

National Taxation of State Instrumentalities (Book Note)

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York, is of special importance. There is probably no one more competent or better equipped to unfold the history and legal phases of zoning than is the author who, as counsel to the "Zoning Committee of New York" since its foundation and "a member of the Advisory Committee of Zoning appointed by Herbert Hoover, Secretary of Commerce", has had the advantages of unusual experience both in national and local problems in this field.

This book reflects the full consciousness of the author to the social, moral, and legal aspects of zoning, as well as his complete mastery of the history of the subject. The following items are especially deserving of mention: (1) the adequate, if not exhaustive, treatment of the constitutional aspect of zoning; (2) the treatment of the technique for the adoption and amendment of zoning ordinances; (3) the full analysis of the basis of differentiation in zoning districts; (4) and the instructive information on the procedure which is followed in matters before the zoning boards. The book also contains an excellent bibliography of books and articles on zoning in the United States (1903-1936).

Mr. Bassett's compact work is highly recommended not only to the practicing lawyer but also to students in government and law in our universities. The instances are rare wherein a law book can be recommended to so many distinct if not entirely different groups.

E. J. O.

NATIONAL TAXATION OF STATE INSTRUMENTALITIES. By Alden L. Powell.
Urbana: University of Illinois Press, 1936, pp. i, 166.

In the general tax agitation now prevalent, the elimination of intergovernmental exemptions based on federal and state sovereignty is receiving renewed attention from all sides. G. Aaron Youngquest, former Assistant Attorney General of the United States, issued a statement on September 28, 1937¹ as to two Joint Senate Resolutions, Numbers 5 and 154, proposing amendments to the Constitution enabling the Federal and State Governments to tax such income. This statement appears in *The Tax Magazine*.² In the American Bar Association Journal³ there recently appeared an article by Mr. Joseph L. Lewinson advocating the taxation of such income. Nicholas Murray Butler in a public statement reported in the New York World-Telegram on September 25 assails the idea of adopting a new amendment to permit the taxation of such income. He believes that the Sixteenth Amendment already covers the ground and he predicts that the Supreme Court can and will end the exemption from income tax of State and Federal Instrumentalities. Finally, mention should be made of the address of Roswell Magill, Under Secretary of the Treasury, before the Thirtieth Annual Conference on Taxation⁴ on October 28, 1937. His subject was, "The Problem of Intergovernmental Tax Exemptions."

¹ Before the Tax Clinic of the American Bar Association at Kansas City.

² November 1937 issue, p. 649.

³ September 1937 issue, p. 685.

⁴ Held under the auspices of the National Tax Association at Baltimore, Md.

A basis for an intelligent understanding of the problem is available in a study made by Alden L. Powell of the University of Illinois, of the legal history of the rule in American constitutional practice that the governmental instrumentalities of states and their political subdivisions are generally immune from taxation by the National Government. This study is quite timely since it appears that some action is about to be taken on this sore spot in our tax laws.

The development of the principle of the state's immunity from federal taxation is ably set forth in this study and is quite familiar to the reader. It is based upon the idea of the sovereignty of the state and the implied freedom from interference by the federal sovereignty as this idea has been developed by Chief Justice Marshall⁶ and the decisions of *Collector v. Day*⁷ and *Pollock v. Farmer's Loan & Trust Co.*⁸

In spite of a long and fairly complete bibliography, the author has apparently not included in his research Louis B. Boudin's provocative study in two volumes, "Government by Judiciary", published in 1932. This reviewer would have enjoyed a critical evaluation of Louis Boudin's thesis that only the federal sovereignty is supreme and so immune from state interference by taxation; that the converse proposition is not valid, and in fact was never advanced by Chief Justice Marshall. The mischief done in *Collector v. Day*⁹ was in Boudin's⁹ opinion and in the opinion of most advocates for the taxation of state instrumentalities, eliminated by the Sixteenth Amendment.¹⁰ Unfortunately this amendment was given a distorted interpretation in *Brushaber v. Union Pacific R. R.*¹¹ The damage done can be righted, if the Supreme Court is willing, in the light of a fresh realistic study of the problem, to reverse *Collector v. Day*¹² and to interpret the Sixteenth Amendment to mean what to the average man it actually says.

The author of this study is in agreement with this solution of the problem.

The speciousness of the argument for the exemption of state instrumentalities from federal taxation is emphasized in such a decision as *Bonaparte v. Appeal Tax Court of Baltimore*.¹³ The Court upheld a state tax upon bonds issued by a municipality in another state, so that it would appear that the National Government does not have as much power to tax bonds of one state as other states have.

In summing up his study of the problem, the author says, "For all practical purposes, the doctrine that 'the power to tax involves the power to destroy'

⁶ *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

⁷ 11 Wall. 113 (U. S. 1871).

⁸ 157 U. S. 429, 15 Sup. Ct. 673 (1895); 158 U. S. 601, 15 Sup. Ct. 912 (1895).

⁹ Justice Bradley in his dissent said, "I cannot but regard it (majority opinion) as founded on a fallacy, and that it will lead to mischievous consequences."

¹⁰ GOVERNMENT BY JUDICIARY, Vol. 2, p. 196.

¹¹ The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states, and without regard to any census or enumeration. (Italics ours.)

¹² 240 U. S. 1, 36 Sup. Ct. 236 (1915).

¹³ See note 6, *supra*.

¹⁴ 104 U. S. 592 (1882).

has apparently outgrown its usefulness. Whether the doctrine has ever been of any great value in preserving the *status quo* of the states in the federal system is doubtful, although it is certain that Chief Justice Marshall did not intend that it should be used to extend immunity from all national revenue laws to state and local agencies. Professor Charles J. Bullock has asserted that 'when Chief Justice Marshall said that the power of taxation involved the power to destroy he forged a thunderbolt and hurled it at a mosquito. If taxes are levied for revenue, (such a doctrine) is absolutely false. Taxes levied for revenue cannot be levied for more than one year, or a few years, on a basis that destroys. Governments have got to let taxable ability and taxable business and the objects of taxation live. It is the power to levy a discriminating tax that destroys, and it was that kind of tax Chief Justice Marshall had before him. * * *'

"* * * It is again emphasized, therefore, that the Supreme Court should lay aside the rule of *stare decisis* and reconsider the whole question of tax-immunity of governmental agencies, both state and federal. * * *"¹⁴

B. H.

CASES ON DOMESTIC RELATIONS. By Frederick L. Kane. St. Paul: West Publishing Co., 1936, pp. x, 572.

The author, long a distinguished member of Fordham University's School of Law, has produced a casebook, which for many years will undoubtedly remain a standard work on the subject of Domestic Relations. This branch of the law has been changed so radically in the past few years by statutes, and the judicial decisions of the various states have been in such utter conflict, that we cannot fail to recognize that Professor Kane has performed an exceedingly difficult task in a most scholarly fashion.

Within the space of less than five hundred pages, he has presented to us in a clear and orderly fashion, the most important decisions in this field, dividing them both as to chronological sequence and the standard subdivisions of the subject.¹ He has, however, "definitely omitted cases on Insane Persons, Aliens, and Master and Servant which formerly were included as part of the law of Domestic Relations," but which the author no longer considers "appropriate". It is difficult for this reviewer to understand why Professor Kane considers these subdivisions inappropriate. On the other hand, he has diverted very little from the traditional division and sequence of the field and has included cases on Dower, Curtesy, the Rights of a Surviving Spouse, Infant's Contracts and Jurisdiction in Divorce. Thus we have lost very little for the sake of brevity. The cases are selected from various jurisdictions such as New York, Massachu-

¹⁴ P. 147.

¹ Marriage and Divorce, Husband and Wife, Parent and Child, with all their various subdivisions.