

BUSINESS AND PROPERTY TAXES

ELGANON ISAACS

The subjects of taxation are persons, business and property. In *State Tax on Foreign-held Bonds* it is said:¹

“The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imports, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways.”

It is the purpose of this paper to differentiate the two principal subjects which affect industry, namely, business and property.

The necessity for making a distinction between them is made clear in *Wells Fargo & Co. v. Nevada*,² where an assessor by mistake entered a tax on property on the duplicate as one on business. The court said:³

“The difference is vital, for, consistently with the commerce clause of the Federal Constitution, the State could not tax the privilege or act of engaging in interstate commerce, but could tax the company’s property within the State, although chiefly employed in such commerce.”

There are other reasons why a differentiation must be made. A provision in a state constitution requiring uniformity may affect a tax on property, but not on business,⁴ or a tax held to be on the one element may involve an arbitrary classification, although this objection would not exist if it was on the other.⁵ In addition, the mechanism available for locating local property is different from that which can be used for locating local activity. The unit rule is applicable to the first but not to the second,⁶

¹ 15 Wall. 300, 319 (U. S. 1872). “Business” in this quotation and in this paper is used in the sense of activity. COOLEY, TAXATION (4th ed. 1924) § 38, makes a division of (1) capitation or poll taxes, (2) taxes on property and (3) excise taxes. The last is practically equivalent to the expression business taxes as used in this paper.

² 248 U. S. 165, 39 Sup. Ct. 62 (1918).

³ At 167, 39 Sup. Ct. at 63.

⁴ Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 41 Sup. Ct. 272 (1921); Oliver Iron Co. v. Lord, 262 U. S. 172, 43 Sup. Ct. 526 (1923).

⁵ Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 Sup. Ct. 578 (1910).

⁶ Isaacs, *The Unit Rule* (1926) 35 YALE LAW JOURNAL, 838.

although the failure to observe the distinction has obscured this fact.⁷

On the surface, it is difficult to see why the two subjects should ever be confused. In its simple form a tax on real estate or personalty is easily recognizable. In like manner, one of a flat rate in the case of a license or one measured by capital stock, or gross receipts in the case of an excise, is readily classified. But when the form is more complicated, a levy on an occupation may nevertheless fall on property. Such a shift occurred in *Dawson v. Kentucky Distilleries Co.*⁸ Kentucky had placed an annual license tax on every person engaged in the business of manufacturing whisky, or in the business of owning and storing it in bonded warehouses in the state, at the rate of fifty cents a gallon for all whisky either withdrawn from bond or transferred in bond from Kentucky to points outside the state. The statute seemed clearly to provide a license for an occupation, but when the court applied the test for this kind of fee it developed into an assessment on property, which, as the result of another statute, violated the requirement of uniformity in the state constitution.

On the other hand, "undoubtedly a tax may be in form a privilege tax, and yet, in substance, may be a tax on property."⁹ In *Postal Telegraph Cable Co. v. Adams*,¹⁰ a tax was levied on an occupation, but since it was not more than if on an *ad valorem* basis, and in lieu of all others, the court held it really was on property.¹¹ A not dissimilar assessment in *Northwestern Mutual Life Insurance Co. v. Wisconsin*¹² in lieu of all others except those on real estate, was held to be not for the privilege of doing business, but in effect a commutation of all amounts levied on personal property.

The nature of the two kinds of taxes is to a certain extent indicated by their names:¹³

"Property taxes are taxes assessed on all property of a certain class in proportion to its value on a specified date. It is assessed at a stated period and collected at an appointed time. An excise tax, as the term itself indicates, is a sum cut out of that which is received or enjoyed by the person subjected thereto. It

⁷ *Hump Hairpin Mfg. Co. v. Emerson*, 258 U. S. 290, 42 Sup. Ct. 305 (1922).

⁸ *Supra* note 4.

⁹ *Kansas City Ry. v. Kansas*, 240 U. S. 227, 235, 36 Sup. Ct. 261, 263 (1916); *cf. Brown v. Maryland*, 12 Wheat. 419, 444 (U. S. 1827).

¹⁰ 155 U. S. 688, 15 Sup. Ct. 268, 360 (1895).

¹¹ See analysis of this case in the dissenting opinion in *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 247, 17 Sup. Ct. 305, 319 (1897).

¹² 247 U. S. 132, 38 Sup. Ct. 444 (1918).

¹³ *Northern Commercial Co. v. Alaska*, 289 Fed. 786, 787 (C. C. A. 9th, 1923).

includes every tax imposed upon the privilege of performing an act or engaging in a business or occupation."

The one is imposed on various forms of property such as tangibles, franchises, gross receipts, value arising from a going concern, and more rarely on capital stock, gross receipts or income as forms of property. The other is imposed on occupations such as insurance, transportation, mining and manufacturing. A distinction may be made between one imposed for the right of engaging in business, or as it is called, a license,¹⁴ and one on the actual doing of business, an excise.¹⁵ It is not always easy to tell the two apart—the "permit" tax in *Western Union Telegraph Co. v. Kansas*¹⁶ was in fact on business—and it may not be necessary to do so. The same contrast with assessments on property exists and the same federal protection arises whether the levy be for the right to do or the doing of business.¹⁷

At the same time, classification is not merely a matter of terminology. We must examine into the entire taxing system of a state to determine validity and practical effect.¹⁸ Much of the confusion today has been caused by the incorrect use of names. If the designation is incorrect, principles may be misapplied. Because not infrequently the legislature misnamed invalid taxes, the principle was laid down very early that "the substance and not the shadow determines the validity of the exercise of the power."¹⁹ In fact, the legislative name is not only not controlling; it sometimes may arouse suspicion.²⁰ In *Galveston, Harrisburg and San Antonio Railway v. Texas*, it is said:²¹

¹⁴ *Adler v. Whitbeck*, 44 Ohio St. 539, 559, 9 N. E. 672, 675 (1886).

¹⁵ *People ex rel. Manila El. R. R. & L. Corp. v. Knapp*, 229 N. Y. 502, 508, 128 N. E. 892, 894 (1920).

¹⁶ 216 U. S. 1, 30 Sup. Ct. 190 (1910).

¹⁷ *Isaacs, The Federal Protection of Foreign Corporations* (1926) 26 Col. L. Rev. 263.

¹⁸ *Maine v. Grand Trunk Ry.*, 142 U. S. 217, 12 Sup. Ct. 121, 163 (1891); *Galveston, Harrisburg & San Antonio Ry. v. Texas*, 210 U. S. 217, 23 Sup. Ct. 638 (1908); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, 37 Sup. Ct. 260, 264 (1917); *Shaffer v. Carter*, 252 U. S. 37, 55, 40 Sup. Ct. 221, 226 (1920).

¹⁹ *Postal Telegraph Co. v. Adams*, *supra* note 10, at 698, 15 Sup. Ct. at 270; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 581, 15 Sup. Ct. 673, 689 (1895); rehearing denied, 158 U. S. 601, 15 Sup. Ct. 912 (1895); *cf. Flint v. Stone Tracy Co.*, 220 U. S. 107, 145, 31 Sup. Ct. 342, 346 (1910).

²⁰ *United States Express Co. v. Minnesota*, 223 U. S. 335, 344, 32 Sup. Ct. 211, 214 (1912); *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292, 293, 35 Sup. Ct. 27, 29 (1914); *St. Louis Southwestern Ry. v. Arkansas*, 235 U. S. 350, 362, 35 Sup. Ct. 99, 102 (1914); *Kansas City Ry. v. Kansas*, *supra* note 9; *Shaffer v. Carter*, *supra* note 18, at 55, 40 Sup. Ct. at 226; *Dawson v. Kentucky Distilleries Co.*, *supra* note 4; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346, 348, 43 Sup. Ct. 125 (1922).

²¹ *Supra* note 18, at 227, 28 Sup. Ct. at 640.

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

One of the principal ways in which an incorrect use of a term has led to a faulty application of principles is in the use of the word "franchise" to describe a tax. This designation may refer to an attempt to reach business as an act, *i. e.* an excise like that found in *Flint v. Stone Tracy Company*:²²

"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, . . ."

It may, on the other hand, refer to a right, as a form of property, which a franchise really is.²³ In order to make the distinction clear, the court, in *Hamilton Company v. Massachusetts*,²⁴ defined franchises as property under the term commodities. "Property taxation and excise taxation . . . are perfectly distinct, and the two systems are easily distinguished from each other" if this is done.

The possible meanings of the term are brought out in *Ozark Pipe Line Corporation v. Monier*.²⁵ An annual "franchise" tax was imposed on a corporation equal to one-tenth of one per cent of the par value of capital stock and surplus employed in business in the state. The majority opinion emphasized the business element and held the incidence was on interstate business. Mr. Justice Brandeis, however, dissenting, emphasized the element of privilege—"it is laid upon the privilege of carrying on business in corporate form"²⁶—and construed the statute as involving a tax on a franchise, and so on property.

In *Western Union Telegraph Co. v. Kansas*,²⁷ a tax measured by total capital stock was held invalid in the case of a foreign

²² *Supra* note 19, at 145, 31 Sup. Ct. at 346.

²³ *Central Pacific R. R. v. California*, 162 U. S. 91, 126, 16 Sup. Ct. 766, 779 (1896); *Home Insurance Co. v. New York*, 134 U. S. 594, 601, 10 Sup. Ct. 593, 595 (1896); *Cream of Wheat Co. v. Grand Forks County*, 253 U. S. 325, 40 Sup. Ct. 558 (1920).

²⁴ 6 Wall. 632, 640 (U. S. 1867); see also *Society for Savings v. Colte*, 6 Wall. 594 (U. S. 1867); *Provident Institution v. Massachusetts*, 6 Wall. 611 (U. S. 1867); *Home Insurance Co. v. New York*, *supra* note 23.

²⁵ 266 U. S. 555, 45 Sup. Ct. 184 (1925).

²⁶ At 568, 45 Sup. Ct. at 187.

²⁷ *Supra* note 16.

corporation. On the other hand, in *Kansas City Ry. v. Kansas*²⁸ and *Kansas City Ry. v. Stiles*,²⁹ similar taxes were held valid in the case of a domestic corporation. This apparent conflict may be quickly resolved by a recognition of the fact that the tax in the former was on business, and the one in the latter on franchises as property. The distinction is not between domestic and foreign corporations, although the cases involved seem to suggest this, but between a tax on an act, and one on a right; between a tax on business and one on property. Nor, if the tax in *Ashley v. Ryan*³⁰ was imposed on a franchise as property, which the court says it was, is there any conflict between the *Ashley* case and the *Western Union* case.

A somewhat similar difficulty arises in construing the nature of the corporate excess. This is, of course, intangible property.³¹ But apparently it is considered that the difference between it and business is purely psychological.³² At least, this seems to be the meaning of the court in *Galveston, Harrisburg & San Antonio Ry. v. Texas*:³³

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation."

To make the general distinction which, as we have seen, the court has not generally observed, several tests have been developed. These are (a) ownership, (b) operation, (c) commutation and (d) addition of taxes.

(a) *Ownership*. The test applied in *Dawson v. Kentucky Distilleries Co.*³⁴ to establish that a tax fell on property was one of ownership—"To levy a tax by reason of ownership of property is to tax the property." In this case, one activity after another was eliminated until only ownership remained.

"The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously it has none of the ordinary incidents of an occupation tax. . . . this tax is not upon the business

²⁸ *Supra* note 9.

²⁹ 242 U. S. 111, 37 Sup. Ct. 58 (1916).

³⁰ 153 U. S. 436, 14 Sup. Ct. 865 (1894).

³¹ *Adams Express Co. v. Ohio State Auditor*, *supra* note 11; rehearing denied 166 U. S. 185, 17 Sup. Ct. 604 (1897).

³² *Cf.* HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) 122.

³³ *Supra* note 18, at 227, 28 Sup. Ct. at 640.

³⁴ *Supra* note 4, at 294, 41 Sup. Ct. at 275.

or occupation of the warehouseman. . . . Nor is the alleged business of merely owning and storing whisky in bond made taxable. . . . Likewise the tax is not one imposed upon the business of owning, storing and removing whisky from bond. . . . Nor is the tax one on the business of removing liquor owned. . . . But as stated by the lower court, "the thing really taxed is the act of the owner in taking his property out of storage into his own possession. . . . To levy a tax by reason of ownership of property is to tax the property. . . . It cannot be made an occupation or license tax by calling it so."³⁵

There also seems to be an underlying distinction between business and property taxes in the decision on the income tax law of 1894, in *Pollock v. Farmers' Loan & Trust Co.*³⁶ The contention was made in this case that a tax on income from real estate and personal property was direct, and illegal because not apportioned. The court seems to identify direct with capitation and property taxes, and indirect taxes, by inference, with those levied on business.³⁷ The income tax, it was held, was levied because of ownership and therefore fell on property. As such it was direct because:

" . . . it has always been considered that a tax upon real estate *eo nomine* or upon its owners in respect thereof is a direct tax within the meaning of the Constitution." (p. 580)

(b) *Operation.* On the other hand, it is stated in *Oliver Iron Company v. Lord*,³⁸

"Obviously a tax laid on those who are engaged in . . . business, and laid on them solely because they are so engaged, . . . is an occupation tax."

In this case Minnesota required of all who were engaged in the business of mining or producing iron ore or other ores within the state, a payment in each year of an occupation tax equal to six per cent of the value of the ore mined or produced during the preceding year. This levy was to be in addition to all others. The statute also provided that the amount be computed on the value of the ore mined at the place where it was brought to the surface of the earth, less certain deductions.

It was contended that the subject taxed was property and

³⁵ At 292, 41 Sup. Ct. at 274.

³⁶ *Supra* note 19, at 580, 15 Sup. Ct. at 689.

³⁷ At 577, 15 Sup. Ct. at 688. There are only three incidences of taxes, namely, persons, property and business. *State Tax on Foreign-held Bonds*, *supra* note 1, at 319.

³⁸ *Supra* note 4, at 177, 43 Sup. Ct. at 529; see also *Billings v. United States*, 232 U. S. 261, 281, 34 Sup. Ct. 421, 424 (1914).

that the statute was therefore invalid under a uniformity clause in the state constitution. But the court said:³⁹

“We think the tax in its essence is what the act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts.”

The Federal Capital Stock Tax of 1909,⁴⁰ we believe may be classified as one on business. The statute calls for a special annual excise tax “with respect to the carrying on or doing business” by certain companies equivalent to one per cent of the entire net income over and above five thousand dollars received from all sources during the year with certain deductions. Defining an excise as a tax upon activity, the court in *Flint v. Stone Tracy Company*⁴¹ seems to hold the incidence is on business. It is true the quotation of Cooley’s definition of an excise,⁴² which includes corporate privileges, is confusing because a corporate privilege is a valuable property right. However, the classification in this case of the tax as indirect makes it fall on that subject matter which is other than persons or property, namely, business.⁴³ It is different from the Federal Income Tax of 1894, held invalid in *Pollock v. Farmers’ Loan and Trust Company*,⁴⁴ because, as the court said in the *Flint* case:⁴⁵

“The *Pollock Case* construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.”

On the other hand, in its discussion in the *Flint* case, the court⁴⁶ seems frequently to consider that a privilege as a valuable right is involved—“The tax under consideration, as we have con-

³⁹ *Oliver Iron Co. v. Lord*, *supra* note 4, at 177, 43 Sup. Ct. at 528.

⁴⁰ 36 Stat. 11, at 112-117 (1909).

⁴¹ *Supra* note 19, at 151, 31 Sup. Ct. at 349.

⁴² Excises are “taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.” COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1903) 680.

⁴³ *Cf.* State Tax on Foreign-held Bonds, *supra* note 1, at 319.

⁴⁴ *Supra* note 19.

⁴⁵ *Supra* note 19, at 150, 31 Sup. Ct. at 348.

⁴⁶ At 151, 31 Sup. Ct. at 349.

strued the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity." And again the court says:

"The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals." (p. 161)

If, of course, the tax is on a right, it is on property. But, on the whole, the court seems to consider the incidence to be on business.⁴⁷

The element of activity which is present in the transfer or inheritance of estates, although in some cases involving merely acceptance on the part of a legatee, suggests that taxes on the transmission of estates should also be treated as falling on activity rather than on property. Inheritance has, as a rule, been identified with an act rather than with ownership of property.⁴⁸ It is the transfer or receipt which is the subject of taxation. In *Knowlton v. Moore*,⁴⁹ it was pointed out that death duties generally have been in all countries considered different from taxes levied directly on property on account of ownership.

(c) *Commutation of taxes.* In general, when one assessment is imposed in lieu of all others, it is considered to fall on property.⁵⁰ Why the court should lean toward this interpretation is difficult to say. Perhaps taxes on property are older. But there may be something more involved. The court seems to feel that property must be taxed before business can be. In *United States Express Co. v. Minnesota*,⁵¹ the court assumed that if the tax was considered to be on the former, the latter would escape entirely:

"The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express

⁴⁷ *McCoach v. Minehill Ry.*, 228 U. S. 295, 301, 33 Sup. Ct. 419, 421 (1913); *United States v. Whitridge*, 231 U. S. 144, 147, 34 Sup. Ct. 24, 25 (1913).

⁴⁸ *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288, 18 Sup. Ct. 594, 596 (1898); *State v. Ferris*, 53 Ohio St. 314, 326, 41 N. E. 579, 580 (1895); cf. Powell, *Extraterritorial Inheritance Taxation* (1920) 20 COL. L. REV. 283.

⁴⁹ 178 U. S. 41, 78, 20 Sup. Ct. 747, 762 (1900).

⁵⁰ *Postal Telegraph Cable Co. v. Adams*, *supra* note 10; cf. *McHenry v. Alford*, 168 U. S. 651, 671, 18 Sup. Ct. 242, 250 (1898); *Pullman Co. v. Richardson*, 261 U. S. 330, 339, 43 Sup. Ct. 366, 368 (1923).

⁵¹ *Supra* note 20, at 346, 32 Sup. Ct. at 215.

companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all."

It might with equal validity be said that if the statute be construed so as not to reach business, this subject would also not be taxed at all.

(d) *Addition of taxes.* On the other hand, when a tax is found to be in addition to other taxes, the court usually interprets it as one on business. In *Choctaw, Oklahoma and Gulf R. R. v. Harrison*,⁵² it was contended that a state tax on mining property used in the mining of coal for certain Indian tribes under an act of Congress fell on property. But, said the court, in reference to the act:⁵³

"Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an *ad valorem* basis.' We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment—provision is made for determining that upon a different basis. . . . the manifest purpose is to reach all sales and secure a certain percentage thereof."

Where, also, after the property of a company had been assessed, in *Meyer v. Wells Fargo & Co.*,⁵⁴ a gross revenue tax was imposed and declared to be "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets," it was held that the incidence was not on property but on business and therefore affected gross earnings which were derived partly from interstate commerce.

It must be noted that the question of double taxation does not arise here, although it has been frequently held that there is nothing in the federal Constitution to prohibit double taxes.⁵⁵ The subjects of the two impositions are distinct. One is property, the other is business; one is capital, the other activity.⁵⁶

The difference between a tax in lieu of other taxes, *i. e.*, one on property, and one in addition to an *ad valorem* tax, *i. e.*, one on business, was pointed out in *Cudahy Packing Company v. Minnesota*.⁵⁷ In this case an assessment at a stated per cent of earnings in lieu of others was placed against a company in

⁵² *Supra* note 20.

⁵³ At 298, 35 Sup. Ct. at 29.

⁵⁴ 223 U. S. 298, 32 Sup. Ct. 218 (1912).

⁵⁵ *St. Louis Southwestern Ry. v. Arkansas*, *supra* note 20, at 367, 35 Sup. Ct. at 104; *Cream of Wheat Co. v. Grand Forks*, *supra* note 23, at 330, 40 Sup. Ct. at 560.

⁵⁶ *Ohio Tax Cases*, 232 U. S. 576, 594, 34 Sup. Ct. 372, 376 (1913).

⁵⁷ 246 U. S. 450, 454, 38 Sup. Ct. 373, 375 (1918).

respect of its cars and intangible property. The two cases previously considered⁵⁸ were contrasted:⁵⁹

"The former involved a tax in Oklahoma of a stated per cent. of the gross receipts of an express company doing both a local and an interstate business in that State. The statute called the tax a 'gross revenue tax' and declared that it was to be 'in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the State was to be reached and valued in another way."

The court then considered the *United States Express Company* case:⁶⁰

"The other case involved a tax in Minnesota of a designated per cent. of the gross earnings of an express company from business done in that State, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the State as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the State."

It is not every additional tax, however, which falls on business. Besides the subject of physical property there is intangible property, whether it be the corporate excess or a franchise.⁶¹ This may be reached by an additional tax before business is affected. The corporation, in *St. Louis, Southwestern Ry. v. Arkansas*,⁶² was assessed on its physical property and, in addi-

⁵⁸ *Meyer v. Wells Fargo & Co.*, *supra* note 54, and *United States Express Co. v. Minnesota*, *supra* note 51.

⁵⁹ At 454, 38 Sup. Ct. at 375.

⁶⁰ At 454, 38 Sup. Ct. at 375.

⁶¹ *Adams Express Co. v. Ohio State Auditor*, *supra* note 11; *Maine v. Grand Trunk Ry.*, *supra* note 13.

⁶² *Supra* note 20, at 367, 35 Sup. Ct. at 104.

tion, the state imposed an "annual franchise tax" for the privilege of exercising its franchise in the state, of one twentieth of one per cent each year upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in the state. The court held the tax was on the franchise to be a corporation or to exercise corporate powers in the state. That it must not amount to more than the ordinary tax on property

" . . . does not mean, as is contended, that because of the Fourteenth Amendment a State may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the State, including that employed in interstate commerce."⁶³

In like manner, *Underwood Typewriter Co. v. Chamberlain*⁶⁴ involved an assessment in addition to the general property tax, and although the court refused to denominate it either a property or business tax, it nevertheless in fact treated it as one on property.

Perhaps the interpretation given to *Maine v. Grand Trunk Railway Company*,⁶⁵ where a tax imposed in addition to one on general property was nevertheless held to be valid as falling on property, could be applied to the *Underwood* case.⁶⁶ The interpretation is found in *Galveston, Harrisburg & San Antonio Railway v. Texas*.⁶⁷ The court calls the additional assessment in the *Maine* case an "excise," but it is clear what it means.

"The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value."⁶⁸

In other words, the first tax in the *Maine* case was on physical property, and the second on the corporate excess.⁶⁹ However, it does seem that the second also includes the same subject matter as that of the first. The unit rule allocates not only tangibles but also the corporate excess,⁷⁰ and its use in the *Grand Trunk*

⁶³ *Ibid.*

⁶⁴ 254 U. S. 113, 41 Sup. Ct. 45 (1920).

⁶⁵ *Supra* note 18.

⁶⁶ *Cf. Meyer v. Wells Fargo & Co.*, *supra* note 54, at 301, 32 Sup. Ct. at 219.

⁶⁷ *Supra* note 18, at 226, 28 Sup. Ct. at 639.

⁶⁸ At 226, 28 Sup. Ct. at 640.

⁶⁹ COOLEY, *op. cit. supra* note 1, at § 1676.

⁷⁰ Isaacs, *op. cit. supra* note 6.

Railway case and the *Underwood Typewriter* case effects this result by one operation.

It is principally when tangibles, the corporate excess and the franchise have all been reached, that the additional tax will be considered to fall on business. In *Galveston, Harrisburg & San Antonio Ry v. Texas*,⁷¹ a first assessment was placed on the property of the railroad taken as a going concern. A second, equal to one per cent of gross receipts could not, it was held, be on property measured by gross receipts. The significance of the phrase "equal to" is explained, because if no other assessment had been involved, "equal to" would have shown a measure for a property tax:⁷²

"The distinction between a tax 'equal to' one per cent. of gross receipts and a tax of one per cent. of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. . . . This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

The tax was held to fall on business and because of the unlimited measure, on interstate business. It was, therefore, invalid.

The foregoing indicates the necessity of making a distinction between the incidences of business and property. It also suggests that the four tests of ownership, operation, commutation and addition of taxes, if applied consistently, are adequate for the purpose.

⁷¹ *Supra* note 18, at 227-8, 28 Sup. Ct. at 640.

⁷² At 227, 28 Sup. Ct. at 640.