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## Federal Taxation - Income Tax on Salary of Subsequently Appointed Federal Judge

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In the particular case of injuries to patients in hospitals, an interesting distinction has been drawn between the torts of servants and the torts of staff physicians, surgeons and nurses; it being held, without reliance upon the "waiver" theory, that for the negligence or mistake of carefully selected members of the professional staff the hospital is not responsible. This upon the ground that the hospital undertakes "not to heal or attempt to heal through the agency of others, but merely to supply others who will heal or attempt to heal on their own responsibility."<sup>13</sup>

It is this last rule which the New York Court of Appeals, in *Hamburger v. Cornell University*,<sup>14</sup> has now extended to the case of injuries resulting from the negligence of university professors. A student had been injured by an explosion in a laboratory, which, it was claimed, resulted from the negligence of a member of the teaching staff. The court held that the university was not liable for such negligence, and Judge Cardozo, in the course of his opinion, said: "The governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of its faculty are masters, and not servants, in the conduct of the class room. They have the independence of a company of scholars."

The analogy between the hospital surgeon and the university professor is compelling, and in the light of the hospital cases the decision must be approved. Incidentally, it may be said that university professors will appreciate the recognition, in such unequivocal terms and by such an enlightened jurist, of their independent status. The present writer is inclined to believe that both justice and sound policy would be served if the immunity of charitable institutions were at least restricted to this comparatively small class of cases. In his judgment the opinion in the Colorado case, adopting for that jurisdiction the rule of complete immunity, is to be regretted.

FREDERIC C. WOODWARD.

CONSTITUTIONAL LAW—FEDERAL TAXATION—INCOME TAX ON SALARY OF SUBSEQUENTLY APPOINTED FEDERAL JUDGE.—[United States] On February 24, 1919, the federal Revenue Act of 1918 was approved.<sup>1</sup> Section 213 purported to include as "gross income" (from which, after certain deductions and credits, "net income" was to be computed and taxed) the compensation of all officers and employees of the United States, expressly including the president and all judges of all courts of the United States. On February 25, 1919, an act<sup>2</sup> fixed the salaries of the judges of the federal Court of Claims at \$7500 a year, and, on September 1, 1919, S. J. Graham assumed the duties of a judge of this court. Being required to include this salary as "gross income" under the Revenue Act of 1918 and to

13. *Hillyer v. Governors of St. Bartholomew's Hospital* [1909] 2 K. B. 820; *Schloendorff v. New York Hospital* (1914) 211 N. Y. 125, 105 N. E. 92; *Basabo v. The Salvation Army* (1912) 35 R. I. 22, 85 Atl. 120.

14. (1925) 240 N. Y. 328, 148 N. E. 539.

1. 40 U. S. St. L. 1057, c. 18.

2. 40 U. S. St. L. 1156, 1157, c. 29.

pay a tax thereon, Graham sued the collector of his district to recover back the tax so paid. The federal district court gave judgment for him,<sup>3</sup> and this was affirmed by the Supreme Court in the decision here discussed.<sup>4</sup>

The District Court put its decision upon the perfectly tenable (even though debatable) ground that, it having been held in *Evans v. Gore* that the Act of 1918 could not constitutionally apply to *existing* salaries of federal judges, it did not appear that Congress would have desired to tax the salaries of the small minority of subsequently appointed judges if the great majority of existing ones were immune. The Supreme Court, however, in its opinion by Mr. Justice McReynolds (Brandeis, J., dissenting) went wholly upon the ground that the Constitution protected the salaries of subsequently appointed judges from diminution by a taxing act equally with those of existing judges. It was granted that Congress might provide, in fixing the salaries of future judges, for the deduction of a definite percentage (whether called a tax or not), so long as in the result it was definitely declared what sum each judge should receive; but, once this was declared, it could not be diminished by a taxing act, even a prior one (provided, of course, that the prior taxing act itself did not definitely fix the deduction from the future judges' salaries). The Act of 1918, though prior to the appointment of Judge Graham, did not and could not (under its terms) definitely fix his salary or the deductions from it, as it merely required him to return it as part of his "gross income," from which deductions and credits were to be allowed, not definite in amount but varying widely from year to year according to circumstances, so that the ultimate diminution of his salary by the tax on net income was not at all made definite by the terms of the Act of 1918. The only act definitely fixing Judge Graham's salary, then, was the one of February 25, 1919, and the amount so fixed (\$7500) could not be diminished by the application of the Act of 1918.

Of this decision it may be said: (1) *Evans v. Gore* is a case of doubtful correctness. It is hard to believe that a general income tax, falling alike upon all salaries subject to federal taxation, could, as applied to a federal judge, be the kind of diminution of compensation aimed at by the constitutional prohibition, or by any possibility be a means of threatening the independence of the judiciary, as a discriminatory tax might be. A decision so dubious ought not to be readily extended to distinguishable cases.

(2) The principal case is distinguishable from *Evans v. Gore*, for, while the argument of the court that a prior tax is as bad as a subsequent one (if it does not fix a definite non-diminishable compensation) would have weight if either tax could possibly be used as a hostile weapon against the judiciary, it has little weight in the absence of such a possibility. A prior tax differs from a subsequent one in that the judge appointed after its passage knows that his salary is meant to be taxed by it, and knows the formula that will be used

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3. *Graham v. Miles* (1922 Dist. Md.) 284 Fed. 878.

4. *Miles v. Graham* (1925) 45 S. Ct. 601.

to determine the amount of the tax though he cannot be sure in advance just what that amount will be, because the total of his deductions from gross income depends, from year to year, somewhat upon unpredictable personal contingencies; and this difference might well distinguish the case from a decision so little related to any vital public policy as is *Evans v. Gore*.<sup>5</sup>

(3) The principal case might properly have been affirmed upon the non-constitutional ground given by the lower court. It was not necessary to its decision to pass upon a doubtful point of constitutional law.<sup>6</sup>

(4) Lastly, and perhaps most persuasive of all, the judgeship in question was of the Court of Claims, which, like the territorial courts of the United States, is not one of the courts created under Article III, section 1 of the Constitution, in which is vested the power of the United States and whose judges "shall hold their offices during good behavior and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."<sup>7</sup> If such courts are not 'constitutional' courts but are created by virtue of the general legislative power of Congress to govern American territory outside of a state and to determine the validity of claims against the United States—and consequently their judges need not be appointed for life<sup>8</sup>—it would seem that the prohibition against a diminution of judicial salaries, which occurs in the Constitution in the same sentence with the life-tenure clause did not apply to such courts either. At any rate, this appears to be a proper matter to be determined by argument rather than by assumption, but it is not mentioned in Mr. Justice McReynold's opinion.

JAMES PARKER HALL.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PUBLIC AND PRIVATE SCHOOLS—THE RIGHT OF PARENTAL CONTROL.—[United States] In the case of *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,<sup>1</sup> the Supreme Court of the United States holds unconstitutional an act of Oregon which requires all children of the state who are between the ages of eight and sixteen years to be sent to the public schools. It holds that the statute not only violates the constitutional rights of the parents of the children in question, but of the various denominational and private schools of the state, and that the right to liberty and property which is guaranteed by the Fourteenth Amendment to the federal Constitution involves not merely the right of the parents to educate their children where they please, but the right of private and denominational schools to tap the general reservoir of prospective students untrammelled by unreasonable legislative interference. We have no doubt of the unwise-

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5. (1920) 235 U. S. 245.

6. Compare *United States v. Delaware & Hudson Ry.* (1909) 213 U. S. 366, 407-8.

7. See *American Insurance Co. v. Canter* (1828) 1 Pet. 511; *Gordon v. United States* (1864) 117 U. S. 697, appendix.

8. *American Ins. Co. v. Canter* (1828) 1 Pet. 511.

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1. 45 Sup. Ct. Rep. 570.