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EXCISE TAXES IN THEIR RELATIONSHIP TO PROPERTY TAXES*

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Disregarding the comparatively unimportant poll tax imposed upon individuals as such, it is safe to say that, in the broadest sense, taxation presents but two fundamental classifications — property taxes, based upon the privilege of possessing property, and excise taxes, based upon the privilege of performing some act or engaging in some activity. Many taxes partake of the characteristics of both classifications — as, for example, net income taxes, stamp taxes, and many others, but in spite of appalling complexity and variation, all taxation inherently must partake of the characteristics of a property tax or an excise tax, or a mixture of both, because all human economy in final analysis is based upon accumulated wealth which we call property, and upon the activities of individuals.

Not only is this classification inherent in all taxes, but economic history presents a succession of conflicts between the two underlying philosophies. Whether the citizen's accumulation or his activities should bear the primary burden of government, is a question that has been repeatedly asked by every civilized sovereignty. Early in the second century B. C., Rome had abolished all direct taxes, including the land tax in Italy, the state being supported by income from the public domains and levies upon the provinces. During the reign of Augustus, these sources becoming inadequate, the Emperor desired a land tax, but opposition of the landowners being effective, there was imposed instead a one percent excise tax on auction sales, a four percent tax on the sale of slaves, a five percent tax on the freeing of slaves, and a five percent inheritance tax on indirect legacies above the value of about five thousand dollars in present-day currency.

The later Roman Empire presented a steady development in excise or occupational taxes, although the land tax, after the time of Augustus, was also reinstated, until in the reign of Diocletian, in addition to property taxes, there were occupational taxes in number comparable to those of our own day.

After the break-up of the Roman Empire the concept of a centralized government, with power to levy taxes, was, for a time, preserved, but with the death of Charlemagne in the early part of

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the ninth century, feudal Europe may be said fully to have commenced. With feudalism, taxation, as we understand it, almost entirely ceased to exist. In many instances small principalities emerged by reason of the superior strength, ability or opportunity of some particular chieftain or baron. Such was particularly true of England prior to the Norman Conquest in 1066. With the Conquest a great impetus was given to the royal power. William of Normandy never exerted, or attempted to exert, the power to levy taxes in either the Roman or modern sense. His was peculiarly a feudal government. Theoretically the owner of all of the land, his barons owed to him and his successors, at least in theory, a land rental, payable originally in services in case of war or emergency. Governmental expenses were not differentiated from the personal expenses of the ruler, and both were largely met by income from the personal estate of the king. The obligations of feudal service naturally developed into money payments, based on possession of property, really within the classification of property taxation. The cycle of tax development from property to occupational taxes had again commenced. It is almost axiomatic that in simpler forms of civilization the burden of taxation is upon property. As government becomes more far-reaching in its activities and civilization becomes more complex, it follows virtually as a matter of course that various excise taxes based on privilege or occupation arise. So it was in England. Up to the time of the Tudors, property taxation in the guise of feudal obligation to the ruler was the chief support of government, outside of the sovereign's personal income. During the time of the Tudors and, more noticeably, during the reign of the first two Stuarts, there was a very definite tendency toward what amounted to occupational taxation. The most common form which such taxes assumed was the granting of a monopoly to an individual or, after the statute of 1624, to a company to engage in occupations, or to sell certain goods. Sometimes such monopoly was granted merely as a matter of royal favor. More frequently, however, it was a source of income to the sovereign. Taxation of this character by Charles I in a large measure led to the outbreak of the English Civil War in the middle of the seventeenth century. Such taxation, particularly among the commercial and agricultural classes from which America was chiefly settled, was intensely unpopular, and at this period the early settlement of the Atlantic seaboard was most active. The settlers brought with them an inherent opposition to the privilege or occupational imposition as they understood it. To them, it had been an instrument of royal tyranny, and during colonial times such conception was never relinquished. With this background, it is easy to understand the resentment with which the stamp taxes of George III were met. A stamp tax upon commodities or documents is predominantly a privilege tax, although it has close relationship to property. This historic background, with its roots deep in resentment against the English scheme of colonial excise taxation, coupled with the comparative simplicity of American civilization, made the property tax almost the sole source of revenue of the various states, immediately following the adoption of the Constitution. Peculiarly enough, however, provisions of the Constitution of the United States as finally adopted virtually forced the Federal Government to rely upon excise, and not property, taxes for its support. At the time of the Constitutional Convention there were uppermost in the public mind two classes of taxes, (a) property taxes, and (b) duties upon imports or exports. Recognizing the danger of disunity which had been so forcibly emphasized by conditions arising under the Articles of Confederation, Article 1, Section 10 of the Constitution provided that no state, without the consent of Congress, should lay any impost or duty on imports or exports except that which might be absolutely necessary for executing its inspection laws, the net proceeds of such duties and imposts to be paid into the treasury of the United States and such levies to be subject to the revision and control of Congress. Section 8 of the same Article gave to Congress the power to lay and collect taxes, duties, imposts, and excises, all but the first to be nationally uniform. Section 9 of the same Article withheld from Congress the power to levy any direct taxes unless in proportion, among the various states, to the census of population. Because of the practical difficulties attendant upon a direct tax levy under the limitation of Section 9, the states alone exercised the power to levy direct property taxes, and the Federal Government was forced to rely upon excise or indirect taxes.

It was the opinion of Chief Justice Fuller as expressed in the second decision of *Pollock v. Farmers' Loan & Trust Co.*,[1] that such division in policy between federal and state taxation was intentional and the result expected by the members of the Constitutional Convention. He states:

[1] 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895).

> "The founders anticipated that the expenditures of the States, their counties, cities, and towns would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes."[2]

However, at the time of the Constitutional Convention, and for many years thereafter, the concept of excise or indirect taxes was much more limited than at present, not so much as a matter of legal inhibition as in popular thinking. It is interesting, in view of the modern extension of these taxes, to consider how closely taxes of this type were associated with ideas of property. Cooley, writing in 1876, defines duty as an indirect tax imposed on importation, exportation or consumption of goods; custom as a duty on imports or exports, and an excise as an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or deal in certain commodities.[3] These definitions were approved in the *Pollock* case. It is to be noted how secondary is the idea of a tax upon an activity disassociated from property. Personal activity taxes, so disassociated from property, were, almost without exception, pure license taxes which had been recognized for many centuries in English law, and from the beginning of the colonies in America. A pure license tax is payment for some special privilege or immunity, and underlying it, is always the thought of regulation, the revenue derived being of secondary importance. Inevitably, however, particularly in periods of stress, the temptation is always present to raise public revenue in the guise of licensed regulation. The most famous and historically significant example of this tendency is found reflected in the *Bates* case,[4] decided in the early years of the reign of James I. By that time it was established in England that an impost could not be laid otherwise than by act of Parliament. The sovereign levied a duty upon imported currants under his royal prerogative to regulate foreign commerce. A subservient court upheld the imposition not as an ordinary custom or impost, but as an exercise of the royal regulatory power over commerce. This holding was at first approved by Lord Coke, but later severely criticized by him. Its doctrine extended by Charles I, was one of the chief causes of the English Civil War. A typical example of the license tax used both for the purposes of regulation and likewise for the purpose of revenue is the tax upon intoxicating

[2] *Id.* at 621.
[3] COOLEY ON TAXATION (1876) 6.
[4] An information against Bates, Lane Ex. 22, 145 Eng. Rep. R. 267 (1606).

liquors. By its very inherent purpose and nature, a license tax could not be imposed upon all citizens. It only applied to those who desired to exercise the special privileges which it permitted. With the inevitable blending of the license tax and the excise tax, there arose the problem of selective classification for the purposes of taxation. So long as the state, through its regulatory power, imposed a license tax on a business such as manufacture or sale of intoxicating liquors, the engaging in monopolies and the like, all clearly the subject of special regulation, no such problem could arise. However, when levies were laid, frequently in the form of pure license taxes, upon occupations not involving the exercise of any special privilege and not involving public welfare or morals, the problem of classification became acute. Could a state or the Federal Government exercise its power of license taxation upon occupations of an ordinary character not subject to regulation by the police power? The question came before the supreme court of West Virginia in *Sperry & Hutchinson Co. v. Melton, Sheriff,* decided in 1911.[5] The court upheld the legislative power, saying:

> ". . . . The Legislature has prescribed a license tax for the carrying on of many lines of business that do not directly relate to the public health, safety or morals. Such, for example, are the license taxes on vendors of patent rights, on junk dealers, on traveling vendors of sewing machines and musical instruments, and on the owners of trading houseboats. It is entirely legitimate to tax a privilege, business or occupation. Of course there must be reasonable classification, and no unjust discrimination. The tax must be equal and uniform in relation to all persons of the same class. But where a tax is imposed in compliance with these principles, no excuse for it need be sought under the police power".[6]

Sperry & Hutchinson Co. v. Melton is in harmony with many decisions in other jurisdictions, and prior to the World War its doctrine of legislative power to tax occupations and activities not subject to regulation under the police power and within reasonable limits to classify and select such occupations as should be subject to such tax, was firmly established. The next development was with respect of the classification, through exemptions, of the particular businesses to be taxed. Assuming, for instance, that a pipe line involved a business subject to an occupational tax, could there be a sub-classification among pipe companies and those with a shorter

[5] 69 W. Va. 124, 71 S. E. 19 (1911).
[6] *Id.* at 125.

line exempted from the tax? The court answered the question in the affirmative in the opinion of *Eureka Pipe Line Co. v. Hallanan,*[7] a case reversed on general grounds by the Supreme Court of the United States,[8] but without affecting the rule above noted. Later a monetary exemption under the West Virginia business-profession tax was upheld in *Hope Natural Gas Co. v. Hall, Tax Commissioner,*[9] and affirmed by the Supreme Court of the United States.[10] Throughout all of the decided cases during the last thirty years there has been an ever increasing liberality in upholding taxes of this character. Broad as this current of authority has been, the courts have frequently asserted that no occupational tax of a selective character was valid if it involved arbitrary or unreasonable classification or exemption.[11] Exemptions based upon the personal history or status of the taxpayer, as, for example, prior military service, have been rejected.[12]

To summarize: Prior to the great expansion of governmental activities, both state and federal, contemporaneous with, and following, the World War, there had been a steady development in the scope of the excise tax. So far from being limited to the duties, imposts and excises mentioned in the Federal Constitution, and as understood at the time of its adoption, the concept of excise tax, blended with much of the ideology of the license tax, had been so expanded that any tax upon any occupation or activity was considered within the power of the legislature, which had likewise an attendant power to classify and select occupations to be taxed, provided such classifications were not arbitrary and that taxes were applicable alike to all individuals in the particular class affected. Until the World War there had been little change in the tacit division of taxes whereby the Federal Government supported itself through customs receipts and internal excise taxes of a semi-regulatory character, — by far the most important being the tax on intoxicating liquors — and the states chiefly supported themselves

[7] 87 W. Va. 396, 105 S. E. 506 (1921).

[8] Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227 (1921).

[9] 102 W. Va. 272, 135 S. E. 582 (1926).

[10] Hope Natural Gas Co. v. Hall, Tax Commissioner, 274 U. S. 284, 47 S. Ct. 639, 71 L. Ed. 1049 (1927).

[11] See State Board of Tax Com'rs v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1930); Liggett v. Lee, 288 U. S. 517, 53 S. Ct. 481, 77 L. Ed. 929 (1932).

[12] Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394 (1932); Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136 (1906); State v. Shedroi, 75 Vt. 277, 54 Atl. 1081 (1903).

from property taxes. Under the demands for revenue arising from the Civil War and, to a much lesser degree, from the Spanish War, the Federal Government had extended its taxing powers to embrace an income tax on the former occasion, various documentary stamp taxes and the like, but such were recognized as emergency measures and, in virtually all instances, lapsed, or were repealed, after the respective conflicts had terminated. These temporary taxes had little effect except to furnish historical tax precedents when the stress of the World War, economic difficulties, and the general expansion of governmental activities required greatly augmented governmental revenue, both state and federal. Because of these latter conditions, the last twenty-five years have seen an unparalleled extension of the excise, occupational, and privilege taxes. These years have likewise seen a complete departure from the long standing separation in the tax bases of the state and federal governments. The latter has been unable, because of the practical limitations arising from the requirement of apportionment, to extend its taxing power to reach a broad property tax, but the Sixteenth Amendment, effective from February 25, 1913, gave it the power to collect taxes upon incomes, without apportionment among the several states, even though such income emanated directly from property. Temporarily deprived for a few years of the revenue derivable from an excise tax upon the sale of intoxicating liquors, it asserted its right to levy excise taxes in innumerable other instances. The states, finding themselves unable to finance their expanding activities through revenue derived from property taxes, invaded, as it were, the general field of excise taxes, in which, previous to 1900, they had, almost without exception, confined themselves to purely regulatory license taxes.

It is unnecessary to review this recent history of tax development. It is only too well known. I likewise conceive that it is not my function either to praise or criticize this trend of modern taxation, and I shall confine myself merely to noting some of the questions and problems that have arisen from this extension of the scope of excise taxation in its relation to *ad valorem* taxes. The first problem — and it is a vital one to the modern practitioner — is the ever dimming line of demarcation between the legal concept of a property tax and that of an excise tax. Perhaps the first case in the history of the United States dealing with this problem was *Hylton v. United States*,[13] in which a tax on carriages levied by

[13] 3 Dall. 171, 1 L. Ed. 556 (U. S. 1796).

Congress in 1794 was held not a direct tax but an excise tax, a holding vigorously criticized by Madison. Of course, the difficulty in determining the line of demarcation between property and excise taxes in the first instance focused chiefly upon the income tax. Income of an individual is usually derived from many sources. Is a tax upon that part which originated directly from real estate or personal property, equivalent to a property tax? The majority of the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*,[14] answered in the affirmative. The question is now, of course, an academic one, so far as the particular tax is concerned, income taxes being validated *eo nomine* by the Sixteenth Amendment to the Federal Constitution of the United States and by the amendment approved in 1932 to the West Virginia Constitution.

The original concept of an excise tax brought it into close relationship with actual property. It is therefore to be expected that perhaps the most important group of excise taxes which have developed during the last thirty years are those having a direct connection with property. All incidents of ownership and all activity with respect of property necessarily fall into four great classifications:

(1) Property, except land and the simplest forms of personal property, must be given economic usefulness, either by production if it be a natural resource, by processing or manufacturing, or by both successively — an economic creation, as it were.

(2) It may be acquired in various ways.

(3) It may be possessed and used by its owner in every lawful manner.

(4) It may be disposed of either by sale, by gift, by destruction or consumption, or by testate or intestate transfer at its owner's death.

It is startling to note that in every classification of these essential incidents of property ownership, there is to be found a large number of occupational or privilege taxes.

In case of one of the most fundamental forms of property, natural resources, such as coal, oil and gas, in order to acquire economic usefulness, must be separated from the real estate, and perhaps the first important phase in West Virginia of the development of excise taxation was the period extending over the many years in which a so-called production tax upon coal, oil and gas

[14] 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895).

was urged and opposed. It is, of course, now embraced in the Code,[15] and this incident of property activity is taxed. Such a tax is popularly spoken of as a production tax, and in West Virginia is imposed upon the business of "producing". Actually it has many incidents of a property tax. A valuable natural resource is removed from the land for the purpose of ultimate consumption and destruction. The depletion of the land and the consequent continuing diminution of the wealth of the state has been presented as one of the strong arguments for such tax. In many states similar taxes are spoken of as "severance taxes", and this phraseology is not unknown in West Virginia. The tax may be attributed to the privilege of *producing property* for economic use, or it may be conceived of as essentially being for the privilege of *removing and destroying such property itself*. The constitutionality of this tax, including its classification, its exemptions, its possible effect on interstate commerce, was upheld in *Hope Natural Gas Co. v. Hall*,[16] following *Oliver Iron Co. v. Lord*,[17] and many other cases of like holding. Likewise taxes upon articles created by manufacture have been upheld in numerous cases, and, of course, the various federal processing taxes come to mind as exemplifying taxes upon the economic creation of property. In West Virginia there is a most comprehensive manufacturing and compounding tax embraced in the Code.[18] It is therefore apparent that the initial incident of personal property, the creation of its economic usefulness through so-called production or manufacture, is fully covered in recent tax development.

The validity in general of such taxes, as well as of other excise taxes, cannot be doubted, in view of the position the courts have taken that a privilege or activity is taxable for the purpose of raising revenue, even though not of such nature as would make it subject to the regulatory power of the state. The production or manufacture of articles of commerce is a fundamental economic and social necessity. So far from being of a nature requiring regulation, it is to be encouraged. Nevertheless production and manufacture do involve activity, and such activity has accordingly been universally held as the proper subject of occupational tax, in addition to the *ad valorem* property tax upon the article itself when produced or manufactured.

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15 W. VA. CODE (Michie, 1937) c. 11, art. 13, § 2(a).
16 102 W. Va. 272, 135 S. E. 582 (1926).
17 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929 (1923).
18 W. VA. CODE (Michie, 1937) c. 11, art. 13, § 2 (b).

Coming to the second incident of property, is its acquisition by purchase or otherwise a proper subject of excise tax? Perhaps the most recent important development in excise tax law relates to taxation upon acquisition of property, and a large number of states have passed statutes of this character. Such in West Virginia is the so-called consumers sales tax, now embodied in the Code.[19] The tax is officially and popularly known as a sales tax. Section 3 of the act imposes the tax upon the privilege of engaging in the business of *selling* tangible personal property at retail, and of dispensing certain selected services. Section 4 provides that the *purchaser* shall pay the amount of the tax. Section 11 further provides, with criminal penalty for infraction, that the seller shall not absorb any part of the tax. It is obvious therefore that the name "sales tax" is a misnomer. The seller may not pay the same. He is the mere collecting agency of the state. The purchaser on acquiring the property may alone pay the tax. For what is he paying? The answer is obvious — for the privilege of *acquiring* property, and the consumers tax is clearly a tax upon the acquisition of property. As said by the Supreme Court of Appeals of West Virginia in *Kresge Co. v. Bluefield,*[20] involving a municipal consumers sales tax, noted by the court as similar to the state statute, it is "an exaction from the consumer and not the dealer". In that decision the court very forcibly distinguishes an excise tax of this character from a license tax imposed in the exercise of police powers, and the language of the opinion even disaffirms the element of privilege as a basis for the tax, saying:

> ". . . . The consumer who pays the tax under consideration will not thereby derive any privilege he does not already possess. He has the natural and inherent right to acquire and use the necessities of life. The validity of a general consumers sales tax rests upon the obligation of the citizen to support the government and not upon the theory that the right to obtain food, raiment and shelter, is a taxable privilege.
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> "It is said that a license charge is a species of excise tax. This is very true, but it differs from the species of excises denominated consumers sales tax."[21]

Such language is not fully in accord with the underlying theory of many decisions upholding excise taxes as founded upon a theoretical privilege, but is in accordance with the universal cur-

[19] W. VA. CODE (Michie, 1937) c. 11, art. 15.
[20] 117 W. Va. 17, 183 S. E. 601 (1936).
[21] *Id.* at 20.

rent of modern authority that an excise tax need not be predicated upon an activity subject to the regulatory power of the state. Certainly *Kresge Co. v. Bluefield,* as well as the inherent nature of the tax, make it apparent that the consumers sales tax is not upon the transfer of title from seller to purchaser, but is an exaction upon the purchaser, brought about by his receipt or acquisition of property.

Legacy taxes as distinguished from estate taxes are admittedly taxes upon the privilege of acquiring property by an heir or legatee. Other examples could be cited of a tax upon the acquisition of property as distinguished from a tax paid by the seller for the privilege of selling property, and it is apparent that the second incident of property, its acquisition, has been well covered by the occupational tax.

The third incident of property is its possession and use by the owner. In this classification there are necessarily two situations presented — property may be owned without current monetary or commercial benefit, or it may be of such nature, or may be so used, that it will yield an income or other benefit to the owner. A simple example is found in the case of real estate. A man may own a tract of land which brings him no income whatsoever. He may own a residence which brings no monetary return, but does bring a return in the benefit derived from the owner's personal use, or he may own land, improved or unimproved, which yields an income in the form of rent, royalty or the like. He may own personal property wholly unproductive, or that yielding income, interest or dividends.

First, let us consider whether or not in the modern development of excise tax law the mere ownership of property, without accompanying current benefit, is subject to tax as distinguished from the property itself. Until recent years, I believe no one would have doubted the proposition that the bare ownership of property involved no privilege of a character taxable otherwise than by *ad valorem* taxation. Any property must have an owner in order that it be subject to tax. There can be no tax without a taxpayer. Clearly the bare ownership of property is covered, and exclusively covered, by the tax upon the property itself. It is certainly in the last realm of sophistry to say that if I have a wholly unproductive piece of land, I must pay a tax upon the land itself because it exists and I am the owner of it, and must pay a second tax for the privilege of owning it, or that the privilege of owning unproductive land or personal property is distinguishable from the ownership itself. Nevertheless, attempts in recent years have been made to tax the privilege of owning unproductive property. An interesting example, somewhat earlier than most taxes of this character, is found in the Code of West Virginia,[22] imposing a tax of five percent an acre upon land, productive or unproductive, held in excess of ten thousand acres by a corporation, the act reciting that the exaction is "for the privilege of acquiring and holding of land". By its language and the time of its original adoption, this tax was undoubtedly considered a pure license tax as distinguished from an excise tax. Much may be said for the validity of this tax, if it be treated as a pure license tax. It is levied upon a corporation — an artificial creature of the state which exercises the privileges of corporate activity by the grace of the state. However, a similar tax in Mississippi applicable to both individuals and firms, was held unconstitutional in *Thompson, Auditor v. Kreutzer,*[23] hereafter more fully discussed, as being a discriminatory tax on property, and not a privilege tax. The constitutionality of this tax has never been raised in West Virginia so far as I am advised, although the section is cited, for illustrational purposes, in the concurring opinion of Judge Miller in *Coal & Coke Ry. Co. v. Conley.*[24]

Perhaps the most interesting example of an attempt to tax a privilege incident to the bare ownership of property is presented in the case of *Dawson v. Kentucky Distilleries & Warehouse Co.,*[25] involving a so-called annual license tax imposed by the state of Kentucky upon each gallon of whiskey either withdrawn from bond or transferred in bond to a point outside of the state. The Supreme Court of the United States characterized such activity as the mere exercise of that dominion necessarily comprised within the ownership of property, and invalidated the statute as being a property, and not a privilege, tax. The following significant language occurs in the opinion of Justice Brandeis, speaking for a unanimous court:

> "'... The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property."[26]

[22] W. VA. CODE (Michie, 1937) c. 11, art. 12, § 66.
[23] 112 Miss. 165, 72 So. 891 (1916).
[24] 67 W. Va. 129, 67 S. E. 613 (1910).
[25] 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638 (1921).
[26] *Id.* at 294.

In *Thompson, Auditor v. Kreutzer,* the supreme court of Mississippi was considering an acreage tax imposed on firms and individuals for the so-called privilege of owning land in excess of one thousand acres, such tax being in addition to the ordinary *ad valorem* tax of the state, the constitution of which required uniformity in property levies. The court invalidated the tax as being a property tax, using the following significant language in the opinion:

> "Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. Discarding, then, the word 'privilege' and substituting therefor the proper word 'right', the distinction here sought to be made by the attorney-general is one without a difference. In a strict legal sense, 'property' (from the Latin word *proprius,* meaning belonging to one; one's own) is synonymous with the 'right of ownership' and means one's exclusive right of possessing, enjoying, and disposing of a thing..."
>
> "Property may also be, and in the section of the Constitution here under consideration is, used to signify 'things owned'. In order that a thing may be owned, some one must, of course, have a right to the ownership thereof. A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself."[27]

Other cases might be cited to the same effect, and probably today a tax on the naked right of unproductive ownership would not be sustained by the courts as based upon a so-called privilege if super-added to a property tax upon the thing itself. The validation of such an enactment may be the next step in the so-called progress of tax law.

When, however, property is held for productive use, the situation presented is different. Real estate is rented, and royalties or rentals are received by the owner. Corporate dividends are paid upon stock or interest paid upon notes. Is the privilege of receiving such usufruct taxable in addition to the tax upon the property itself? Any benefit, either in money, in kind, or otherwise, derived from property involves the enjoyment of that property, as does the use of property by the owner for his own purposes or convenience. If benefit derived in terms of money from property be considered a taxable privilege, it would seem necessarily to follow that the mere use of property or the mere having of it,

[27] 112 Miss. 165, 167, 72 So. 891 (1916).

providing it brought some convenience or enjoyment to the owner, would involve a taxable privilege. If I own two houses, occupy one myself and rent the other, and the receipt of rent be a taxable privilege, certainly the equivalent personal use and enjoyment which I derive from the other property would likewise be a taxable privilege if the legislature so elected. The question, therefore, reduces itself to the simple statement — does the enjoyment of property, either through personal use by the owner or through the receipt of monetary benefits or usufruct in kind, involve a taxable privilege separate from, and in addition, to, the *ad valorem* tax upon the property itself? Until recently I believe the universal answer would have been in the negative. The value of property ownership, and its only value, necessarily consists of deriving benefit from it in the form of personal use, income or future realization, the latter certainly being a hope or prospect not currently taxable as involving a present privilege. Ownership of property would be entirely valueless if it did not carry with it, as an incident, the right to enjoy that property, and certainly taxation of the thing itself would logically cover the enjoyment of that thing.

Such, until recent years, has been the undoubted reasoning underlying the law. In *Hylton v. United States,* perhaps the most liberal of the early cases in upholding an excise tax, it was stated in the opinion by Justice Paterson:

> " . . . Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land independently of its produce, is of no value".[28]

During the century following the *Hylton* case this concept became more and more fixed. Ninety-eight years later it was the basis of decision in the case of *Pollock v. Farmers' Loan & Trust Co.,* the philosophy of which, as stated in the opinion of Chief Justice Fuller, was as follows:

> " . . . A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution".[29]

Departing from this doctrine in its reasoning, but decided largely upon the particular provision of the Virginia Constitution

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28 3 Dall. 171, 177, 1 L. Ed. 556 (U. S. 1796).
29 158 U. S. 601, 625, 15 S. Ct. 912, 39 L. Ed. 1108 (1895).

and statutes is the case of *Hunton v. Commonwealth,*[30] a case involving inclusion of property-income in a return for net personal income tax. A different situation is there presented than that present when an excise is imposed for the specific privilege of collecting or receiving income from property, a typical example of which is the West Virginia amendment of 1935 to the business-profession tax, hereafter discussed.

No state has gone farther than West Virginia in affirming, in non-tax cases, the identity of property and usufruct or income from that property. The leading case of *Paxton v. Benedum-Trees Oil Co.,*[31] immediately comes to mind, a case holding that real estate and its royalties and rents from it were so inseparable that a grant of the latter was tantamount to a conveyance of the corpus itself. In this opinion, in quotation from the Supreme Court of the United States, the following language appears:

> " 'A right to land essentially implies a right to the profits accruing from it, since without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself.' (Shep. Touch. 93 Co. Litt. 4 b.) 'For what,' says Lord Coke, in this page, 'is the land, but the profits thereof.' "[32]

The ownership of real estate and the right to receive royalties therefrom were held inseparable in *Pittsburgh & W. Va. Gas Co. v. Ankrom,*[33] *Musgrave v. Musgrave,*[34] and other cases. However, the question in its tax implications came before the Supreme Court of Appeals of West Virginia in *Laing v. Fox, State Tax Commissioner,*[35] involving the statutory provision[36] imposing a privilege tax upon every person engaging or continuing within the state in any business, profession, trade, occupation or calling not included in the other subdivisions. Involved in that case was income received by the taxpayer from property, and the third syllabus states that the section in question was inclusive of taxpayer's receiving income from loans and investments. In its discussion of this question the court said:

> "We reject the theory of plaintiff that income from loans and investments is not an income of a 'business, profession,

30 166 Va. 229, 183 S. E. 873 (1936).
31 80 W. Va. 187, 94 S. E. 472 (1917).
32 *Id.* at 194.
33 83 W. Va. 81, 97 S. E. 593 (1918).
34 86 W. Va. 119, 103 S. E. 302 (1920).
35 115 W. Va. 272, 175 S. E. 354 (1934).
36 W. Va. Acts 1933, c. 33, § 2(i).

trade, occupation or calling' within the meaning of the statute, which provides that 'business', as used therein, 'shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect.' The lending or investing of money requires of one so engaged active and discriminate judgment''.[37]

No issue can be taken with the court that the lending or investing of money requires active and discriminate judgment, and upon this reasoning the opinion is based. What, however, is to be said of the passive receipt of income from property previously invested perhaps by one other than the taxpayer? Let us say that an infant of tender years becomes owner of a bond as distributee or legatee of a decedent. The investment has been made and the discriminate judgment exercised long prior to the taxable year in question. The present owner would not be capable of "active and discriminate judgment", to use the words of the court. The only value of the bond, in addition to the expected return of the principal, is the receipt of interest. The bond is properly returned for taxation and an *ad valorem* tax paid upon it. During the course of any particular year the infant, through its guardian, receives interest, such receipt being entirely passive upon its part, involving actually no exercise of judgment. Can it be said that the passive receipt, without any activity of investment or judgment, involves a taxable privilege separate and apart from ownership of the bond itself, which is the subject of an *ad valorem* tax? The opinion of the court in the *Laing* case does not so indicate, but makes it clear that the basis of a tax is the lending and investing of money requiring of one so engaged active and discriminate judgment.

Following the decision in *Laing v. Fox,* the business-profession tax of West Virginia was expanded in 1935,[38] specifically imposing a tax upon every person engaging or continuing in the "business of collecting" incomes from the use of property in the form of rentals, royalties, fees, interest or otherwise. This statute came before the federal courts in litigation which culminated in the decisions of *James v. United Artists Corporation,*[39] finally decided by the Supreme Court of the United States during the current year. That case involved a taxpayer engaged in the business of distributing motion picture films for exhibition and collecting a compensation or so-called rental for the use thereof. There was not

[37] 115 W. Va. 272, 286, 175 S. E. 354 (1934).
[38] W. Va. Acts 1935, c. 86, W. VA. CODE (Michie, 1937) c. 11, art. 13, § 2 (i).
[39] 305 U. S. 410, 59 S. Ct. 272, 83 L. Ed. 246 (1939).

involved the question of passive receipt of income, the activities incident to the business involved being noted in the opinion of the Court. The question was whether those activities were exercised within the state of West Virginia, and the decision of the lower court that the taxpayer was not doing business within the state and that the attempted tax was an unconstitutional burden on interstate commerce was affirmed. The case throws little light on the problem here presented as to whether or not enjoyment of property through passive receipt of income involves a taxable privilege. The act of 1935 imposes the tax on the business of "collecting incomes". The word "collecting" appears to involve an idea of greater activity than mere passive receipt, but is a matter of speculation as to what the decision of the court will be if the question ever comes squarely before it as to whether or not such passive receipt of income, unaccompanied by any activity or exercise of discriminate judgment, involves a taxable privilege distinguished from the ownership of the property itself. It therefore may be said with respect to the third classification of attributes of property that mere ownership, without derivation of income or benefit, does not involve a taxable privilege. The collecting of income from property, real or personal, in whatever form, may be subject to a privilege tax, provided there be accompanying activity in investment or in the exercise of judgment respecting such investment. Whether or not passive receipt of income alone, unaccompanied by such activity, is subject to a privilege tax is still an open question.

Coming to the fourth incident of property involving the disposal thereof by the owner, such disposal may be in four different ways: (a) destruction, without any commercial benefit; (b) sale by the owner during his lifetime, or destruction for a consideration, which amounts to a sale; (c) gift by the owner during his lifetime; (d) transfer at death either under a will or under intestacy law. Sales and the privilege of selling property are, of course, common subjects of excise taxes. Section 2(c) of the West Virginia business-profession tax and many other examples occur to the mind. The validity of these taxes is no longer open to doubt. Likewise the disposal of property by gift is a privilege certainly taxable under the decision of *Bromley v. McCaughn*,[40] which holds that the making of a gift of property is an exercise of only one incident of ownership and involves the exercise of a taxable privilege disassociated from the property itself. Distinguishing between gen-

[40] 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed. 226 (1929).

eral ownership and particular acts of ownership, Justice Stone, speaking for the majority of the Court, says:

> ". . . . While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, ... this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class. . . .
>
> "It is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute property or ownership may be fully enjoyed free of the tax."[41]

The learned justice delivering the opinion evidently realized that if a tax upon one attribute of ownership were permitted, there might be successive excises upon the various incidents of ownership until their cumulative effect would be to tax the general privilege of ownership, in addition to the tax on the property itself — a forecast which a review of subsequent tax development clearly shows to have been well founded. He meets the problem by stating it, and merely declaring that it is not before the Court, in the following language:

> "It is said that, since property is the sum of all the rights and powers incident to ownership, if an unapportioned tax on the exercise of any of them is upheld, the distinction between direct and other classes of taxes may be wiped out, since the property itself may likewise be taxed by resort to the expedient of levying numerous taxes upon its uses; that one of the uses of property is to keep it, and that a tax upon the possession or keeping of property is no different from a tax on the property itself. Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, ... and hence a direct tax requiring apportionment, that is not the case before us."[42]

However, whatever may be thought as to the soundness of *Bromley v. McCaughn* in tax philosophy, its effect in upholding a gift tax as upon the exercise of a privilege and not upon property may not be doubted.

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41 *Id.* at 136.
42 *Id.* at 137.

Of course, that disposal or transfer of property most interesting from the viewpoint of the lawyer ensues upon the death of an owner. Necessarily his ownership ceases and there is an involuntary transfer of title either under his will or under the law of intestate succession. In this field is perhaps the furthest extension of excise taxes in their relationship to property. With the demands of government, both state and federal, for further sources of revenue arising after the turn of the century, taxation upon the passing and receipt of estates was most intriguing to law-makers and economists. Precedents could be found in Europe. Prior to the actual enactments of the statutes themselves, much was written in support of the philosophy of the succession tax. It was insisted that the right of succession whereby property passed from a decedent to his heirs or devisees, was not a natural right, not a right even inherent in the property, but was a benefit in the nature of a favor conferred by the state, and that usually property devolved upon those who had not assisted in accumulating or earning it. It was argued as being in the nature of a gratuity to them, not emanating solely from their ancestor, but by reason of the beneficial favor of the state that permitted and safeguarded such devolution. Such argument, coupled with a feeling that this new form of taxation would tend to divide great estates and prevent undue concentration of wealth very early in the modern development of excise law, led to extensive succession taxes. The result was that in the realm of succession taxes a more intensive taxation followed than in any other branch of excise taxation. Every transfer of property is composed of two elements, (a) the passage of title *from* the transferror, and (b) the receipt of title *by* the transferee. In virtually all instances of taxation of transfers, only one element is taxed. By the West Virginia business-profession tax, in so far as it relates to the sale of property, the passage of title from the transferror alone is taxed. The so-called consumers sales tax touches only the acquisition of property by a purchaser. By reason of provisions as to their respective fields of operation, exemptions and the like, these two taxes as presently in effect in West Virginia do not impinge one upon the other to any marked degree. It is conceivably possible that they might be extended and merged so that every sale of property would be subject to two kinds of tax—(1) upon the seller for the privilege of divesting himself of title, and (2) upon the purchaser for the privilege of receiving the title. Such a multiplicity of taxation arising from one transaction, placed in the simple framework of a sale of personal property probably excites a sense of injustice. If I pay two cents under the consumers sales tax for the privilege of buying a dollar's worth of property, it would undoubtedly strike me as unjust if the seller at the same time paid two cents for the privilege of selling me that property. However, such multiplicity of excise tax is exactly what has happened in the realm of succession taxes. In the writing and public discussion preceding the enactment of these statutes in America, there was stressed the privilege that a decedent had in the assurance, as a matter of governmental favor, that his property might go to those dearest to him, and there was even greater emphasis that those who received such property were the beneficiaries of governmental grace, in that they became the owner of that which they had not earned and for which they had paid no consideration. Accordingly, two definite types of succession taxes arose: (1) what we usually call an estate tax, measured by the estate of the decedent as a whole, predicated upon the transfer of title *from* a decedent, and (2) the inheritance or legacy tax based upon the privilege of receipt *by* the heir or distributee. In West Virginia, as in many other states, the taxpayer faces both of these taxes, emanating as they do from the same transfer of property. The federal statute imposes a typical estate tax, measured by the net amount of the estate as a whole, graduated only with respect of amount and not affected by any status of the ultimate beneficiary or his relationship to the deceased, except only, of course, there are the usual charitable and governmental exemptions. The West Virginia inheritance tax, on the other hand, has always been a legacy or inheritance tax. Payable by the executor in the first instance, it nevertheless is based solely upon the legacies received, with rates varying not only with respect to the amount of the legacy, but according to the relation between the deceased and the particular recipient. Under the federal law, a net estate of a million dollars left to one child or ten children, carries the same tax, whereas under the state law, in the first case there would be one legacy of a million dollars upon which the tax would be predicated, and in the second case there would be ten legacies of one hundred thousand dollars, with correspondingly less tax. The first federal succession tax since the Civil War was embraced within the act of Congress of June, 1898, usually spoken of as the Spanish War revenue act, and embraced an imposition upon legacies and distributive shares of personal property. The constitutionality of this case came before the Court in *Knowlton v. Moore.*[43] Reviewing early precedents under similar acts in various states and other jurisdictions, the Supreme Court of the United States pointedly held that succession taxes were not property taxes, but were upon the transmission or receipt of property, and were accordingly constitutional, without apportionment under the provisions of the Constitution of the United States. Therefore, citizens of West Virginia, as well as those in many other states, encounter perhaps the utmost refinement of privilege tax philosophy whereby a tax is paid upon property transferred by reason of a decedent's *losing* title through death, and at the same time a tax by reason of the recipient's *gaining* title.

The distinction between these two types of succession tax is clearly stated by the supreme court of West Virginia in the recent case of *Central Trust Co. v. James,* in the following language:

> "The difference between these taxes, federal and state, respectively, is clear and emphatic; the one is on the right to transmit and the other on the right to receive".[44]

Difficulties arose in the administration of these two taxes, particularly turning upon the question as to whether or not an estate tax was to be deducted in computing the amount of subsequent legacies for inheritance tax purposes. It would seem obvious that such tax, being in diminution of the estate as a whole and a prior charge thereon, must be deducted in computing an inheritance tax, as certainly no legatee could receive a legacy which had not borne its share of the former tax. Some courts, however, not recognizing the essential difference between the two taxes, refused such deduction. A greater number held otherwise and allowed the deduction, included in which is the supreme court of West Virginia, speaking in the *Central Trust Company* case just referred to.

Not only is a multiplicity of tax attributable to one transfer of property by reason of the two types of succession taxes, with an undoubted right in both the state and Federal Government to impose both, but it has recently been pronounced that a right may adhere in more than one state to impose inheritance taxes upon the transfer of the same intangible property. I refer to the case of *Curry v. McCanless,*[45] decided by the Supreme Court of the United

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[43] 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969 (1900).
[44] 199 S. E. 881 (W. Va. 1938).
[45] 59 S. Ct. 900, 83 L. Ed. 865 (U. S. 1939).

States on May 29, 1939. There, a decedent, resident of Tennessee, by a trust instrument transferred certain stocks and bonds to a trust company doing business in Alabama, reserving to herself the power to remove the trustee, direct the sale and investment of the trust property, and dispose of the trust estate in her will. Mr. Justice Stone, speaking for four of the justices, in addition to himself, expounded the philosophy that intangibles are rights, not related to physical things but involving relationship between persons, natural and corporate, which the law recognizes and which can only be made effective through the control over, and protection afforded to, those persons whose relationships furnish the origin of such rights. Apparently no distinction was in the mind of the learned Justice as between bonds and corporate stock, both of which were subject to the trust. A bond involves, of course, a personal obligation undertaken by the debtor, although it is almost universally also secured by a lien upon particular property. Corporate stock, on the other hand, by numerous decisions has been defined as representative of an undivided interest in the property of the corporation remaining after the payment of its debts. Justice Stone reasons, in effect, that a taxpayer whose intangible property has a situs in a state other than that of his residence, invokes, as it were, the laws of both states, and that his ownership is within the jurisdiction of both. He goes to the extent of stating that the taxation of a corporation by a state wherein it does business, measured by the value of all of its intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all of its intangibles. As to this point he speaks only for four justices, including himself, Justice Reed reserving his conclusion upon this point. Virtually all of the reasoning of the decision is appropriate to property taxation. In the course of the opinion the writer in fact calls attention to the constitutional power of a trustee's domicile to subject the trust estate to property taxation, and concludes that since in the instant case Alabama could lawfully tax the property in the trustee's hands, there was no ground for saying that it could not tax the transfer of it, or an interest in it, upon the death of the beneficial owner. Of course, the majority opinion in this case recognizes that the tax there imposed was upon a transfer at death, and not actually *in rem* upon the property itself, but it virtually assumes that the same jurisdictional rules apply to transfer taxes that apply to property taxes. Perhaps *Curry v. McCanless* goes further than any other decided case which the writer has been able to find in its disregard of the essential difference between an excise tax imposed upon transfer of property at death, and a property tax. It is certainly confusing, if not disturbing, to the mind of the tax practitioner, and many questions arise. What, for example, would be the effect if the laws of the two states in question as to the devolution of personal property were different? This question evidently occurred to Justice Stone, but he contents himself with saying that there is no conflict between the laws of the two states particularly involved. Such, of course, is fortuitous circumstance, and if the case continue as a precedent, what answer will be given where there is a difference in the succession laws of two states? Suppose — and the situation must often occur — that in one state a surviving spouse receives, under the intestacy law, all personal property to the exclusion of children, whereas in the second state there is a division between them. The property at death must be transferred to someone. Let us assume that the law of the first state governed, and the surviving spouse received the entire distribution of the personal estate. Under the *Curry* case the second state, taxing because of the locus of the property prior to death, would be taxing theoretical transfers to the children who never actually received anything. Each state would be taxing transfers of the same property on account of the same death that were utterly inconsistent one with the other. Furthermore, if any state may impose a succession tax upon the ground that during lifetime the owner of the property in question had invoked its law to preserve and enforce his rights of ownership, most complicated situations would arise and taxes be multiplied indefinitely. Assume a decedent, a resident of West Virginia, had owned a note which he had deposited with an agent or trustee in Pennsylvania, secured by a mortgage upon real estate in Kentucky, executed by a debtor living in Maryland. At the time of his death he was foreclosing the mortgage in Kentucky and suing the debtor personally in Maryland, thereby invoking the laws of the two states, while, so long as the note physically remained in Pennsylvania, the laws of that state were certainly invoked for its protection. Could these three states, as well as the state of domicile, four in all, each impose a succession tax merely because the laws of all of them were being invoked for the protection of ownership during the life of decedent? Their laws of succession might be wholly different. Could there be a valid concept of taxable transfer at death of the same property in all four states, with different recipients in the different jurisdictions?

Many other questions arise under the *Curry* case. Whatever may be thought of its reasoning, and however acute are the problems that can arise under it, it is nevertheless a landmark in the development of excise tax law. In addition to duplication of taxation with respect of the same transfer, springing from the two types of succession taxes, and in addition to the concurrent rights to tax in the state and federal governments, it permits a multiplicity of taxation among different states. It might very well happen, in the case of a large estate, that the aggregate taxes upon the various theoretical transfers of an item of intangible personal property would exceed the total value of the property itself.

In conclusion, I wish again to revert to *Bromley v. McCaughn,* decided almost exactly ten years ago, a case sustaining, as has been seen, the validity of the federal gift tax, chiefly on the ground that it was a privilege tax upon only one incident of property ownership, Justice Stone stating that under that statute other rights of ownership might be enjoyed free of the tax. In the opinion the learned justice indicates that a tax levied upon all uses to which property might be put, might, in effect, be a property tax, but avoids answering the question implied in such a situation by the mere statement that such a case was not before him. The situation, if not in the exact detail indicated, has actually developed in substance during the last ten years, when the cumulative effect of the various excise taxes in relation to property is considered. The result is startling. While these excise taxes do not reach the use of all property in all particulars, and have various exemptions, the fact remains that, in all of the four great divisions of an owner's relationship to his property, there are extensive excise taxes imposing upon him exactions for the privilege of using, enjoying, or disposing of that which he owns, all in addition to the *ad valorem* taxes upon the thing itself. With respect to the manufacture or the production of property, we have various sales taxes, manufacturing taxes and processing taxes. Upon acquisition of property in West Virginia, and in many other states, there is the so-called consumers sales tax, and within this realm is operative one of the two great types of succession taxes — the tax on the receipt of an inheritance or a legacy. Property having been acquired, excise taxes upon its enjoyment have been levied, and it is established that if the receipt of income be accompanied by any activity or discriminate judgment, there is involved a taxable privilege wholly disassociated from the tax on the property itself. It is possible that the mere passive receipt, unaccompanied by any activity or exercise of judgment, may also be held a taxable privilege. Upon the fourth attribute of property, its disposal, we have sales taxes, stamp taxes, and, for the privilege of disposal by gift, there is, of course, the gift tax. Upon transfer at death there is both an estate tax upon the passing of title from the decedent, and an inheritance or legacy tax upon the receipt of the property by the legatee or distributee, and there may be multiplicity of state taxation as to the latter.

The foregoing summary, of course, involves, indiscriminately, taxes laid by the federal and state governments. In some cases there is duplication, in others there is not, but in virtually all instances there is the *power* to levy the particular type of tax, in each sovereign. There are, of course, some species of property, the enjoyment of which has not yet been taxed, and there are various exemptions, but the power to extend excise taxes is ever present, and during the last ten years there has been a tremendous tax expansion which may well continue.

I wish carefully to avoid overstatement, but I believe it is true that an owner of property, in addition to the *ad valorem* tax upon the property itself, may be, and in many instances is, subject to a privilege tax upon every one of the four great incidents of ownership of property, and that the only so-called privileges that such owner may exercise with freedom from excise is the naked ownership of property, without any beneficial use, income or activity with respect of it, and the right to dispose of property through final consumption or destruction, without financial benefit or consideration. To have property without income or productive use, and to destroy property without financial benefit or consideration, are the only two attributes of ownership, dry and profitless as they are, that an owner may have without present danger of a privilege tax in West Virginia. In some states even the bare privilège of bringing, and using, property into the jurisdiction is made the subject of an excise tax, supplementary to the so-called consumers sales tax. Such legislation was introduced in the last session of the West Virginia Legislature, but did not pass.

Nothing is farther from my intention than to indicate dissent from the philosophy of the excise tax, or to criticize any particular tax that has been here discussed. Such is not my function nor my desire. Virtually all tax practitioners, as well as economists, recognize that both property and the activities of individuals, being the foundation of all economic and social relationships, are, in proper cases and, above all, to a reasonable degree, each a legitimate basis for taxation. While a particular excise tax in its relation to property, may be sound and subject to no criticism, the temptation in the minds of the legislators (a temptation to which we may perhaps say Justice Stone yielded in *Bromley v. McCaughn*) is to consider that *particular* tax in its *single* relationship to property taxes. It is when the cumulative effect of all excise or privilege taxes are considered that we turn to the underlying thought of Justice Holmes in his dissenting opinion in *Federal Intermediate Credit Bank v. Mitchell,*[46] that most of the distinctions of the law are distinctions of degree. When it is considered that, in addition to taxes upon property itself, privilege taxation has expanded to such a degree that every profitable incident or use to which property may be put may be taxed, and in many instances is so taxed, all in addition to *ad valorem* taxes, a situation is presented which must make us all pause and consider.

[46] 277 U. S. 213, 48 S. Ct. 449, 72 L. Ed. 854 (1928).