Book Reviews

JURISDICTION AND POWER OF TAXATION. By Edward S. Stimson. Kansas City: Vernon Law Book Co. 1933. pp. viii, 119.

DOUBLE TAXATION OF PROPERTY AND INCOME. By Arthur Leon Harding. Cambridge: Harvard University Press. 1933. pp. x, 326.

If this review were to be given a title it might well be called "The Formulae of Jurisdiction and the Multiple Taxation Problem." For whatever the dissimilarity of these books may be, they are alike in expressing the firm belief of the authors that the complexity and confusion which exist in the law of tax jurisdiction can largely be eliminated if the courts will apply the correct general formulae of jurisdiction.

The formula which Professor Stimson sets forth consists of two principles: first, the "fundamental principle" that "jurisdiction is physical power", and second, the "principle of fairness" contained in the due process clause of the Fourteenth Amendment. The limitation on the taxing power resulting from the first principle the author calls the "international law limitation", while he refers to the limitation arising from an application of the second principle as the "constitutional limitation". The "power principle" or "international law limitation", is expressed in the terms of Story's familiar statement of territorial jurisdiction that "A sovereignty's legislative power is limited, except as to its citizens located abroad, to persons and property within its own territory." Accordingly, continues Professor Stimson, a sovereignty has no power to tax where neither the person nor the property taxed is located within its boundaries unless such person is one of its citizens, and conversely it does have power to tax where either the person or the property or both are located within its territory. When the person and property are located in different jurisdictions, the sovereignty in which the person is located "has power to tax it" but "has no power to assert a personal claim against nonresident aliens." Since the state where the property is located and the state where the owner resides both have power to levy a tax measured by the value of the property, the undesirable result is double taxation. It is here that the second principle, "the rule of fairness" of the Fourteenth Amendment, enters the field as a "supervening constitutional limitation" prohibiting double taxation by the states of the Union. Throughout his book the author keeps his discussion of the "power principle" distinct from that of the "fairness principle" devoting seventy-three pages to the first and only nineteen to the second. This division of the material affords, he asserts, "the basis for a critical estimate of the decisions."

The critical reader will wonder how any student of the subject could have written such a book in the year 1933. The doctrine expressed by Professor Stimson might have gone unquestioned in the days of Mr. Justice Field, but at the present time it only strikes a note of confusion. This confusion results first from the author's attempt to predicate jurisdiction on some concept of physical power, and second, his assumption that there are legal restrictions on the taxing power other than those contained in constitutional limitations on legislative action.

The fallacy of the power concept of tax jurisdiction is perfectly clear if we consider the possible relation of taxation to any exercise of physical power. Taxation involves first, the imposition of a personal obligation on the taxpayer or a lien on his property, and second, the enforcement of this obligation or lien by seizure of the taxpayer's person or property, usually the latter. Since tax obligations and liens are nothing more than legal concepts, their creation is not a physical act and in no way involves the exercise of physical power. However, the enforcement of the obligation, or lien, against the recalcitrant taxpayer can be accomplished only by seizing

the defendant's person or property, and consequently the power to collect a tax does include the power to exercise physical control over the taxpayer or his property. Since this is the only exercise of physical power involved in taxation, the only reasonable meaning that can be given to such a statement as "jurisdiction to tax is based upon physical power" is that the power to impose a tax is based upon the physical power to collect it. This would mean that jurisdiction to tax exists when, and only when, there is the physical power to enforce the tax by seizing the taxpayer or his property. But obviously such is not the case. There may be jurisdiction to impose a tax when there is no power to collect it, as for example in the case of citizens resident abroad, and on the other hand all the cases in which the courts have held that there was no jurisdiction have presented situations where the power to collect the tax not only existed, but its exercise was entirely too probable to suit the taxpayer's interests. Since the creation of a tax liability is not itself a physical act, and is not dependent upon the power to collect the tax, an attempt to frame a principle of jurisdiction in terms of physical power serves only to confuse the real issues presented in the jurisdiction cases.

The second source of confusion in Professor Stimson's book is the assumption that there are legal limitations on the taxing power other than those contained in the constitution. The author evidently believes that the rules of international law, whether public or private he does not indicate, somehow impose certain restrictions on the taxing power quite independent of constitutional limitations. The whole book is arranged on this assumption, yet the reader is left at a loss to understand how such a view can possibly be consistent with the established constitutional doctrine that a court will hold an act of the legislature void only when it conflicts with some provision of the Constitution. Rules of the conflict of laws or of public international law constitute limitations on legislative action only to the extent to which the courts have read them into some constitutional provision, the one usually employed for this purpose being the due process clause of the Fourteenth Amendment. In the early tax jurisdiction cases[1] the Supreme Court was inclined to predicate its decisions upon a strict territorial theory of sovereignty which theretofore had found its chief application in the field of conflict of laws and which never should have been relied upon in construing constitutional limitations on legislative power. However, in recent years the court has shifted its point of view, and now the rules of jurisdiction, like other limitations read into the due process clause, have become essentially rules of reasonableness rather than abstract deductions from some concept of territorial sovereignty. The author's treatment of his subject tends to clothe the territorial theory of jurisdiction with an apparent validity and inflexibility which it does not possess.

Professor Stimson's approach also leads him into a faulty and very misleading analysis of the cases. For example, in discussing the application of his "power principle" he asserts, "The United States Supreme Court has held that a tax upon persons subject to a sovereignty's power may be measured by foreign real estate."[2] As authority for this very startling statement he cites the case of *The Delaware Rail-*

1. The two earliest cases Professor Stimson does not cite: Railroad Co. v. Jackson, 7 Wall. 262 (U. S. 1868); St. Louis v. The Ferry Co. 11 Wall. 423 (U. S. 1870).

2. P. 8.

road Tax[3] and *Cook v. Tait*.[4] Neither one of these cases can be taken to sustain the proposition, and the Supreme Court has never adopted such a rule.[5] Moreover, a number of English cases are cited for the statement that "the sovereignty having power over the deceased at the time of his death has no power to impose an inheritance tax on foreign property."[6] They all involve questions of statutory construction and of course none of them hold that Parliament has no power to impose such an inheritance tax if it sees fit to do so. In a number of places[7] throughout the book *Blackstone v. Miller* is cited and discussed with no indication that it has been expressly overruled.

Professor Harding's book, the first of the Harvard Studies in the Conflict of Laws, is a much more elaborate and intensive work than that of Professor Stimson. In the first three chapters the author briefly outlines the course of the Supreme Court decisions down to *Burnet v. Brooks*,[8] criticises the control and benefit theories of taxation and proposes his own formula of jurisdiction which he calls the integration theory. The remainder, and bulk of the book, is devoted to a discussion of the cases involving jurisdiction to tax property, transfers of property, persons, acts and income.

By the integration theory the state may, according to Professor Harding, "tax all property goods, labor services, and the like, which have become identified with the economic structure of the state, by incorporation into or integration with the business mechanism so defined" and "the state is without power to tax wealth which has not become so integrated with this economic mechanism, even though the state may afford that property some protection, even though it may confer upon that property some benefit, and even though it may have the power to exercise some control over the property or have jurisdiction over it in the larger sense of power to affect rights in the property."[9] The author proposes the integration test as a juristic doctrine which "rationalizes the distinctions and demarcations which appear in the decided cases;" which constitutes "in substance what was actually in the minds of the courts, either consciously or unconsciously, in making the distinctions and demarcations;" and finally, which "can be used to reach rational and just decisions in a fairly efficient manner in the troublesome cases which may arise in the future."[10]

Whether Professor Harding's theory has been, consciously or unconsciously, in the minds of the judges I would not attempt to say, but I think it is pretty clear that it does not rationalize the distinctions in the decided cases nor point the way for the decisions of the future. It is in the borderline case that any doctrine must

3. 18 Wall. 206 (U. S. 1873). In this case the court sustained a Delaware tax on a Delaware corporation which was measured by capital stock and apportioned on the track mileage basis. It was shown that the ratio which the value of the property in Delaware bore to the total value of the property owned by the corporation was less than the ratio which the track mileage in Delaware bore to the total track mileage.

4. 265 U. S. 47 (1924). The court sustained the federal income tax as applied to the income of a nonresident citizen derived from sources outside the United States.

5. Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (1903) is ordinarily accepted as establishing the law to be just the opposite of what Professor Stimson states it to be.

6. P. 73. The cases are cited in n. 170.

7. Pp. 22, 26, 29, 30.

8. 288 U. S. 378 (1933). The case came out too late to be included in the text but is cited in the notes. One wonders how the author would have treated it.

9. P. 42.

10. P. 45.

prove its value, and in this situation the author's handling of his own theory is not at all convincing. His argument that a debt is "integrated" at the domicile of the creditor is very strained. It is difficult to see why a debt is necessarily "integrated" anywhere, and when the author speaks of the maxim, mobilia sequuntur personam, as a "very helpful organizing fiction" creating a presumption that intangibles are "integrated" at the domicile of the owner, he has departed completely from the realistic plane upon which he claims to be discussing his subject.

The difficulty with the integration formula is that it is based upon the theory that the economic structure of a state is a unit distinct from the economic structures of other states. The truth is that most business today is run on a national, international or at least multi-state basis, and when any item of wealth is integrated in a business it frequently becomes part of a business unit which extends throughout a number of states. In this situation a theory of tax jurisdiction which attempts to allocate a part of the business to one state or another according to whether it is "integrated" with the economic life of that state is just as fictional and just as difficult to apply as the benefit theory or any other of the theories which Professor Harding criticizes.

To say that Professor Harding's test does not measure up to the standards he has set for it is not a criticism of his industry or ability for he has attempted the impossible. The alpha and omega of the law of jurisdiction is not to be found in any general rule that can be framed. Just what proportion of the wealth of the New York, New Haven and Hartford Railroad, for example, should be taxed by the state of Connecticut depends upon a multitude of factors which cannot be expressed in any juristic formula. It is extremely doubtful whether the Supreme Court ever should have undertaken the judicial control of multiple taxation; perhaps the problem could be handled better by legislation; but if the court continues on the course it charted in *Farmers' Loan and Trust Company v. Minnesota*[11] it will have to pick its way from case to case, giving in each instance pragmatic consideration to the factors which may render the particular tax desirable or undesirable.

I have availed myself of the reviewer's privilege of dwelling upon those aspects of Professor Harding's book with which I disagree, but I do not wish to leave the impression that it is not a very creditable piece of work. My disagreement is with the author's point of view, not the manner in which he has presented it. He has brought to the consideration of a very difficult subject an originality, thoroughness and facility of style which set a high standard for future Harvard Studies in the Conflict of Laws.

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