Ct. 673, 39 L. ed. 759), and also at a time eight years before Congress proposed, and twelve years before the states ratified, the constitutional amendment permitting such a tax. It is absurd to characterize a contract made under such circumstances as an attempt at evasion of the income tax laws of 1918 and 1921.

Petitioner's "evasion" argument, however, has another aspect. It is urged that

> "If the principle announced by the Circuit Court of Appeals becomes the settled law, then compensation for personal services may be divided into infinitesimal parts by agreements between any person having income from personal services and his immediate family so as to defeat the manifest intent of Congress to tax such income as a whole. Further, the principle announced seems broad enough to enable a person to escape taxation by mere assignments to third parties which operate to divest him of the right to receive his earnings." (Petition, page 5.)

In reply to this line of argument it should first be pointed out that this case is *sui generis.* It involves property relations by agreement between a husband and wife under the statutory provisions of one state—California; and thus it does not constitute authority upon agreements between other persons. In the second place this decision involves a binding contract supported by adequate consideration, and also one as to which the California law has made a specific exception to the usual requirement of consideration. The "mere assignments to third parties", which petitioner fears will be legalized for tax purposes, thus do not come within the scope of this decision.

However, if the holding of the Circuit Court of Appeals were authority to the effect that an individual might avoid taxation upon himself by *complete and bona fide* assignments of his future income to others, nevertheless this would be no valid reason for reversing the judgment. If taxpayer A does effectively assign a part of his income to B, prior to its receipt, so that the income belongs to B as soon as it comes into existence, why should A be taxed upon it rather than B? There is no just reason—no reason at all except to give the federal government more revenue. Petitioner seems to fear a large reduction in revenue by such arrangements. He imagines a division of future earnings into infinitesimal parts among a man's immediate family; but there is obviously no likelihood that many taxpayers will voluntarily give up their future income completely to others, even to members of their families. Those who really do so in good faith and without retaining control over such income should have the benefit of their sacrifice and should not be taxed.

(b) The argument that the Revenue Acts in question evince a paramount intention on the part of Congress to tax a husband upon all of his earnings is unsupported by any provision in those acts.

This seems to be the argument chiefly relied upon in the brief in support of the petition for certiorari (pages 9-13). Although it is repeatedly stated that the Revenue Acts of 1918 and 1921 show the paramount intention of Congress to tax the husband upon all his earnings regardless of the fact that these earnings may belong to another, no provisions of the Revenue Acts are specifically referred to or quoted in support of such statements. The truth is that there is no indication in either the Revenue Act of 1918 or that of 1921 as to which person Congress intended to subject to the tax as between a husband and wife in a case like this, where the husband has earned the income in question but one-half of it belongs to the wife from the moment it comes into existence and prior even to its receipt. On page 8 of petitioner's brief the following extracts from Sections 210, 212, 213 and 211 of the Revenue Act of 1918 are quoted under the heading "Statutes Involved":

> "Sec. 210. That, * * * there shall be levied, collected, and paid for each taxable year upon the *net income* of every individual a normal tax. * * * (Italics supplied.)
>
> Sec. 212. (a) That in the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> Sec. 213. That for the purpose of this title * * * the term 'gross income'—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions * * *.
>
> SURTAX.
>
> Sec. 211. (a) That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *."

It is then stated on the same page of petitioner's brief that similarly numbered provisions of the Revenue Act of 1921 are similar to the provisions of the Revenue Act of 1918 above quoted.

A brief examination of the above quoted provisions of the Act is sufficient to demonstrate that Congress did not indicate any intention as to which person should be taxable upon salaries, wages or compensation for personal service. Congress clearly intended that someone should be taxable on this kind of income because it included such income in its definition of gross income. But the provision is that gross income includes "income *derived* from salaries, wages or compensation for personal service". Derived by whom? The statute is silent on this question. It does not say that the *earner* of the income is to be taxed although the income may belong to another. It merely states that salaries, wages and compensation for personal service shall be a part of *someone's* gross income; and in order to determine who this someone is, we must go back to the question of the person to whom that income belongs.

In the absence of any provisions of the federal statutes on this question, we must of necessity turn to the local law of property—which is here the California law with regard to property relations between husband and wife and with regard to the construction of the contract involved in this case. That is exactly what this court did in the case of *United States v. Robbins*, 269 U. S. 315, 46 Sup. Ct. 148, 70 L. ed. 285. In that case this Court first held that the question whether a wife was taxable for federal income taxes upon one-half of the community income of her husband and herself (both being residents of California and having made no contract such as the one involved in this case), was determined by the California community property law as construed by the Supreme Court of California. The decisions of the Supreme

Court of California were examined and it was concluded that they meant that in the absence of agreement the wife had no vested interest in community property during the lifetime of the husband,—in other words, that community property and community income did not in any way or in any part belong to the wife. Accordingly it was held that for federal income tax purposes none of the community income in that case was income to the wife.*

In this case exactly the same test has been made. The Circuit Court of Appeals has consulted the California law and has concluded that because of the agreement between respondent and his wife respondent's earnings belong one-half to his wife. It follows that such one-half is taxable to her rather than to him.

Petitioner has great difficulty to keep from conceding that the test applied by the Circuit Court of Appeals is correct. In an endeavor to avoid any such concession, petitioner advances the argument that Congress has evinced an intention to tax the *earner* of income rather than the *recipient* or *owner* of such income. Thus it is said on pages 12 and 13 of petitioner's brief:

> "Of course, Congress may not ignore the fact that a piece of property is owned by more than one individual and tax the entire gain upon its sale to one of the owners alone. But we think that Congress may properly regard compensation for personal services as the sole income of the individual who performed the services and leave him to divide it after its receipt in any manner he thinks best. Congress may not prevent its being *held* in joint tenancy, but, on the other hand, Congress may require that in applying a Federal revenue statute, it shall be treated as an entirety and taxed as the income of the individual who earned it."

*It is true that in the *Robbins* case the decision of this Court was also rested on the independent ground that Congress could tax the husband because he controlled and had full disposition of the community income; and this Court evidently concluded that Congress had indicated an intent to tax the person who controlled income, although the statutory provisions indicating such intent were not pointed out. However, this other ground for the *Robbins* case cannot have any application to the present controversy because here the record is clear to the effect that respondent and his wife were in joint and equal control of the income in question, and that respondent did not exclusively control it or have the exclusive disposition of it.

We doubt very much whether Congress could, as petitioner asserts, tax the earner of income rather than the person who receives the income, or the one to whom it belongs. If a corporation employs a brilliant inventor at a low salary under a contract whereby the corporation obtains all the products of the inventor's genius, can Congress constitutionally tax the inventor himself upon the income of the corporation from his inventions, in an amount largely in excess of his salary, merely because he has undoubtedly been the earner of that income for the corporation? It seems to us that an attempt to tax an earner of income, merely because he is the earner, upon what someone else receives as a result of his efforts, would be mere confiscation.

Nevertheless, it is not necessary to determine this question in this case because there is no indication whatever of any intention on the part of Congress to tax an earner as such. Petitioner quotes no provision of the statutes to this effect for the obvious reason that there is no such provision.

The taxation of a partnership is a clear example of an intention on the part of Congress to the contrary. Take the case of an ordinary law partnership composed of three individuals who have agreed to share profits equally. Obviously in such a case the actual amounts earned by the respective partners are seldom the same. One year one partner may have a large business and contribute considerably more than his one-third to the earnings of the partnership. Another year it may be another partner. Nevertheless the income tax acts do not provide for the taxation of the partners upon what they respectively earn. They are taxed rather upon their shares of the total partnership income as determined by their partnership agreement. It is not the person who earns the income, but the person to whom the income belongs that is important for income tax purposes.

(c) The argument that the decision of the Circuit Court of Appeals disregards the "constructive receipt theory" is fallacious because under that theory the person who is taxed on account of having constructively received income must have received an equivalent benefit.

Petitioner's petition and brief both cite numerous "constructive receipt" cases. In addition to the authorities so cited there should be mentioned in the same class two recent decisions of this Court in companion cases, namely,

> *Old Colony Trust Company v. Comm. of Int. Rev.*, (decided June 3, 1929, Oct. Term 1928, No. 130), and
>
> *United States v. Boston & Maine Railroad*, (decided June 3, 1929, Oct. Term 1928, No. 129).

The typical "constructive receipt" case is one where a lessor of property provides in his lease for direct payments by the lessee to creditors or stockholders of the lessor in lieu of ordinary rental payments to the lessor. Most of the cases cited by petitioner are of this class. Such is the *Boston & Maine Railroad* case, above cited, in which the Court held that a lessor of railroad properties was subject to tax upon the amount paid by the lessee, pursuant to provisions of the lease, to the federal government on account of income taxes of the lessor. The *Old Colony Trust Company* case above cited differed in that it was not a lease case, but was a case in which an employer, pursuant to contract of employment with its employee, paid the federal income taxes of the employee directly to the government. In each of these cases the person or corporation whose taxes had been paid was held to have realized income to the extent of the payments made for his or its account on the theory that such payments had been constructively received.

It is to be noted in all these cases that the taxpayer held to have constructively received income did receive an equivalent benefit which could be exactly measured in terms of the amount of money paid by the other party to the transaction. Thus in the *Boston and Maine Railroad* and *Old Colony Trust Company* cases the taxpayer in question had his or its liability for income taxes reduced by exactly the amount which such taxpayer was held later to have constructively received. The same is true where a lessor has moneys paid to its bondholders or other creditors by the lessee. As a practical matter the same thing is true where a lessor has the lessee make payments direct to the lessor's stockholders. In such cases the duty of the lessor to pay dividends to its stockholders, which is a real business duty, if not always a legally binding one, is performed for it, and the extent to which it has discharged such duty is accurately measured by the amount paid to its stockholders.

There is no such situation in the present case. The receipt by respondent's wife of one-half of his earnings is not a benefit to respondent which is even roughly equivalent to the amount so received by his wife. Indeed it is no benefit to him at all, except possibly in so far as it may displace his obligation to provide her with support—a benefit incapable of close measurement. In fact, his benefit from the contract cannot be accurately measured by the income which she receives. The only way in which his benefit can be accurately measured is to tax him upon his one-half of all of *her* income in accordance with the terms of the contract between them. The question of the taxation of such income is not involved in this case.

(d) The argument that an assignment of future earnings operates only to give a right enforceable in equity is inapplicable because this is not the case of an ordinary assignment of future earnings; but if the argument did apply it would be ineffective because the proper person to be taxed for income taxes is the equitable owner of the income.

We are quite willing to admit, as argued by petitioner, that under California law an assignment of future wages does not operate to pass a legal title thereto *in praesenti*, but only creates an equitable title which can be enforced in a court of equity as and when the wages come into existence. See

Cox v. Hughes, 10 Cal. App. 553, and
Bridge v. Kedon, 163 Cal. 493.

As a last argument petitioner refers to this principle, claiming that it prevents the treatment of any of respondent's earnings as taxable to his wife. However, as we have already pointed out, this case is *sui generis*. It does not involve the kind of assignment of future wages for the purpose of obtaining present credit which is contemplated in the California code sections providing that a mere possibility not coupled with an interest cannot be transferred at law, and which is considered in the authorities holding that such a possibility can be assigned only in equity. This is the case of an agreement between a husband and wife as to their property relations, and the method whereby they and each of them will receive and hold property. As such it has the special sanction of Civil Code Sections 158 and 161, already referred to, and of the authorities cited by the Circuit Court of Appeals in its opinion. These authorities hold very clearly that such an agreement does affect future earnings and gives the husband or wife, as the case may be, to whom such earnings are allotted by the agreement, the right to sue a third party for the earnings and to recover in such suit, although they have not yet been received by the earner. See especially

Wren v. Wren, 100 Cal. 276, and
Kaltschmidt v. Weber, 145 Cal. 596.

In other words, the special code treatment of such an agreement as this takes it out of the class of ordinary assignments of future earnings so that any argument based upon the rules applicable to such assignments is beside the point.

However, if the ordinary rule as to assignments of future earnings—to the effect that they are enforceable only in equity—does apply to this case, we do not see how that alters the situation for income tax purposes. Aside from the fact that the distinction between law and equity has been largely abolished in California, the federal tax laws have been and should be construed as levying the income tax upon the equitable owner of income, who is the real beneficial owner, rather that upon the person who merely holds legal title. Thus in the case of a trustee the tax law provides that although he must return the gross income of the trust in a special trustee's return, he is allowed to deduct any income of the trust which is to be distributed currently to the benficiaries, and the beneficiaries themselves are taxable upon such income. See

1928 *Revenue Act,* Section 162(b) and (c).

Furthermore, even when such income is not currently to be distributed to the beneficiaries, and is thus treated as income of the trustee, it is not added to the trustee's own personal income, but is separately reported by him on a trust return, and he is, of course, allowed to pay the tax out of the trust funds, so that it is in the end paid by the beneficiaries or equitable owners.

The case of a partnership, already mentioned, is similar. One member of a firm of three who share profits equally may receive a check for fees payable to him personally. He is thus the legal owner of that income, but under the partnership agreement the proceeds of the check must be divided equally between the partners, and accordingly the income tax law taxes each of the partners upon the one-third of this check (assuming it to represent net income). In other words, the income tax law taxes the equitable or beneficial owner as determined by the partnership agreement.

In every case where the question is which one of two or more parties is responsible for the tax on certain income, the test to be applied is, who is it who actually gets the income in beneficial ownership and enjoyment? He is the one whom it is the object of the law to tax. This is the rule as applied by the courts. There is no distinction in principle between the present case and such cases as

O'Malley-Keyes v. Eaton, 24 F. (2d) 436;
Young v. Gnichtel, 28 F. (2d) 789;
Bowers v. New York Trust Co., 9 F. (2d) 548.

In the first of these cases, *O'Malley-Keyes v. Eaton,* the plaintiff was beneficially entitled to the income of a certain trust created under the will of her great grandfather. In 1921 she executed an instrument transferring and assigning all her right to the future income of the trust to a trust company for the benefit of her children and thereafter such income was paid to the trust company for her children and she received none of it. The Treasury Department r[illegible]d that the transfer did not operate *in praesenti* and that the income accruing must be deemed to be received first by the plaintiff and then to pass to the trust company for the benefit of her children, and upon this theory endeavored to tax the income as though received by her. The court rejected this as a fiction wholly unsound, saying (p. 437):

> "After all, the stark *fact* is that the plaintiff did not receive this income, and cannot receive this income. To say that she did receive it is to indulge in a deliberate fiction. Suppose that she had never assigned her interest, and suppose, further, that she deliberately declined to accept any income from her great grandfather's estate; could we say that the income was received by her and tax her accordingly, in spite of the fact that we concede that she did not receive it at all?"

In the second case mentioned, *Young v. Gnichtel*, the plaintiff was entitled during her lifetime to one-third of the income from a trust created by her father's will. In 1922 she assigned out of this income an annual income to her husband of $9,000 and to each of her children of $2,500. Again the Treasury Department ruled that notwithstanding the assignment the income should be deemed to have been all received by and be taxable to the plaintiff before any portion of it passed to her husband and children. But again the court rejected this line of reasoning as pure fiction and held that the real fact was that after the assignment the portion of the income assigned to her husband and to each of her children was their income and not hers and was properly taxable as their income and not as hers.

In the third case, *Bowers v. New York Trust Company*, the principle was applied to an income from personal services rendered by a partnership. One Cannon followed the business of acting as an agent on commission for

cotton mills. Among his clients were certain mills, known as the "Cannon Mills", in which he or his family had a controlling interest. Later he formed a partnership and transferred his commission business to it and made certain arrangements with the partnership the upshot of which was that, as to three of the "Cannon Mills", the commissions that would otherwise be payable by them to the partnership for its services should be paid to certain members of Cannon's family. As in the *O'Malley* and *Young* cases, the Treasury Department ruled that the commissions from these three mills should be deemed to be received by the partnership for whose services they were paid and then to pass from the partnership to the members of Cannon's family, and that therefore they should be deemed partnership income and taxable as such. The court, however, overruled this contention and held that the commissions so paid the members of Cannon's family, although paid for services rendered by the partnership, were not taxable to the partnership since it had no beneficial interest in them.

If the test applied in these cases,—the test which we submit is the final test that should be applied in determining who shall pay the tax upon certain income,—is applied to the present case, no doubt can remain. The beneficial owner of the income resulting from the petitioner's personal services is not himself alone, but himself and his wife as joint tenants. Upon that basis, as the basis which in fact really exists, the income should be taxed. It is upon such basis that the Circuit Court of Appeals decided this case as it did. We submit, therefore, that the judgment of that court should stand, and the petition for certiorari should be dismissed.

Respectfully submitted,

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Dated: San Francisco, California,
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(APPENDIX FOLLOWS.)

Appendix A.

CALIFORNIA CIVIL CODE SECTIONS CITED OR REFERRED TO.

SEC. 158. *Husband and wife may make contracts.* Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

SEC. 159. *Husband and Wife. Property Relations.* A husband an wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

SEC. 160. *Consideration for agreement of separation.* The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

SEC. 161. *May be joint tenants, etc.* A husband and wife may hold property as joint tenants, tenants in common, or as community property.