Constitutional Law-Court of Claims-Legislative Courts-Reducing Judge's Salary

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that no one will question this legal proposition. Domicile has always been the basis for legislative jurisdiction.\(^ {14}\)

Examining the principal case it is clear that the state of Tennessee had no legislative jurisdiction over defendant stockholders.\(^ {15}\) Defendants were non-resident; the articles of incorporation neither impliedly or expressly authorized the doing of business outside the state of Indiana; they took no part in causing the acts to be done there, in fact, were entirely ignorant of them. Since the shareholders were not subject to the jurisdiction of the state of Tennessee, it follows that the Indiana court reached a correct result in not applying the law of Tennessee.

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\(^ {15}\) Williams v. United States (1933), 53 S. Ct. 751.
\(^ {5}\) 10 Stat. 612, (1855); Belt v. United States (1870), 15 Ct. Cl. 92.
The question was squarely presented in Miles v. Graham where an income tax on the salaries of judges of the Court of Claims was held unconstitutional as violating Art. 3. Miles v. Graham followed Evens v. Gore which held similarly as to an income tax on judges of the District Courts even though the tax was imposed before the judge assumed office. Ex Parte Bakelite may be said to overrule clearly Miles v. Graham. It specifically declares that the Court of Claims is a legislative court and not one formed under Art. 3, although the question in the case involved the Court of Customs Appeals which was declared to be a legislative court. The Court of Claims and its development were carefully considered. Congress from the outset required it to give advisory opinions. Afterwards some judgments were to have the effect of binding judgments and others were still to be advisory. This is true at the present time.

It is well settled that courts formed under Art. 3 cannot render advisory opinions because by this Article it is provided that the judicial power shall extend to cases and controversies, in which classification advisory opinions are not included. Therefore, since it is held that advisory opinions may be rendered by the Court of Claims, it is only because it is a legislative court and not one formed under Art. 3 of the Constitution.

Justice Taney, in Gordon v. United States, refused appellate jurisdiction of the Supreme Court on the ground that the Court of Claims didn't render a judgment in the legal sense of the term. In McElrath v. United States, it was held that the seventh amendment was not violated by failure to give a jury trial in the Court of Claims. If the Court of Claims exercised judicial power, such a result could not have been obtained. The Constitution provides that the judicial power shall extend to cases and controversies to which the United States shall be a party. By the First Judiciary Act this provision was held to mean all controversies to which the United States shall be a party plaintiff since a sovereign is exempt from suit and can only be sued with its consent. It follows that controversies to which the United States is a party defendant, as is the case in proceedings in the Court of Claims, lie outside of the power vested by Art. 3 in the constitutional courts. The Court of Claims is a special court.

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10 Ex parte Bakelite Company (1928), 279 U. S. 438, 73 L. ed. 789.
12 10 Stat. 612 (1855).
13 12 Stat. 765 (1863); 14 Stat. 9 (1865); 22 Stat. 435 (1883); 23 Stat. 283 (1865); 24 Stat. 505 (1887).
16 Gordon v. United States (1864), 117 U. S. 697 (appendix); In re Sanborne (1892), 148 U. S. 222, 37 L. ed. 429.
17 McElrath v. United States (1880), 102 U. S. 426, 26 L. ed. 189.
18 1 Stat. 73 (1789).
which was created to consider claims against the United States. Such a function is a legislative function, and the court in the principal case was correct in holding the Court of Claims a legislative court.

In view of the principal case, it seems difficult to justify the result in the case of O'Donoghue v. United States\(^2\) which was decided at the same term. In the latter case, it was held that the Courts of the District of Columbia were judicial courts under Art. 3 and that therefore the salaries of the judges could not be reduced. Yet, judgments of the courts of the District of Columbia are held to be advisory, and it is held that such courts may carry on legislative functions, and that they are therefore legislative courts,\(^21\) and that consequently the Supreme Court has no appellate jurisdiction.\(^21\) The cases cited settled the proposition that functions essentially administrative or legislative cannot be imposed upon judicial courts.\(^22\) The O'Donoghue case seems to overrule the above authority and hold that judicial courts can render advisory opinions and perform functions essentially legislative. Yet the principal case concerning the Court of Claims was decided at the same session and is in line with the authority that a judicial court cannot have thrust upon it legislative and administrative functions, but that such result can only be obtained in the case of legislative courts. The Supreme Court, it seems, has decided the same question in both cases differently. It is difficult to rationalize the result.

Although Evens v. Gore\(^23\) is rationalized on the grounds that a reduction of a federal judge's salary is unconstitutional, it may be questioned as to the correctness of holding that an income tax on a judge's salary is a reduction as contemplated by Art. 3. Evens v. Gore holds that an income tax results in an unconstitutional reduction of a judge's salary, but goes on to say that the property of a Federal judge may be taxed. A tax on one is just as much a diminishment of the salary as a tax on the other. Holmes in his dissent in Evens v. Gore says that it is not the purpose of Art. 3 to make judges a privileged class exempt from supporting institutions which benefit them. It is difficult to see how a statute requiring a man to pay taxes that all other men have to pay can be made an instrument to attack his independence. What the Constitution really intended to protect against, it seems, was a direct reduction of a judge's salary, and not to exempt the judges from the ordinary duties of citizens by exempting them from payment of income taxes.

M. K.

**NUISANCE—UNDERTAKING ESTABLISHMENTS**—Plaintiffs brought an action to enjoin the defendants from using certain premises located in a residential district for a funeral home and undertaking establishment. The

\(^{20}\) O'Donoghue v. United States (1933), 53 S. Ct. 740.

