary Steel Corporation owns the properties of the Bethlehem group which are located in the State of Maryland. It also owns the stock of the Bethlehem Iron & Steel Corporation, a New York corporation, located in New York, which owns the properties of the Bethlehem group located in New York. These properties are leased to the Bethlehem Steel Co. for operation.

The Midvale Steel Co. was incorporated under the laws of Pennsylvania on December 14, 1880. Its name was changed to McClintic-Marshall Corporation on February 5, 1931. To avoid confusion it will be referred to herein as Midvale. At the time its name was changed, it had 50 shares of stock outstanding, 45 shares being held directly by Bethlehem and the other five shares by directors.

During the months of September, October, and November, 214,159 shares of Bethlehem common stock were purchased on the New York Stock Exchange, under authorization from Grace, for use in the acquisition of the fabricating business and assets of McClintic-Marshall. In authorizing the purchase of stock for the purpose mentioned above, Grace had the informal approval of the members of Bethlehem's board of directors.

The cash of the Bethlehem group is carried by the Bethlehem Steel Co. in an account designated as "Inter-company Balances." Through this account each company is credited with its portion of the profits on any contract or job in which it participates and with the cash coming into the account through such company. In a similar manner each company is charged through the account with its expenditures. In making the purchases of the Bethlehem stock described above, the checks were drawn by the Bethlehem Steel Corporation. The books of that corporation do not show acquisition of the stock, however, and it was not charged with the cash so expended, its cash being neither increased nor decreased as a result of the purchases. The disbursements for the shares purchased were charged against the Bethlehem Mines Corporation and described as disbursements "for account of Bethlehem Mines Corporation." The shares, when acquired, were carried on the books of the Bethlehem Mines Corporation in an account designated "Contingent Fund Assets." In its balance sheet of December 31, 1930, the Bethlehem Mines Corporation carried the 240,000 shares of Bethlehem stock as "Investment-Capital Stock of Domestic Corporations." The balance sheet of Bethlehem for the same date showed these shares as outstanding. The consolidated balance sheet showed a footnote to the effect that the 240,000 shares were to be used in part payment for McClintic-Marshall assets.

Upon the purchase of the various lots of Bethlehem stock, the shares so acquired were transferred to the names of individuals. These individuals signed statements to the effect that the stock so held was owned by Bethlehem, and they assigned to it any and all dividends thereon. The dividends paid during the year 1930 and until February 1931 on the stock in question were not paid to the individuals in whose names the shares stood, nor were they paid to Bethlehem, in accordance with the signed orders of those individuals; the dividends were paid to the Bethlehem Mines Corporation which, according to the books of account, was the purchaser and owner of the stock. Bethlehem at no time received credit or showed receipt of the dividends on its books. The entries on the books were made with the intention of showing the Bethlehem Mines Corporation as the owner of the stock.

Some time in February 1931, 25,841 shares of Bethlehem stock acquired by the Bethlehem Mines Corporation prior to the McClintic-Marshall negotiations were written down on the books to the average cost of the 214,159 shares acquired during the months of September, October, and November, 1930. The total write-down amounted to \$912,849. Thereafter the average cost of the entire 240,000 shares was reflected as \$76.74 per share. Bethlehem was

never at any time charged with the amount by which the stock was written down. The Bethlehem Mines Corporation was credited with the amount of the write-down and an account of the Bethlehem Steel Co., designated as "Reserve for Depreciation of Investments", was charged.

By instruments dated February 7, 1931, McClintic-Marshall, McClintic-Marshall Construction Co., McClintic-Marshall Construction Co. of Illinois, and McClintic-Marshall Steel Supply Co. conveyed to Midvale all their real estate and interest in real estate. By instruments bearing the same date the McClintic-Marshall Construction Co. of New York, Inc., conveyed its real estate to the Bethlehem Iron & Steel Corporation, and the McClintic-Marshall Co. of California conveyed its real estate to the Pacific Coast Steel Corporation. By bills of sale also bearing the date of February 7, 1931, McClintic-Marshall, McClintic-Marshall Construction Co., McClintic-Marshall Construction Co. of Illinois, McClintic-Marshall Construction Co. of New York, Inc., McClintic-Marshall Co. of California, McClintic-Marshall Steel Supply Co., McClintic-Marshall Export Co., and McClintic-Marshall Co. transferred all assets except real estate and patents to Midvale. The transfers of patents and trade marks were covered by separate instruments to meet the requirements of the offices in which notices of such transfers were to be filed.

Under date of February 10, 1931, an instrument designating Bethlehem as party of the first part, McClintic-Marshall as party of the second part, and the seven subsidiary corporations as parties of the third part, and reciting the transfer and conveyance by McClintic-Marshall to Bethlehem or "nominees", was executed by Bethlehem, wherein Bethlehem, in accordance with the terms of the agreement of January 22, 1931, assumed and agreed to pay or to cause to be paid all liabilities of the group, except those specifically excepted in the January agreement. By an instrument bearing the same date and naming Bethlehem, the McClintic-Marshall Construction Co. and the Union Trust Co. of Pittsburgh as parties, Bethlehem assumed the \$12,000,000 bond issue of the Construction Co. A third instrument, also dated February 10, 1931, was executed by Bethlehem, the McClintic-Marshall Construction Co., A. W. Mellon, and R. B. Mellon. It provided for the substitution of collateral in connection with the \$12,000,000 bond issue in place of the then existing collateral which belonged to petitioner and R. B. Mellon.

In accordance with the request of McClintic-Marshall, the 240,000 shares of Bethlehem common stock were issued 72,000 shares each to A. W. Mellon and R. B. Mellon and 48,000 shares each to C. D. Marshall and H. H. McClintic. On February 10, 1931, C. D. Marshall delivered his receipt covering the 240,000 shares of Bethlehem common

stock and the \$8,200,000, principal amount, of Bethlehem 4½ per cent Serial Gold Bonds, reading as follows:

RECEIVED from Bethlehem Steel Corporation, a New Jersey corporation, \$8,200,000, principal amount, of its Four and One-Half Per Cent. Serial Gold Bonds and Certificates for 240,000 shares of its common stock made out in the following names and for the number of shares set after each such name, respectively:

Andrew W. Mellon.....	72,000 shares
Richard B. Mellon.....	72,000 "
Howard H. McClintic.....	48,000 "
Charles D. Marshall.....	48,000 "

Dated February 10, 1931.

[Signed] C. D. MARSHALL.

The bonds after authentication by the Union Trust Co. of Pittsburgh, as trustee, were actually delivered by William J. Brown, treasurer of Bethlehem, to the Bankers Trust Co. in New York, and the Bankers Trust Co.'s receipt was delivered to Marshall.

The four common stockholders of McClintic-Marshall directed a letter to Bethlehem, bearing the date of February 10, 1931, granting an option to purchase the 100 shares of William Penn Construction Co. stock for the sum of one dollar at any time within ninety days after the collateral furnished by A. W. Mellon and R. B. Mellon in connection with the \$12,000,000 bond issue of the Construction Co. should be released from the lien of the trust. Bethlehem exercised the option and acquired the stock for the sum of one dollar. The Construction Co. is still in existence, but holds no properties and conducts no business.

The stock of the Riter-Conley Co., Kenilworth Land Co., Steel Frame House Co., and Steel Frame House Finance Co. was transferred to Midvale. It was delivered on February 10, 1931. In each instance the certificates were delivered endorsed in blank and the name of Midvale (McClintic-Marshall Corporation of Pennsylvania) was written in.

All of the properties transferred and conveyed by McClintic-Marshall and its subsidiaries in accordance with the agreement of January 22, 1931, including the real estate in California and New York and the stock of the Kenilworth Land Co., Riter-Conley Co., Steel Frame House Co., and Steel Frame House Finance Co., were entered on the books of Midvale. None of the properties acquired and none of the liabilities assumed in connection therewith were ever entered on the books of Bethlehem. In May of 1931 the California real estate was transferred by proper book entries to the Pacific Coast Steel Corporation and the New York real estate was similarly transferred to Bethlehem Iron & Steel Corporation. In making these transfers the Pacific Coast Steel Corporation was charged with the

net amount of \$660,939 for the real estate conveyed to it and Midvale was credited with that amount, and Bethlehem Iron & Steel Corporation was charged with the net amount of \$2,397,275 for the real estate it received and Midvale was credited in the same amount. The minute books of those corporations contain no reference to the acquisition of any of the McClintic-Marshall assets.

After the name of Midvale was changed to McClintic-Marshall Corporation on February 6, 1931, a new ledger was set up on which an account was opened designated as "Investment in properties purchased from McClintic-Marshall, (Del.)." The amount of the investment was shown as \$26,617,246. The journal voucher from which the entry was posted was dated March 12, 1931, and designated as being for the "Month of February, 1931." The voucher reads as follows:

To record the purchase of the properties of McClintic-Marshall Corporation, (Del.) pursuant to the agreement dated January 22, 1931, between Bethlehem Steel Corporation and McClintic-Marshall Corporation, (Del.). Delivery made to McClintic-Marshall Corporation, (Del.) of 240,000 shares of Bethlehem Steel Corporation Common Stock—without par value and \$8,200,000 par amount, of Bethlehem Steel Corporation 4½% Serial Gold Bonds, in payment of properties.

Account	Description	Amount	Amount
2-F	Marketable Securities 240,000 shares—		
	B. S. Corp. Common Stock	\$18,417,246.00	
9-A	Inter-Company Balances Bethlehem Steel Corporation		8,200,000.00
			<u>\$26,617,246.00</u>

A second journal voucher of Midvale dated March 13, 1931, also purporting to cover a transaction in February, shows "Purchase from Bethlehem Steel Corporation of 240,000 shares of Bethlehem Steel Corporation Common Stock, without par value" at \$76.74 per share, or \$18,417,246. Under the same date, however, a Bethlehem Mines Corporation journal voucher was drawn to show transfer of 240,000 shares of Bethlehem common stock direct from the Bethlehem Mines Corporation to Midvale for \$18,417,246. The name of Midvale (McClintic-Marshall Corporation) was subsequently stricken through and the name of Bethlehem inserted therefor. Thereafter, under date of April 15, 1931, journal vouchers were entered in the records of Bethlehem to show a purchase in February of the 240,000 shares of Bethlehem common stock by Bethlehem from the Bethlehem Mines Corporation, at \$76.74 per share, or \$18,417,246, and at the same time a sale of the same shares, at the same price, to Midvale.

The 240,000 shares of Bethlehem common stock were carried on the books of the Bethlehem Mines Corporation as its property from the time of purchase on the New York Stock Exchange up to the time of transfer to Midvale, and at no place on the books of Bethlehem is

there any entry showing that Bethlehem transferred the said 240,000 shares of stock to McClintic-Marshall for its fabricating business and assets.

The dividends on the 240,000 shares of Bethlehem common stock up to February 1931 were eventually credited to Midvale. By the terms of the agreement McClintic-Marshall was entitled to the dividends on the said stock after October 1, 1930, and this credit was made to Midvale to offset the amount by which the fabricating business and assets were diminished when transferred in accordance with the agreement dated January 22, 1931.

On February 10, 1931, the fair market value of the 240,000 shares of Bethlehem common stock was \$13,920,000 and that of the \$8,200,000, face value, of its bonds was \$7,913,000, or 63.7567 per centum and 36.2433 per centum, respectively, of the total of \$21,833,000.

It was stipulated that the accumulated earnings or profits of McClintic-Marshall available for distribution in dividends were \$25,000,000 as of February 10, 1931, of which sum not less than \$18,000,000 was accumulated prior to December 31, 1930. The amounts were so stipulated without prejudice to the contentions of the parties as to their availability for distribution as dividends by McClintic-Marshall, Union, and Pitt Securities Corporation, a corporation subsequently organized to take over part of the assets transferred by McClintic-Marshall to Union.

Under date of February 15, 1931, Bethlehem directed a letter to Midvale (McClintic-Marshall Corporation of Pennsylvania) stating that the letter was to confirm an agreement wherein Midvale had agreed to assume and had assumed all obligations of Bethlehem under its agreement with McClintic-Marshall dated February 10, 1931, except the \$12,000,000 bond issue of the McClintic-Marshall Construction Co., and had agreed to pay to Bethlehem \$20,200,000 on demand and a further amount equal to the cost of the 240,000 shares of Bethlehem common stock. On the same date Bethlehem directed a letter to Beth-Mary Steel Corporation, stating that it was to confirm the assumption by Beth-Mary Steel Corporation of the \$8,200,000 in Bethlehem bonds used in the acquisition of the fabricating business and assets of McClintic-Marshall and the assumption of the \$12,000,000 bond issue of the McClintic-Marshall Construction Co., and further stating that in connection with such assumption Bethlehem had assigned and transferred all of its rights to receive from Midvale the \$20,200,000, as above set forth.

The transfer of properties between members of the Bethlehem group was not unusual when suggested for purposes of business expediency, but in each instance where such transfers were made the proper charges and credits were entered on the books of each cor-

poration and record ownership actually passed in respect of assets so transferred. After such transfers the recipient of the assets treated those assets as its own, taking up the income therefrom and sustaining the expenses incident thereto.

In connection with the acquisition of the property of McClintic-Marshall by the various subsidiaries of the Bethlehem Steel Corporation and the assumption of the bond indebtedness of the Bethlehem Steel Corporation, no change was made in the outstanding capital stock of any of the corporations. Bethlehem's outstanding common stock amounted to 3,200,000 shares. It also had 7 percent cumulative preferred stock having a par value of \$100,000,000 outstanding.

On January 20, 1931, the Union Trust Co. and Marshall and McClintic, representing themselves and A. W. Mellon and R. B. Mellon, entered into an agreement providing that the Trust Co. would purchase from them Bethlehem bonds in the principal amount of \$8,200,000, to be issued by that company under the terms set forth in the contract. On February 10, 1931, the Bankers Trust Co. informed Marshall that it held the bonds subject to his order. On February 11, 1931, Marshall authorized the Bankers Trust Co. to deliver them to the Union Trust Co. in accordance with the agreement of January 20. The Union Trust Co. issued its checks to the petitioner and the other McClintic-Marshall stockholders. The petitioner received \$2,373,900, representing the sale of his portion of the bonds at 96, plus accrued interest of \$12,300. The petitioner entered the amount so received on his books under date of February 11, 1931, and reported in his income tax return a profit of \$1,922,631. It was admitted in the pleadings that the item of \$12,300 was erroneously reported by the petitioner as interest received.

Bethlehem had no arrangement or agreement with the Trust Co. governing the disposition of the bonds after issuance.

McClintic-Marshall, the name of which was changed to William Penn Corporation, has conducted no business since February 10, 1931, and since that date has had no assets. In February 1933 its certificate of incorporation was amended, reducing its capital stock to 100 shares having a par value of \$100 per share.

IV.—*The Liquidation of Union Construction Co.*

The Koppers Co.—Union Construction Co. reorganization.—Among the investment assets transferred to Union by McClintic-Marshall was a block of 500,000 of the 600,000 outstanding common shares of the Koppers Co., a Delaware corporation (hereinafter called Koppers Co.), engaged, with its many subsidiaries, in building byproduct coke