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Constitutional Law--Taxation as Income of Officer's Salary Exempt from Diminution During Term of Office

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In *Patternson* v. *Miracle*,[25] the court recognized a partial assignment as effective over a subsequent attachment, finding an acceptance of the assignment by the local agent of the insurance company, and presuming that the local agent had the authority to do so in the absence of a showing to the contrary. This possibly indicates a desire on the part of the court to avoid the result of the decision in *Henry Clay Fire Ins. Co.* v. *Denker's Exr.*

The rule in *Henry Clay Fire Ins. Co.* v. *Denker's Exr.*, is contrary to the weight of authority in the United States, and in opposition to the general trend of the law of assignments in the United States and Kentucky in particular. Reason, as well as practical considerations of the commercial world, is against it. It is submitted that it should be restricted as far as possible in the future, if not directly overruled.

PAUL OBERST.

CONSTITUTIONAL LAW—TAXATION AS INCOME OF OFFICER'S SALARY EXEMPT FROM DIMINUTION DURING TERM OF OFFICE.

The Kentucky Income Tax Act, passed by a special session of the General Assembly in 1936, provides:

> "A tax is hereby annually levied for each taxable year upon every resident individual of this State upon his entire net income as herein defined for purposes of taxation. . . ."[1]

Plaintiff, a judge of the circuit court, sought an injunction to prevent defendant, as state commissioner of revenue, from enforcing penalties against him because of his failure to file an income tax report in accordance with the requirements of the statute, contending that the tax, insofar as it affected his salary as judge, was unconstitutional in that it diminished his compensation during his term of office in violation of Sections 161 and 235 of the Constitution of Kentucky.[2] *Held* (three judges dissenting, by a special Court of Appeals, the judges of the regular court having declared themselves disqualified to act), that the tax did not diminish plaintiff's compensation during his term of office within the meaning of the State Constitution, and that the act was therefore valid.[3] The undiminished compensation guaranteed by the Constitution, the court said, means compensation as such, and not "exemption of public officials from any tax that is levied on any other citizen of Kentucky. . . . The Commonwealth,

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the employer of the person to whom such wages are payable unless and until said employer shall signify in writing upon said instrument his assent to said assignment . . ."

[25] 253 Ky. 347, 69 S. W. (2d) 708 (1934).

[1] Ky. Stats. (Carroll, 1936), § 4281b-14.

[2] Ky. Const., § 161: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment, or during his term of office." Id., § 235: "Salaries of public officers shall not be changed during the terms for which they were elected."

[3] Martin, Commissioner of Revenue v. Wolfford, 269 Ky. 411, 107 S. W. (2d) 267 (1937).

cities, counties, and taxing districts must be supported or else governmental functions will cease, and those who are receiving their compensations from the Commonwealth or its governmental agencies should bear their proportional part of the expense of maintaining the very governmental institutions from which they derive their livelihood."[4]

Two views exist, each bolstered by the authority of decided cases, as to the taxability under a general income tax statute of the salary of a public official whose compensation is constitutionally protected against diminution during his term of office. One such line of cases holds that such taxation is a reduction of compensation which violates the constitutional guaranty; a second, with which the *Wolfford* case[5] must now be listed, holds that such a tax is not within the constitutional prohibition, and is therefore valid.

The majority rule, it may be observed, is to the effect that such a tax is unconstitutional. It has been held by the United States Supreme Court that under Article 3 of the Constitution of the United States, which provides that judges of the Supreme and lower federal courts shall receive for their services a compensation "which shall not be diminished during their continuance in office,"[6] the salaries of such judges may not be subjected to taxation by Congress.[7] The constitutional provision, the court held, does not merely forbid direct diminution, but was intended to include indirect diminution, such as would be effected by the imposition of an income tax. Nor does the Sixteenth Amendment, giving Congress power to "collect taxes on incomes from whatever source derived,"[8] permit Congress to tax the incomes of federal judges derived from salary; it was not the purpose of the amendment to extend the federal taxing power to subjects not previously included within its scope, but merely to remove the requirement of the Constitution that direct taxes be apportioned among the states in proportion to population.

Furthermore, in *Miles* v. *Graham*,[9] the Supreme Court held that

[4] *Id.* at 419.

[5] *Supra*, note 3.

[6] United States Const., Art. 3, § 1. "The judges, both of the supreme and inferior courts . . . shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

[7] Evans v. Gore, 253 U. S. 245, 40 Sup. Ct. 550, 64 L. Ed. 887, 11 A. L. R. 532 (1920); (1922) 20 Mich. L. Rev. 540; (1921) 5 Minn. L. Rev. 145. The holding of the Gore case as to the non-taxability of salaries of federal judges was foreshadowed by an opinion of the Attorney General in 1869 in regard to the income tax then in effect, 13 Op. Atty. Gen. 161 (1869), as well as by the dictum in Wayne, Admr. v. United States, 26 Ct. Cl. 274, 290 (1891), and the dictum of Mr. Justice Field in Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 604, 15 Sup. Ct. 673, 39 L. Ed. 759, 827 (1895).

[8] "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

[9] 268 U. S. 501, 45 Sup. Ct. 601, 69 L. Ed. 1067 (1925).

Congress could not impose an income tax upon the salary of a judge of the Court of Claims, under the doctrine of the *Gore* case,[10] even though the statute providing for the tax was in existence at the time the judge took office and at the time the act fixing his salary was passed. The purpose of Article 3, Section 1, said the court,

> "was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office."[11]

It is clear, however, that the doctrine of *Evans* v. *Gore* does not apply with respect to federal officers and employees other than the President and the federal judges. Such officers are not protected by the constitutional provision, which by its terms applies only to the President and the judiciary,[12] and Congress may therefore constitutionally tax their salaries as income, even though such taxation does reduce their compensation during their terms of office.[13]

The earliest case representing the majority view to be decided by a state court is the Pennsylvania case of *Commonwealth ex rel. Hepburn* v. *Mann*,[14] in which the court, apparently overruling by implication the earlier case of *Commissioners of Northumberland County* v. *Chapman*,[15] held that a constitutional provision that judges of the court of common pleas should receive a compensation "which shall not be diminished during their continuance in office" rendered invalid a tax upon the "salaries and emoluments of office" of such judges. The court further held that even where the legislature had increased the salary of the judge after his assumption of office, such increase was protected from taxation by this provision. In both the *Mann* case and the *Chapman* case, the tax was not an income tax of general application, but a special excise imposed on the holders of "offices and posts of profit", though in each case the levy was apparently part of a general scheme of license taxes embracing many trades and professions.

In the case of *City of New Orleans* v. *Lea*,[16] the question involved was whether the city, as authorized by its charter, might constitutionally tax the salary of a justice of the state supreme court, under a constitutional provision that judges should receive "a salary which shall not be diminished during their continuance in office." The

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[10] *Supra*, note 7.

[11] *Id.* at 508.

[12] *Supra*, note 6; United States Const., Art. 2, § 1, cl. 6. "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected . . ."

[13] Galm v. United States, 39 Ct. Cl. 55 (1903) *semble* (decided under the income tax act of 1862).

[14] 5 W. & S. 403 (Pa., 1843).

[15] 2 Rawle 73 (Pa., 1829).

[16] 14 La. Ann. 197 (1859).

court, in holding the tax invalid, relied not only upon this constitutional provision, but upon the principle of separation of powers expressly embodied in the constitution of Louisiana, arguing that the existence of one department ought not to depend on the will of another, as it would if the legislature could diminsh the salaries of the judiciary by imposing a tax thereon.

Under a similar constitutional provision, North Carolina also has adopted the majority view, holding that the legislature cannot impose an income tax upon the salaries of the judges.[17] Furthermore, North Carolina is in accord with the early Pennsylvania case of *Commonwealth ex rel. Hepburn* v. *Mann*,[18] in holding that such tax may not be imposed even though the legislature has previously increased a judge's salary during his term of office, on the ground that the increase, from the time it becomes effective, constitutes as much a part of the salary as the original amount, so that the whole becomes subject to the protection of the constitutional provision.[19]

The majority rule is also followed by an advisory opinion of the Supreme Court of Alabama,[20] holding that under a constitutional provision that the compensation of any officer holding any civil office of profit under the state or any county or municipality thereof shall not be diminshed during his term of office, a proposed act levying an occupational tax on salaries of county and state officers would be unconstitutional. It should be noted, however, that this was not an income tax of general application, but a tax on the salaries of the officials as such. It would seem that under this constitutional provision a similar result might well be reached even in a jurisdiction which held that an income tax of general application is not an unconstitutional diminution of the officer's compensation.

Again, in the recent Delaware case of *Green* v. *Du Pont*,[21] it was held that the salary of the state attorney general was not subject to the payment of state income tax in view of a provision in the state Constitution that "no law shall extend the term of any public officer or diminish his salary or emoluments after his election or appointment," notwithstanding the fact that this officer took office after enactment of the tax statute.

The minority view, that the salary of a public official is taxable as income, and that such taxation is not an unconstitutional reduction of such official's compensation during his term of office, is well represented by the leading case of *State ex rel. Wickham* v. *Nygaard*,[22] decided in Wisconsin in 1915. Here the court held that the provision of the Wisconsin constitution to the effect that the compensation of any

[17] In re Taxation of Salaries of Judges, 131 N. C. 692, 42 S. E. 970 (1902); Long v. Watts, 183 N. C. 99, 110 S. E. 765, 22 A. L. R. 293 (1922); (1922) 1 N. C. L. Rev. 39.

[18] *Supra*, note 14.

[19] Long v. Watts, *supra*, note 17.

[20] In re Opinion of the Justices, 225 Ala. 502, 144 So. 111 (1932).

[21] —— Del. ——, 180 Atl. 437 (1935).

[22] 159 Wis. 396, 150 N. W. 513 (1915).

public officer shall not be diminished during his term of office must be read in connection with the later amendment which provided that "taxes may also be imposed on incomes," so that the salary of a state judge was subject to taxation under the state income tax act. The court, speaking of the income tax amendment, said:

> "We are not at liberty to rewrite this clause so as to read that taxes may be 'imposed on incomes, except where the income consists of a salary received by a public officer.' We perceive very little room for construction, and if a doubtful question were involved it should not be resolved against the exercise of the taxing power by the state."[23]

Taylor v. *Gehner*,[24] upheld the right of the state of Missouri to impose an income tax upon the salary of a state judge notwithstanding a provision of the state constitution that the salaries of such judges should not be increased or diminished during the period for which they were elected. The court, which quoted with approval from the dissent of Mr. Justice Holmes in *Evans* v. *Gore*, stated that

> "From its historical background, the purpose intended to be subserved by the section is perfectly well known; it is one of the checks and restraints imposed to secure the independence of the judiciary. It is not a tax exemption provision."[25]

Also adhering to the minority view, the Montana court, in the recent case of *Poorman* v. *State Board of Equalization*,[26] held that a statute imposing a net income tax on "every individual" applied to the net income derived from the salary of a state judge whose official salary constituted his entire income, and that the tax did not violate a constitutional provision prohibiting reduction of compensation of public officers during their terms of office. The court said:

> "It is impossible to construe a 'net' income tax law as an amendment which reduces salaries by the amount of the tax; this for the reason that the tax is not levied against the salary, and does not affect all officials alike; of two officials whose salary is the same, by reason of the allowable exemptions and deductions from the 'gross income' in order to arrive at the taxable income, one may be required to pay a substantial tax and the other no tax whatever, although neither has an income outside of his salary. The 'net' result of the computation is but 'the profit derived from the operation' of a governmental instrumentality—the office—by an individual."[27]

To these cases representing the minority view, the instant case must now be added.

As a matter of policy, it is submitted, the minority view is preferable. Though it may be true that "the power to tax involves the

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[23] *Id.* at —, 150 N. W. at 516. Cf. the holding in Evans v. Gore, note 6, *supra*, that the federal income tax amendment does not extend the federal taxing power to subjects previously excluded from its scope.

[24] 329 Mo. 511, 45 S. W. (2d) 59, 82 A. L. R. 989 (1931); (1932) 32 Col. L. Rev. 915.

[25] *Id.* at —, 45 S. W. (2d) at 60.

[26] 99 Mont. 543, 45 P. (2d) 307 (1935); (1935) 3 U. of Chi. L. Rev. 141.

[27] *Id.* at —, 45 P. (2d) at 313.

power to destroy,"[28] it is difficult to find any destructive effect in a requirement that public officers shall pay the same taxes as other citizens. Theoretically, of course, a legislature with unlimited taxing powers might at some future time discriminate against public officers by a higher tax rate than that imposed upon ordinary citizens; but the fact that the power to tax the salaries of officers as income might be abused does not justify a court in holding invalid a tax which does not abuse this power. The possibility of discrimination against the salaries of public officials would not even exist in Kentucky, where it is well established that excises must be uniform, in the sense that classification of taxpayers thereunder may not be arbitrary and unreasonable.[29] Nor does it seem likely that such a tax will have the effect of undermining the principle of separation of powers and the independence of the judiciary. "To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge."[30]

It would scarcely be argued that officers were protected by such constitutional provisions from the necessity of paying property taxes, sales taxes, and the like, though such taxes might be paid out of current income derived solely from an official salary. An attempt might be made to distinguish such a case from the case of an income tax on the ground that such taxes are not levied upon the officer's salary, though they may be paid therefrom. But the income tax itself affects the officer's salary only in a similarly indirect manner; the tax is not upon the salary, but upon net income, and the salary is not even the measure of the tax, as is shown by the fact that two persons whose sole sources of income were from salaries of equal size might pay income taxes of different amounts, because of differences in their exemptions.[31]

On principle, therefore, it is submitted that the instant case is correctly decided, though the numerical weight of authority is decidedly against it.

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CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—VENUE STATUTES DISTINGUISHING BETWEEN RESIDENTS AND NON-RESIDENTS.

Defendants, residents of Mississippi, while driving an automobile through Kentucky, collided with and damaged a truck owned and operated by plaintiff.[1] The accident occurred in Boyle County and plaintiff, a Jefferson County corporation, brought an action in that county and service was made on defendants by serving a copy of the summons

[28] McCulloch v. Maryland, 4 Wheat. 316, 431 (1819).

[29] See Trimble, *Excise Taxes and the Uniformity Clause of the Constitution of Kentucky* (1937), 25 Ky. L. J. 342, and cases cited therein.

[30] Dissenting opinion of Mr. Justice Holmes, Evans v. Gore, 253 U. S. 245, 265.

[31] Poorman v. State Bd. of Equalization, *supra*, note 26.

[1] Henry Fischer Packing Co. v. Mattox, 262 Ky. 318, 90 S. W. (2d) 70 (1936).