assignment of defaulted obligations by lending institutions[15] seems to indicate that the FHA itself did not anticipate priority, since assignments made after the filing of a petition in bankruptcy do not receive priority.[16] If priority had been contemplated, it is reasonable to suppose that FHA regulations would have provided for more rapid assignment, unless it was believed that the increased collection costs resulting from such a policy would exceed the value of the priority obtained.

It is uncertain whether the priority recognized in the instant case extends to claims arising under Title II, which provides for the insurance of mortgage-secured loans which do not exceed a specified percentage of the value of the mortgaged property.[17] The Court has found that no priority was intended in cases of loans made under federal statutes requiring security which must be approved by a Government official.[18] Since Congress itself established the security requirements for loans to be insured under Title II, it seems especially doubtful whether claims arising under this title will receive priority. Moreover, the FHA is required to collect from insured lending institutions a premium which was intended by Congress to be,[19] and which has thus far proved to be,[20] sufficient to meet all losses incurred under Title II.

Taxation—Capital Gains Tax—Realization of Gain on Stock Transferred under Lump Sum Alimony Settlement—[Federal].—A taxpayer's wife sued for a divorce from bed and board and for alimony. Subsequently, she amended her libel and asked for an absolute divorce, which in Pennsylvania cuts off the wife's right to alimony.[1] Before an absolute divorce decree was entered the taxpayer and his wife entered into a contract for full settlement of the wife's claims for maintenance and support. Shortly after the decree was awarded, in accordance with one of the terms of the agreement, the taxpayer transferred to his wife 7,200 shares of stock which had cost the taxpayer $7,574 and had a fair market value of $156,975 at the date of delivery. The Board of Tax Appeals overruled the tax commissioner's assessment of a taxable gain to the taxpayer, declaring that even if a divorce settlement were taxable as "a sale or other disposition of property"[2] it was impossible to satisfy Subsection 111(b) of the Internal

[15] According to FHA regulations, assignments cannot be made by lending institutions to the FHA before sixty days following default, and are not mandatory until seven months after default. Property Improvement Loans Under Title I of the NHA Regulations Effective Feb. 4, 1938, at 28. Moreover, FHA regulations permit collection by the lending institution on an instalment basis, which may delay assignment for several years. Modernization Credit Plan, Bull. No. 1, at 8 (1934).

[16] Cases cited note 4 supra.

[17] 48 Stat. 1247 et seq. (1934), 12 U.S.C.A. §§ 1709 et seq. (Supp. 1941).

[18] Priority was denied a claim of the United States in Cook County Nat'l Bank v. United States, 107 U.S. 445 (1882), in which the Court emphasized that the National Banking Act provided that the Secretary of the Treasury should require pledges of Government securities for deposits of the United States in national banks. Likewise, in United States v. Guaranty Trust Co., 280 U.S. 478 (1930), in which priority was denied a claim of the United States, it appeared that the approval of the ICC was necessary for security offered by railroads seeking loans under Title II of the Transportation Act of 1920.

[19] 78 Cong. Rec. 11195 (1934). [20] 7th Annual Report of the FHA 107, 109 (1941).

[1] Pa. Stat. Ann. (Purdon, 1930) tit. 23, §§ 45–47, construed in Dixon v. Com'r, 109 F. (2d) 984 (C.C.A. 3d 1940).

[2] Revenue Act of 1934, at § 22(e), 48 Stat. 688 (1934), 26 U.S.C.A. § 22(f) (1940).

Revenue Code, which provides that the amount of capital gain realized is "the sum of any money received plus the fair market value of the property (other than money) *received*";[3] the rights received by the taxpayer under the agreement were said to have no fair market value.[4] On appeal, *held*, that the taxpayer realized a taxable gain measured by the difference between the market value of the stock transferred at the date of delivery and the cost of the stock to him,[5] since it may be presumed that the taxpayer, who dealt at arm's length with his wife, got his money's worth in settling her unliquidated claim. Decision reversed, two judges dissenting. *Com'r v. Mesta*.[6]

The court's decision that the "fair market value of the property . . . . received" by the taxpayer is determined by the parties' valuation of the wife's right to support is a reasonable interpretation of Subsection 111(b). The fact that the property received has no value in the hands of the taxpayer, who has discharged his obligation to support, does not preclude a fair market value at the time of transfer. Thus, a capital gains tax is imposed upon the trustee of an estate who discharges an obligation to pay a fixed sum of money by delivering securities which have appreciated in value during the time the trustee held them.[7] Nor does the fact that the wife's right to support is an unliquidated claim mean that a fair market value at a given time cannot be found.[8] The best evidence of the market value of any property, in the absence of an open market, is its price at the last sale.[9] The price need not be a cash price and may be deduced from the value of the property transferred by the taxpayer. Thus, upon an exchange of stock for land, the Board of Tax Appeals has held that the fair market value of the realty was measured by the market value of the stock at the time of transfer.[10] Therefore, the court in the instant case, although dealing with a different section of the Internal Revenue Code, could quite properly determine that the amount realized by the transferor was the market value of the stock at the time the transferee agreed to settle her claim. To hold otherwise would be to ignore the benefit which the transferor had, in fact, received from the appreciation in the value of the stock during the time he held it.[11]

[3] 48 Stat. 703 (1934), 26 U.S.C.A. § 111(b) (1940) (italics added).

[4] L. W. Mesta, 42 B.T.A. 933 (1940). An alternative ground for the BTA decision was that the transaction was a division of marital property from which no taxable gain was realized.

[5] 48 Stat. 703 (1934), 26 U.S.C.A. § 111(a) (1940).

[6] 123 F. (2d) 986 (C.C.A. 3d 1941).

[7] Kenan v. Com'r, 114 F. (2d) 217 (C.C.A. 2d 1940); Suisman v. Eaton, 15 F. Supp. 113 (Conn. 1935), aff'd per curiam 83 F. (2d) 1019 (C.C.A. 2d 1936), cert. den. 299 U.S. 573 (1936). The BTA suggestion that the "property received" must be of exchangeable value in the hands of the transferee, L. W. Mesta, 42 B.T.A. 933, 940 (1940), seems to be an erroneous application of the concept of income under §§ 22(e) and 111(b).

[8] The same problem of valuation would be presented by an analogous situation in which the defendant in a negligence action secured the release of the plaintiff's unliquidated claim to damages by transferring stock to the plaintiff.

[9] 5 Paul and Mertens, Law of Federal Income Taxation 704–5, 720 (1934).

[10] Northwestern States Portland Cement Co., 7 B.T.A. 835 (1927); 5 Paul and Mertens, op. cit. supra note 9, at § 52.73.

[11] See Kenan v. Com'r, 114 F. (2d) 217, 220 (C.C.A. 2d 1940); cf. Helvering v. Horst, 311 U.S. 112 (1940).

Furthermore, the imposition of a capital gains tax upon the husband who discharges his obligation to support his wife by transferring stock to her under a lump sum settlement is a logical corollary to the treatment of the alimony trust type of divorce settlement by the United States Supreme Court. Where the income from such trusts is used to discharge the husband's continuing obligation to support,[12] the settlor-husband is taxed under the constructive receipt doctrine as if the income had been paid to him and he had transferred the proceeds to the beneficiary-wife.[13] If, however, the husband is under no such obligation, the income from the alimony trust is taxable to the wife,[14] not the husband.[15] In the instant case, the husband would certainly not be taxed on the income from the stock transferred, since his obligation to support was discharged by the settlement. On the other hand, the lump sum settlement and the transfer of stock pursuant to it may reasonably be considered as a funding of the husband's otherwise continuing obligation to support. The appreciated value of the stock is, therefore, properly taxable to him under Subsections 22(e) and 111(b) as if he had sold the stock and transferred the cash equivalent to his wife.

The approach taken by the majority of the court in the instant case should eliminate the similar difficulties which would arise upon a subsequent sale of the stock by the wife. The capital gain or loss to her would be determined by the difference between the "cost" of the stock to her, the basis under Subsection 113(a),[16] and the amount realized upon sale. If the stock's "cost" to her, the surrender of her right to support, were considered immeasurable, the basis in her hands would be zero and the capital gain the total sale price of the stock.[17] But if, as in the instant case, the parties' valuation of the right to support were accepted, the basis of the stock to the wife would be the market value of the stock at the time of the settlement. Finally, it should be noted that, by taxing the husband for the capital gain, the court avoided the possibility that the gain would not be taxed at all; if the wife should die before selling or otherwise disposing of the stock, the basis to her heirs or legatees would be the market value of the stock at the time of her death.[18]

[12] The obligation may continue because the local court retains power to modify the alimony provisions of the divorce decree, Douglas v. Willcuts, 296 U.S. 1 (1935); Helvering v. Fitch, 309 U.S. 149 (1939), or because the husband assumed a personal obligation to support, Helvering v. Leonard, 310 U.S. 80 (1940); Weir v. Com'r, 109 F. (2d) 996 (C.C.A. 3d 1940), cert. den. 310 U.S. 637 (1940).

[13] Douglas v. Willcuts, 296 U.S. 1, 9 (1935); Mertens, 1939 Supplement to Paul and Mertens, The Law of Federal Income Taxation 2619 n. 37 (1939); see Paul, Five Years with Douglas v. Willcuts, 53 Harv. L. Rev. 1 (1939); Magill, The Supreme Court on Federal Taxation, 1939–40, 8 Univ. Chi. L. Rev. 1 (1940).

[14] Pearce v. Com'r, 62 St. Ct. 754 (1942).

[15] Helvering v. Fuller, 310 U.S. 69 (1940); Dixon v. Com'r, 109 F. (2d) 984 (C.C.A. 3d 1940).

[16] 48 Stat. 706 (1934), 26 U.S.C.A. § 113(a)(1940).

[17] Cf. White v. Thomas, 116 F. (2d) 147 (C.C.A. 5th 1940) (cost for claim against estate zero even when claim had value); Sterling v. Com'r, 93 F. (2d) 304 (C.C.A. 2d 1937), cert. den. 303 U.S. 663 (1939) (no cost for worthless claim against estate).

[18] 48 Stat. 706 (1934), 26 U.S.C.A. § 113(a)(5) (1940); 86 Treas. Reg. art. 113(a)(5)–1 (1934).