Security First Nat. Bank of Los Angeles, Executor.

28 BTA 289

The Commissioner determined deficiencies in Henry E. Huntington's income tax for 1925, 1926, and the period ending May 23, 1927, of $334,297.66, $259,474.18, and $223,054.12, respectively. A number of errors originally assigned have been either waived or settled by stipulation and need not be set forth here. The petitioners' assignments of error which are urged for our decision are:

1. The Commissioner erred in including in the income of Henry E. Huntington for each period the income of the trust which the latter had established for the Henry E. Huntington Library and Art Gallery.

2. If (1) is decided adversely to the petitioners, then the Commissioner erred in failing to allow deductions from the income of Henry E. Huntington for losses incurred by the trust in 1925 and 1926 in the operation of a ranch for profit.

3. If (1) is decided adversely to the petitioners, then the Commissioner erred in including in income for the period ended May 23, 1927, $509,600 as a dividend, representing the value of certain land transferred to the trust by the Huntington Land and Improvement Co. at the request of its sole stockholder, Henry E. Huntington.

4. The Commissioner erred in failing to allow proper deductions for each period on account of contributions to the Henry E. Huntington Library and Art Gallery, a trust, organized and operated exclusively for scientific, literary, and educational purposes. [pg. 291]

5. The Commissioner erred in including in income for each period amounts representing interest on coupon bonds of the Los Angeles Railway Corporation and the City Railway Corporation of Los Angeles which became due in these periods but were not paid to the taxpayer.

6. The Commissioner erred in including in income for 1925 and 1926 certain amounts representing gain from the sale in 1925 of Old Dominion Land Co. stock instead of allowing a loss in 1925 from this sale.

7. The Commissioner erred in failing to allow a deduction for 1925 of $12,500 as an ordinary and necessary expense of the taxpayer's business, being the amount charged to him in that year by the Huntington Land and Improvement Co. to recompense it for amounts paid in 1923, 1924, and 1925 to an employee of the Standard Felt Co.

8. The Commissioner erred in failing to offset 1925 and 1926 income with a net loss of 1924 resulting from a debt of H. Knickerbacker & Co. ascertained to be worthless and charged off in that year.

The respondent claims an increase in the deficiencies for 1925 and the period ended May 23, 1927, alleging affirmatively in this connection that:

(A) There should have been included in income for 1925, interest from the preceding interest date to January 2, 1925, on Pacific Electric Railway Co. bonds given by the taxpayer to the Henry E. Huntington Library and Art Gallery;

(B) Henry E. Huntington did not sustain a capital net loss in the amount of $440,530 or any other amount on the sale of bonds of the Los Angeles Railway Corporation during the period ended May 23, 1927.

FINDINGS OF FACT.

Henry E. Huntington was a wealthy man who died on May 23, 1927. He was then 77 years of age and a resident of San Marino, California. His books of account were kept and his income tax returns were made on the basis of cash receipts and disbursements. The Security First National Bank of Los Angeles and Caroline H. Holladay are, respectively, executor and executrix of his estate.

I.

The decedent had collected about 175,000 rare books and about 1,000,000 manuscripts. This collection was very valuable. From the standpoint of quantity and quality of rare materials, it had few [pg. 292]equals in the world. Prior to 1919 most of this collection was in storage, uncatalogued, and not readily available for inspection or use.

In 1904 the decedent employed a landscape gardener, who thereafter planned and developed a botanical garden on a tract of about 175 acres in San Marino, California. This garden was developed into one of the finest collections of cacti and succulent plants in the world. The land belonged to the Huntington Land and Improvement Co. The decedent owned all of the stock of that corporation. In 1911 he completed a residence on this land. He occupied the residence until his death. The building was designed to house and display a valuable art collection which he owned. In 1917 the Huntington Land and Improvement Co. conveyed to the decedent about 445 acres known as the San Marino ranch, which included the above described tract. In 1919 he began the construction of a library building on this land near his residence. This library was intended to house his collection of rare books and manuscripts.

About this time the decedent consulted his attorney as to the creation of a trust to own and operate the library with the right reserved to the decedent and his wife to act as trustees, to withdraw and substitute securities, and to change or enlarge the purposes of the trust. He was advised that such a trust could be created under the California Act of March 9, 1885, but that from such a trust property could not be withdrawn for the grantor's own use.

The decedent and his wife executed a deed of trust dated August 30, 1919, conveying a few acres, the library site, to five trustees and their successors, who were to serve without compensation. That deed is in part as follows:

Whereas, said Henry E. Huntington desires, in his lifetime, to promote and advance learning, the arts and sciences, and to promote the public welfare by founding, endowing and having maintained a library, art gallery, museum and park within this state;

*** [Here follows the conveyance "for such purposes, and acting in pursuance of an Act of the Legislature of the State of California, hereinafter mentioned."]

To Have and to Hold the above granted premises unto the said parties of the second part, and to their successors in trust nevertheless, and to and for the uses and purposes herein mentioned and above referred to, and in pursuance of the provisions in that behalf, of the Act of the Legislature approved March 10th, 1885, and known as Chapter XLVII of the Statutes of California of 1885, entitled:

"An Act to advance learning, the arts and sciences, and to promote the public welfare, by providing for the conveyance, holding, and protection of property, and the creation of trusts for the founding, endowment, erection and maintenance within this state of universities, colleges, schools, seminaries of learning, mechanical institutes, museums, and galleries of art."

[pg. 293]

THE SAID PARTY OF THE FIRST PART DOES HEREBY DESIGNATE AS FOLLOWS:

I.

THE NATURE, OBJECT AND PURPOSES OF THE INSTITUTION HEREBY FOUNDED

AND ENDOWED, AND TO BE MAINTAINED HEREUNDER.

Its Nature: A free public library, art gallery, museum and park, containing objects of artistic, historic or literary interest.

Its Object: Advancement of learning, the arts and sciences, and to promote the public welfare.

Its Purposes: To provide the means for encouraging and carrying on the above mentioned work within the State of California, and by otherwise doing such things as may be necessary to fully carry out the object of this grant.

II.

THE NAME BY WHICH IT SHALL BE KNOWN.

"HENRY E. HUNTINGTON LIBRARY AND ART GALLERY."

III.

THE POWERS AND DUTIES OF THE TRUSTEES, AND THE MANNER IN WHICH

THEY SHALL ACCOUNT AND TO WHOM. ***

[Providing for a board of five trustees to act affirmatively by a majority of three.]

The trustees (subject to the reservations and to the rights to alter and amend hereinafter contained) shall have power, and it shall be their duty:

*** [To meet and organize on September 18, 1919, to manage and control the institution and the present and future trust property, to receive, in their discretion, property from others, upon terms harmonious with the purposes of this trust, to receive other property from the grantors subject to the same trust, to make by-laws consistent with law and the trust, to make rules and regulations for management of the property, to keep full records, to employ a librarian, an assistant, cataloguers, superintendent, and others, to use the income in executing the trust and to invest or deposit the excess, and, with a portion of it, buy additional material, to keep the property in good repair, to do all necessary things, and after the death of both grantors to make an annual report to the Secretary of State of the State of California.]

IV.

THE MODE AND MANNER AND BY WHOM THE SUCCESSORS TO THE TRUSTEES

NAMED IN THE GRANT ARE TO BE APPOINTED. ***

[The grantor may remove any trustee for good cause and may fill vacancies. After both grantors have died, trustees may be removed by equity proceedings and successors elected by the other trustees.]

V.

THE ELECTION OF THE GRANTOR TO PERFORM, DURING HIS LIFE, ALL DUTIES

AND EXERCISE ALL THE POWER WHICH, BY THE TERMS OF THIS GRANT,

ARE ENJOINED UPON AND INVESTED IN THE TRUSTEES.

The grantor herein does hereby, in accordance with the provisions of the aforesaid Act of the Legislature, elect:

First: In relation to the property hereby conveyed, and in relation to such other property as may hereafter be given or granted by said grantor, or given or granted, bequeathed or devised by any other person or persons to said trustees for the purpose of this trust, and in relation to the erection, maintenance and management of the institution hereby founded, to perform, during his life, all the duties and exercise all the powers which, by the terms of this grant, are enjoined upon and vested in the trustees herein named. And it is further provided that if the wife of said party of the first part, Arabella D. Huntington, shall survive him, then said Arabella D. Huntington shall, during her life, in relation to the property hereby conveyed, and in relation to such other property as may hereafter be given or granted by said grantor, or given or granted, bequeathed, or devised, by any other person or persons to said trustees, for the purpose of this trust, and in relation to the erection, maintenance and management of the institution hereby founded, perform, during her lifetime all of the duties and exercise all of the powers which, by the terms of this grant, are enjoined upon and vested in the trustees herein named.

Second: That upon the death of the grantor herein, or upon the death of the wife of said grantor, Arabella D. Huntington, if she shall survive him, all such powers and duties shall devolve upon and shall be exercised by the trustees named in this grant and by their successors.

VI.

RESERVATION OF THE RIGHT TO ALTER, AMEND OR MODIFY THE PROVISIONS

OF THIS GRANT AND THE TRUSTS THEREIN GRANTED, IN CERTAIN

RESPECTS.

The grantor herein does hereby reserve to himself during his life, and to his said wife, Arabella D. Huntington, if she survive him, the right to alter, amend, or modify the terms and conditions of this grant and the trusts therein granted, in respect to the nature, object and purposes of the institution founded, the name by which it shall be known, the powers and duties of the trustees, the manner in which and to whom they shall account, the mode and manner and by whom their successors shall be appointed, the rules and regulations for the management of the property conveyed, the place or places where and the time when any building or buildings or other improvements necessary and proper for the institution shall be required, remodeled, or erected, and the character and extent thereof.

VII.

RESERVATION OF OTHER RIGHTS.

The grantor herein does hereby reserve to himself and to his said wife, Arabella D. Huntington, if she survive him:

First: The right to absolute dominion over any personal property which he may now give, or which he, his said wife, or any other person may hereafter [pg. 295] give, convey or bequeath to the said trustees, or to their successors, and over the rents, issues and profits thereof.

Second: The right to absolute dominion over the rents, issues and profits of the real property hereby granted, or to be hereafter granted, conveyed, or devised to said trustees, or to their successors.

Third: The right to improve, change, manage and control the trust property as if this trust had not been made, and if the grantor, or his said wife, Arabella D. Huntington, if she survive him, should deem it desirable so to do, to substitute for such stocks, bonds, or other securities, as may be hereafter conveyed or bequeathed to the said trustees or their successors, other stocks, bonds or securities, even if such other stocks, bonds, or securities may draw a lesser rate of interest, but this reservation does not include the right to sell or incumber any of the real property which may be granted, conveyed or devised.

All these rights and all other rights reserved by, and all powers and privileges given or duties imposed upon, the said grantor, or his wife, Arabella D. Huntington, by the terms of this grant, shall be exercised, enjoyed and performed by the said grantor, or by his said wife, Arabella D. Huntington, without let or hindrance, and free from all interference from any source whatever, and from all duty to report in respect thereto, and from all liability to account in any manner therefor, and from all liability for waste, loss, misapprehension, or from any act or deed whatever by either of them done or permitted, and free from all liability against the estates of either of them.

*** IX.

SHALL NOT BE MERGED OR USED FOR ANY OTHER PURPOSE.

The real property and/or improvements, and/or the personal property of the trust herein declared, shall not be used for any other purposes than the purposes declared herein, and said "Henry E. Huntington Library and Art Gallery" shall not be merged or consolidated with any other institution or institutions of like character or otherwise, provided, however, that the said grantor reserves to himself and to his said wife, Arabella D. Huntington, or to the survivor of them, the absolute dominion over any real or personal property hereafter given or conveyed by them or either of them to the trustees herein named, or their successors, and the right to occupy and use

the said real property and improvements, together with the furnishings thereof, as a home place or otherwise.

*** The instrument was recorded on September 15, 1919.

The board of trustees met on September 18, 1919, organized, and adopted bylaws. The decedent was not a trustee but was present at all meetings up to the time of his death and exercised a controlling influence over the board.

The library building was completed in 1920. The rare books and manuscripts were moved in shortly thereafter.

By a deed dated June 30, 1920, the decedent and his wife conveyed to the trustees additional land for an entrance or plaza. This conveyance [pg. 296] recited that it was subject to all of the terms and conditions of the former deed except "that the property hereby conveyed is not, and shall not be, subject to the dominion, or the right to occupy and use, reserved to the grantor and his said wife, Arabella D. Huntington, in and by the proviso expressed in Paragraph IX of said former indenture." By another deed dated June 30, 1920, they conveyed to the trustees other land used for growing oranges, avocados, persimmons and hay. This conveyance recited that it was subject to all of the terms and conditions of the original deed. It also reserved to the grantors and to the trustees, after the death of the grantors, the power to sell, upon the condition that the proceeds thereafter be subject to the trust. By a deed dated October 15, 1921, the decedent and his wife conveyed to the trustees the residence and botanical gardens above referred to. This deed likewise recited that it was subject to all of the terms and conditions of the deed of August 30, 1918. By an instrument dated February 23, 1922, the decedent and his wife conveyed to the trustees, subject to the terms and conditions of the deed of August 30, 1918, all of the books, manuscripts, pictures, tapestries, furniture, art objects, and other things which constituted the two collections heretofore mentioned.

The trustees on January 9, 1923, dedicated a plot of ground as a burial place for the decedent and his wife.

By a deed dated February 8, 1926, the decedent (his wife having died) made certain changes in the trust without otherwise disturbing it. The principal changes were that the institution should be a public research library, art gallery, museum and botanical garden for reference and research work only, without circulation or withdrawal privileges, free to all qualified persons, and that surplus income should be used for expenses of research associates and fellows and in publishing and distributing their work. In this deed the decedent not only confirmed his former grants but used appropriate words to make a present grant of the real property described in the former deeds. By later deeds he permitted the sale by the trustees of unnecessary land upon condition that the proceeds thereafter be subject to the trust. He also executed other deeds correcting errors, conveying additional property and founding an art memorial in the name of his wife, which was to be housed in a wing of the library building. These deeds recited that they were subject to the same terms and conditions as the earlier conveyances.

The decedent gave to the trustees property of the total value of about $42,000,000. He never withdrew any funds or property from the trust. He directed a number of sales and exchanges of trust property. All of the trusts were accepted by the trustees. The decedent never surrendered his reserved rights. [pg. 297]

No income tax returns were filed for the trust for the years 1925, 1926 or 1927. The Commissioner has held that the trust is exempt from income tax since the decedent's death but prior thereto its income was taxable to the decedent. The Commissioner, in determining the deficiencies, added to the decedent's income amounts totaling $250,005.42 for 1925, $648,234.32 for 1926, and $82,942.20 for the period ended May 23, 1927, representing income of the Henry E. Huntington Library and Art Gallery, a trust. The notice of deficiency explains this action as follows:

Income shown on the books of the Henry E. Huntington Library and Art Gallery trust for all the years involved in the Revenue Agent's report has been included as taxable income to the taxpayer in the proper year. This office holds that since the agreement creating the above mentioned trust shows such trust to be revocable, the income therefrom is taxable to the grantor under the provisions of section 219 (h) of the Revenue Act of 1926.

II.

The decedent transferred to the Henry E. Huntington Library and Art Gallery trust $3,445,638.16 in 1925, $2,097,020.59 in 1926, and $6,683,940.35 in the period ended May 23, 1927. These transfers consisted entirely of personal property. In determining the deficiencies the Commissioner disallowed all deductions claimed on account of these alleged gifts.

III.

On June 30, 1920, the decedent conveyed to the trust, as above mentioned, a tract of land consisting of about 200 acres. Most of this tract was planted with orange trees which had been cultivated for a number of years and from which crops were picked and sold frequently at a profit. In 1917 about seven acres were planted with avocado trees because of the attractive market for avocados. In 1924 ten acres, in places most exposed to frosts, were planted with persimmon trees. Some hay was raised on this land. Part of the hay was used to feed the work horses and the surplus was sold. There was an orange packing house on the property. A separate set of books was kept for this property, the receipts were deposited in the name of the trust and all expenses of operation were paid by the trust. The trust maintained a ranch department which irrigated, cultivated, and planted the land, and picked, packed and sold the fruit. The landscape gardener above mentioned supervised this work. This part of the property was operated for profit. The following summary of income and expenses for the years 1925 and 1926 was taken from the books above mentioned: [pg. 298]

	1925	1926
Income:		
Citrus fruit sales	$11,935.50	$26,546.54
Sales of hay, shrubs, etc	3,548.59	7,183.34
Packing house rent	1,000.00	1,000.00

Acreage rent	776.10	
Total income	17,260.19	34,729.88
Expenses:		
Supplies, etc	29,420.13	29,373.05
Pay roll, etc., net	18,756.46	19,179.95
Proportion of packing house expense	7,234.43	13,338.10
Depreciation of equipment	3,920.61	4,018.03
Net expense per ranch expense account	59,331.63	65,909.13
Loss	42,071.44	31,179.25

In determining the deficiencies the Commissioner did not include in income the above items of income and did not allow as deductions the above items of expense.

IV.

In January 1927, the decedent stated to the vice president of the Huntington Land and Improvement Co. that he desired that company to convey to the trust known as the Henry E. Huntington Library and Art Gallery about 102 acres of land, so that the trust might exchange the land for certain objects of art. The board of directors of the Land Co., at a special meeting held on January 25, 1927, adopted a resolution to make the conveyance. This resolution recited that the owners of all of the capital stock of the company desired the company to convey the land to the trust as a gift. On the same day the property was conveyed by deed to the trust to be held subject to the conditions and trusts contained in the previous deeds, but with power in the trustees to sell and exchange the land. On the same day the trustees of the library and the decedent executed a deed conveying this land to an art dealer in exchange for certain personal property. The Land Co. made no charge on its books against the petitioner on account of this transfer.

The Commissioner, in determining the deficiency, has treated this transaction as a dividend to the decedent and has added to income under the item "dividends", $866,320 representing the value of this property. The parties have stipulated that the value of the land was $509,600.

The Land Co. owned about 700 acres of land in the city of San Marino adjoining land which the decedent had theretofore conveyed to the trust. The company was engaged in the business of selling this land in lots. The value of the adjacent property of the Land Co. was greater because of the location of the Henry E. [pg. 299]Huntington Library and Art Gallery than it otherwise would have been. The books of the Land Co. show that during the year 1927 the par value of its capital stock outstanding was $100,000; its earned surplus was over $8,000,000; and its "appreciated surplus" was over $4,500,000.

A.

Early in January 1925, the decedent transferred to the Henry E. Huntington Library and Art Gallery, subject to the terms of the trusts heretofore mentioned, $1,000,000 par value of coupon bonds of the Pacific Electric Railway Co., with interest coupons attached, on which $25,000 would become due on March 1, 1925. The trust intended to use these bonds to purchase pictures and consequently the decedent delivered the bonds to an art dealer on or before January 4, 1925, in exchange for the pictures. The decedent claimed a deduction for contributions in which these bonds were included at their cost to him, $708,208.50. This deduction was not allowed by the Commissioner. There was a ready market for the bonds. The interest was paid regularly. No part of the interest on these bonds has been included in the decedent's income for 1925.

B.

On February 28, 1927, the decedent sold 2,752 bonds of the Los Angeles Railway Corporation to the Huntington Land and Improvement Co. at the then

market price of $847.50 per bond, or $2,332,320. On that day he owed the purchaser $882,425.72 and received credit on the books of the purchaser for $2,366,720, which included a credit for interest on the bonds from December 1, 1926, to the date of the sale in the amount of $34,400. The balance due the decedent in this account was later paid. On February 28, 1927, the Henry E. Huntington Library and Art Gallery conveyed about 300 acres of land to the Huntington Land and Improvement Co. for a consideration of $2,331,700 and invested the proceeds in 2,752 bonds of the Los Angeles Railway Corporation which it purchased from the Huntington Land and Improvement Co. at $847.50. The price received for the land was a fair one. The decedent's estate reported as income the interest accrued on the bonds to the date of sale and claimed and was allowed a capital net loss in the amount of $419,680 from the sale of the 2,752 bonds. The interest on these bonds due June 1, 1927, was collected by the owner. The sale and exchange above described were made because the decedent desired the trust to have the bonds instead of the land.
[pg. 300]
V.
The Los Angeles Railway Corporation was organized in 1910 in order to consolidate several street railway companies. The decedent owned all of its outstanding stock from the time of its incorporation until the date of his death. Shortly after incorporation it authorized a bond issue of $20,000,000. It retained $5,250,000 of these bonds to cover bonds of subsidiaries of that par value which were outstanding during the period here involved. It issued $14,750,000 of its bonds, of which the decedent took about one third and the rest were sold to the public. The bonds in the hands of the public were never in default as to interest.
The Los Angeles Railway Corporation organized and held all of the stock of the City Railway Co. This company issued its bonds in the amount of $5,000,000 all of which were held by the decedent.
All of the bonds above mentioned were 5 percent coupon bonds in units of $1,000.
On December 1, 1925, the decedent owned 5,373 bonds of the Los Angeles Railway Corporation which were a part of his original holdings. Interest in the amount of $134,325 became due on these bonds on that date. On June 1 and on December 1, 1926, he owned 5,298 of these bonds. Interest in the total amount of $264,900 became due on these bonds during that year. He also retained 30 coupons due June 1, 1926, from bonds which he sold in 1926 prior to June 1. The face amount of these coupons was $750. The following table shows the number of bonds of the City Railway Co. owned by the decedent at various interest dates and the interest then due:

Date	Number owned	Interest due
Feb. 1, 1925	4,042	$101,050
Aug. 1, 1925	3,918	97,950
Feb. 1, 1926	3,891	97,275
Aug. 1, 1926	3,763	94,075
Feb. 1, 1927	3,633	90,825

The decedent never presented the coupons and never actually received the interest on any of the bonds mentioned in this paragraph. This had been his practice since 1917. He did not report such interest on his income tax returns. The corporations made accruals on their books and claimed deductions on their returns representing this interest.

During the years 1925 and 1926 the decedent owned 431 bonds of the Los Angeles Railway Corporation which he had purchased on the open market and which were not a part of his original holdings. The interest on these for each semiannual period amounted to [pg. 301]$10,775. He regularly presented the coupons from these, actually collected the interest, and regularly reported it in his income tax returns.

In determining the deficiency for 1925 the Commissioner added $344,100 to the decedent's income, representing interest on the Los Angeles Railway Corporation bonds due December 1, 1925, and all of the interest due in 1925 on the City Railway Co. bonds held by the decedent. This included $10,775 which had been reported on the return.

In determining the deficiency for 1926 the Commissioner added $477,300 to the decedent's income, representing interest due within the year on the two kinds of bonds. This resulted in a duplication to the extent of $20,300.

In determining the deficiency for the period ended May 23, 1927, the Commissioner added $90,825 to the decedent's income, representing interest on the City Railway Co. bonds due on February 1, 1927. This represented $2,500 less than was actually due on that date.

The Los Angeles Railway Corporation was fairly prosperous until 1915, when "jitney" competition cut into its revenues. This lasted for several years. Then it began to suffer from the high costs arising from the World War. It had losses in 1917, 1918, and 1919. About this time the population of Los Angeles began to increase rapidly. This resulted in increased income to the corporation until after 1924. In 1923 a company applied for permission to use motor buses in Los Angeles. The corporation opposed this in a bitter campaign. The new company was kept out but the corporation had to inaugurate bus service and otherwise expand. The increase in population resulted in additional paving, grading, etc., the cost of which the corporation had to share to the extent of about $1,000,000 annually. Funds for this purpose had to be borrowed from banks on notes and from other corporations in which the decedent was interested. During 1925, 1926, and the first part of 1927 these loans amounted to about $4,000,000. The decedent endorsed many of these notes. In addition, the corporation owed the decedent interest and other amounts on open accounts and notes amounting to more than $1,500,000.

The corporation tried several times to secure permission to charge an increased fare. Those proceedings did not result in any increase in fares until after the period here involved.

The consolidated net income of the two companies was $191,906 for 1925, $27,384 for 1926, and $135,898 for 1927, after deducting all interest due, including the interest here in question. The Los Angeles Railway Corporation had a surplus in 1925 and 1926 which [pg. 302]amounted to about $1,500,000. The City Railway Co. had a surplus of $104,900 until 1926. The companies never had sufficient cash on hand to pay the interest owed to the decedent.

In February 1926, the corporation issued to the decedent its promissory note for $268,500 in payment of interest due on the bonds in 1924 and 1925. He discounted this note at a bank and reported the amount thus derived as income. The corporation has paid $100,000 on this note.

VI.

In 1925 the decedent sold 6,277 shares of Old Dominion Land Co. stock for $627,700. He had bought three of these shares in 1906 at $80 per share, 2,805 shares in 1907 at $75.58 per share, and the rest after February 28, 1913. In his returns for 1925 and 1926 he reported installments of profits based upon cost and stated that the March 1, 1913, value of the stock was $70 per share. The Commissioner made no change in the basis used.

After the decedent had filed his income tax return for 1925, the Old Dominion Land Co. had its properties appraised as of March 1, 1913, by three experienced real estate dealers of Newport News. As a result of this appraisal the company increased the value of its assets on its books to show as of March 1, 1913, a surplus of $2,942,358.10 and a book value of about $249 a share instead of the former surplus of $420,030.57 and book value of about $121 a share. The

appraisers appraised each lot or parcel of land separately and added the items together to arrive at the total value. The Commissioner accepted the values shown on this appraisal for the purpose of computing gain or loss to the company upon the sale of lots during the period 1917 to 1925, inclusive.

The Old Dominion Land Co., since its organization in 1880, has held and developed land and lots in and around Newport News, Virginia, and has also sold some of its property. All sales were made through local dealers, as the company maintained no sales organization. Prior to the World War the population of Newport News was about 20,000. During the war the city grew very rapidly until it had a population of over 35,000. Its population in 1930 was 34,417. The city has only two important industries, shipbuilding, carried on by the Newport News Shipbuilding and Dry Dock Co., and shipping, which is due to the location there of a terminus of the Chesapeake & Ohio Railroad. In 1913 these industries had a normal year. Cancellation of contracts after the war and in 1921 had a depressing effect upon the city. This was gradually overcome. There has been no great demand for the property of the Old Dominion Land Co. [pg. 303]except during the war period. The value of the land was increasing from 1913 through 1925.

The following table shows for certain years the profit and loss of the company, as computed before the appraisal, and the dividends paid:

Year	Profit	Loss	Dividend Per cent
1909		$27,763.36	
1910		28,702.09	
1911	$31,943.97		
1912		2,055.49	
1913	60,137.21		2
1914	4,382.89		1
1915	55,747.62		1
1916		$18,814.16	11
1917	$91,208.50		
1918	168,720.85		5
1919	188,017.52		
1920	86,926.08		
1923			2

Most of the stock of the company was closely held. The stock was not listed upon any exchange. The par value was $100. Nineteen thousand six hundred and twenty-five shares were issued and outstanding. In 1917 thirty shares were sold at par. Sales of large blocks at $70 per share were made in 1919, 1920, and 1922. Other sales of smaller lots of stock were made at various times at prices ranging from $30 to $75 per share.

The fair market value on March 1, 1913, of the stock of the Old Dominion Land Co. held by the decedent on that date was not greater than the cost of that stock to him.

VII.

In 1921 the Huntington Land and Improvement Co. owned most of the stock of a manufacturing company known as the Standard Felt Co. In an effort to make the operations of the Felt Co. successful, H. S. Cook, a capable factory executive, was employed by the Felt Co. at a salary of $15,000 per annum. Cook became president of the Felt Co. The Huntington Land and Improvement Co. paid a part of Cook's salary, including $2,500 in 1923, $5,000 in 1924, and

$5,000 in 1925. In 1923 the decedent acquired the Felt Co. common and preferred stock from the Huntington Land and Improvement Co. In the same year he sold some of the common stock. In 1925 he disposed of additional holdings of Felt Co. stock. In the latter year he agreed that the Huntington Land and Improvement Co. should charge him on its books with the amounts it had paid on account of Cook's salary after the decedent had acquired the Felt Co. stock. These charges amounted to $12,500. A deduction of this amount was claimed on the decedent's return as an ordinary and necessary expense and was disallowed by the Commissioner in determining the deficiency. [pg. 304]

VIII.

In 1921 the brokerage firm of H. Knickerbacker & Co. was a limited partnership under the laws of the State of New York. Helen M. Knickerbacker, the widow of the founder of the firm, was an inactive limited partner to the extent of her contribution of $250,000. Robert Gibson was the active general partner and the only other member of the firm. He had been with the firm for many years. He was a member of the New York Stock Exchange and a member of its governing board from 1914 until 1930. He was also secretary of the Exchange in 1921. The firm had an excellent reputation. The decedent had been a customer of this firm for at least twenty years. It had bought and sold many securities for him.

The decedent owned a large block of the stock of the Chesapeake & Ohio Railroad Co. which gave him working control of that company. He was chairman of its board of directors. He had bought and sold large blocks of this stock through H. Knickerbacker & Co. In March 1921, he owned 30,000 shares of this stock, which were on deposit with the brokerage firm in the decedent's active account. He owed the firm $628,000 on this account. On March 7, 1921, he paid the balance due and called for delivery of his stock. He then learned that his stock was pledged as collateral for debts of the brokerage firm which that firm was unable to pay and the firm could not deliver his stock. In order to enable H. Knickerbacker & Co. to secure the release of the stock and make delivery to him, the decedent was forced to lend the firm $1,490,000. He made the loan, secured his stock, and later, in 1923, sold it to the Van Sweringens as a result of negotiations pending in March 1921.

He advanced the money to H. Knickerbacker & Co. on or about March 15, 1921, and at the same time took as evidence 7 percent demand notes of H. Knickerbacker & Co. The decedent placed a representative with the firm to supervise its business and had an investigation made to discover all available collateral and possible sources of repayment for his loan. There was pledged as collateral for the notes certain valuable real estate belonging to Gibson, some brewery stock which was worthless, 2,000 shares of United States Express Co. stock, a company then in liquidation, and Gibson's seat on the Exchange, then worth about $80,000. No other property could be discovered except the accounts receivable of the firm in excess of $1,000,000. The decedent also learned that Gibson was residuary legatee under the will of Mrs. Knickerbacker. The latter died in 1922, but in 1923 it was apparent that her specific legacies would consume all of her estate. Efforts to collect the accounts receivable showed that they were practically worthless. Only $9,000 was collected from this source. The rules of the Exchange provided that [pg. 305]obligations owed other members should be paid first out of the proceeds of the sale of a member's seat. The seat was sold in 1930 for $479,000, but no part of that amount was available to be applied on the decedent's loan. The firm continued in business until 1930. It had losses in 1921, 1922, and 1923. During this period the decedent advanced other amounts to the firm,

which were repaid to him. On December 31, 1924, the liabilities of the firm exceeded its assets by more than $1,000,000. In 1924 part of the collateral on the decedent's notes was sold and the proceeds credited on the notes. The remainder was appraised and credited, leaving a balance due of $1,225,643. The decedent determined this amount to be a worthless debt and charged it off his books in 1924. The Commissioner allowed the deduction of this amount on the 1924 return and a net loss resulted. The Commissioner has refused to allow any net loss for 1924 to be carried forward to 1925 and 1926.

The decedent withdrew his representative with the firm about 1924. He had made numerous demands upon the firm for payment and had employed counsel to aid in collecting the debt. In 1925 and 1926 he collected a total of $18,000 from the firm. In the fall of 1926 the decedent employed new counsel who, in later years, succeeded in collecting a total of $300,000, most of which was paid out of earnings of the firm. The decedent and his estate reported these amounts as income in the year received.

The decedent was an officer and a stockholder in a great many corporations. He directed the operations of many corporations over which he had control. These included the Chesapeake & Ohio Railroad Co., the Los Angeles Railway Corporation, and the City Railway Co. He was regularly and actively engaged in 1921 and 1924 in the business of directing the operations of a number of corporations, the stock of which he held principally for that purpose. The loan to H. Knickerbacker & Co. was made as a necessary incident of preserving his stock in one of these corporations and the loss in 1924 resulted from the operation of a business regularly carried on by the decedent in 1924. The parties have stipulated facts from which the amount of the net loss for 1924 to be carried forward can be computed.

OPINION.

Murdock:

I.

The Commissioner has included in the decedent's income for each period the income for the corresponding period of the trust, known as the Henry E. Huntington Library and Art Gallery. The explanation given in the notice of deficiency and the arguments now advanced by the respondent indicate that he relies [pg. 306]upon the following provisions of subsections (g) and (h) of section 219 of the Revenue Act of 1926:

(g) Where the grantor of a trust has, at any time during the taxable year, *** the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust *** be distributed to the grantor or be held or accumulated for future distribution to him

*** such part of the income of the trust shall be included in computing the net income of the grantor.

The same provisions were in the Revenue Act of 1924. Congress intended by the enactment of these provisions to prevent a taxpayer from reducing, or altogether avoiding, his income tax liability by the creation of a trust to hold income-producing property and the retention of a power which would enable him at will to withdraw the property or to direct the payment of the income to himself. The words of Congress are clear enough for present purposes and the case may not turn upon any ambiguity in the language of the taxing statute. If the words of either of these provisions cover the case, the Commissioner must be sustained even though the decedent never exercised his power and even though to tax him may appear to be a great hardship. Corliss v. Bowers, 281 U.S. 376; Clapp v. Heiner, 51 Fed. (2d) 224; Alfred F. Pillsbury, 19 B.T.A. 1229, 1233. Conversely, if the letter of the act does not apply, then there should be no enlargement through interpretation. In short, we are to apply the act as we find it and not our own notions of equity. Crooks v. Harrelson, 282 U.S. 55.

Both parties agree that the original trust deed must receive primary consideration since the others refer to and depend upon it. There are no provisions in that deed expressly authorizing or permitting distribution or accumulation of income to or for the grantor. But the respondent contends that the grantor retained to himself the power to revest in himself title to the trust property and also the power to distribute to himself the income of the trust. He points particularly to the provisions of Paragraph VII of the original trust instrument, wherein the grantor reserved to himself the right to absolute dominion over the personal property conveyed to the trust and the income therefrom, the right to absolute dominion over the income of the real property, and the right to improve, change, manage, and control the trust property as if the trust had not been made. The paragraph also provides that these rights shall be exercised without let or hindrance and free from all interference from any source whatever. Paragraph IX provides that the grantor reserves to himself the absolute dominion over any real or personal property thereafter given to the trustees. Furthermore, there was no [pg. 307] liability upon him to account to anyone for anything he did with the property. The rights thus reserved were never relinquished by the decedent as long as he lived.

"Absolute" means perfect, complete, unrestricted, freed or loose from any limitation or condition. "Dominion" means ownership or right to property, including the right to claim, use, enjoy, and dispose of to the exclusion of every other person. The phrase "absolute dominion" must ordinarily connote unrestricted, perfect, and complete ownership in a thing. Webster's New International Dictionary; Bouvier's Law Dictionary, Rowles 3d ed., People v. Perry, 84 Cal. 31; 24 Pac. 33; Columbia Water Power Co. v. Columbia Electric Street Ry. Light & Power Co., 172 U. S. 475. Cf. Anderson v. Wilson, 289 U. S. 20. No California case in point has been called to our attention. In People v. Cogswell, 113 Cal. 129; 45 Pac. 270, there is no indication that the grantor reserved any right of absolute dominion. Yet the California statutes provide that there may be such a trust. 1 There is no showing that any of the income of the [pg. 308] trust was from real estate. If the decedent retained during his life perfect, complete and unrestricted ownership of a part or all of the corpus of the trust, and particularly of all of the income, obviously he could at any time revest legal title in himself and he could in his discretion distribute the income to

himself. The Commissioner contends that he did retain these rights and therefore the income was properly included in his income.

The petitioners contend that the phrase "absolute dominion" as used in the statute and in the trust instrument means only a power to further the trust for eleemosynary purposes. They are drawn to this conclusion, not by one determinative word or provision, but by the application of several rules of interpretation. They point to a number of the provisions of the original trust instrument and the act which, they contend, can not be reconciled properly with the respondent's interpretation of the words "absolute dominion." In order to avoid incongruities, and in order to give meaning to each provision of the deed and of the act, they say that the words "absolute dominion" must mean something less than the power to revoke, deplete or destroy the trust. They also call attention to the California Act of March 21, 1872, California Civil Code, sec. 2280:

A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

Their argument is sufficiently specious to require careful consideration. This we have given it, but without being convinced that the plain words used by the decedent admit of any modification. Consequently, we may not go outside the deed and the act to raise a doubt as to the meaning of the words used or to find the intention of the grantor. Objections can be suggested to each view, but in our opinion the respondent's conclusion is the one most easily and naturally reached.

Huntington apparently desired absolute freedom, so long as he might live, in developing his ideas concerning the use of the trust property. Cf. Fosdick Estate, 139 Atl. 318. He reserved the power to deal with all contingencies which might arise. He alone was to [pg. 309]be the judge of the sufficiency of his reason for any of his acts. Yet he desired to have in existence a trust which would manage the trust property from the moment of his death. He further desired that this trust should not be untried but should be an organization which had developed with him and which had benefited through the experience of operating, at least formally, during his life. Thus, he made the trust something more than a potentiality during his life. He allowed it to operate in form at least. The trustees were permitted to gain experience in the conduct of its affairs during his life, and when he died and actual control passed into the hands of the trustees they were not untried. Viewed in this way all of the provisions of the deed have some reasonable purpose and there is no part of the deed which is inconsistent with any other. The statute of California permitted him to do what he did. He retained for himself broad powers and he also retained powers more restricted. The retention of one does not negative the retention of the other. He actually exercised the more restricted powers, but the occasion never arose for the exercise of the broadest powers he retained. One who can act as trustee without accounting to anyone, who has retained absolute dominion over the property and over all of the income, and who can control the trust property as if the trust had not been made, has very extensive powers. These, in our opinion, included the power to revest in himself legal title to the personal property at least, and perhaps to the realty, and the power and discretion to appropriate all of the income of the trust property for his own purposes apart from the purposes of the trust. Cf. Porter v. Commissioner, 288 U. S. 436. "He was free at any moment, with reason or without, to revest title in himself

*** ." Burnet v. Guggenheim, 288 U. S. 280. The income was subject to his unfettered command. Corliss v. Bowers, supra. The Commissioner did not err in taxing the income of the trust to the grantor. Cf. Grace Whitney Hoff, 20 B.T.A. 86; Joseph H. Bromley, Jr., 26 B.T.A. 878; Reinecke v. Smith, 289 U. S. 172; Jackson v. Commissioner, 64 Fed. (2d) 359; O'Donnell v. Commissioner, 64 Fed. (2d) 634; affirming 25 B.T.A. 956.

II.

The next question would not arise had our decision on the first point been in favor of the petitioners. The Commissioner not only taxed the income of the trust to the petitioners for 1925 and 1926, but for those years he failed to allow, as an offset against that income, losses incurred in those years in the operation of a ranch. For each year the ranch had certain income and certain expenses. [pg. 310]The Commissioner does not question the amount of either. In each of the two years the expenses exceeded the income. The Commissioner has not included the ranch income in computing the deficiencies and he has not reduced trust income by the ranch expenses. He did not comment on the matter in his notice of deficiencies. In order to limit the evidence to matters as to which the parties were at odds, the Board Member asked counsel for the respondent to state the ground upon which the respondent relied to support his action. Counsel replied that the respondent's position was that the ranch was operated for Huntington's pleasure and the expenses were not incurred in a business carried on for profit. Thereupon the petitioners introduced evidence to refute this position. That evidence is not as complete and convincing as it might be. Nevertheless, it sufficiently negatives, for present purposes, the Commissioner's view that the ranch was conducted as a rich man's hobby. The ranch was operated for profit. Cf. Edwin S. George, 22 B.T.A. 189. Counsel for the respondent in his brief argues that the proof fails to show that the expenditures were ordinary and necessary. In view of his statement at the trial referred to above, proof of such facts was unnecessary.

III.

The third issue is whether or not the Commissioner erred in holding that a transfer of land was equivalent to the receipt by the decedent of a dividend of $509,600. Originally the amount involved was $866,320, which the Commissioner had determined was the value of the land. The parties have stipulated that the value was $509,600. Consequently, the difference between the two figures should be excluded from income on the basis of the stipulation. The petitioners have raised this issue as an alternative to be considered only in the event the first issue is decided adversely to their contention. But the respondent argues that he has correctly included the value of the land in the decedent's income as a dividend, regardless of whether or not the income of the trust is taxable to the decedent.

The land belonged to the Huntington Land and Improvement Co. The decedent owned all of the stock of that corporation and exercised control over it. He wanted to purchase some objects of art for the Henry E. Huntington Library and Art Gallery from a certain art dealer. Therefore he suggested to the vice president of the corporation that the corporation transfer the land to the trust so that the trust, in turn, could transfer the land to the dealer in exchange for the art objects. This was known to be satisfactory to the dealer. The corporation made the transfer on January 25, 1927, pursuant to a resolution of the directors in which the transfer [pg. 311]was described as a gift. On the same day the trust made the exchange with the dealer. The Commissioner held that

the transaction was equivalent to the distribution of a dividend to the decedent. This holding must be sustained. The corporation had ample earned surplus from which to distribute a dividend of $509,600. A dividend may be paid in kind. Peabody v. Eisner, 247 U. S. 347. It need not be called a dividend. Phelps v. Commissioner, 54 Fed. (2d) 289; affirming 20 B.T.A. 866; certiorari denied, 285 U. S. 558. Although the directors may have called it a gift and intended to make a gift, it may nevertheless be a dividend. Lincoln National Bank, Executor, 23 B.T.A. 1304; affd., 63 Fed. (2d) 131. Cf. Alexander Sprunt & Sons v. Commissioner, 64 Fed. (2d) 424, affirming 24 B.T.A. 599. There need be no formal declaration of a dividend. Chattanooga Savings Bank v. Brewer, 17 Fed. (2d) 79; certiorari denied, 274 U. S. 751. Hadley v. Commissioner, 36 Fed. (2d) 543; affirming 6 B.T.A. 1031. The contention of the petitioners is that the transfer was made by the corporation for business purposes to increase the value of adjoining land held by it. This was obviously not the purpose which any of the parties had in mind at the time. If the transfer affected the value of the remaining land, the effect was incidental, unintentional, and not the real purpose of the transfer. The corporation acted solely to accommodate the decedent. At the end of the day the earned surplus of the corporation was reduced by the book value of the land, the trust had the art objects, and the decedent had fully accomplished his sole purpose in having the transfers made. Although it may not be important, it is a fact also that through his absolute dominion over the personal property of the trust, he was in control of the art objects. He enjoyed the use of the corporate property and obtained what he wanted to buy. For income tax purposes the transaction amounted to the distribution of a dividend to the decedent. Cf. L. J. Christopher, 13 B.T.A. 729; affd., 55 Fed. (2d) 527.

IV.

The petitioners contend, under the fourth issue, that the Commissioner erred in failing to allow proper deductions, for each of the three periods here involved, on account of alleged gifts made by the decedent to the Henry E. Huntington Library and Art Gallery. They make this claim under section 214 (a)(10) of the Revenue Act of 1926, which allows as deductions, subject to certain limitations, "contributions or gifts made within the taxable year to or for the use of:

*** any

*** trust

*** organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes

*** no part of the net earnings of [pg. 312] which inures to the benefit of any private shareholder or individual." This contention of the petitioners is closely related to the first issue discussed in this proceeding. Section 214 (a)(10) allows deductions for gifts made within the taxable year. Courts hold that there is no gift unless the donor absolutely and irrevocably divests himself of the title, dominion, and control over the subject of the gift. For a summary of authorities see Margaret M. Edson, 11 B.T.A. 621, and the opinion of the Circuit Court of Appeals for the Eighth Circuit, 40 Fed. (2d) 398, reversing the Board. In holding that there was a taxable gift in 1925 within the meaning of section 319 of the Revenue Act of 1924, the Supreme Court in the case of Burnet v. Guggenheim, supra, stated that:

Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed *** . While the powers of revocation stood uncanceled in the deeds, the gifts, from the point of view of substance, were inchoate and imperfect. *** By the execution of deeds and the creation of trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others [cases cited], but the substance of his dominion was the same as if these forms had been omitted. Corliss v. Bowers, supra. He was free at any moment, with reason or without, to revest title in himself, except as to any income then collected or accrued. As to the principal of the trusts and as to income to accrue thereafter, the gifts were formal and unreal. They acquired substance and reality for the first time in July, 1925, when the deeds became absolute through the cancellation of the power.

*** *** a gift is not consummate until put beyond recall.

The alleged gifts were of personal property. This property was not put beyond recall within the taxable year but remained subject to the donor's "absolute dominion." Cf. Porter v. Commissioner, supra; Jackson v. Commissioner, supra. Furthermore, the decedent could take to himself at any time the benefits of the net earnings of the trust property. Thus, for these two reasons, the transfers in question can form no basis for a deduction under section 214 (a)(10) of the Revenue Act of 1926. First National Bank of Boston, Administrator, 25 B.T.A. 252.

A.

Before taking up the petitioners' next assignment of error we will consider the respondent's affirmative claims. The respondent contends that interest in the amount of $16,666.66 should be included in the decedent's income for 1925. This amount was the accrued interest on a million dollars par value of Pacific Electric Railway Co. bonds at the date in 1925 when the bonds, with the coupons attached, were transferred to an art dealer in exchange for pictures. The coupons attached were not due until a later date. The transfers of personal [pg. 313]property which the decedent made to the trust were not gifts, inasmuch as he retained absolute dominion over the property after it was transferred to the trust. See discussion on first and fourth points, supra. Thus, the question is whether or not he was in receipt of interest, and therefore income, when he not only transferred the bonds and coupons to the trust but immediately used that personal property to make purchases of other personal property on behalf of the trust. Counsel for the respondent made this claim for an increased deficiency at the hearing by amendment to his answer. Consequently, the burden of proof on this issue is upon him. Board's Rule 30; S. L. Fowler, 6 B.T.A. 250. But facts to raise the question fairly are not in the record. The decedent sold other bonds with coupons attached, during the periods before us, and in the transactions received a certain amount of cash which was specifically paid on account of the accrued interest. He reported the amounts received as interest. But here the respondent has not shown the value of what was received in exchange or that anything was received on account of interest. Cf. S.O. 46, C.B. III, p. 90. Consequently, the question suggested by the respondent is academic only, in so far as this case is concerned. We can not say that error was committed in omitting this item from income for 1925.

B.

The respondent contends, in case he is sustained on the petitioners' first point, that the deficiency for the period ended May 23, 1927, should be increased because he erroneously failed to disallow a deduction of $419,600 claimed on the return as a loss from the sale of Los Angeles Railway Corporation bonds. Some similar bonds were sold by the decedent to his daughters, but the respondent no longer contends that the loss on those particular bonds was improperly allowed. The facts relating to the transactions in the remaining bonds are clear. On a certain day the decedent sold the bonds at market to the Huntington Land and Improvement Co. On the same day the Huntington Land and Improvement Co. transferred the same bonds at the same price to the Huntington Library and Art Gallery trust in exchange for land. The respondent does not question the effect or the genuineness of the sale by the decedent to the corporation of which the decedent was the sole stockholder. A deductible loss may be sustained through such a sale. David Stewart, 17 B.T.A. 604; Corrado & Galiardi, Inc., 22 B.T.A. 847. The only point made by the respondent is that the decedent did not sustain any real loss, since the same bonds which he parted with in the morning were a part of the trust personalty by evening and he had absolute dominion over the trust personalty. [pg. 314]The respondent would apply the provision of section 214 (a) (5) that no deduction shall be allowed for loss claimed to have been sustained in any sale of securities where within 30 days after the date of the sale the taxpayer has acquired substantially identical property and the property so acquired is held by the taxpayer for any period after such sale. The petitioners' briefs are silent in regard to the question thus raised.

The decedent did not personally reacquire substantially identical property and, strictly construed, the language of 214 (a) (5), above referred to, might not apply. However, the rule of strict construction should not be unduly pressed to permit easy evasion of a taxing statute. Carbon Steel Co. v. Lewellyn, 251 U. S. 501. Unless the respondent is right, a trust like this one could be used deliberately to accomplish the very thing which Congress intended to frustrate Compare the last paragraph of the opinion in Reinecke v. Smith, supra. The evidence does not indicate that income tax avoidance was thought of in connection with the particular transactions here in question. But a taxpayer's good intentions are not determinative of his right to a loss deduction. The sale to the corporation and the exchange to the trust were each a part of a single plan conceived and carried out by the decedent. His one desire was that the trust have bonds in place of unnecessary land. The corporation and the trust were his pawns. He completely controlled both and made each act to carry out his plan. But, when his purpose was accomplished, we find that for income tax purposes his one move checkmated the other.

The trust was not a taxpayer. The practical effect of the creation of the trust was to assign income. Reinecke v. Smith, supra. All of the income of the trust was still taxable to the decedent. His gifts to the trust were so lacking in substance that the gift tax of the Revenue Act of 1924 would not have reached them. They would not support a claim for a deduction under section 214 (a) (10) of the Revenue Act of 1926. It would be anomalous if the acquisition by the trust here shown would not defeat the taxpayer's claim to a deduction under section 214 (a) (5) of that act. The Supreme Court has said repeatedly, "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed-the actual benefit for which the tax is paid." Corliss v. Bowers, supra, at page 378; Tyler v. United States, 281 U. S. 497; Burnet v. Guggenheim, supra; Reinecke v. Smith, supra. Likewise, taxation is primarily concerned with the actual reduction of the benefit for which the tax is paid. "Generally speaking, the income tax law is concerned only with realized losses, as with realized gains." Lucas v. American Code Co., 280 U. S. 445. Although title to the bonds was acquired by the trust, actual command over the property was still [pg. 315]in the decedent. How can the fact or the amount of

his loss be determined while the bonds have value and while he can revest title in himself? If the value of the bonds had subsequently increased, he might even have made a profit on them. We are unable to say that he realized any loss. The difference between acquisition by him personally and acquisition by the trust amounts only to a refinement of title and may be disregarded so far as section 214 (a) (5) is concerned. "The substance of his dominion was the same as if these forms had been omitted." Burnet v. Guggenheim, supra. Cf. O'Donnell v. Commissioner, supra. The alleged loss of $419,600 was not sustained in the period ended May 23, 1927.

V.

The decedent owned about one third of the outstanding bonds of the Los Angeles Railway Corporation and all of the outstanding bonds of the City Railway Co. The interest on some of these bonds which became due during the periods here in controversy was not reported in the decedent's income tax returns. The Commissioner included this interest in income for the period in which the coupons matured. The petitioners' fifth contention is that this was in error since the decedent, who was on the cash basis, did not actually receive the interest and the corporations did not have the cash with which to pay it. A taxpayer on the cash basis certainly can not, by refusing to present his coupons and collect his interest when it is due, select the year in which he will report that interest. Cf. Ella C. Loose, Executrix, 15 B.T.A. 169. The Commissioner has provided by regulations that bond interest is constructively received when the interest coupons mature and are payable and the interest should be reported in that year even though the coupons are not cashed until later. Regulations 69, article 52, and prior regulations. Although this rule should be properly restricted, nevertheless the time for reporting income may not depend upon the whim of a taxpayer. Cf. Newman v. Commissioner, 41 Fed. (2d) 743. In the normal case we would expect a taxpayer having interest coupons maturing in a certain year to report the interest in his income for that year. What circumstances are there in this case which would justify the failure to report the interest on these particular bonds?

If a debtor is insolvent or obviously unable to pay his interest, it may be under some circumstances that the creditor need not report the interest as income of the year in which the coupons mature. Cf. American Cigar Co., 21 B.T.A. 464, 492; Marian Otis Chandler, 16 B.T.A. 1248; Great Northern Ry. Co., 8 B.T.A. 225; affd., 40 Fed. (2d) 372; certiorari denied, 282 U. S. 855. These two corporations, [pg. 316]however, not only were solvent, but had a considerable surplus. They showed a profit for each year after accruing all of their interest, including the interest in question, as an obligation.

The decedent did not present for payment the coupons on certain of his bonds and did not receive payment of that interest in cash. Yet about two thirds of the bonds of the one corporation were in the hands of the public and the interest on those bonds was paid regularly as it became due. The petitioner regularly presented the coupons from some of his Los Angeles Railway Corporation bonds and actually received the interest. As we have already said, he never presented his coupons on the bonds in question. He made this distinction voluntarily. The petitioners would have us believe that the decedent was making every effort to collect this interest but his efforts were successfully resisted by the corporations. This is difficult to understand in view of the fact that the decedent actually exercised his complete control over both corporations. Bond interest is not in default where the coupons are not presented and payment is not demanded. In 1927 he sold a large block of these bonds for a price which expressly included the accrued interest. He also gave away some of the bonds. After the sales and after the gifts the owners of the bonds

regularly collected the interest from the corporations. The decedent obtained some of the interest on his bonds by discounting a note which the corporation gave him on account of interest on these bonds. He did not want the corporations to be in default on their bond interest. His failure to collect the rest of the interest on his bonds seems to have been pretty largely a matter of his own choice. Cf. John I. Chipley, 25 B.T.A. 1103.

We are not unmindful of the fact that the corporations did not have on hand sufficient cash or "current assets" to pay all of the coupons when they became due. Cf. Marian Otis Chandler, supra. But the decedent was in control of their finances, had not presented his coupons for several years, and, of course, did not need to have the cash on hand if he did not intend to present his coupons. He was making advances to the corporations, and his failure to demand and collect the interest was equivalent to an advance, subject to demand. We must assume that their failure to have the means of payment and his failure to insist upon payment were matters of his own choice, done to suit his own convenience and for his own good purposes. But he cannot thus avoid his own tax liability on this interest. In John A. Brander, 3 B.T.A. 231, in discussing constructive receipt, we said:

It was not that the corporation would not pay, but rather he would not receive. This election to give the corporation the temporary use of the amount is an exercise by him of its enjoyment, and this is one of the primary attributes of income.

[pg. 317]

Nor have we overlooked the fact that these companies had gone through strenuous times prior to the years here involved. However, 1924 was apparently a good year and there was no reason to believe in the taxable years that the corporations were going to fail or that they would be unable to pay the interest to the decedent when he chose to demand it. Whatever the difficulties were, they did not render the corporations insolvent, prevent the payment of the interest on the bonds of the other holders or avert a profit after all of the interest had been accrued. The doctrine of constructive receipt of income by one on a cash basis should be sparingly applied, yet we are unable to say that the evidence justifies a reversal of the Commissioner's determination on the ground that the decedent was not in constructive receipt of this interest. John A. Brander, supra.

VI.

The decedent sold a number of shares of the stock of the Old Dominion Land Co. in 1925 at $100 per share. He had acquired some of these shares before and some after March 1, 1913. The controversy relates to the basis for the computation of gain or loss on the sale of those shares which were acquired prior to March 1, 1913. In making his income tax return for the year 1925 the decedent considered that the cost of those shares was in excess of their value on March 1, 1913, and, therefore, he computed and reported by the installment method a profit on the basis of cost. Furthermore, he stated in that return that the fair market value of the shares on March 1, 1913, was $70 per share. He was familiar with the property, the corporation's activities, and with prices which had been paid for the stock. Later, the corporation had its properties appraised as of March 1, 1913. But thereafter the decedent filed his 1926 return reporting an additional installment of his profit on the basis of cost and stating the March 1, 1913, value to be $70 as before. The Commissioner accepted the basis used and made certain adjustments which are not

in controversy. Apparently encouraged by the appraisal, the executors of the decedent now claim that the shares of stock acquired prior to March 1, 1913, had a fair market value on that day greatly in excess of cost. They therefore claim that the decedent had a loss instead of a profit upon the disposition of those shares involved in the 1925 sale which were acquired prior to March 1, 1913. The Commissioner contends that the cost basis used in the returns was proper for all shares then sold.

The petitioners called the two surviving appraisers to show how they made the appraisal and to state that in their opinion the fair [pg. 318] market value of the real estate on March 1, 1913, was the appraised value. The company's property consisted principally of real estate. However, it had a few other assets and the petitioners also offered evidence to show the value of those assets on March 1, 1913. After the appraisal was made in 1926 the books were adjusted to conform and they then showed a book value for the stock on March 1, 1913, of about $249. The petitioners also called as a witness an expert on the valuation and marketing of unlisted securities. He was told to assume certain facts in a hypothetical question, and on the basis of these stated that, in his opinion, the fair market value of the stock on March 1, 1913, was $183 a share. He assumed that the fair market value of the real estate was the amount determined by the appraisers. He was not told of any sales of the stock.

We need not discuss in detail the retrospective appraisal of the land nor the witnesses' valuation of the stock. The evidence shows that the value of the land was always increasing and never decreasing from March 1, 1913, to the date of the sale by the decedent. If the stock was as valuable on March 1, 1913, as the witness states, it must have been worth far more than par at other times both before and after that date. Yet actual sales show quite the contrary. Cf. Andrews v. Commissioner, 38 Fed. (2d) 55; affirming 13 B.T.A. 651; Penney & Long v. Commissioner, 38 Fed. (2d) 849; E. Louis Jacobs, 20 B.T.A. 529; H. H. Blumenthal, 21 B.T.A. 901; Detroit Trust Co. et al., Executors, 25 B.T.A. 340; American Chemical Paint Co., 25 B.T.A. 1208. The petitioners did not attempt to present a history of sales of the stock. The respondent's counsel endeavored to bring out at least a part of this history. It does not appear whether or not there were any sales of the stock on or about March 1, 1913. The sales disclosed were rather remote from March 1, 1913. But there were a great many of these sales, and, so far as we know, the stock never sold above par, and only twice at par, one being the sale in controversy, and the other being the sale of a very few shares in 1917. Most of the other sales were made at 70 or below. The book value of the stock was always far in excess of sales prices actually obtained. The property was not selling rapidly in 1913 and even when land sales were booming the stock sold at 70 or below. Earnings based upon cost were not large. Thus, the petitioners rely principally upon the opinion of a witness, while the Commissioner's determination is supported by sales and other facts. Unless there is a fair preponderance of the evidence favoring the petitioners' view, it is our duty to affirm the Commissioner. Here the necessary preponderance is lacking. [pg. 319]

VII.

The petitioners claim a deduction of $12,000 in 1925 as an ordinary and necessary expense paid by the decedent during the taxable year in carrying on a business. The Commissioner disallowed the deduction. The amount represents the total of payments made by the Huntington Land and Improvement Co. to H. S. Cook in 1923, 1924, and 1925. The Huntington Land and Improvement Co. charged this total to the decedent's account in 1925. But the decedent was on the cash basis and proof of payment was essential even if his case were otherwise complete.

Cook was not employed by the decedent and rendered no more service directly to the decedent than did any other employee of the Felt Co. Thus the services were not rendered in connection with the decedent's business. The decedent was not obligated to pay Cook. He voluntarily assumed the burden of the expense. At least no necessity for any expenditure by the decedent has been shown. The petitioners rely upon Lillian M. Goldsmith, 7 B.T.A. 151, and Samuel Rottenberg, 20 B.T.A. 589. Those cases are distinguishable. In each the taxpayer had engaged someone to render services to him. Here the employee was engaged to do no more than to manage properly the business of the corporation. The decedent was only a stockholder of the Felt Co. and can not deduct its ordinary and necessary expenses. Cf. Dalton v. Bowers, 287 U.S. 404; Burnet v. Clark, 287 U.S. 410. The corporate entity may not be disregarded. Cf. Burnet v. Commonwealth Improvement Co., 287 U.S. 415. The requirements of section 214 (a) (1) of the Revenue Act of 1926 have not been met.

VIII.

One of the most important questions in this case is whether or not the decedent sustained a statutory net loss in 1924. The figures necessary to a computation of a statutory net loss have been agreed upon. Thus the solution depends upon whether an amount deducted in 1924 as a debt ascertained to be worthless and charged off in that year was properly deducted in that year and whether there was in that transaction a loss which resulted from the operation of a business regularly carried on by the decedent. The decedent did not claim a corporation's loss or a loss upon the disposition or worthlessness of stock. Cf. Dalton v. Bowers, supra; Burnet v. Commonwealth Improvement Co., supra; Burnet v. Clark, supra. Although the evidence is not all one way, nevertheless it demonstrates pretty clearly that the decedent was regularly and actively engaged in carrying on a business and the loss resulted from the operation of that business. He was not merely a stockholder. He dominated [pg. 320] a great many corporations. He was the principal officer of most of them. He had his representatives placed in charge of many of these corporations. Either directly or indirectly he controlled their affairs and determined their policies. This was his principal activity. In order to carry on this business he had to acquire stock in the corporations which he desired to operate. The Chesapeake & Ohio Railway Co. was such a one and he had a regular account with a broker for the purpose of increasing and changing his ownership of its stock. This was an incident of his business. The inability of the broker to deliver the stock was an unfortunate circumstance definitely connected with the decedent's business. It necessitated the loan and thus led to the loss. The decedent had to make the loan in order to get his stock and proceed with his business. He could not afford to jeopardize his right to the stock. It was essential to his business. But the loan was not additional cost of his Chesapeake & Ohio stock. It was a separate transaction, the result of which was not dependent upon what he might obtain for his stock. He could not claim a loss in 1921 because there were then probable sources of repayment. He had reason to believe that Gibson might be successful. After three barren years and further investigation he had reasonable grounds to conclude that the balance due was a worthless debt. Other theories on which the loss might or might not form the basis for a statutory net loss need not be discussed.

Reviewed by the Board.

Decision will be entered under Rule 50.

Arundell, dissenting:

I am unable to agree with the decision on the sixth point treated in the prevailing opinion. The conclusion is there reached that within the meaning of the revenue act the taxpayer and the trust created by him should be treated as substantially identical, and, inasmuch as the bonds sold by the taxpayer (Huntington) were reacquired by the trust within thirty days, the loss may not be deducted. Sec. 214 (a) (5), Revenue Act of 1926.

But the statute itself makes the distinction between trusts and individuals and it took special legislation, viz., subsections (g) and (h) of section 219, to tax the income of a revocable trust to the creator thereof. Valid trusts have long been recognized in this country. The law of trusts is well established. The creator of a trust parts with legal title to the trust property. He does not have legal title to any property acquired by the trust. Legal title to all trust property is in the trustees. They do not hold it as individuals as they would their own property, but only in a new fiduciary capacity which they have been given by the law and the trust deed. Henry E. Huntington was neither a trustee nor a beneficiary of the trust. A [pg. 321] trust, though revocable, is nevertheless a trust until it is revoked. Langley v. Commissioner, 61 Fed. (2d) 796. See also Hibbard, Spencer, Bartlett & Co., 5 B.T.A. 464, where a number of authorities are cited. Likewise, the Henry E. Huntington Library and Art Gallery trust was a trust as long as the grantor did not destroy it by the exercise of his retained powers over it.

Distinctions between a trust and the grantor must be recognized except as the revenue act constitutionally provides otherwise. Cf. Warden v. Lederer, 24 Fed. (2d) 233; L.O. 1102, C.B. I-2, p. 50. All of the income of this particular trust for the periods before us must be included in computing the income of the grantor because of specific provisions in the Revenue Act of 1926. These provisions do not require that for all purposes of the act the trust merge into the individual and lose the separate identity which it otherwise has. The distinction between the individual and the trust is recognized not only in the language of section 219, but in the very necessity for such statutory provisions as are contained in (g) and (h). In fact the language of (g) and (h) may deny to this taxpayer the benefit of a loss of this very trust where that loss exceeds all trust income. Trusts are taxpayers, potentially at least. Section 219 requires that trust income be separately computed. Many trusts pay tax. Others must file returns on which no tax is due. Losses of trusts frequently benefit no other taxpayer. Section 219. Section 214 (a)(5) allows a loss deduction except where the taxpayer acquires and holds substantially identical property. The taxpayer here did not acquire or hold such property after the sale. The restriction contained in section 214 (a)(5) does not deal specifically with acquisition and holding by some other entity. A broader inhibition should not be read into the act.

Marquette and Leech agree with this dissent.

1 Chapter LVII of the Statutes of California, approved March 9, 1885, provides substantially as follows:

Section 1. The act shall be liberally construed to effect its objects and promote its purposes.

Section 2. Any person, desiring, in his lifetime, to promote the public welfare by founding, endowing, and having maintained, within the state, a university, college, school, seminary of learning, mechanical institute, museum, or gallery of art, or any or all thereof may convey to trustees any of his property within the state for this purpose.

Section 3. The grantor may designate:

1. The nature, object, and purpose of the institution,

2. Its name,

3. The powers and duties of the trustees, etc.,

4. The method of appointing successors,

5. Rules and regulations for management of the property,

6. The time and place for erecting buildings, and provide for all other necessary things to carry out the purpose of the grant, including what shall be taught and who shall use without charge.

Section 4. The trustees may sue and defend.

Section 5. The grantor, by a provision in the grant, may elect to perform all duties and exercise all powers of the trustees during his life.

Section 6. The grantor may "reserve the right to alter, amend, or modify the terms and conditions thereof, and the trusts therein created, in respect to any of the matters mentioned or referred to in subdivisions one to six, inclusive, of section two hereof; and may also therein reserve the right, during the life of such person or persons, of absolute dominion over the personal property conveyed, and also over the rents, issues, and profits of the real property conveyed, without liability to account therefor in any manner whatever, and without any liability over against the estate of such person; and if any such person be married, such person may, in said grant, further provide that if his wife survive him, then such wife, during her life, may have the same absolute dominion over such personal property, and such rents, issues, and profits, without liability to account therefor in any manner whatever, and without liability over against the estate of either of the spouses."

Section 7. The grantor may provide that the trustees may become custodian of the person of minors.

Section 8. The grant may be executed, acknowledged, and recorded like grants of real property.

Section 9. No action to set aside, annul or affect the conveyance or the title to the trust property can be commenced more than two years after the recording of the grant.

Section 10. The property conveyed shall not after a lapse of two years from the date of recording be subject to force sale under exemption, etc., against the grantor unless the action was commenced within two years of recording. Nor shall it be sold under execution, etc., if there be other property of the grantor available.

Section 11. The grantor may by will give all of the trust property to the state, to take effect only should the trust fail for any reason, as an assurance that his wishes will be carried out as nearly as may be.

The above act was amended in 1891 to include in the list of institutions botanical gardens and public parks.

An act, supplemental to the above act, was approved on March 13, 1903. It provides that the founders may surrender their reserved rights at any time and thereupon all rights, powers, privileges, trusts and duties shall vest in and devolve upon the trustees as they would otherwise have done upon the death of the grantors.