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Harding on Double Taxation*

Professor Harding in his recent book, *Double Taxation of Property and Income*,¹ has espoused the cause of those who would carve the tax base of interstate enterprises, or of interstate income, into convenient slices for state taxation. The philosophy presented involves a conflict with the domiciliary principle in income taxation and bids fair to be one of the important major problems before the United States Supreme Court in the near future.

The volume here reviewed—"a study in the judicial delimitation of the conflicting claims of taxing jurisdiction advanced by the American States," to quote from its subtitle—is a study indeed of the conflict of law with economic fact and sound fiscal principles. It is a scholarly analysis of judicial decisions in a field delimited by the exclusion of interstate commerce and due process, save as they affect property or income taxation. The analysis is based upon the actual citation of 540 cases² and a study of all (so far as the reviewer knows) germane legal-periodical literature. The cases are carefully annotated, classified and distinguished.

The volume roughly divides itself into two parts: (1) what the law is; and (2) what the law should be, albeit, what the author hopes to make it. Everyone can read the first part of the book with profit; the second part will doubtless be read only with mental reservations. From that portion of the book devoted to the first objective the author draws "the new principle of taxation inherent therein, but *which the Court itself has never put into words*."³ That new principle is "dis-

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¹ HARVARD STUDIES IN THE CONFLICT OF LAWS, Vol. I. Cambridge, Harvard University Press, 1933, x, 326 pp. \$3.50.

² See Table of Cases, HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933), 289-307. Duplicate listings not eliminated in count.

³ HARDING, *op. cit. supra* note 2, at 34. (Italics added.) Cf. "The writer seeks a practical solution to a practical question. . . . He takes from the fact of judicial decision a recently formulated judicial ideal which frowns upon double and multiple taxation of wealth by two or more of the States of the American Union, each acting independently of the others. He seeks to apply this judicial

covered" in cases dealing with *ad valorem* property taxes,⁴ transfer (death) taxes,⁵ poll taxes,⁶ and the taxation of certain acts.⁷ Says Professor Beale in his introduction as editor: "Professor Harding, for the first time so far as I am aware, has formulated a principle, which he has called the principle of integration, that expresses this limitation. This book is the development of his theory and its establishment as reconciling the decisions."⁸ Ability to reconcile decisions seems, in the mind of many legal scholars, to elevate a formula to the level of a principle. It may indicate a consistent rule for harmonizing discordant tones but it scarcely furnishes a guide for the future. Its basis is *stare decisis*, not the wisdom of the policies promulgated. Nor is there any assurance that the rule once laid down may not later be overthrown, as was finally done with *Blackstone v. Miller* in *Farmers' Loan & Trust Co. v. Minnesota*.⁹ Even this latter case has not settled the principles involved and the court may even reverse itself on the underlying philosophy of that case as the absurdity of *Senior v. Braden*¹⁰ and similar decisions becomes more apparent.

The task of guiding the court in its decisions *in futuro* Harding takes up next. Out of the past recorded wisdom of courts, principally on property taxes, he evolves his formula. He seeks to apply it to the new domain of income taxation and, in particular, to situations in that field on which the court has not yet spoken. He aims to guide the court to proper results, "to predict some of these future developments on

ideal, in the judicially sanctioned manner and technique, to the judicially approved fact categories. He does not seek a universal formula of justice in taxation which might be used to guide legislatures in providing for the future. He does not seek a handbook to guide the steps of the tax official in his myriad activities. *Instead he seeks to put into words a concept of jurisdiction to tax which the courts have already brought into actual existence, albeit unconsciously.*" p. 3 (Italics added).

⁴ Ch. IV.

⁵ Ch. V.

⁶ Ch. VI.

⁷ Chapter VII deals with privilege taxes other than corporate license and franchise taxes. "We deal with the right of the State, in the sense of jurisdiction, to compel an individual to contribute to the support of the State, the liability being conditioned upon the doing of an act or acts." p. 132. The author specifically excludes "fees paid in return for special services," p. 130, and taxes for non-fiscal purposes, pp. 131-32.

⁸ Pp. vii-viii. And with the following concluding complimentary sentence in that introduction the reviewer agrees. "Whether one agrees with every conclusion he has reached, it is certainly true that no thinker or writer on the subject can hereafter afford to ignore his brilliant generalization and his careful investigation of the material."

⁹ *Blackstone v. Miller* (1903) 188 U. S. 189; overruled by *Farmers' Loan & Trust Co. v. Minnesota* (1930) 280 U. S. 204, 209. Consult "Table of Cases" for Harding's comments.

¹⁰ (1935) 295 U. S. 422.

the basis of past positive law and fact. . . . It is advanced on the basis of past decision, is attuned to present fact, and is designed as a step in a progressive future. Once its purpose has been achieved, once order has been brought out of the present disorder, and that order found to be fair and just, in light of the claims of all interested taxing jurisdictions, the concept herein advanced may well be discarded."¹¹ Truly it will then have done its damage, measured by the "fair and just, in the light of the claims of all interested taxing jurisdictions." It is difficult to see how the theory presented can have been evolved from the facts upon which rest the foundations of the modern economic world. Quite apart from these considerations Harding has spun a philosophy allegedly drawn from decisions of the past. Its value, whatever it may be, can be judged only by its inevitable results—among other things, it would make impossible state income taxes with progressive rates applicable to the total of an individual's income where a portion of that income is derived from out-of-state business.

Properly to lead the court is a worthy aim; to mislead it is a calamity. That the court needs conspicuous signboards to direct its course has become increasingly obvious. It may be led, however, in either a proper or an improper direction.

¹¹ HARDING, *op. cit. supra* note 2, at 5; *cf.* also pp. 34, 45. But note "Within the near future the Supreme Court will be confronted with the necessity of bringing into this field the same order that has been brought in to the different fields of property taxation. The evils of double taxation and of taxation without jurisdiction are as pronounced and as serious in the field of income taxation as in the fields of taxation which we have already discussed. It is quite inconceivable that the Court which has done so much to prevent improper practices in the field of property taxation will stand by and permit abuses to be practiced in this new field. Happily, the Court has already indicated that it intends no such inaction. To date, however, the hulk of decided cases is small, and does not have sufficient organization to indicate exactly what course the Court will follow. At the same time certain principal lines of cleavage have already become apparent. In addition the recent property tax cases provide us with many analogies which may be applied to the income tax problems. There is no reason to believe that the Court will depart from the traditionally sanctioned common law analogical reasoning. To the contrary, we find that the decided cases indicate a marked tendency to carry the reasoning of the one field over into the other.

"The function of the present chapter is primarily to apply to the field of income taxation the principles which are becoming well established in property and transfer taxation, and to demonstrate how, on the basis of the property tax cases, the Court may order the field of income taxation so as to recognize and protect the right of the State or States with real jurisdiction, and to restrain those who would tax without jurisdiction as the Court has defined it. The ultimate result of the application of these principles is conceived to be the elimination of the present double taxation of income, and the subjection to taxation of the income which now escapes entirely because of inconsistent theories of taxation in the several States." Pp. 138-40. The chapter on "The Right to Tax Income" occupies 143 pages, 138-281—slightly over half of the text.

Before Mr. Harding presents his discovery for guiding the courts through the maze of multiple taxation, he pays his respects to economists generally¹² for having "had little to offer in substance," for having confined "their attentions to the theory of taxation and public wealth, with scant attention to the practicalities of taxation to the individual," for having "reached no agreement as to essential theory," for which and other reasons the writer "preferred to build the present discussion *upon the more stable foundation of judicial decision.*"¹³ A few more jabs at the economists plus a statement of the mission of the volume enliven the reading of the introductory chapter, as follows:

"The modern economic thought which has centered about this problem has not reached sufficient certainty and formulation to justify the courts in incorporating it into the legal system. The judicial system is in no position to decide vital doctrinal disputes of economic theory. The courts cannot abandon a course of decision based upon one economic doctrine, and start a new line of decision on the basis of a different economic doctrine, until the new doctrine shall have established itself to such an extent that it promises to have a not too short span of life. The first evidence of the establishment of such a position appears when those who are expert in the particular field of non-legal knowledge reach some unity of opinion concerning it. About all the unity which has appeared in economic writings of late in this particular field is to the effect that the courts have not been altogether sound in the results which have been reached. The reasons for this belief seem to be as many and as varied as there are books upon the subject.

"We cannot wait until the economists have settled their disputes. We must decide these questions on the basis of such knowledge as we have. We must use the tools that we have, poor as they may be, to reach the justest, and at the same time the most expedient, result possible. It is this function which the present work has sought to perform. It is here sought to supply a legal tool, a measure of right and wrong in the field of taxation, by means of which the courts may proceed in (to borrow a phrase) their interstitial legislation, pending such time as a more perfect measure may be brought into existence and established by experience."¹⁴

When economists do not agree, turn the matter over to lawyers! It need only be added that intelligent, thinking individuals—economists or lawyers—seldom agree about important matters either of principle or policy. Agreement is frequently tantamount to stagnation.

Yet, with all of his disrespect for economists, Harding's fundamental principle appears to have been borrowed from an economist—Professor Seligman—with but scant acknowledgment¹⁵ and with almost no citation of germane economic literature. This principle is labeled by the author "a theory of taxation based upon economic integration; or, more

¹² On the basis of which 8 economists and 10 general works are cited, p. 6n.

¹³ P. 6. (*Italics added.*)

¹⁴ Pp. 6-7.

¹⁵ Compare Professor Seligman's concept of "economic allegiance," in SELIGMAN, *ESSAYS IN TAXATION* (10th ed. 1925) 113.

concisely, an *integration theory of taxation*."¹⁶ What is meant by integration? The concept, difficult of definition, and as conveniently vague for judicial latitude in interpretation as "general welfare," "due process" or "equal protection," is explained by the author as follows:

"The economic function of the State is found to consist of a single complex interrelated organism, consisting of men, the labor and acts of men, and of property, including its use, enjoyment, productivity, and transfer. Each of these factors operates upon the value, productivity, and utility of each of the others, to the end that the political whole, the State, may make economic progress. The existence of the coördinated group, the fact of human and economic solidarity, makes this economic progress possible. Property and labor have great value in society. They have little or no value in a vacuum. The politically organized State, the representative of the social group responsible for the wealth and its utility, taxes all persons and things which participate in this group activity. It may tax any or all elements of the whole. It may tax all property which has become identified with the economic organism. It may tax all persons who have become identified with the organism. It may tax all transfers and dealings in the property within the organism. It may tax all acts of whatever kind which occur in the functioning of the organism. The essential element of jurisdiction to tax is the integration of the property, the person, or the act into the organismal whole."¹⁷

Throughout the book the test is applied to particular situations and various taxes.

The concept of "economic integration" as expounded by Harding differs somewhat from the pregnant suggestion of Professor Seligman, who said:

"Every man may be taxed by competing authorities according to his economic interests under each authority. The ideal solution is that the individual's whole faculty should be taxed; but that it should be taxed only once, and that *it should be divided among the tax districts according to his relative interests in each*. . . . In apportioning the total fiscal obligation of the individual it is therefore necessary to ascertain from what place or places his earnings are derived, and then to observe in what place or places they are expended. Only in this way can his real economic interests be located."¹⁸

The ideal solution is seen in a centrally-administered tax with division of proceeds among the states in proportion to economic interests.¹⁹ Short of attaining the ideal, various suggestions are made, such as, taxation of real estate and tangibles by state of location and taxation of intangibles and income by state of residence, or the national

¹⁶ HARDING, *op. cit. supra* note 2, at 45. Italics are Harding's.

¹⁷ Pp. 136-7. See also explanation on p. 42.

¹⁸ SELIGMAN, *op. cit. supra* note 15, at 113. (Italics added.)

¹⁹ Note italics. *Cf.* "When the era of interstate agreements is finally reached, it will be feasible to attempt the more ideal plan of taxing the entire property or income, dividing the proceeds among the states of location and domicile according to a pre-established proportion, and in harmony with the doctrine of economic interest." *Ibid.* at 116.

taxation of intangibles with allocation of proceeds.²⁰ Harding, on the other hand, wants the tax base divided among the states with allocations based on economic integration and with residual sums accruing to state of domicile.²¹ To income tax situations he applies the doctrine of *mobilia sequuntur personam* as modified by the rule of business *situs*. He has paid his respects to the "*mobilia*" doctrine, labeling it as a "discredited fiction," hailing the business *situs* cases which push the maxim "almost to the brink of oblivion"²² yet the "*mobilia*" doctrine with its *situs* appendage is the capstone of the integration formula. It is one thing roughly to apportion revenue-yields on the basis of economic interest; it is a very different matter, in administration at least, to carve up the tax base for state, or even local, levies. One course enables a jurisdiction, coextensive with the bulk of trade and commerce, to appraise the base and tax a taxpayer under a single uniform system on his total taxable capacity, the revenues being shared with the component units in the political system. The other course requires each jurisdiction to attempt, on the basis of factors only partially under its control, to estimate the total tax base and by the application of arbitrary fractions arrive at its share of the whole. Not only does this course involve duplications in administrative machinery, the multiplication of returns filed by taxpayers (all of which cost money) and the substitution of estimates where facts are unavailable by particular units, but it also breaks down in practice unless closer cooperation between state tax administrators than has yet been secured is attained. When 48 states independently attempt to arrive at unit values and their own *prorated* shares the chances of error and evasion are greatly increased compared to the errors and avoidance involved in centralized administration with division of yield. Of course, either the plan of carving the tax base for state taxation or the plan of dividing revenues from a centrally-administered tax appropriately give some weight to economic interests. The issue between the reviewer, as supported by the views of Professor Seligman, on the one hand, and the writer, on the other, concerns the use to be made of the interests involved. This is a far deeper question than that of mere tax jurisdictions. It involves both the philosophy of tax systems and their administration.

Grave questions arise when the attempt is made to apply to taxes *in personam* the legal doctrines formulated for taxes *in rem*. It tends, in the first place, to introduce a rigidity in the tax structure which at

²⁰ *Ibid.*

²¹ HARDING, *op. cit. supra* note 2, at 209-210, 235, 258.

²² *Ibid.* at 209.

all costs should be avoided. The legal concepts as to the property tax seem to prevent, without drastic constitutional amendment, the development of personal taxes based on individual wealth. The very least that can be said is that left to themselves the courts would probably prevent either the conversion of present *in rem* property taxes into taxes on persons measured by wealth, or the development of individual taxes on wealth (*in personam*) as a supplement to them. The rules for the taxation of land, for example, indicate how far the courts, and many theorists, have strayed from the fundamental purpose of taxation, namely, the division of costs of government among the *persons* governed, rather than the things or objects controlled, on which the exclusive jurisdiction over land taxation extends. Thus, "jurisdiction over land for taxation is exclusive with the State of *situs*, and one State cannot constitutionally tax land situated in another State."²³ Can a state tax a resident (*in personam*) on his total wealth regardless of where situated? Or can it measure personal capacity by total wealth (or property)²⁴ irrespective of the *locus* of that wealth? The decisions apparently prevent this. They are based upon an *in rem* concept; if applied to a *personal tax* measured by wealth they would effectively prevent the total capacity of the individual from being taxed on an ability basis. They would require proportional taxation of land at its *situs* and limit the taxation of the individual in his state of residence to the property situated there (or imported under the *mobilia* rule for intangibles). If, however, the state of domicile sought to tax wealth progressively the tax base could include only such portion of the individual's wealth as happened to be situated in that state. Sometime the states may desire to impose taxes on individuals measured by their total wealth regardless of where situated. Because a property tax has been converted into an *in rem* levy is no reason why a different sort of a tax should not be developed. When *in rem* notions are allowed to control *in personam* taxes a mistake in both logic and fact is being made.

No complaint can be voiced at giving the state of *situs* jurisdiction over the taxation of land, but when *exclusive* jurisdictions are established interests of other jurisdictions are ignored or overridden. The whole problem of jurisdiction is one of balancing interests among territories containing taxpayers on the one hand and their property, income or rights on the other. When all are in the same civil unit the

²³ *Ibid.* at 46. To which the author adds, "Upon these points all the different theories of jurisdiction to tax are agreed"—but this is true only for theories under which land taxation is viewed exclusively as *in rem*.

²⁴ Not used synonymously for reasons familiar to all economists and but few lawyers.

problem does not arise, but as absentee ownership grows, as capital is sent from one state to assist in the development of another, as business flings itself across political boundaries, questions of who shall tax and what the tax base shall be arise. The power to tax is frequently judged superior to the ethics upon which that power rests. Debtor states are often reluctant to forego their right to tax the claims of creditor states. Each may have a valid claim to tax a portion of the tax base but once *exclusive* jurisdictions are established the claims of one state are overruled. If decisions as to one type of tax are arbitrarily applied to all taxes, or even to different sorts of taxes only injustice is likely to result. It is one thing, for example, to say land shall be taxed where situated; it is another thing to say persons shall not be taxed on their capacity measured by total wealth, even including land owned outside of the state. The one tax is definitely *in rem*. It may be in return for specific benefits directly conferred. The other tax is of a different variety. It is a purely personal tax definitely related to one measure of personal faculty. Broader social interests and other governmental benefits than those conferred *in rem* are sought to be reached by it. To it the rules of land taxation *per se* are not applicable. Furthermore, it is one thing to give a state exclusive claim to the proceeds of all taxes collected merely because it is in a position to enforce, or better administer, the tax laws; it is another thing to allow personal taxes to be imposed by one authority, but with divisions of yields among those units having a recognized claim therein. These differences are often ignored. Of course, no solution is perfect, nor subject to general agreement. Perhaps the state of *situs* should be allowed to continue its *in rem* levies as a concession to fiscal necessities or benefit principles; perhaps the state of domicile should be allowed to tax the individual on his wealth wherever situated; the error comes in making either jurisdiction exclusive.

This error is due, in large part, to the adoption by Harding of the common misconception that double taxation is deleterious, to be avoided at all costs. A study of the literature will indicate, however, that only *objectionable* double taxation is *objectionable*. If, for example, double taxation were completely universalized no objection could be taken to it.²⁵ No discriminations against persons or objects taxed would be then involved. It is only when undesirable discriminations are created by non-universal double taxation that objections arise. Fundamentally the question involved in "double taxation" relates only to the economic

²⁵ This course is proposed in the model plan of state and local taxation developed by a committee of the National Tax Association of which Professor Bullock of Harvard was chairman. See *Proceedings*, N. T. A. (1919) 426-470; *ibid.* (1933) at 353-420.

and social effects produced by the effective differentials in tax burdens created by the double taxes in issue. These differentials may be in either direction. Effective rates may be lower in one set of jurisdictions on the same tax base than in others; or the rates may be higher in one than in the other. To the extent that departures from equality of burdens in different jurisdictions are unjustified, measured by their economic and social consequences, the double taxation is regarded as objectionable and is labeled "discriminatory" for added emphasis. The judgments are made on the basis of the probable effects. If the effects are bad, double taxation is *objectionable*; if not, then little remains to be said. The problem is simply one of appraising the effects for good or ill produced by differentials in the effective tax rates, achieved by compounding the tax base. That economic conduct is altered with reference thereto, or that prices and rates of remuneration change with reference to these burdens is ignored in the legal literature.²⁶ The courts and most legal scholars have been content to look at the tax base—is it levied on more than once? That seems to be their primary concern. They have ignored the only really important question—the size of the tax rate. It is economic burdens, not tax bases which count! A tax levied under all the legal rules in force today may be many times heavier than a tax upon a prohibited duplicate base. The courts forget the burden to condemn the base. Moreover, a base appropriated for one type of tax (*in rem*) apparently can not be used, under current judicial doctrines, as the base or part of the base for a wholly different type of tax. Harding would perpetuate this by having the courts transfer a set of principles developed for one type of tax to control a wholly different genus and species of imposts.

Of course, Mr. Harding can say that so far as his application of the "*mobilia-business-situs*" rule to income is concerned he is committing no inconsistency. Many courts have held the income tax to be a property tax rather than a personal levy.²⁷ While he points out defects in this view he concedes with the *Pollock* case²⁸ "that an income tax on the income from property is very closely akin to a tax upon the property

²⁶ Those interested in double taxation should read the brilliant study of Sir Basil Blackett for the League of Nations, MEMORANDUM ON DOUBLE TAXATION, Provisional Economic and Financial Committee (1921) E. F. S. 16 A16; and REPORT ON DOUBLE TAXATION (1923) E. F. S. 73, F. 19; submitted to the Financial Committee, League of Nations. See *infra* note 47.

²⁷ The errors of this view have been exposed, though they now and then enable courts to dispose of income tax laws as their predilections dictate. For a discussion of the issues see Brown, *The Nature of the Income Tax* (1933) 17 MINN. L. REV. 127-45; Harsch, *State Income Taxation As Affected by Property Tax Limitations* (1931) 6 WASH. L. REV. 97-111.

²⁸ *Pollock v. Farmers' Loan & Trust Co.* (1895) 158 U.S. 601.

itself" and "that an income tax probably cannot be fitted into any other category of taxation."²⁹ The ultimate reconciliation is made on the basis of the integration principle! —

"The *income tax*, on the other hand, proceeds to tax the individual who has participated within the group function, upon the individual benefits actually received. It is merely the final exaction in return for the benefits conferred under the social and economic solidarity of the people. *It rests ethically upon the idea that those who benefit most directly from the structural whole should contribute most to the cost of its maintenance and operation.*

"When we look at the income tax in this real aspect, and discard for the moment legalistic and economic jargon, it appears that jurisdiction for the imposition of an income tax does not differ materially from jurisdiction for the purposes of other taxes. The State levies the one type of tax in return for the *opportunity afforded*, and levies the other in return for the *opportunity realized upon*."³⁰

If the ethical interests indicated in the italicised sentence above mean anything, how can double taxation of income be rejected as bad? If the tenets indicated above are to be applied how can tax jurisdiction fairly be made exclusive? The absurdity of exclusive tests becomes greater as jurisdictional boundaries become smaller. If, instead of 48 states, suppose exclusive jurisdiction is to be allocated to 3,000 counties; the difficulties of the test become apparent. If incomes are to be integrated, what would happen to the Harding solution if slices of the tax base were to be parceled among local subdivisions? It would seem, however, that if the individual is to be taxed in return for "*opportunities realized upon*" that taxation must be upon the total of his income wherever earned and would require the imposition of progressive rates. This can not be accomplished when the tax base is carved up among the various states (or other units) by the Harding integration formula. His retort may be that tax rates are one thing, jurisdictions are another but the basis of the latter is to make equitable taxation possible, not to prevent it. The particular rate structure desired may be a purely economic-ethical question not involved in the jurisdictional rules but if these rules prevent the total tax base from being reached—as Harding would with his "integrated allocations with domiciliary residues"—the problem is of far greater moment than the harmonizing of legal metaphysics through a vague "new" principle. Jurisdictional concepts should make possible equitable taxation, not prevent it. The issue presented by Harding is one of fundamental philosophies *re* taxation, masquerading under the guise of a territorial jurisdictional dispute.

The transfer of *ad valorem* rules *in rem* to income taxation seems to destroy, or at least makes logically precarious, the taxation of

²⁹ HARDING, *op. cit.* *supra* note 2, at 151.

³⁰ *Ibid.* at 153 (Italics by Harding, save for last sentence in first paragraph).

property plus the taxation of income therefrom. It also presents nice questions of income taxation *per se*. If the state of *situs* of land chooses not to tax the land but the income therefrom, is the non-resident owner freed from taxation on his income *from this source* in the state of his domicile? And if this is his entire income is he scot-free? If the state of *situs* taxes the land upon an *ad valorem* base, can the state of domicile tax the income derived from such land?

This question may appear, to the superficial reader, to have been answered by *Senior v. Braden*,³¹ decided since the book under review was printed, but a careful reading of that case will dispel any illusions as to its technical legal significance. Although the court held void the application of the Ohio tax on productive investments measured by the income therefrom,³² the case stands only for two propositions in the field of *property* taxation: (1) that the *cestui* is the equitable owner of the trust *corpus* and not simply the owner of the equitable obligation of the trustee; and (2) that if the trust *corpus* consists of real property the state of domicile can not levy a property tax upon the interest of the *cestui* therein if the property is situated in another state.³³ That the state has no right to tax the *cestui's* interest if it be an interest in land in another state was rashly, and even gratuitously, admitted by the Attorney General of Ohio.³⁴ The majority rested its opinion on this

³¹ *Senior v. Braden*, *supra* note 10; Justices Stone, Brandeis and Cardozo, dissenting. Cf. HARDING, *op. cit. supra* note 2, at 34, where the record of fairness and justice of Mr. Justice Cardozo is commended.

³² OHIO GEN. CODE §5638; (1931) 114 OHIO LAWS 722.

³³ See note (1936) 24 CALIF. L. REV. 200-207.

³⁴ The brief in the case was written by Professor Thomas C. Lavery on the theory that the interest of the beneficiary of a trust was merely a claim *in personam* against the trustee. The concession in question was hypothetically made to direct the attention of the court to the record in the case and to indicate the real nature of the rights involved. The germane section in the brief is as follows—note the sentence italicized in the brief:

"In the light of the foregoing discussion, it may be candidly admitted that under the Fourteenth Amendment to the Constitution of the United States, the state of Ohio has no power to tax land or interests in land situate beyond its borders; nor has it power to tax land or interests in land situate within the state in any other manner than by uniform rule according to value, under Article XII, Section 2, of the Constitution of Ohio. From this it follows as a matter of course that if the property of the appellant which the appellees seek to tax in this case is land or an interest in land, situate within or without the state, their action is unconstitutional and should be permanently enjoined. *If, however, the property of the appellant in the several trusts is unequivocally shown by the record in this case to be in fact a species of intangible personal property in the nature of a bundle of equitable choses in action, then the state of Ohio has the power to impose the tax which the appellees, pursuant to provisions of the General Code of Ohio, have sought to do, without offending either the due process clause of the Fourteenth Amendment to the Constitution of the United States, or Article XII, Section 2, of the Constitution of the state of Ohio.*

"With the law of the case dealing with jurisdiction to tax thus established, it

admission.³⁵ The case adds little, therefore, to rules of *situs* for intangibles; it establishes nothing—strictly construing its facts—for income taxation.³⁶

The decision of the majority in *Senior v. Braden*³⁷ seems to fall, however, within the folds of the Harding integration formula since the author approves *Hutchins v. Commissioner*,³⁸ *Opinion of the Jus-*

is at once apparent that its *major problem* is to determine the nature of the interest of the appellant in the several trusts, since constitutional limitations which restrict the power of the state of Ohio to tax land or interests therein have no application to the taxation of intangible personal property. The appellant holds and enjoys his interest under various agreements and declarations of trust which have been introduced in evidence and made a part of the record in this case (R., 65-140). These documents disclose that his interest in each trust now before this Court is by nature an equitable chose in action, as, it is submitted, the analysis now to be made will show" (Brief of Appellees, *Senior v. Braden* in United States Supreme Court, October Term, 1934, No. 658, pp. 20-21).

³⁵ *Senior v. Braden*, *supra* note 10, at 422, 429. But see the penetrating analysis of Justice Stone as to the errors of the majority in resting the decision on so tenuous a thread. *Ibid.* at 438-41.

³⁶ The case was concerned with property taxation only because: (1) The court acted on the assumption of counsel that the tax was a property tax; (2) the tax was "levied on . . . intangible *property*." OHIO GEN. CODE (1931) § 5638; (3) the tax was assessed to the owner of the certificates on tax day even though he was not the owner when the income was received; (4) the court held the tax bad as being imposed on an interest in land. If it were holding an income tax invalid for the reason that jurisdiction to tax income from land depends upon jurisdiction to tax the land, it is strange that it did not say so. *Cf. Pollock v. Farmers' Loan & Trust Co.*, *supra* note 28.

While this may solve technical requirements it does not absolve the court from looking beyond "the precise form or descriptive words"—to quote from *Lawrence v. State Tax Commission* (1932) 286 U. S. 276—to the real nature of the tax. Although the majority in *Senior v. Braden*, *supra* note 10, at 429, repeat the ritual that "Our concern is with realities, not nomenclatures," it remained for Justice Stone to point out, in his dissent, the fallacy of the majority, as follows:

"But when new and different legal interests, however named, are created with respect to land or a chattel, of such a character that they do enjoy the benefits of the laws of another state and are brought within the reach of its taxing power, I know of no articulate principle of law or of the Fourteenth Amendment which would deny to the state the right to tax them. No one would doubt the constitutional power of a state to tax its residents on their shares of stock in a foreign corporation whose only property is real estate or chattels located elsewhere, . . . or to tax a valuable contract for the purchase of land or chattels located in another state, . . . or to tax a mortgage of real estate located without the state even though the land affords the only source of payment . . ." *Ibid.* at 435.

"Similarly, I do not doubt that a state may tax the income of its citizens derived from land in another state . . . I can perceive no more constitutional objection to imposing such a tax than to the taxation of a citizen on income derived from a business carried on by the taxpayer in another state, and subject to taxation there, which we upheld in *Lawrence v. State Tax Comm.*, . . . or to the tax on income derived from securities having a tax *situs* in another state, upheld in *Maguire v. Trefry*, 253 U. S. 12 . . ." *Ibid.* at 436.

³⁷ *Supra* note 10.

³⁸ (1930) 272 Mass. 422, 172 N.E. 605.

tices,³⁹ *Carter v. Hill*,⁴⁰ and *Pierson v. Lynch*.⁴¹ Weight is added to this conclusion by Harding's labored attempt to discredit *Lawrence v. State Tax Commission*,⁴² which upholds the right of the domiciliary state to tax income derived in another state, and which therefore conflicts with the integration formula sponsored by the author. If the views of Harding prevail, progressive personal income taxation by states is damned wherever a portion of the income is from non-resident business enterprises. States can not tax individuals on their total capacity measured by income—or property owned. The court, if it follows Harding, forces a division of income on the basis of the apparent *locus* of the source of income. If the income is derived from land, that income seems to be taxable only in the state of *situs* of the land. But does the income even from land arise where the land is situated? Crops, for example, are sold in urban communities to be shipped to consumers in other commonwealths or to be fabricated elsewhere, the prices often being established in world markets far removed from the *situs* of the land. Does income arise where production takes place, where the market is situated, where the consumer resides, or perchance where the owner lives? Even equitable certificates—commonly traded in as real estate securities, resembling corporate stocks, of the preferred type especially, and issued to finance real estate enterprises rather than to represent ancient trusts from which precedents grew—are given a *situs* where the real estate is situated.

The interest of the courts has so far extended only to the superficial origin of income. They have not been concerned with its economic origin. Nor does it seem to have occurred to the courts that the taxation of income *and* the taxation of the property from which the income is received is but a method of taxing funded (so called "unearned") income at higher differential rates than income from labor or service. Almost everyone knows the difference between two such incomes and the greater ability of the recipient of funded income to bear the tax. When the courts rule upon such issues as "double taxation" they are simply excusing themselves, on the basis of popular prejudices, for not having discovered what really is at stake. If property and the income therefrom are not both to be taxed, fiscal policies can not be adapted to personal capacities to pay. If only states having the *situs* of land

³⁹ (1930) 84 N.H. 559, 149 Atl. 321.

⁴⁰ *Carter v. Hill* (1930) 31 Haw. 264, 269-71, turns on the *intention* of the legislature to tax rather than upon its *right* to tax and is poor support for the Harding doctrine; see especially pp. 269-71. It is repeatedly cited for propositions too broad for the issues legally involved. HARDING, *op. cit. supra* note 2, at 105, 180, 215.

⁴¹ (1933) 237 App. Div. 763, 263 N. Y. Supp. 259, cited: HARDING, *op. cit. supra* note 2, at 227.

⁴² *Supra* note 36. See HARDING, pp. 218 ff.

can tax the income from land, the resulting taxes can only be of the *in rem* variety, never related to personal capacities, save as to those whose entire wealth and income are within the confines of the taxing state. To deny the claims of the state of domicile for integratory, or any other reasons, is to force all taxation into the caricatures of impersonal *in rem* imposts. Integration as an exclusive basis of tax jurisdiction is nothing less than an abortion on justice.

The Supreme Court has not put the United States in the same legal straightjacket.⁴³ "The judicial doctrine of *situs* for taxation and the principles against double taxation are strictly principles of our interstate law, not of international law."⁴⁴ We have, thus, one rule for citizens of states as to their national incomes, another for citizens of the nation on their international incomes.⁴⁵ Federated governments beget queer rules of conduct. "Nevertheless the time has come when the pressure of social and economic interests will compel treaty or other steps for the elimination of much of the international double taxation that exists. The principles which we have here developed in studying the power of the States are all of such nature that they might well be applied to international questions."⁴⁶

It is of interest to note that steps have been taken to bring about international comity in the field of international double taxation. The League of Nations early studied the conflicting theories of tax jurisdiction; it carefully weighed the claims of each; and on the basis of long investigations, by the leading fiscal minds of the world, recommended the adoption of the domicile rule—allowing states to tax residents on the total of their incomes wherever earned—in preference to rules based upon economic interests.

The pertinent conclusions of the commission of the League of Nations were as follows:

"(1) On the subject of income taxation in its developed form, the reciprocal exemption of the non-resident under method 2 is the most desirable practical method of avoiding the evils of double taxation and should be adopted wherever countries feel in a position to do so.

"... Looking forward to the future, the influence of example by others and the spirit encouraged by the operations of the League of Nations indicate the possibility of a development away from localized ideas and from the earlier stages of economic thought typified by strict adherence to the principle of origin. Moreover, as semi-developed countries become more

⁴³ Cf. *United States v. Bennett* (1914) 232 U. S. 299; *De Ganay v. Lederer* (1919) 250 U. S. 376; *Cook v. Tait* (1924) 265 U. S. 47; *Burnet v. Brooks* (1933) 288 U. S. 378.

⁴⁴ HARDING, *op. cit. supra* note 2, at 231.

⁴⁵ See especially *Cook v. Tait*; *Burnet v. Brooks* (involving death duties), both *supra* note 43.

⁴⁶ HARDING, *op. cit. supra* note 2, at 231-32.

industrialized, with the resulting attenuation of the distinctions between debtor and creditor countries, the principle of personal faculty at the place of residence will become more widely understood and appreciated and the disparity between the two principles will become less obvious, so that we may look forward to an ultimate development of national ideas on uniform lines toward method 2, if not as a more logical and theoretically defensible economic view of the principles of income taxation, at least as the most practicable solution of the difficulties of double taxation."⁴⁷

At the expense of incurring the wrath of the editors for the voluminous quotations already incorporated in this review, it is important to see what the economic experts told the League of Nations about this doctrine Harding is supposed to have discovered. Their opinion is important because the author of the book under review undertook the work originally "at the request of the Economics Section of the League of Nations, in an effort to find in the American interstate cases principles upon which international treaties might be based."⁴⁸ No such principles were found. In fact, the theory Harding proposes, which had previously been considered by experts, would scrap twelve years of work by the League. It is particularly significant, therefore, that the economic advisers to the league committee wrote of the doctrine of "economic allegiance"⁴⁹ as follows:

"In the attempt to discover the true meaning of economic allegiance, it is clear that there are three fundamental considerations: that of (1) *production of wealth*; that of (2) *possession of wealth*; that of (3) *disposition of wealth*. We have to ask where the wealth is really produced, *i.e.*, where does it really come into existence; where is it owned; and, finally, where is it disposed of?

"By *production of wealth* we mean all the stages which are involved up to the point of the wealth coming to fruition, that is, all the stages up to the point when the physical production has reached a complete economic destination and can be acquired as wealth. The oranges upon the trees in California are not acquired wealth until they are picked, and not even at that stage until they are packed, and not even at that stage until they are transported to the place where demand exists and until they are put where

⁴⁷ League of Nations, Economic and Financial Commission, REPORT ON DOUBLE TAXATION, submitted to the Financial Committee by Professors Bruins, Commercial University, Rotterdam, Holland; Einaudi, Turin University, Italy; Seligman, Columbia University, U. S. A.; and Sir Josiah Stamp, London School of Economics, England; E. F. S. (1923) 73 F. 19, p. 51. This document—one of the most valuable ever produced on the subject of double taxation—was not cited by Harding although it was published in 1923. Nor do any of the documents of the League of Nations rise above the level of footnotes. The bibliography is confined to "Law Review Articles." Thus are also excluded from reference, save in scanty footnotes, the works of the principal scholars on double taxation. Professor Seligman gets mention in the bibliography on the basis of an article on stock dividends, p. 288, but his name, together with all economists and all other writers except Adam Smith, is omitted from the index, except as to his classification of capital gains, p. 312. Smith is listed in the index under "Adam" and "Sources of Income."

⁴⁸ HARDING, *op. cit.* *supra* note 2, at 232n.

⁴⁹ This doctrine Harding has called "economic integration."

the consumer can use them. These stages, up to the point where wealth reaches fruition, may be shared in by different territorial authorities. By *disposition of wealth* we mean the stage when the wealth has reached its final owner, who is entitled to use it in whatever way he chooses. He can consume it or waste it, or re-invest it; but the exercise of his will to do any of these things resides with him and there his ability to pay taxes is apparent. By *possession of wealth* we refer to the fact that between the actual fruition of production into wealth and the disposing of it in consumption there is a whole range of functions relating to establishing the title to the wealth and preserving it. These are largely related to the legal framework of society under which a man can reasonably expect to make his own what has been brought into existence. A country of stable government and laws which will render him those services without which he could not enter into the third stage of consumption with confidence is a country to which he owes some economic allegiance. The question thus arises as to the place where these property rights are enforceable. Mere possession without the privilege of enforcing the rights to the property is of very little economic importance.

"The three considerations of weight in economic allegiance thus really become four, namely, the acquisition of wealth, the location of wealth, the enforceability of the rights to wealth and the consumption of wealth. Corresponding to these four considerations would be the four points which become of significance in considering the proper place of taxation. The principle of acquisition corresponds to the place of (1) origin of wealth; the principle of location to that of (2) *situs* of the wealth; the principle of legal rights to the place of (3) enforcement of the rights to wealth; the principle of consumption or appropriation or disposition to the place of (4) residence or domicile.

"... It is not pretended that every function falls easily into one of these four classes. For example, a manager of an estate in Java may be said to be the directing brain living in Java, and some of the legal rights relating to that estate may be enforceable in Java; on the other hand, the final control and direction may be in the hands of directors in Amsterdam; finally, the actual recipient of a part of the profits may be a shareholder in London. It is not easy in the last analysis to decide whether the production or origin stage can be said to end in Java or whether the brains in Amsterdam are not an essential part of all the operations concerned in production. Moreover, before the London shareholder can get hold of the wealth, two sets of legal rights may have to be exercised: first, those relating to incorporation of the company in Amsterdam; and, secondly, those relating to the ownership by the company of the property in Java. The analysis is therefore not in any sense final.⁵⁰

"... in the case of the income tax, if our ideal of taxation is the tax on pure income, there is no such thing as the taxation of the separate stages until we have ascertained whether the whole sequence of operations has ended in a profit, and, if so, how much; and then we must go back and allocate that profit over all the different operations in the countries in which they may have taken place. In practice, such an allocation may be said almost to baffle analysis. It may well be that productive operations up to a certain point have been well and profitably conducted and that the whole of the excellent results to this point are thrown away by bad selling. Are, then, the countries that shared in the profitable stages of the operation to receive nothing? It may well be that the precise amount of profit to be

⁵⁰ League of Nations, Economic and Financial Commission, *op. cit. supra* note 47, at 22-23.

allocated to particular countries is never finally determinable when we have such complex operations as the raising of produce, its transport to countries where it is sold and the direction of the whole of these operations from another country, with a set of legal apparatus in every one of these countries which is indispensable to the whole sequence. In so far, therefore, as the problem of taxation is a problem of taxing income, it may well be that the determination of these different classes of economic allegiance is not merely exceedingly difficult in practice but not always exactly determinable in economic theory.

"... When, however, it comes to the consideration of the taxation of pure income, it is difficult to establish that such an analysis can have great practical value; at any rate modern income is such a composite product and such a complex conception that even theoretically it is not easy to assign in a quantitative sense the proportions of allegiance of the different countries interested. Unless in theory the quantitative assignment can be made, it obviously is difficult to make it the basis of any practical plan."⁵¹

The administrative difficulties alluded to above are ever-present in applying the Harding thesis. He would have each state under its own laws, in the absence of compacts or of *legislation* by the United States Supreme Court, determine the "unit value" of a taxpayer's income.⁵² This sum would be divided into two parts: (1) that "which it is possible to assign a source or origin at a single place," and (2) that income which it is impossible so to assign to a single source and which, therefore, must be allocated to the states. This allocation is the final step and is supposed to give to each state "a fair proportion to the amount which these States have contributed to the final result." These routines are to be applied to single businesses within the same corporate setup. What is a single or unitary business is left to the courts to determine, on what principle, Harding does not make clear. Whether canning, for example, is a single business, or whether canning fruit is a different business from canning vegetables or fish, is left for judicial determination. If the court deems them to be separate businesses, though embraced within the same corporate setup, separate allocations for taxation will have to be made.⁵³ Even though there may be unity of management, sales, finance, etc., the courts may declare a paint business separate and distinct from manufacture and sale of condiments and preserves by the same corporation.⁵⁴ What may the courts not say about income from a company manufacturing

⁵¹ *Ibid.* at 26-27.

⁵² On page 258 Harding uses the word "business" instead of "taxpayer." The difference is not significant.

⁵³ "The State may use an allocation formula to reach its due share of the income from the unitary business which extends into the State, but cannot use the formula to reach the income from *another and distinct business conducted by the same company.*" P. 260. (Italics added.)

⁵⁴ See facts with reference to The Glidden Co., MOODY'S MANUAL OF INVESTMENTS: INDUSTRIALS (1935) 1357.

glass, insecticides, fertilizers, cement, and selling natural gas, putting its products on the market through its own branches and wholly-owned subsidiaries which, in turn, sell other products?⁵⁵ Is this a unitary business or how many? What would Mr. Harding decide about Sears, Roebuck and Company? That concern, incorporated in New York, does mail order, general merchandising and other business, including the sale of coal in car-load lots, through 428 stores and 44,306 employees.⁵⁶ Its main plant is in Chicago. It has branches in Seattle, Dallas, Kansas City, Philadelphia, Los Angeles, Memphis, Minneapolis, Boston and Atlanta. It owns all of the stock of Encyclopedia Britannica, Inc.; has a substantial interest in the United Wall Paper Company; has valuable contracts, supported by investments, with the Goodyear Tire and Rubber Company; maintains a housing concern, and a corporation to *barter goods* with foreign countries; operates two insurance companies doing business in many states; owns numerous stores through which it markets goods; manufactures farm implements in Illinois, paint in Tennessee, California, Illinois and Pennsylvania, radio cabinets in Kentucky, phonographs in Minnesota, sash and doors in Ohio, and musical instruments in Illinois. Lack of space prevents further enumeration. According to Harding, for each single business a separate allocation must be made! Harding is silent as to how he would allocate dividends from this and other concerns. Presumably it is to be done on the basis of economic integration, but further clues or formulae are not divulged. Regardless of whether the rule is practical for single traders, the Harding theory breaks down completely when attempt is made to apply it to a complex business corporation. The "single business" test laid down by the author not only is impossible of administration but opens wide the door to tax avoidance.

To Harding business is essentially a simple affair—one type of activity which has just happened to extend across state lines. Increasingly fewer businesses conform to this delineation. In the first place, not all of them are unitary enterprises. Second, the units within and without the state are not often separate, some of them are only arbitrarily severable. Others appearing to be separate are actually, though perhaps not legally, one. Not only would businesses have to be taken apart for allocation among states but the activities would have to be divided within the business and these in turn subdivided among the states. No formula is suggested for apportioning businesses within themselves. Harding seems to have confused this problem with attempts on the part of states, to cite one of his own illustrations, to tax

⁵⁵ See Pittsburg Plate Glass Co., *ibid.* at 2059.

⁵⁶ *Ibid.* at 2193.

non-integrated railroads not entering the taxing state.⁵⁷ Extra-territoriality is confused with business unity. Nothing whatever is said, except in connection with the corporate excess,⁵⁸ as to those cases where separate corporations must be put together to form the units they really are.

Harding properly rules out, save in unusual cases,⁵⁹ allocations based on single factors. He objects to complex formulae, and desires to restrict the factors entering the allocation equation to tangible property, wages and sales,⁶⁰ with the necessary qualifications to allow the substitution of other elements "to guard against undue capriciousness of result."⁶¹ Complexities, however, have generally been introduced in tax formulae and tax laws to increase the *quantum* of justice in their operation. Taxes can seldom be both simple and just.

It is interesting to observe the naivete with which Harding disposes of economic and business problems. If a separate set of books is kept for each state that seems almost sufficient to establish the verity of any profit (or loss) claimed.⁶² A reading of the record in the *Palmolive* case should dispel that notion.⁶³ Seemingly there was nothing wrong with the accounting methods—the debits and credits—in that case. Accounts may show the *amount* of profits but they do not necessarily show whence they come. The amount of profits shown, moreover, is not always above question, even if customary accounting rules are followed. Nor have the methods of cost accounting analysis proceeded to such a pinnacle as to satisfy the requirements of the *marginal* analysis of economic statisticians. Who can say precisely to what a profit is due; or from where, or from what, it comes? The "disciplined intellect"⁶⁴ of the courts may hurl back the echo from the oracle but that does not establish a scientific fact.

⁵⁷ HARDING, *op. cit. supra* note 2, at 260. He also cites the case of a soap company within and an affiliated advertising company maintained apart from the soap business outside the state. No jurisdiction is postulated for the advertising concern in the "soap manufacturing" state, to simplify the case. Suppose only soap is advertised, may not the incomes of the two concerns be somewhat interdependent?—the advertising company upon the good name of the soap, the soap company upon the persuasiveness of the advertising copy? If separate corporate identities are maintained so that one concern can "milk" profits from the other the court may look behind the scenery to view the real facts, just as it did in the *Palmolive* case, *infra* note 63. Before such facts the distinction of the single business made by Harding seems highly artificial.

⁵⁸ *Cf.* pp. 247-48, 275 ff.

⁵⁹ *Cf.* pp. 265-66.

⁶⁰ P. 270.

⁶¹ P. 271.

⁶² *Cf.* p. 261.

⁶³ *Palmolive Company v. Conway* (W. D. Wis., 1930) 43 F. (2d) 226; *aff'd* (C. C. A. 7th, 1932) 56 F. (2d) 83.

⁶⁴ *Cf.* HARDING, *op. cit. supra* note 2, at 271.

It is just these questions which "economic integration" is supposed to answer. It is supposed to measure the territorial contribution of each element in the economic process. What each territory gives to the production, distribution, sorting, storing, consumption, etc., of income is supposed to be measured—and divided where it can not be otherwise localized—by any equation made up of one part of wages, one part tangible property, one part sales, to which is added lemon juice as desired, with other modifications as circumstances warrant. The author attaches little significance to purchasing, save as it enters into the wages item, and little to transportation, though he would modify the formula if the *taxpayer* proved the former substantial and would allow savings from transportation to be taxed where carried on,⁶⁵ but both are regarded as unusual. Is it true that purchasing and transportation are not important as profit differentials? What of the case of the United States Steel Company with mines in Minnesota, ore-carrying railroads in Minnesota and Wisconsin, ore boats on the Great Lakes, steel mills in Gary, and markets nearby in Chicago? In the Pittsburgh district ore docks, railroads, coal mines, river boats and different markets in other states are also involved. May not purchasing be equally advantageous to United States Gypsum, Johns-Manville, or any canning factory? Perhaps they have a monopoly on a favorably situated natural resource. May not the economy of large scale buying be the foundation of the wholesale, jobbing and merchandising trade? Yet in the case of jobbers, brokers, etc., Harding attributes the profit to selling rather than to advantageous buying.⁶⁶ As a matter of fact, should not selling be regarded as a cost of business, the profit being considered as arising from the production rather than from the marketing of the goods? This view would seem to be as reasonable as that advanced by the author. Other concerns may secure profit margins from financial management, ability to secure discounts, or even low interest rates on loans. If economic activity is to be integrated, all such activity should be counted.

Harding, of course, has no real objection (if complex formulae are avoided) to increasing the elements in the allocation formulae. What he wants is to divide the economic carcass according to the activity carried on in each *state*. He says nothing of the lesser units, of the regions composing states, or extending beyond their boundaries, nor does he mention national interests. In many cases the claims of the states *per se* and of the lesser units are not very strong. If perchance state lines were redrawn many commonwealths would lose what

⁶⁵ P. 266.

⁶⁶ P. 267.

claims they now have on much allocable income and wealth. That they now have them is simply a matter of chance, or perhaps, of historical accident. The claims so far as they are valid apply to economic regions rather than to states *per se*. The claims of the nation to its resources may be as strong even as claims of territories within the nation to smaller pieces of the same pie.

What is vital in the allocation process is the attempt to measure the contribution of *certain* territories (states) to income derived, for the most part, from interstate (national) or even international commerce. The process leaves out of account the vital contributions of many territories. The states where financing is done, where management takes place, where ideas are created, where advertising is printed or the copy read, seem to enter the formula only through the payroll and property equations. If separate functions are performed by independent companies, or even subsidiaries or perhaps, by separate departments, their states may not count in the final reckoning. In other words, economic integration means single business combinations of the vertical type devoted to one pursuit. It means, too, that but few of the economic activities of the modern world are counted in the tax formula. Values, in short, are said to depend on property, labor (wages) and sales promotions. Only in unusual cases is it conceded that the balance of our economic institutions contribute enough to justify their inclusion in apportioning the unit values. To be workable the formula must be simple. If the formula comprehended all economic activity it would be as administratively unworkable as it now is unfair by its circumscriptions. Yet only if it includes all economic functions can it lay claim to being a true integratory theory.

The amount of income assignable to a single place is also worth consideration. A business may all be conducted in a single state, yet the economic interest (or integration?) may not all be there. New York City thrives on purchases by non-residents. Cincinnati, Philadelphia, Detroit and other centers do the same. The advertising signs in one state visible in another may attract trade. Newspapers and even trade rumors cross state lines. Radio broadcasts originating in New York, planned in Europe, may cause Iowa farmers to buy products manufactured in Illinois out of raw materials imported from Wisconsin and sold to jobbers in Kansas City who resell them to Iowa merchants. The same broadcasts may create a demand for home products made as well as sold by home merchants. Where is the economic interest in income from such transactions? To what is each interest due? And what is the worth in dollars to tax of each such interest? In many cases the "single unit in the single state," to use Harding's concept, is single

only because in our ignorance we have so assumed it. It is like attributing all land values in a city to urban dwellers, with no allowance for values produced by trade and intercourse with the hinterland, or areas more remote. Debtor states may owe their worth to loans of capital, equipment or skill by creditor countries. The economic balance sheet and the profit and loss statement drawn by Harding for the integration theory contain too few items and are based on too little economic research.

The Harding thesis breaks down, the author points out, (1) in the case of a tax on a "nonresident railroad brakeman upon income received for frequent trips through the State upon a non-stop freight train"; (2) in case New Jersey sought to tax New Yorkers on profits from a deal consummated on a Jersey golf course; and (3) in case Illinois tried to tax a resident of Missouri on the royalties of a poem written while employed as an usher at an Illinois race track.⁶⁷ If New York salesmen customarily entertained their western customers on New Jersey golf courses and received valuable orders thereon, or if brakemen habitually rode on non-stop trains across Indiana, Connecticut or Rhode Island it is difficult to see why the integration theory, so far as it is valid anywhere, should not apply. Perhaps Harding is trying to distinguish cases of personal income from corporate or business incomes, but this distinction is not made.⁶⁸ As a matter of fact no differentiation is made between the two. Emphasis is placed upon the lack of "integration" with local economic activity. Moreover, when the readers are told that there are no serious jurisdictional problems in connection with capital gains,⁶⁹ it is only because the gains are all attributed to the *situs* of the property. The author does not care to follow the course of economic integrations to the factors producing the gains.

In the field of *ad valorem* taxation Harding believes that the integration principle "accords entirely with every decided authoritative case of to-day except those dealing with the domiciliary taxation of the corporate excess, and the domiciliary taxation of credits with a business *situs* elsewhere."⁷⁰ Here he doubts the continued support of present rules by the courts. The reviewer likewise shares these doubts.

Finally, the author sees the possibility that his unit-valuation-three-factor apportionments may produce tax bases in excess of 100 per

⁶⁷ Pp. 191-92.

⁶⁸ P. 192.

⁶⁹ P. 186.

⁷⁰ P. 111.

cent.⁷¹ He indicates the possibility of interstate agreement and of *legislation* by the Supreme Court. On the basis of precedent there is greater likelihood of the happening of the latter than of the former. But this is no solution. The court may change its mind and its rules may be upset by administrative nullification or ineffective application, not to ignore subsequent legislation. Differentials in effective tax rates remain though double taxation *per se* may be avoided. The merit of the Harding thesis lies only in this outward avoidance of double taxation. But if the Harding thesis is followed by the courts not only is the course of tax administration made both difficult and arbitrary but the adoption of his *exclusive* tests means the end of progressive *personal* taxation on interstate incomes. The more that base can be carved up the less effective can rate progressions be made. That seems to be too high a price to pay for the avoidance of duplicate tax bases when the theory is impotent to control differential tax burdens.

After condemning personal taxation on business incomes, Harding, as a last act, damns the central taxation of business income with division of yields among the states. Uniform business taxes for the nation would seem to be vastly superior to 48 unit-rule apportionments carried out under Supreme Court supervision. Difficult as it would be to apportion revenues fairly under taxes centrally imposed, the task is measurably easier and less costly than carving the tax base and the different activities of modern business units for inadequate state taxation. Under a centrally-imposed tax, total faculty could at least be reached under a proper rate structure. The merits of that portion of Professor Seligman's suggestion on economic interest Harding did not adopt, nor has he felt more kindly disposed to the reviewer's similar suggestion.⁷² The arguments against an all-embracing Federal income tax with division of yield were: (1) doubt if a statute could be passed; (2) belief that it "would have the effect of taking from the States the power to encourage or discourage industry within the States"; (3) "would take from the States the power to devise a more equitable system in lieu of the present antiquated *ad valorem* system"; and (4) it would revive all of the difficulties of apportionment.⁷³ None of these arguments goes to the merits of the question—nor does the complaint that some states might lose revenues, since they would share in taxes distributed. Such a plan would end interstate (but not international) double taxation and would make for uniform income taxa-

⁷¹ P. 271. Provided that not all states use the same factors or give them the same weights. Harding seems to blame administrators rather than legislators for exceeding the total base.

⁷² Cited p. 273n.

⁷³ P. 273.

tion (it is hoped on an ability basis), within what for most purposes is the economic and commercial trade area of its citizens. The interests of its citizens in uniform non-multiple taxation with sharing of revenues, Harding does not think is any more important than the claim of a state—divorced from its citizens—to “a fair portion of all that income which the society within the State has made possible.”⁷⁴ According to him, state interests are superior to national interests and a federal tax with division of yields is the solution “least desirable of all.”⁷⁵

The only conclusion to draw from this *impassé* is that Harding favors no effective taxation of income. His solution for the states is administratively impractical; its destruction of the progressive rate structure is unjust. His attempted demolition of attempts to solve the problem on a national base—on the assumption that trade and commerce are primarily national and that many of our economic, as well as social values are national as well—leaves but one conclusion—try the worst possible solution, or none at all. The book under review is a good exposition of the law of property tax jurisdiction. As a projection of the law for income taxation it points the court in the wrong direction.

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⁷⁴ P. 274.

⁷⁵ *Ibid.*