SUPREME COURT OF THE UNITED STATES.

No. 6, Original.—October Term, 1945.

The State of Nebraska, Complainant,
vs.
The State of Wyoming, Defendant, and the State of Colorado, Impleaded Defendant, The United States of America, Intervenor.
} In Equity.

[October 8, 1945.]

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above

the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming aand seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover....	8360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line ...	2430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder dam to head of Alcova reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe dam and head of Pathfinder reservoir is less than area of original river bed through Pathfinder reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte

River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible.

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree duly authenticated under the seal of this Court.

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SUPREME COURT OF THE UNITED STATES.

No. 263.—October Term, 1945.

A. L. Lusthaus, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The question in this case is the same as in *Commissioner* v. *Tower*, No. 317, decided this day. Here, too, the Commissioner made a deficiency assessment against the husband, petitioner, for purported partnership earnings reported in his wife's return for 1940 and not reported by the petitioner. The Commissioner's action was based on a determination, made after an investigation, that for income tax purposes no partnership existed between the petitioner and his wife. The following are the controlling facts: Petitioner has operated a furniture business since 1918 and since 1933 he has conducted a retail furniture business at two stores located in Uniontown, Pennsylvania. His wife helped out at the stores whenever she was needed without receiving compensation. In 1939 the petitioner found himself confronted with the prospect of large profits and correspondingly large income taxes. This caused him concern and he called in his accountant and attorney. Together they worked out a plan for the supposed husband-wife partnership here involved. The wife had little to do with the whole transaction, and testified when asked about the details that "on the advice of counsel I did what he told me to do". In accordance with the plan the petitioner executed a bill of sale to his wife by which he purported to sell her an undivided half interest in the business for $105,253.81. At the same time the wife executed a partnership agreement under which she undertook to share profits and losses with her husband. The wife paid for her undivided half interest in the following way. Petitioner borrowed $25,000 from a bank and gave his wife a check for $50,000 drawn against the amount borrowed and further funds which he had withdrawn from the business and deposited with the bank for that purpose. The wife

then gave petitioner her check for $50,255.81 and the petitioner repaid the $25,000 to the bank. Petitioner's wife also gave him eleven notes in the amount of $5,000 each of which according to an understanding were to be paid from the profits to be ascribed to the wife under the partnership agreement.[1] Petitioner reported in a 1940 gift tax return that he had made a gift of $50,000 to his wife. Pennsylvania issued petitioner and his wife a certificate authorizing them to carry on the business as a partnership. When the partnership was formed petitioner's wife owned her home, valued at twenty-five to thirty-thousand dollars and securities worth up to twenty-five thousand dollars.

After the partnership was formed the wife continued to help out in the stores whenever she was needed just as she had always done. But petitioner retained full control of the management of the business. His wife was not permitted to draw checks on the business bank account. During the taxable year here involved the husband filed social security tax returns as owner of the business. Neither partner could sell or assign the interest ascribed by the partnership agreement without the other's written consent. Though, at the close of each year the profits of the business were credited on the books to petitioner and his wife equally, no withdrawals were to be made under the partnership agreement unless both partners agreed. The husband drew no salary. During 1940, which is the tax year here involved, the business net profits were in excess of $80,000, from which the respondent withdrew about $4,500 and his wife withdrew only $59.61. The following year they withdrew approximately $16,000 and $19,900 respectively, the wife's withdrawal being used largely to pay back some of the $5,000 notes given as part of her alleged contribution to the partnership capital. On this evidence the Tax Court found

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[1] The Tax Court found as follows on this phase:

"He [the husband] would make her a 'gift' of a part of the purchase price and take her promissory notes for the balance. She could pay off the notes from her share of her profits of the business." A part of the testimony supporting this finding was given by the husband as follows:

"Q. And what were the terms of that oral agreement?

"A. Just as I stated, that she [the wife] would pay me $50,000 in cash and the balance to be paid in notes.

"Q. Payable yearly?

"A. Payable yearly in notes.

"Q. In the amount of $5,000 each for 11 years?

"A. Yes.

"Q. Where was she to get the amount to be paid off yearly?

"A. From the profits of the business."

that the wife acquired no separate interest in the partnership by turning back to her husband the $50,000 which he had given her conditioned upon her turning it back to him; and that the partnership arrangements were merely superficial, and did not result in changing the husband's economic interest in the business. It concluded that while the partnership was "clothed in the outer garment of legal respectability" its existence could not be recognized for income tax purposes. 3 T. C. 540. The Circuit Court of Appeals affirmed. 149 F. 2d 232. The petitioner challenges the Tax Court's finding that the wife was not a genuine partner on the ground that the evidence did not support it. We hold that it did.

For the reasons set out in our opinion in *Commissioner* v. *Tower,* No. 317, decided this day, the decision of the Circuit Court of Appeals is affirmed.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice REED, dissenting.

As the Court considers, and as we do, the question in this case is the same as that in *Commissioner* v. *Tower,* decided today, and as the Court relies to support its conclusion upon the reasons set out in the *Tower* opinion, we shall state the grounds for our dissent in this case rather than the *Tower* case. We choose this certiorari for our explanation because the issue stands out more boldly in the light of the facts before and findings of the Tax Court.

A. L. Lusthaus, as an individual proprietor, had operated a furniture business in Uniontown, Pennsylvania, for a number of years. In 1939 a realization of existing and prospective federal income tax burdens caused him to cast about for a legal means of lessening the tax. Such method of tax avoidance has not heretofore been considered illegal and appropos of this rule, this Court says today in the *Tower* opinion, "We do not reject that principle." See *Gregory* v. *Helvering,* 293 U. S. 465, 469, and cases cited; *Bullen* v. *Wisconsin,* 240 U. S. 625, 630-31.

The statement in the Court's opinion adequately covers the facts. But it should not be inferred from the Court's statement

that the notes given were "according to an understanding . . . to be paid from the profits to be ascribed to the wife under the partnership agreement," that payment of the notes was so limited. The notes were unconditional promises to pay. The payment of them from profits was only a hope.

It is essential, too, we think, to note that in these partnership cases the tax doctrine of *Lucas* v. *Earl,* 281 U. S. 111, 115, as to the attribution of income fruit to a different tree from that on which it grew is inapplicable. Here, so far as the income is attributable to the property given, the gift canot be taken as a gift of income before it was earned or payable, as in *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122, where the income was held taxable to the donor. It was a gift of property which thereafter produced income which was taxable to the donee, as in *Blair* v. *Commissioner,* 300 U. S. 5; cf. *Helvering* v. *Horst, supra,* 119.

From first to last, the record shows a controversy as to whether the business is a valid partnership under the tax laws. The issue never has been whether Mr. Lusthaus failed to return his personal earnings for taxation. There was no effort on the part of the Commissioner to tax him upon a part or all of the partnership earnings as personal compensation which he had earned individually but assigned to the partnership for collection or which he had earned individually but caused to be paid to a fictitious partnership. While the Tax Court pointed out that the income resulted in part from petitioner's managerial ability, it also recognized that the capital contributed to the earnings. 3 T. C. at 543. The Tax Court thought that the wife acquired "no separate interest of her own by turning back to petitioner the $50,000" which had been given her conditionally and for that specific purpose. Why it thought the wife did not become an owner in the partnership business, the Tax Court does not explain. The Court's opinion does not turn upon any issue which is connected with the value of Mr. Lusthaus' services and we mention it only for the purpose of focusing attention upon what seems to us the Court's error. If the case was in the posture of a tax claim against Mr. Lusthaus based upon his failure to account for income actually earned by him but paid to his wife, an entirely different issue would be presented.

Since the questions of taxability in this case turn on the wife's bona fide ownership of a share in the partnership, we cannot say

that federal law is controlling. Even if it were, we are pointed to no federal law of partnership which precludes the wife's becoming a partner with her husband and making her contribution to capital from money or property given to her by her husband, as well as from any other source.[1]

The Court's opinion does not hold that income of husband and wife must be taxed as one. Congress has refused to do this although urged to do so.[2] It does not hold that a wife may not be a partner of her husband under some circumstances. It is said she may be "If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things . . . 26 U. S. C. §§ 181, 182." (*Tower* slip opinion, p. 7) But as we read the Court's opinion, it decides that a wife may not become a partner of her husband for federal income tax purposes, if the husband gives to her, directly or indirectly, the capital to finance her part of the partnership investment unless she also substantially participates in the management of the business or otherwise performs vital additional services. This conclusion we think is erroneous. There is no provision or principle of the Internal Revenue laws which prevents a husband from making a gift of property to his wife, even though his motive is to reduce his taxes, or which requires the income thereafter to be taxed to the husband if the gift is genuine and not pretended and he has retained no power to deprive the wife of the property or its income.

We have pointed out that the amount of earnings to be allocated to petitioner's managerial abilities is not in issue. There is no

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[1] Of course, federal tax provisions are not subject to state law. United States *v.* Pelzer, 312 U. S. 399, 402-3. As rights under partnership arrangements are so essentially local, Congress by selecting the receipt of income as the taxable incident may have intended to leave the determination of its character as partnership or individual to state law. "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." Morgan *v.* Commissioner, 309 U. S. 78, 80; Heiner *v.* Mellon, 304 U. S. 271, 279. See Blair *v.* Commissioner, 300 U. S. 5, 9; Crooks *v.* Harrelson, 282 U. S. 55; Uterhart *v.* United States, 240 U. S. 598, 603.

In Lucas *v.* Earl, 281 U. S. 111, the validity of the contract to transfer sums earned was not significant to the inquiry as to who earned the compensation.

[2] Revenue Bill of 1941, H. R. 5417, as introduced, 77th Cong., 1st Sess., Sec. 111; H. Rep. No. 1040, 77th Cong., 1st Sess., p. 10; 87 Cong. Rec. 6731-32. See Mandatory Joint Returns, Joint Committee on Internal Revenue Taxation, U. S. Gov. Printing Office, 1941. It is an old problem. Statement, Secy. of Treas., Tax Avoidance, 1933, Ways & Means Committee.

question but that the gift of $50,000 was complete either in itself or joined with the subsequent transfer of a half interest in the partnership assets by payment of that $50,000 plus the additional cash and notes. On termination of the partnership, half of the assets would go to her. On her death, her interest in the partnership would go to her heirs or legatees. The value of her individual property — $45,000 to $55,000 — would increase the financial strength of the partnership as it would become subject to claims against the partnership. Uniform Partnership Act (Mich.), Chap. 191, Title 20, § 20.15; *Aiton* v. *Slater*, 298 Mich. 469, 474. Her husband paid his federal gift tax on the $50,000. The fact that the partnership "brought about no real change in the economic relation of the husband and his wife to the income in question" cannot affect taxability any more in the present than in any other marital situation where individual incomes exist within the intimate family circle. When a stockholder in a corporation gives stock to his wife, the family's gross income remains the same. It is only surtaxes which are reduced.

Congress taxes partnership income to the partners distributively.[3] It has defined partnership to the extent shown below.[4] The term "partnership" as used in Section 182, Internal Revenue Code, means ordinary partnerships. *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S. 110, 113. When two or more people contribute property or services to an enterprise and agree to share

[3] 26 U. S. C. §182. "Tax of partners. In computing the net income of each partner, he shall include, whether or not distribution is made to him—

"(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

"(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

"(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b)."

[4] 26 U. S. C. § 3797. "Definitions. (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

. . . . . .

"(2) Partnership and Partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

the proceeds, they are partners.[5] The Court says, *Tower* opinion, slip pages 4 and 5, that "When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both." The suggestion seems to be that an inference of intention entirely contrary to all the primary facts may be deduced at will and without challenge by the Tax Court. People intend the consequences of their acts. When all the necessary elements of a valid partnership exist and no evidence is produced which points the other way, an intention to be partners must follow. Lindley, Partnership (10th Ed.), 44. This situation exists in this and the *Tower* case. The purpose to reduce taxes on family income certainly is not evidence of intention not to form a partnership.

The wives contributed property if the gifts of money for investment in the partnerships were valid. The Court treats the validity of the gift in the *Tower* opinion, slip p. 6, as immaterial. In this, the *Lusthaus* case, there is no question made by the Tax Court as to the validity of the gift. Since the Revenue Code recognizes the power of a taxpayer to make gifts of his property on payment of a gift tax where due, I. R. C., 1000 *et seq.*, such a transfer is valid if real and complete. There was no evidence in either the *Tower* or this case that the fact conditions for a completed gift were not satisfied or that a genuine gift was not intended, or that the husband in fact or in law retained any right or power to deprive the wife of the property given to her or the income from it. Property was transferred absolutely and beyond recall without consideration from the husband to the wife. That is a gift as effective between husband and wife as between strangers.[6] She did not hold in trust for her husband.

The husband was the managing partner but had no control otherwise over the distribution of assets on dissolution or of

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[5] Campbell *v.* Northwest Eckington Co., 229 U. S. 561, 580; Karrick *v.* Hannaman, 168 U. S. 328, 334; Meehan *v.* Valentine, 145 U. S. 611, 618; Berthold *v.* Goldsmith, 24 How. 536, 541; Ward *v.* Thompson, 22 How. 330, 334.

Mich. Stat. Anno. (1937), Chap. 191, Title 20, § 20.6. "Sec. 6. (1) A partnership is an association of two [2] or more persons to carry on as co-owners a business for profit; . . ."

[6] Burnet *v.* Guggenheim, 288 U. S. 280, 286; Helvering *v.* N. Y. Trust Co., 292 U. S. 455, 462; Bogardus *v.* Commissioner, 302 U. S. 34, majority's and minority's definition; Smith *v.* Shaughnessy, 318 U. S. 177; Helvering *v.* American Dental Co., 318 U. S. 322, 330.

withholding her share of the earnings when distributed. Before distribution they were her earnings held subject to her right to an accounting and taxable to her under the Revenue Laws. This distinguishes the case from the short term trust of *Helvering* v. *Clifford,* 309 U. S. 331. Management of a business which involves only the risk of the capital of another is not the control to which the *Clifford* case refers.

To us the evidence shows, without any contradiction, that in consummation of the husband's gift to the wife a valid partnership was created to which the federal tax acts are applicable. There is no finding and no evidence that the transaction was pretended or a sham, or that the husband in fact or in law retained any power to deprive the wife of any part of her contribution to the capital or her share of income derived from it. Two right steps do not make a wrong one. From these facts the intention to form a partnership must be inferred. Upon this record the tax advantage to the husband resulting from his gift of income producing property is lawful because the gift was lawful and therefore effective to bestow on the wife the income thereafter derived from property which was her own.

The judgment should be reversed.

The CHIEF JUSTICE joins in this dissent.

SUPREME COURT OF THE UNITED STATES.

Nos. 328 and 329.—October Term, 1945.

Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company, Appellants, 328 *vs.* Otho A. Cook, Commissioner of Revenues for the State of Arkansas.	Appeal from and Writ of Certiorari to the Supreme Court of Arkansas.
Otho A. Cook, Commissioner of Revenues for the State of Arkansas, Petitioner, 329 *vs.* Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company.	

[March 4, 1946.]

Mr. Chief Justice Stone delivered the opinion of the Court.

An Arkansas statute, Act 118 of 1923, Pope's Digest, Arkansas Statutes (1937), § 13371, imposes "a privilege or license tax . . . upon each person . . . engaged in the business of . . . severing from the soil . . . for commercial purposes natural resources, including . . . timber." By § 13372, as a condition of the license, there is imposed on the severer an obligation to pay the tax and consent that the tax "shall . . . remain a lien on each unit of production until paid into the State Treasury." Section 13375 fixes the tax at 7 cents per thousand feet of the timber severed. Section 13376 provides that the state "shall have a lien upon any and all natural resources severed from the soil". In § 13382 it is provided that "the payment of said privilege taxes shall be required of the severer . . . actually engaged in the operation of severing natural products, whether as owner, lessee, concessionaire or contractor. . . . The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance."

Appellants in No. 328, a copartnership, entered into contracts with the United States for the purchase and severance of timber on national forest reserves located within the state, some of which were public lands of the United States when Arkansas was admitted to statehood and some of which were acquired by the United States by purchase with the consent of the state. The contracts of severance and purchase provided that "title to all timber included in this agreement shall remain in the United States until it is paid for, and scaled, measured or counted." By the contracts the appellants were required in advance of severance to place with the Government representative advance installments of the estimated purchase price.

In the years 1937 to 1942, appellants, proceeding under their contract, severed timber from the forest reserves in question. An execution having been issued and delivered to the county sheriff, appellee in No. 328, and also appellant in No. 329, for collection of the tax assessed against appellants in No. 328 for the years in question, they brought the present suit in the state chancery court to enjoin the collection. The questions on which the parties ask decision are (a) whether the forest reserves which were public lands of the United States before Arkansas was admitted to statehood are subject to the taxing jurisdiction of the state; (b) whether the forest reserves acquired by the United States by purchase remain subject to the taxing authority of the state; and (c) whether the tax is unconstitutional as a tax laid upon the property or activities of the United States, or because the tax laid on plaintiffs imposed an unconstitutional burden on the United States.

The chancery court gave judgment for plaintiffs enjoining collection of the tax. It held that if the tax "be applied" to plaintiffs, it "would be a tax upon the operations of the Government of the United States", and that the tax "does not apply to timber severed by the plaintiffs from the National Forest." On appeal the Supreme Court of Arkansas modified the judgment, holding that the state was without authority to lay a tax on the severance of timber from lands which were public lands of the United States when Arkansas was admitted to statehood; that the authority of the state to lay the tax extended to transactions occurring on the forest reserve acquired by the United States by purchase; and that the present tax assessed against plaintiffs for the severance of timber on forest reserves of this class did not lay an unconstitutional burden on the United States. — Ark. —, —.

Plaintiffs have appealed, in No. 328, from so much of the judgment as sustained the tax with respect to lands acquired by the United States by purchase, urging in their assignments of error that the Supreme Court of Arkansas erred in reversing the judgment of the chancery court, "which held to be void the severance tax statute", and in holding that the severance tax law is not repugnant to the supremacy clause, Art. VI, cl. 2 of the Constitution, or to Art. IV, § 3, cl. 2, conferring on Congress power to dispose of "and make all needful Rules and Regulations respecting . . . Property belonging to the United States." Defendant, appellant in No. 329, seeks by his appeal to reverse so much of the judgment as denied the right to levy the tax for severance of timber from forest lands reserved from the public domain. On submission of the jurisdictional statements in this Court we postponed to the hearing on the merits consideration of our jurisdiction in No. 328. In No. 329 we dismissed the appeal for want of jurisdiction. § 237(a) of the Judicial Code as amended, 28 U. S. C. § 344(a). Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by § 237(a) of the Judicial Code as amended, we granted certiorari.

Under § 237 of the Judicial Code we are without jurisdiction of the appeal in No. 328, unless there was "drawn in question" before the Supreme Court of Arkansas "the validity of a statute" of the state, "on the ground of its being repugnant to the Constitution, . . . or laws of the United States." The purpose of this requirement is to restrict our mandatory jurisdiction on appeal, *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, 651, and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, *Charleston Ass'n* v. *Alderson,* 324 U. S. 182, 185-6 and cases cited, or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it. *Fiske* v. *Kansas,* 274 U. S. 380, 385 and cases cited. This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, *Wall* v. *Chesapeake & Ohio R. Co.,* 256 U. S. 125, 126; *Citizens Nat'l Bank* v. *Durr,* 257 U. S. 99, 106, or has in fact been decided by it, *Nickey* v. *Mississippi,* 292 U. S. 393, 394; *Whitfield* v. *Ohio,* 297 U. S. 431, 435-6, and that its decision was necessary to the judgment. *Cuyahoga Power*

Co. v. *Northern Realty Co.,* 244 U. S. 300, 304 and cases cited. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground. The bill of complaint in the chancery court set up only that the demand of the state for the tax "is an illegal and void exaction" and "is in violation of" Art. IV, § 3, cl. 2 and of Art. VI, cl. 2 of the Constitution. There were no assignments of error in the Supreme Court of Arkansas.

As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States. *Charleston Assn* v. *Alderson, supra,* 185-6 and cases cited. That court's opinion, while holding that the "tax law" was applicable to "persons severing timber from lands of the United States in the national forest", does not indicate that plaintiffs raised there, or that the court passed upon, the validity of the statute as applied. The court considered only the validity of "the tax", not that of the statute.

With reference to plaintiffs' liability for the tax it decided only that the state "has the right to collect the severance tax, so far as territorial jurisdiction is concerned", for severance of timber from lands acquired by the United States by purchase, and that plaintiffs could not claim the benefits of the immunity, if any, of the Federal Government from "the tax", since it was imposed on plaintiffs, not the Government or its property. It said that the Government was not constitutionally immune from such economic burden as might be passed on from the taxpayer to the Government by reason of the effect of the tax paid by the severers, citing *James* v. *Dravo Contracting Co.,* 302 U. S. 134 and *Alabama* v. *King & Boozer,* 314 U. S. 1. Being asked to enjoin the collection of the tax, the state court contented itself with holding that the tax, which was assessed on plaintiffs and not the Government, imposed no burden on the Government which infringed its implied constitutional tax immunity. Since the collection of a tax by a state officer, as here, may or may not offend against the Constitution, independently of the constitutionality of a statute, see *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 369, the state court, in holding the tax consti-

tutional, did not necessarily pass on the constitutional validity of the statute.

In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or "the right to collect the tax" which has been levied, or to show that the validity of the tax alone has been considered. *Charleston Assn.* v. *Alderson, supra,* 185, and cases cited. For "the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis" of an appeal. *Jett Bros. Co.* v. *City of Carrollton,* 252 U. S. 1, 6. It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment, *Jett Bros. Co.* v. *City of Carrollton, supra*; *Miller* v. *Board of County Comm'rs,* 290 U. S. 586; *Memphis Gas Co.* v. *Beeler, supra,* 650; *Commercial Credit* v. *O'Brien,* 323 U. S. 665; *Charleston Assn.* v. *Alderson, supra,* 185, or, as here, upon a "tax", *Citizens Nat'l Bank* v. *Durr, supra,* 106; *Indian Territory Illuminating Co.* v. *Board of County Comm'rs,* 287 U. S. 573; *Baltimore Nat'l Bank* v. *State Tax Comm'n,* 296 U. S. 538; *Irvine* v. *Spaeth,* 314 U. S. 575, or upon the attempt to collect a tax, *Jett Bros. Co.* v. *City of Carrollton, supra.*

Since plaintiffs' attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under § 237 of the Judicial Code. Treating the appeal as a petition for writ of certiorari, as required by § 237(c) of the Judicial Code, we grant certiorari, as we did in No. 329. We can consider only the federal questions passed upon by the state Supreme Court.

Our decision in *James* v. *Dravo Contracting Co., supra,* and in *Alabama* v. *King & Boozer, supra,* and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state.

Plaintiffs now, for the first time, assail the tax and the statute imposing it, on the ground that the Act requires the severer to collect the tax from the owner of the timber at the time of severance, Pope's Digest, § 13382, and gives to the state a lien on the

land from which the lumber is severed, *id.*, § 13374, and a lien upon the severed timber, *id.*, § 13376, even though title to the severed product has not passed to the taxpayer. They contend that the Act thus purports to place a forbidden tax directly on the United States. Cf. *Mayo* v. *United States,* 319 U. S. 441.

But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now sought to be presented is in some measure related to that decided by the state court, and, like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely "an enlargement" of an argument made before the state court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare *Dewey* v. *Des Moines,* 173 U. S. 193, 197, 198. We are therefore not free to consider it.

"In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 317, and cases cited. For, as we said in *McGoldrick* v. *Compagnie Generale,* 309 U. S. 430, 434-435, "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." See also *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633; *Bolln* v. *Nebraska,* 176 U. S. 83, 89-92; *New York* v. *Kleinert,* 268 U. S. 646, 650-1; *Whitney* v. *California,* 274 U. S. 357, 362, 363; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 267-8.

In view of the lien provisions of the statute and its provisions which purport to authorize the taxpayer to collect the tax from the owner of the severed timber, here the Government, it is suggested that we cannot rightly adjudge that the state is entitled to recover the tax on the transactions of severance involved, without determining the applicability of these provisions to the Government and their validity if so applied. We are not now concerned with the Government's liability to the statutory lien or for payment of the tax. It will be time enough to consider its interests when some effort is made to enforce the lien or collect the tax from the United States. We obviously do not by our judgment against the plaintiffs impose the tax on the Government. Their property alone is subject to the lien of the present judgment and to execution issued under it. They cannot recover the amount of the judgment from the Government unless the Constitution permits. And if it forbids they obviously will not collect the tax. In neither case does our judgment impose any burden on the United States. We are not called on to determine whether plaintiffs could have successfully contested their liability in the state courts or here, if the contentions were properly raised, upon the ground that they would be unable to collect the tax from the Government, either because the provision purporting to allow such collection is inapplicable where the owner is the Government or, if applicable, invalid, or on the ground that the tax, applied to them without recourse against the Government, would deny to them the equal protection of the laws.

The state, construing its own law, has rendered an unconditional judgment holding plaintiffs liable for the tax. For purposes of our review we must assume that the judgment conforms to state law. Hence we are called on to determine only federal questions properly raised on the record. Considering the only question of the tax immunity of the United States which is so raised, we decide for reasons already stated that the tax now laid and sustained imposes no unconstitutional burden on the federal Government. No question arising under the Fourteenth Amendment is raised by the record either in the state courts or here, and we are without jurisdiction to pass upon it.*

* Even if the opinion of the Supreme Court of Arkansas had proceeded on a ground so unexpected as to make timely, by petition for rehearing, the raising of the federal questions now for the first time advanced, compare Saunders *v.* Shaw, 244 U. S. 317; Ohio *v.* Akron Park District, 281 U. S. 74, 79, plaintiffs in their petition for rehearing did not suggest them.

A further question is whether the lands in the forest reserve, which were purchased for that purpose by the United States, are within the territorial taxing jurisdiction of the state. The answer turns on the interpretation of the statute of the United States authorizing the acquisition of the lands, §§ 7 and 12 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. §§ 480, 516, and of the state statute of Arkansas authorizing the sale. Pope's Digest, § 5646. The meaning of both statutes, as applied in this case, is a federal question, since upon their construction depend rights, powers and duties of the United States. *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 197, and cases cited.

The statute of Arkansas consenting to the purchase of forest lands by the United States, provided that the state should "retain a concurrent jurisdiction with the United States in and over lands so acquired . . . ", to issue and execute "civil process in all cases, and such criminal process as may issue under the authority of the State . . . ". It made no express grant or reservation of legislative power over the areas purchased. Hence the statute cannot be taken as having yielded or intended to surrender to the Federal Government the state legislative jurisdiction over the area in question, so far as exercise of that jurisdiction is consistent with federal functions. Any doubt as to the effect of such a grant by the state in conferring exclusive legislative jurisdiction over the territory which is acquired by the Federal Government is removed by the provisions of the federal statute.

Section 12 of the federal statute, authorizing the purchase, provided:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State, wherein such land is situated, shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants "be absolved from their duties

as citizens of the State''. Compare *Mason Co.* v. *Tax Comm'n, supra*; *Atkinson* v. *Tax Comm'n,* 303 U. S. 20; *Collins* v. *Yosemite Park,* 304 U. S. 518, 528; *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 99.

Our conclusion, based on the construction of the interrelated state and federal statutes, is that the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States.

What we have said of the argument that the tax assessed on plaintiffs is an unconstitutional burden on the Government, is applicable to the tax assessed for severance of timber from forest reserve lands which, from the beginning, have been a part of the public domain. That tax is likewise valid if the state has legislative jurisdiction over such lands within its boundaries.

Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c. 100, 5 Stat. 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution. *Ft. Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 539; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404. Such authority did not pass to the United States by virtue of the provisions of Article I, § 8, cl. 17 of the Constitution, which authorize it ''to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be''.

Since the United States did not purchase the lands with the consent of the state, it did not acquire exclusive jurisdiction under the constitutional provision, and there has been no cession of jurisdiction by the state. *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 651; *Mason Co.* v. *Tax Comm'n, supra,* 210. Although Arkansas has, by § 5647, Pope's Digest, conferred on Congress power to pass laws, civil and criminal, for the administration and control of lands acquired by the United States in Arkansas, it has ceded exclusive legislative jurisdiction neither over lands reserved by the United States from the public domain nor over lands acquired in the state. *Ft. Leavenworth R. R. Co.* v. *Lowe, supra,* 530, 531. It follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve.

We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally a part of the public domain of the United States, or were acquired by the United States by purchase, and that the tax assessed against plaintiffs is not subject to any constitutional infirmity, or to any want of taxing jurisdiction of the state to lay it with respect to transactions on the federal forest reserve located within the state.

The judgment is reversed insofar as it adjudged plaintiffs not liable for the tax on severance of timber from lands held by the United States as original owner, and the cause is remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this opinion. In all other respects the judgment is affirmed. On the remand the state courts will be free, so far as their own practice allows, to determine any state questions here involved and any federal questions not already decided by this opinion. Compare *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, with *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113.

So ordered.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice RUTLEDGE, dissenting.

In No. 328 the Court sustains the application of the Arkansas severance tax to the appellants.[1] As I understand the opinion, this rests on the view that the Arkansas Supreme Court decided that the statute[2] directs the tax to be thus levied, whether or not the lien and collection provisions are applicable to the United States and, so taking its action, that the tax as applied is constitutional. I cannot accept this view of the Arkansas court's decision or of the validity of the tax in its present application. In my judgment the cause should be remanded to the state court for it to determine the applicability of the lien and collection pro-

[1] On the jurisdictional discussion of the Court the appellants are, of course, petitioners on certiorari.

[2] Pope's Digest Ark. (1937) §§ 13371-13395. The statute was first enacted in 1923. Acts of Arkansas, 1923, Act 118. It was materially amended in 1929, but its essential scheme remained the same. Acts of Arkansas, 1929, Act 283.

visions to the United States, or their severability, and in the light of that determination to ascertain the constitutional validity of the tax as applied to appellants.

From *McCulloch* v. *Maryland,* 4 Wheat. 316, to now the rule has remained that the states are without power, absent the consent of Congress, to tax the United States, whether with reference to its property or its functions. *United States* v. *Allegheny County,* 322 U. S. 174, 177. That rule is of the essence of federal supremacy. It is not to be chipped away by ambiguous decisions of state courts or easy assumptions relating to their effects which ignore the direct impact of state taxes where they have no right to strike.

This is true regardless of the vagaries of decision, at different periods, in allowing expansion of the Government's immunity to include others. Recent recessions from former broad extensions of this kind have settled that ultimate economic incidence upon the Government of a state tax laid upon others is not alone enough to invalidate the tax. *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Alabama* v. *King & Boozer,* 314 U. S. 1; see *Penn Dairies* v. *Milk Control Com'n.,* 318 U. S. 261, 269.[3] But this does not mean either that such incidence of the tax is irrelevant to its validity or that all state taxes purporting to be laid upon others are valid.

It is still true that "the taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52; *Federal Land Bank* v. *Bismarck,* 314 U. S. 95. If the person who must pay the tax in the first place is required by the taxing statute to collect the tax or an equivalent amount from the United States, the tax is upon the United States. "State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one." *United States* v. *Allegheny County,* 322 U. S. 174, 189. Although the Court has gone far in permitting the states to force one private person to act as tax collector for another, cf. *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86; *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62; *General Trading Co.* v. *Iowa Tax Com'n.,* 322 U. S. 335, and dissenting opinion at 339, that device cannot be utilized by the states to lay taxes on the United States. Nor has it been held heretofore that a tax purporting to be laid upon a private individual or concern is

[3] See Powell, The Waning of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 633; Powell, The Remnant of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 757.

valid regardless of whether the provisions of the state taxing statute for passing on the tax to another are applicable to the United States or are valid if so applied.

The majority interpret the Arkansas Supreme Court's decision as having the latter effect and, so taking it, sustain the tax as against the objection that as applied it imposes no unconstitutional burden on the Government.

I am unable to comprehend the Court's decision. If it is ruling *sub silentio* or *ex hypothesi* that the lien and collection provisions of the Arkansas statute, for any application to the Government, are inapplicable or severable, we have no right to make such a decision. That is the business of the Arkansas courts. If the ruling is that the tax is valid even though those provisions are applicable to the United States, then for the first time the Court is overruling the basic principle of *McCulloch* v. *Maryland.* If the decision is, finally, that the tax is valid whether or not the lien and collection provisions are applicable or severable, then it embodies both faults.

I do not think the Court means to overrule *McCulloch* v. *Maryland.* Nor does it purport to interpret or determine the Arkansas law concerning either applicability or severability of the statute's provisions. But unless it is doing this, without so stating, I see no escape from the other horn of the dilemma. Either the tax as applied is valid or it is invalid. Whether it is valid or not depends on whether the lien and collection provisions apply to the United States, for they place the tax directly upon the owner. That issue is inescapable in this case, whether in the Arkansas court or here. It cannot be avoided by saying that the tax as applied is constitutional *whether or not* those provisions apply to the United States.

I do not think the Arkansas court decided either that the lien and collection provisions are inapplicable to the United States or that they are severable from the remainder of the statute, notwithstanding it had those provisions before it, cited them though without ruling upon them, and proceeded to sustain the application of the tax to appellant. I think it clear that the court avoided making such a ruling. Nor do I think it held the tax valid regardless of whether the enforcement provisions apply to the United States. In my opinion the Arkansas decision in effect, though not in words, was that the tax had been constitutionally applied even though the collection provisions are applicable to the United States, to the extent at least of the withholding provisions, and was there-

fore to sustain the tax notwithstanding its legal incidence thus falls upon the Government.

My reasons for this view are several. In the first place, the court's opinion, though noting the collection and lien provisions and the contract's term that title to the severed timber should remain in the Government "until it has been paid for, and scaled, measured or counted," does this in the introductory statement of the case and then proceeds through a lengthy discussion without again referring to those provisions.

Moreover they provide plainly that where the severer is different from the owner, the former must pay the tax but he is required to pass it on to the owner.[4] A further provision requires him to withhold the amount of the tax from any money or severed property in kind due the owner under their contract.[5] Another section gives the state a lien on the severed resources for the tax and penalties.[6] The clear effect of the provisions requiring "the reporting taxpayer" to "collect or withhold" the amount of the tax from the owner is to give him a defense to the owner's action to recover the full contract price for the severed resources and an equally clear right of action against the owner for the amount of the tax.

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4 Pope's Digest Ark. § 13382 provides: "The reporting taxpayer *shall* collect or withhold *out of the proceeds of the sale* of the products severed the proportionate parts of the total tax *due by the respective owners of such natural resources* at the time of severance." (Emphasis added.)

5 The provision reads: "Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owners of any royalty, excess royalty or working interest, either in money or in kind, is hereby authorized, empowered *and required* to deduct from any such royalty or other interest the amount of the severance tax herein levied before making such payment." Pope's Digest Ark. § 13382. (Emphasis added.)

"Producer" is defined as every person, firm, corporation or association of persons "engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine, and all other forest products and all other natural products of the soil or water of Arkansas." Pope's Digest Ark. § 13371.

6 Pope's Digest Ark. § 13376: "The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources."

As the section was enacted originally in 1923 the provision for attachment of the lien to machinery, etc., used in severing was not included. This was added by amendment in 1929. Cf. note 2.

Thus the scheme of the tax is to place both its ultimate legal and its ultimate economic incidence on the owner. The tax in terms is "due by the respective owners of such natural resources."[7] It is "a privilege tax or license tax; and is levied on the business of severing," as the Arkansas court declared in this case. — Ark. —, —, 187 S. W. 2d 7, 12. But it is ultimately, as that court has also declared, though not expressly in this case, a privilege or license tax levied upon *the owner's* business of severing, for it applies to him whenever he severs or permits severance for sale; and "sale" includes turning over the timber to one who clears the land as payment for the clearing, although his purpose in doing this is only to make the soil available for tilling.[8]

Moreover, as the Arkansas court did hold specifically in this case, the act contains only two exemptions, neither of which applies to the United States.[9] And on this ground, together with the maxim *expressio unius,* it ruled the act applicable to the severance of timber "in all instances except the two exemptions mentioned."[10]

That ruling, it seems to me, is especially significant when it is considered not only in the light of the court's failure to make further reference to or ruling upon the collection provisions, but also in view of the Arkansas court's previous decisions. Thus, in *Miller Lumber Co.* v. *Floyd,* 169 Ark. 473, 480, the court held: "Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner *must* pay the severance tax; for such contractor and his servants who actually sever the timber *act for the owner in the premises, and their act of severing* the timber *is the act of the owner.*"[11] (Emphasis added)

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[7] See note 4.

[8] See note 11.

[9] One was for the individual owner who occasionally severs in order to build or repair improvements on the premises or for his own use and another for the "producer of switch ties" who hews them out entirely by hand. — Ark. —, —, 187 S. W. 2d 7, 10.

[10] The decision held the tax invalid as applied to the severance from lands held by the United States as original owner, though not as to those purchased with the state's consent.

[11] The effect of the quoted statement is emphasized by its context, in part as follows: "It is apparent then that the owner of lands, who cuts down trees for the purpose of building fences or repairing and constructing houses and other improvements on the land from the timber thus severed from the soil is exempted from paying the tax. It is equally evident that when the

No reference was made in this case to the *Miller* case. In the absence of one we cannot assume that the court intended to overrule that decision or to destroy its rationalization or universal applicability, except for the specific exemptions. Not only the opinion in this case, as much by its omissions as by what it expressly rules, but also the Arkansas court's prior decisions, give every ground for believing that it did not intend either to apply the tax differently in this case than in any other or to overrule its prior determinations of the ultimate nature, character and incidence of the tax.[12]

The majority seem to imply however that this may be exactly what was done; that perhaps the Arkansas court held that since the tax would be unconstitutional if, as the statute contemplates, it

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timber severed from the soil is sold, it falls within the terms of the act, and the tax must be paid by someone. To illustrate: if the owner of timber lands desired to sever it for the purpose of clearing the land and putting it in cultivation and hired other persons to sever the timber for him, he would be required to pay the severance tax. If the owner should lease his land to another person for a designated number of years in order to have his lessee clear the land and put it in cultivation, and if the consideration for the lease in whole or in part was that the lessee should have the timber so removed from the land, the severance tax would have to be paid by such lessee. It will be noted that the language of the act is specific on this subject and provides that the severer or producer as he is called shall pay the tax. The act is very broad and comprehensive, and is levied upon all persons engaged in severing the timber from the soil for sale or commercial purposes, regardless of the purpose for which it is done. The only exception is that the tax shall not be paid where the timber severed is actually used in erecting or repairing structures and other improvements on the land. The application of the timber in part payment for clearing the land is a severing of it for commercial purposes, although the primary purpose of severing it is to enable the land to be put in cultivation. Where a landowner makes a contract with another person to cut and remove the timber from his land for sale or commercial purposes, the owner must pay the severance tax; for such contractor and his servants who actually sever the timber act for the owner in the premises, and their act of severing the timber is the act of the owner.''

In a previous appeal in the same case, 160 Ark. 17, the court had sustained the act as constitutional on the theory that it was a privilege tax and not a property tax.

[12] This view is sustained also by the court's expressed view that ''Imposition of the tax here does not in any sense interfere with the Government's business.'' — Ark. —, —, 187 S.W. 2d 7, 12. The statement could mean that the tax would not be applied to the Government as to other owners, in which event a severance of the collection provisions would be implied. That it does not have this meaning is evidenced, I think, by the court's reliance on James *v.* Dravo Contracting Co., *supra*, where quite different statutory provisions were in question. The court's misapplication of the *Dravo* case was, I think, but a reflection of its implicit idea that the tax would be valid since it was collected immediately from the appellants, even though they might pass on its economic burden to the Government, without regard to how that might be done.

were directly placed upon the Government as owner, it would treat the tax as falling not on the Government but on the severer alone. As has been stated, nothing in that court's opinion suggests such a ruling. And if there were either a ruling or a sufficient suggestion of this sort, it would raise other serious questions, not considered by that court or here, concerning the validity of the tax. The effect of such a holding would seem to be to single out contractors with the Government for the imposition of a tax not placed on other severers. All other contractors, by the terms of the statute and the Arkansas decisions, would be required to pass the tax along to owners. Only contractors with the Government would not be allowed or required to do this. Thus to treat the tax as applicable only to the severer in this case, and the collection provisions affecting the owner as severable and inapplicable, would raise serious questions of discrimination, which neither the Arkansas court nor this court has considered and which appellants are entitled to have determined.

It is true that they have not raised here any question of discriminatory enforcement. But this is because they had no reason to believe that the Arkansas court had applied, or would apply, the statute differently to them than to others or to anticipate the character of the ruling now made. It is doubtful, to say the least, that the Arkansas legislature could place a severance tax exclusively upon persons who sever resources from governmentally owned land. The same doubt would apply to the state court's effort to make the statute so effective, were it to undertake doing this. In my judgment it has not done so. Whether or not such an effort ultimately would be successful, appellants are entitled to be heard upon the question before that result is achieved. They should not be deprived of this opportunity through this Court's foreclosure of the question by a construction of the Arkansas court's ruling not made by itself when the case was before it or in advance of opportunity given to that court to decide the question. Because it has not passed upon applicability or severability of the collection provisions as they affect the owner, and because it has not determined the validity of the tax as applied in the light of such a determination, I think the cause should be remanded to it, so that the former questions may be authoritatively determined before we undertake to decide, upon the wholly speculative basis now presented, whether the tax as applied is valid.

FW Jun 3

SUPREME COURT OF THE UNITED STATES.

No. 473.—October Term, 1945.

John D. Pennekamp and the Miami Herald Publishing Company Petitioners, *vs.* The State of Florida.	On Writ of Certiorari to the Supreme Court of the State of Florida.

[June 3, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

This proceeding brings here for review a judgment of the Supreme Court of Florida, — Fla. —; 22 So. 2d 875, which affirmed a judgment of guilt in contempt of the Circuit Court of Dade County, Florida, on a citation of petitioners by that Circuit Court.

The individual petitioner was the associate editor of the Miami Herald, a newspaper of general circulation, published in Dade County, Florida, and within the jurisdiction of the trial court. The corporate petitioner was the publisher of the Miami Herald. Together petitioners were responsible for the publication of two editorials charged by the citation to be contemptuous of the Circuit Court and its judges in that they were unlawfully critical of the administration of criminal justice in certain cases then pending before the Court.

Certiorari was granted to review petitioners' contention that the editorials did not present "a clear and present danger of high imminence to the administration of justice by the court" or judges who were criticized and therefore the judgment of contempt was invalid as violative of the petitioners' right of free expression in the press. The importance of the issue in the administration of justice at this time in view of this Court's decision in *Bridges* v. *California,* 314 U. S. 252, three years prior to this judgment in contempt, is apparent.

Bridges v. *California* fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant require-

ment in the administration of justice. Pages 263, 265, 266. This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. The evil consequence of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished." Page 263. It was, of course, recognized that this formula, as would any other, inevitably had the vice of uncertainty, page 261, but it was expected that from a decent self-restraint on the part of the press and from the formula's repeated application by the courts standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion. As a step toward the marking of the line, we held that the publications there involved were within the permissible limits of free discussion.

In the *Bridges* case the clear and present danger rule was applied to the stated issue of whether the expressions there under consideration prevented "fair judicial trials free from coercion or intimidation." Page 259. There was, of course, no question as to the power to punish for disturbances and disorder in the court room. Page 266. The danger to be guarded against is the "substantive evil" sought to be prevented. Pages 261, 262, 263. In the *Bridges* case that "substantive evil" was primarily the "disorderly and unfair administration of justice." Pages 270, 271, 278.[1]

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process

1 Compare Schenck *v.* United States, 249 U. S. 47, 52; Thornhill *v.* Alabama, 310 U. S. 88, 105; Carlson *v.* California, 310 U. S. 106, 113; Board of Education *v.* Barnette, 319 U. S. 624, 633.

Clause of the Fourteenth Amendment, protect.[2] When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines.[3]

While there was a division of the Court in the *Bridges* case as to whether some of the public expressions by editorial comment transgressed the boundaries of a free press and as to the phrasing of the test, there was unanimous recognition that California's power to punish for contempt was limited by this Court's interpretation of the extent of protection afforded by the First Amendment. *Bridges* v. *California, supra,* at 297. Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes.

The editorials of November 2d and 7th, 1944, which caused the court to issue the citation are set out below.[4] Accompanying the

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2 Gitlow *v.* New York, 268 U. S. 652, 666; Near *v.* Minnesota, 283 U. S. 697, 707.

3 Bridges *v.* California, 314 U. S. 252, 267. Compare Chambers *v.* Florida, 309 U. S. 227, 228; Hooven & Allison Co. *v.* Evatt, 324 U. S. 652, 659.

4 November 2, 1944:

"*Courts Are Established—*

For the People.

"The courts belong to the people. The people have established them to promote justice, insure obedience to the law and to Punish Those Who Willfully Violate It.

"The people maintain the courts by providing the salaries of officials and setting up costly chambers and courtrooms for the orderly and dignified procedure of the tribunals.

"Upon the judges the people must depend for the decisions and the judicial conduct that will insure society—as a whole and in its individuals—against those who would undermine or destroy the peace, the morality and the orderly living of the community.

"In Order that the courts should not be amenable to political or other pressures in their determination of matters placed before them, Florida Circuit judges are called upon to face the electorate less often than are other elective office holders.

"So long are their terms, in fact, that in Dade county no Circuit judge, and only one judge of another court, has come to the bench by public choice

first editorial was a cartoon which held up the law to public obloquy. It caricatured a court by a robed compliant figure as a judge on the bench tossing aside formal charges to hand a document, marked "Defendant dismissed," to a powerful figure close at his left arm and of an intentionally drawn criminal type. At the right of the bench, a futile individual, labeled "Public Interest" vainly protests.

The citation charges that the editorials

> "did reflect upon and impugn the integrity of said Court and the Judges thereof in imputing that the Judges of said Court 'do recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to

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in the first instance. All the others have been named by a governor to fill a vacancy caused by death or resignation, or similar circumstance.

"Judicial terms in Dade county run:

1—Six years each for six Circuit judges.
2—Four years each for two Civil Court of Record judges.
3—Four years for the judge of the Criminal Court of Record.
4—Four years for the judge of the Court of Crimes.
5—Four years for County judge.
6—Four years for Juvenile court judge.

"These twelve judges represent the majesty and the sanctity of the law. They are the first line of defense locally of organized society against vice, corruption and crime, and the sinister machinations of the underworld.

"It Is beyond question that American courts are of, by and for the people.

"Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.

"The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.

"This Week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court.

"Only in the gravest emergency does a judge take over a case from another court of equal jurisdiction. A padlock action against the Brook Club was initiated last spring before Judge George E. Holt, who granted a temporary injunction.

"After five months, the case appeared Tuesday out of blue sky before Judge Marshall C. Wiseheart at the time State Attorney Stanley Milledge was engaged with the grand jury.

"Speedy decision was asked by defense counsel despite months of stalling. The State Attorney had to choose between the grand jury and Judge Wiseheart's court.

"The judge dismissed the injunction against the club and its operators. The defense got delay when it wanted and prompt decision from the court when it profited it.

"On Oct. 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Tepee Club.

block, thwart, hinder, embarrass and nullify prosecution,' which said acts by you tend to create a distrust for said court and the judges thereof in the minds of the people of this county and state and tend to prevent and prejudice a fair and impartial action of the said Court and the Judges thereof in respect to the said pending case[s]."

After setting out details of alleged willful withholding and suppression of the whole truth in the publications, the citation further charges that

"you, by said cartoon and editorial, have caused to be represented unto the public that concerning the cases of (A) the eight indictments for rape, (B) the said Brook Club case, and

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"Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.

"Judge Holt ruled them out, explaining in denying the injunction against the Tepee Club:

"'The defendant cannot cross-examine an affidavit. The court cannot determine who is testifying and whether belief can be placed upon such testimony . . . The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value.'

"This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which causes people to raise questioning eyebrows and shake confused heads in futile wonderment.

"If Technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the deadwood and the entanglements.

"Make it possible for the state's case, the people's case, to be seen with equal clarity of judicial vision as that accorded accused lawbreakers. Otherwise technicalities and the courts make the law, no matter what the will of the people and of their legislators."

November 7, 1944:

"*Why People Wonder.*

"Here is an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state—which is the people—in prosecutions.

"After stalling along for months, the defense in the padlock case against the Brook Club appeared before Judge Marshall C. Wiseheart for a decision. The State Attorney was working with the grand jury. The court knocked out the injunction. There was speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep.

"That's one way of gumming up prosecution. Another is to delay action. On March 29, Coy L. Jaggears, bus driver, was sentenced to fifteen days in city jail by Judge Cecil C. Curry on conviction of beating up a taxicab operator.

"The arrest precipitated the notorious bus strike. As a result, Jaggears walked out of jail after posting a $200 appeal bond. The appeal never got further.

"There you have the legal paradox, working two ways, but to the same purpose against prosecution. Speed when needed. Month after month of delay when that serves the better."

> (C) the Teepee Club case, that the Judges of this Court [had not] fairly and impartially heard and decided the matters in said editorial mentioned and have thereby represented unto the general public that notwithstanding the great public trust vested in the Judges of this Court that they have not discharged their duties honorably and fairly in respect to said pending cases as hereinbefore set forth, all of which tends to obstruct and interfere with the said Judges as such in fairly and impartially administering justice and in the discharging of their duties in conformity with the true principles which you have so properly recognized in the forepart of said editorial above quoted as being incumbent upon them and each of them; . . .''

Petitioners were required to show cause why they should not be held in contempt.

Petitioners answered that the publications were legitimate criticism and comment within the federal guaranties of free press and created no clear and present danger to the administration of justice. They sought to justify the publications by stating in their return to the rule that the facts stated in the editorials were correct, that two of the cases used as examples were not pending when the comments were made, since orders of dismissal had been previously entered by the Circuit Court, and that they as editors

> ''had the right if not the duty openly and forcefully to discuss these conditions to the end that these evils that are profoundly disturbing to the citizens of this county, might be remedied. The publications complained of did nothing more than discuss the generally recognized weakness and breakdown in the system of law enforcement and call for its improvement.''

It is not practicable to comment at length on each of the challenged items. To make our decision as clear as possible, we shall refer in detail only to the comments concerning the ''Rape Cases.'' These we think fairly illustrate the issues and are the most difficult comments for the petitioners to defend.

As to these cases, the editorial said:

> ''This Week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court.''

We shall assume that the suggestion that the statement, "judicial instance and interpretative procedure . . . even go out to find, every possible technicality of the law to protect the defendant . . . and nullify prosecution," refers to the quashing of the rape indictments as well as other condemned steps. The comment of the last two paragraphs evidently includes these dismissals as so-called legal technicalities. See Note 4.

The citation charged that the prosecuting officer in open court agreed that the indictments were so defective as to make reindictment advisable. Reindictments were returned the next day and before the editorial. It was charged that these omissions were a wanton withholding of the full truth.

As to this charge, the petitioners made this return:

> "That as averred in the citation, a motion was made to quash the indictment in Case 856, the ruling upon which would control in the other cases mentioned. Whereupon the representative of the State Attorney's Office stated in effect that he believed the original indictment was in proper form, but to eliminate any question he would have these defendants immediately re-indicted by the Grand Jury which was still then in session. And thereupon, the Judge of said Court did sustain the motion to quash with respect to Case No. 856.

The record of the Criminal Division of the Circuit Court, set out in the findings of fact at the hearing on the citation in contempt, shows that in case No. 856 the court upheld the defendants' motion to quash "with the approval of the Assistant State Attorney" and quashed the remaining indictments on his recommendation. Reindictment of the accused on the next day, prompt arraignment and setting for trial also appears. We accept the record as conclusive of the facts.

We read the Circuit Court's judgment to find that the comment on the Rape Cases contained only "half-truths," that it did not "fairly report the proceedings" of the court, that it contained "misinformation." The judgment said:

> "To report on court proceedings is a voluntary undertaking but when undertaken the publisher who fails to fairly report does so at his own peril.
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> . . . . . .
>
> "We find the facts recited and the charges made in the citation to be true and well founded; . . ."

This finding included the fact that reindictments were then pending in the Rape Cases. Defendant's assignments of error chal-

lenged the ruling that the matters referred to in the editorials were pending and the Supreme Court of Florida ruled that the cases were pending. 22 So. 2d at 883:

> "We also agree that publications about a case that is closed no matter how scandalous, are not punishable as contempt. This is the general rule but the Florida Statute is more liberal than the rule."

Cf. Florida Statutes 1941, § 38.23 and § 932.03; see also 22 So. 2d at 886.

In *Bridges* v. *California,* 314 U. S. 252, 271-78, dissent 297-302, this Court looked upon cases as pending following completed interlocutory actions of the courts but awaiting other steps. In one instance it was sentence after verdict. In another, a motion for a new trial.

Pennekamp was fined $250 and the corporation $1,000.00.

The Supreme Court of Florida restated the facts as to the Rape Cases from the record. 22 So. 2d at 881. It then reached a conclusion as to all of the charges and so as to the Rape Cases in the words set out below.[5] After further discussion of the facts, the Court said, *id.,* at 883:

> "In the light of this factual recitation, it is utter folly to suggest that the object of these publications was other than to abase and destroy the efficiency of the court."

To focus attention on the critical issue, we quote below from the decision of the Supreme Court of Florida certain excerpts which we believe fairly illustrate its position as to the applicable law.[6]

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[5] 22 So. 2d 875, 882: "So the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges.

"The record was available in all these cases and it does not reveal a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges. It is shown rather that they acted in good faith and handled each case to the very best advantage possible. There was no judgment that could have been entered in any of them except the one that was entered. If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deduced and there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment."

[6] 22 So. 2d 875, 884, 885, 886:

"A newspaper may criticize, harass, irritate, or vent its spleen against a person who holds the office of judge in the same manner that it does a member of the Legislature and other elective officers, but it may not publish scurrilous or libelous criticisms of a presiding judge as such or his judg-

From the editorials, the explanations of the petitioners and the records of the court, it is clear that the full truth in regard to the quashing of the indictments was not published. We agree with the Supreme Court that the Rape Cases were pending at the time of the editorials. We agree that the editorials did not state objectively the attitude of the judges. We accept the statement of the Supreme Court that under Florida law, "There was no judgment that could have been entered in any of them except the one that was entered." 22 So. 2d at 882. And, although we may feel

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ments for the purpose of discrediting the Court in the eyes of the public. Respect for courts is not inspired by shielding them from criticism. This is a responsibility of the judge, acquired over the years by the spirit in which he approaches the judicial process, his ability to humanize the law and square it with reason, the level of his thinking, the consistency of his adherence to right and justice, and the degree to which he holds himself aloof from blocs, groups, and techniques that would sacrifice justice for expediency."

"Courts cannot function in a free country when the atmosphere is charged with the effusions of a press designed to poison the mind of the public against the presiding judges rather than to clarify the issues and propagate the truth about them. The latter was the press that Mr. Jefferson visioned when he promulgated the thesis, 'Our liberty depends on the freedom of the press and that cannot be limited without being lost.' "

"Freedom to publish one's views is a principle of universal practice, but when the press deliberately abandons the proprieties and sets out to poison its pabulum or to sow dragon's teeth and dispense canards for the purpose of doing another a wrong, it is no different category from a free man that does likewise. The most rigid safeguard thrown around a free press would not protect appellants from falsely publishing or announcing to the world that the clergy of Miami were in sympathy with the practice of polygamy or were fostering other doctrines equally obnoxious to approved moral standards."

"The theory of our system of fair trial is that the determination of every case should be induced solely by evidence and argument in open court and the law applicable thereto and not by any outside influence, whether of private talk or public print."

"The State Courts touch the public more frequently than the Federal Courts and they have many reasons to enforce orderly administration that would not arise in the Federal Courts. If that power is to be construed by what appellants contend to be the pattern in the Bridges and Nye cases, then more than one hundred years of state law and decisions on the subject are turned into confusion or set at naught. . . .

"We do not think this can be the law. The Bridges case was disposed of on authority of the ' "clear and present danger" cases,' which are not analogous to most of the state cases because they arise from a different state of the law. The ultimate test in the Bridges case requires that the 'substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.' Even if this test is to [be] the rule in the State Courts, they are authorized to apply it by their own law and standards and unless the application is shown to be arbitrary and unreasonable, their judgment should not be disturbed. The law in Florida permits the most liberal exercise possible of freedom of the press but holds to account those who abuse it.

"We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law."

that this record scarcely justifies the harsh inference that the truth was willfully or wantonly or recklessly withheld from the public or that the motive behind the publication was to abase and destroy the efficiency of the courts, we may accept in this case that conclusion of the Florida courts upon intent and motive as a determination of fact.[7] While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state courts' examination.[8] It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights.[9]

The acceptance of the conclusion of a state as to the facts of a situation leaves open to this Court the determination of federal constitutional rights in the setting of those facts.[10] When the *Bridges* case was here, there was necessarily involved a determination by the California state court that all of the editorials had, at least, a tendency to interfere with the fair administration of criminal justice in pending cases in a court of that state. Yet this Court was unanimous in saying that two of those editorials had no such impact upon a court as to justify a conviction of contempt in the face of the principles of the First Amendment. We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record.

Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve.[11] Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct.[12] It does not follow that public com-

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7 See IX Wigmore, Evidence (3d Ed.) § 2557. Crawford *v.* United States, 212 U. S. 183, 203.

8 Drivers Union *v.* Meadowmoor Co., 312 U. S. 287, 293-94; Lisenba *v.* California, 314 U. S. 219, 238.

9 Chambers *v.* Florida, 309 U. S. 227, 239; Ashcraft *v.* Tennessee, 322 U. S. 143, 152, 153, 154; Malinski *v.* New York, 324 U. S. 401, 404.

10 See the cases in the preceding paragraph, note 8.

11 Murdock *v.* Pennsylvania, 319 U. S. 105, 115; Board of Education *v.* Barnette, 319 U. S. 624, 639; Thomas *v.* Collins, 323 U. S. 516, 527, 530.

12 Bridges *v.* California, 314 U. S. at 269:

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what

ment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

While a disclaimer of intention does not purge a contempt, we may at this point call attention to the sworn answer of petitioners that their purpose was not to influence the court. An excerpt appears below.[13] For circumstances to create a clear and present danger to judicial administration, a solidity of evidence should be required which it would be difficult to find in this record. Compare *Baumgartner* v. *United States,* 322 U. S. 665, 670; *Schneiderman* v. *United States,* 320 U. S. 118.

The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evi-

problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted.''

13 ''These respondents deny any intent by either said editorial or said cartoon either in words or otherwise to interfere with fair and impartial justice in the State of Florida and deny that the large character in the cartoon was beside the judge and on the bench and being heard, recognized and favored, but, on the contrary, these respondents respectfully show that it was the intention of said editorial and said cartoon to condemn and criticise the system of pleading and practice and procedure created by the laws of Florida, whereby such cases could long be delayed and then could be dismissed upon technical grounds in the manner herein shown.''

We add Mr. Pennekamp's statement of the editorial policy of the Miami Herald:

'' 'We are ourselves Free—Free as the Constitution we enjoy—Free to truth, good manners and good sense. We shall be for whatever measure is best adapted to defending the rights and liberties of the people and advancing useful knowledge. We shall labor at all times to inspire the people with a just and proper sense of their condition, to point out to them their true interest and rouse them to pursue it.' ''

dence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. Comment on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tort-feasor. *The Germanic,* 196 U. S. 589, 596; *Arizona Employers' Liability Cases,* 250 U. S. 400, 422, 432. We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida. Cf. *Near* v. *Minnesota,* 283 U. S. 697, 714-15.

What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judge's inclinations or actions in these pending non-jury proceedings could not directly affect such administration. This criticism of his actions could not affect his ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.

It is suggested, however, that even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection presumably at the cost of unfair rulings against an accused. In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions. If, as the Florida courts have held and as we have assumed, the petitioners deliberately distorted the facts to abase and destroy the efficiency of the court, those misrepresentations with the indicated motives

manifested themselves in the language employed by petitioners in their editorials. The Florida courts see in this objectionable language an open effort to use purposely the power of the press to destroy without reason the reputation of judges and the competence of courts. This is the clear and present danger they fear to justice. Although we realize that we do not have the same close relations with the people of Florida that is enjoyed by the Florida courts, we have no doubt that Floridians in general would react to these editorials in substantially the same way as citizens of other parts of our common country.

As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 263.—October Term, 1945.

A. L. Lusthaus, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 25, 1946.]

Mr. Justice Reed, dissenting.

As the Court considers, and as we do, the question in this case is the same as that in *Commissioner* v. *Tower,* decided today, and as the Court relies to support its conclusion upon the reasons set out in the *Tower* opinion, we shall state the grounds for our dissent in this case rather than the *Tower* case. We choose this certiorari for our explanation because the issue stands out more boldly in the light of the facts before and findings of the Tax Court.

A. L. Lusthaus, as an individual proprietor, had operated a furniture business in Uniontown, Pennsylvania, for a number of years. In 1939 a realization of existing and prospective federal income tax burdens caused him to cast about for a legal means of lessening the tax. Such method of tax avoidance has not heretofore been considered illegal and appropos of this rule, this Court says today in the *Tower* opinion, "We do not reject that principle." See *Gregory* v. *Helvering,* 293 U. S. 465, 469, and cases cited; *Bullen* v. *Wisconsin,* 240 U. S. 625, 630-31.

The statement in the Court's opinion adequately covers the facts. But it should not be inferred from the Court's statement that the notes given were "according to an understanding . . . to be paid from the profits to be ascribed to the wife under the partnership agreement," that payment of the notes was so limited. The notes were unconditional promises to pay. The payment of them from profits was only a hope.

It is essential, too, we think, to note that in these partnership cases the tax doctrine of *Lucas* v. *Earl,* 281 U. S. 111, 115, as to the attribution of income fruit to a different tree from that on which it grew is inapplicable. Here, so far as the income is attrib-

utable to the property given, the gift canot be taken as a gift of income before it was earned or payable, as in *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122, where the income was held taxable to the donor. It was a gift of property which thereafter produced income which was taxable to the donee, as in *Blair* v. *Commissioner,* 300 U. S. 5; cf. *Helvering* v. *Horst, supra,* 119.

From first to last, the record shows a controversy as to whether the business is a valid partnership under the tax laws. The issue never has been whether Mr. Lusthaus failed to return his personal earnings for taxation. There was no effort on the part of the Commissioner to tax him upon a part or all of the partnership earnings as personal compensation which he had earned individually but assigned to the partnership for collection or which he had earned individually but caused to be paid to a fictitious partnership. While the Tax Court pointed out that the income resulted in part from petitioner's managerial ability, it also recognized that the capital contributed to the earnings. 3 T. C. at 543. The Tax Court thought that the wife acquired "no separate interest of her own by turning back to petitioner the $50,000" which had been given her conditionally and for that specific purpose. Why it thought the wife did not become an owner in the partnership business, the Tax Court does not explain. The Court's opinion does not turn upon any issue which is connected with the value of Mr. Lusthaus' services and we mention it only for the purpose of focusing attention upon what seems to us the Court's error. If the case was in the posture of a tax claim against Mr. Lusthaus based upon his failure to account for income actually earned by him but paid to his wife, an entirely different issue would be presented.

Since the questions of taxability in this case turn on the wife's bona fide ownership of a share in the partnership, we cannot say that federal law is controlling. Even if it were, we are pointed to no federal law of partnership which precludes the wife's becoming a partner with her husband and making her contribution to capital from money or property given to her by her husband, as well as from any other source.[1]

[1] Of course, federal tax provisions are not subject to state law. United States *v.* Pelzer, 312 U. S. 399, 402-3. As rights under partnership arrangements are so essentially local, Congress by selecting the receipt of income as the taxable incident may have intended to leave the determination of its

The Court's opinion does not hold that income of husband and wife must be taxed as one. Congress has refused to do this although urged to do so.[2] It does not hold that a wife may not be a partner of her husband under some circumstances. It is said she may be "If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things . . . 26 U. S. C. §§ 181, 182." (*Tower* slip opinion, p. 7) But as we read the Court's opinion, it decides that a wife may not become a partner of her husband for federal income tax purposes, if the husband gives to her, directly or indirectly, the capital to finance her part of the partnership investment unless she also substantially participates in the management of the business or otherwise performs vital additional services. This conclusion we think is erroneous. There is no provision or principle of the Internal Revenue laws which prevents a husband from making a gift of property to his wife, even though his motive is to reduce his taxes, or which requires the income thereafter to be taxed to the husband if the gift is genuine and not pretended and he has retained no power to deprive the wife of the property or its income.

We have pointed out that the amount of earnings to be allocated to petitioner's managerial abilities is not in issue. There is no question but that the gift of $50,000 was complete either in itself or joined with the subsequent transfer of a half interest in the partnership assets by payment of that $50,000 plus the additional cash and notes. On termination of the partnership, half of the assets would go to her. On her death, her interest in the partnership would go to her heirs or legatees. The value of her individual property — $45,000 to $55,000 — would increase the financial

character as partnership or individual to state law. "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." Morgan *v.* Commissioner, 309 U. S. 78, 80; Heiner *v.* Mellon, 304 U. S. 271, 279. See Blair *v.* Commissioner, 300 U. S. 5, 9; Crooks *v.* Harrelson, 282 U. S. 55; Uterhart *v.* United States, 240 U. S. 598, 603.

In Lucas *v.* Earl, 281 U. S. 111, the validity of the contract to transfer sums earned was not significant to the inquiry as to who earned the compensation.

[2] Revenue Bill of 1941, H. R. 5417, as introduced, 77th Cong., 1st Sess., Sec. 111; H. Rep. No. 1040, 77th Cong., 1st Sess., p. 10; 87 Cong. Rec. 6731-32. See Mandatory Joint Returns, Joint Committee on Internal Revenue Taxation, U. S. Gov. Printing Office, 1941. It is an old problem. Statement, Secy. of Treas., Tax Avoidance, 1933, Ways & Means Committee.

strength of the partnership as it would become subject to claims against the partnership. Uniform Partnership Act (Mich.), Chap. 191, Title 20, § 20.15; *Aiton* v. *Slater*, 298 Mich. 469, 474. Her husband paid his federal gift tax on the $50,000. The fact that the partnership "brought about no real change in the economic relation of the husband and his wife to the income in question" cannot affect taxability any more in the present than in any other marital situation where individual incomes exist within the intimate family circle. When a stockholder in a corporation gives stock to his wife, the family's gross income remains the same. It is only surtaxes which are reduced.

Congress taxes partnership income to the partners distributively.[3] It has defined partnership to the extent shown below.[4] The term "partnership" as used in Section 182, Internal Revenue Code, means ordinary partnerships. *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S. 110, 113. When two or more people contribute property or services to an enterprise and agree to share the proceeds, they are partners.[5] The Court says, *Tower* opinion, slip pages 4 and 5, that "When the existence of an alleged part-

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[3] 26 U. S. C. §182. "Tax of partners. In computing the net income of each partner, he shall include, whether or not distribution is made to him—

"(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

"(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

"(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b)."

[4] 26 U. S. C. § 3797. "Definitions. (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

. . . . . .

"(2) Partnership and Partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

[5] Campbell *v.* Northwest Eckington Co., 229 U. S. 561, 580; Karrick *v.* Hannaman, 168 U. S. 328, 334; Meehan *v.* Valentine, 145 U. S. 611, 618; Berthold *v.* Goldsmith, 24 How. 536, 541; Ward *v.* Thompson, 22 How. 330, 334.

Mich. Stat. Anno. (1937), Chap. 191, Title 20, § 20.6. "Sec. 6. (1) A partnership is an association of two [2] or more persons to carry on as co-owners a business for profit; . . ."

nership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both." The suggestion seems to be that an inference of intention entirely contrary to all the primary facts may be deduced at will and without challenge by the Tax Court. People intend the consequences of their acts. When all the necessary elements of a valid partnership exist and no evidence is produced which points the other way, an intention to be partners must follow. Lindley, Partnership (10th Ed.), 44. This situation exists in this and the *Tower* case. The purpose to reduce taxes on family income certainly is not evidence of intention not to form a partnership.

The wives contributed property if the gifts of money for investment in the partnerships were valid. The Court treats the validity of the gift in the *Tower* opinion, slip p. 6, as immaterial. In this, the *Lusthaus* case, there is no question made by the Tax Court as to the validity of the gift. Since the Revenue Code recognizes the power of a taxpayer to make gifts of his property on payment of a gift tax where due, I. R. C., 1000 *et seq.*, such a transfer is valid if real and complete. There was no evidence in either the *Tower* or this case that the fact conditions for a completed gift were not satisfied or that a genuine gift was not intended, or that the husband in fact or in law retained any right or power to deprive the wife of the property given to her or the income from it. Property was transferred absolutely and beyond recall without consideration from the husband to the wife. That is a gift as effective between husband and wife as between strangers.[6] She did not hold in trust for her husband.

The husband was the managing partner but had no control otherwise over the distribution of assets on dissolution or of withholding her share of the earnings when distributed. Before distribution they were her earnings held subject to her right to an accounting and taxable to her under the Revenue Laws. This distinguishes the case from the short term trust of *Helvering* v. *Clifford,* 309 U. S. 331. Management of a business which involves only the risk of the capital of another is not the control to which the *Clifford* case refers.

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[6] Burnet *v.* Guggenheim, 288 U. S. 280, 286; Helvering *v.* N. Y. Trust Co., 292 U. S. 455, 462; Bogardus *v.* Commissioner, 302 U. S. 34, majority's and minority's definition; Smith *v.* Shaughnessy, 318 U. S. 177; Helvering *v.* American Dental Co., 318 U. S. 322, 330.

To us the evidence shows, without any contradiction, that in consummation of the husband's gift to the wife a valid partnership was created to which the federal tax acts are applicable. There is no finding and no evidence that the transaction was pretended or a sham, or that the husband in fact or in law retained any power to deprive the wife of any part of her contribution to the capital or her share of income derived from it. Two right steps do not make a wrong one. From these facts the intention to form a partnership must be inferred. Upon this record the tax advantage to the husband resulting from his gift of income producing property is lawful because the gift was lawful and therefore effective to bestow on the wife the income thereafter derived from property which was her own.

The judgment should be reversed.

The CHIEF JUSTICE joins in this dissent.

The Court directs the Texas court to stay its hands until the Commission acts on administrative phases of the rental due to respondent here. This seems improper to me in the situation presented. The trackage agreement has been terminated. Operations of the carriers continue. What Tex-Mex seeks is proper pay from Brownsville for the latter's use of its facilities. The question is not whether the Commission might force trackage arrangements under Section 3(5) or force Brownsville to pay Tex-Mex in the face of a threat of the Commission to allow abandonment but how much does Brownsville have to pay for the use it has made of Tex-Mex tracks. Over this question, the Commission has no authority.

The Court does not say specifically that the Commission may force Tex-Mex to accept the rentals it fixes for the use of the tracks, although there is language which implies that the Commission has that authority. The Court does not consider what action the Commission can take as to rentals if it does not approve abandonment. Consequently, the real issue presented by this suit--how much must Brownsville pay Tex-Mex for the continued use of its tracks--is left unsettled by the decision.

SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1945.

Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, and the St. Louis, Brownsville and Mexico Railway Company, Petitioners,
vs.
The Texas Mexican Railway Company.

On Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

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Mr. Justice Reed, dissenting.

This case calls for a brief statement of the reasons for my dissent from the conclusion reached by the Court.

My difference with the Court arises solely from the ruling that the Interstate Commerce Commission has authority to fix the rental for the use of trackage rights over the Tex-Mex by Brownsville after the termination of the lease. It is said by the Court that this power of the Interstate Commerce Commission to fix rental is derived from Section 5(2)(a)(ii) when read in conjunction with Section 1(18). Under Section 5(2)(a)(ii), the Commission is authorized to approve the acquisition of trackage rights over any railroad line by any other railroad carrier. The language is the language of approval and authorization, not the language of compulsion. It therefore seems clear that if there never had been a trackage agreement, the Commission could not compel one railroad to grant to another trackage rights under this section.

Section 5(2)(b) grants authority to the Commission to make its approval subject to such terms, conditions and modifications as are in the public interest. Upon a request for approval of a trackage agreement, therefore, the Commission could suggest a modification either up or down of the rental, but it could not compel an acceptance of that rental by an unwilling railroad.

Once the agreement has been entered into, I assume that under Section 1(18) the Commission could forbid abandonment by either party to the agreement of the arrangement for the use of the tracks. But this power to forbid abandonment goes no further

than to require the operation and does not confer a right to the Commission to fix the compensation for the continuance of the operation in the absence of an agreement as to rental by the carriers.

This case is predicated on the fact that no actual agreement has been reached with respect to compensation for the use of the tracks. Nevertheless, Brownville is required by the compulsion of Section 1(18) to continue operation and Tex-Mex must permit those operations. The result of this impasse based on statutory compulsion and not consensual arrangement, the Court calls an "agreement" implied in law to pay reasonable compensation. Such an "agreement" is in fact no agreement at all, but an obligation imposed by this Court upon an unwilling party in order to create jurisdiction in the Commission in the absence of the factual agreement contemplated by Section 5(2)(a)(ii). It is like saying the commission of a tort constitutes an agreement to pay compensation for the injuries sustained. But even if we assume with the Court that Tex-Mex and Brownsville made an agreement for trackage rights with reasonable compensation to be determined, I find nothing in the statutes which authorizes the Commission rather than the courts to establish affirmatively what rental or payment would be a reasonable compensation for the trackage rights.

The only situation in which the Commission has authority to fix compensation for the use of the trackage of one carrier by another is in the case of a terminal including main line trackage rights. By Section 3(5), the Commission is given that power. However, if the carrier whose terminal facilities are required to be used is not satisfied with the terms fixed for such use, the carrier whose terminal facilities have thus been required to be given to another carrier is entitled to recover by separate suit or action against such other carrier proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both. Thus, in the only situation where Congress has expressly given authority to the Commission to permit the use by one carrier of another carrier's tracks and to fix compensation therefor, Congress has saved to the carrier the use of whose property is thus requisitioned a right to an independent action at law, possibly with a right to jury

trial for compensation "if the carrier is not satisfied with the terms fixed for such use."

By the decision of today, the Court empowers the Commission to act administratively in adjusting this controversy in a way which does not solve the question posed by the suit. If the decision of the Court means that the Commission can fix the rental for the trackage rights, the Court has empowered the Commission to do what Congress has not authorized in any other situation, that is, to place in the hands of the Commission the power to fix finally the compensation which one carrier shall pay to another for the use of that other carrier's facilities. There is no occasion that I can see so to interpret the statutes.

In these circumstances, it is my opinion that respondent took proper action to recover in the state courts compensation for the use of its tracks and the judgment of the state court should be affirmed.