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Public and Public Welfare Property Tax Exemption in West Virginia

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TRUE, there is nothing unusual and almost nothing of interest for the development of legal theory in West Virginia's law on property tax exemptions. True, all the relevant citations are already assembled at the appropriate places in the code annotations and the digests. Yet there are justifications for the unpretentious discussion here proposed. The practising lawyer will perhaps find useful a summary of the holdings and some observations on how they fit together (and where they fail to fit together). The more speculative will perhaps find perspectives on the judicial process in the way the interests contemplated as beneficiaries of the exemptions and competing claims and demands have fared. And the teacher of West Virginia tax law, alias the writer, will certainly gain two badly needed class hours by assigning the article for collateral reading instead of lecturing on the problem as formerly.

The constitutional basis for exemption is phrased by way of exception to the general command of equality and uniformity, as qualified by the fourfold classification scheme, declaring "but property used for educational, literary, scientific, charitable, or religious purposes, all cemeteries, public property, the personal property, including livestock, employed exclusively in agriculture ... and the products of agriculture ... while owned by the producers may by law be exempted from taxation"\(^1\) while "household goods to the value of two hundred dollars shall be exempted from taxation."\(^2\)

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1 W. VA. CONST. Art. X, § 1.
2 Ibid. Italics supplied.
This language is appreciably different\(^3\) from the corresponding provision in the 1868 constitution and radically unlike the Virginia constitutional provision at the time of separation. The latter, after the general prescription of uniformity, and directions, now obsolete, as to the assessment and exemption of slaves, stated "... other taxable property may be exempted from taxation by the vote of a majority of the whole number of members elected to each house of the general assembly."\(^4\) More than differences over slavery and possibly more than the location of the Union and Confederate forces in 1862, the rankling feeling that Virginia legislation and administration had consistently given the western counties the short end of the stick sparked the movement for separation. The reports of the constitutional convention make it quite plain that, on this specific matter of taxation, the feeling obtained generally that the plenary legislative discretion had been so exercised as to discriminate against western Virginia, inducing in the delegates a purpose to restrict that discretion so as to preclude regional favoritism in the new state.\(^5\) Accordingly the constitution particularized the categories exemptable by specifying, after the routine equality and uniformity clause, "but property used for educational, literary, scientific, religious or charitable purposes, and public property, may by law be exempted from taxation."\(^6\) Other aspects of the taxation article were extensively debated but no attention was directed to the listed members in the quoted clause except the statement that they "are such as appear to be sanctioned by almost universal usage and are conceded, I believe, every where to be right and proper."\(^7\)

\(^3\) The only reference judicially made to the anterior constitutional history, see State v. Kittle, 76 W. Va. 526, 531, 105 S.E. 775, 776 (1921), while apt and adequate for the immediate case, is unilluminating on the general significance of the change, which it somewhat tends to discount.

\(^4\) VA. CONST. Art. IV, § 23 (1852).

\(^5\) Chairman Paxton of the Committee on Taxation and Finance, reporting that committee's proposed article to the convention, said, for instance, "(W)hile the ordinance of secession may have been the occasion of this new State movement on the part of our people, I apprehend there can be little doubt in the mind of any one that the fundamental cause for this division and desire for a new state may be found in the injustice and oppression which our people have suffered from unequal taxation, from oppressive taxation and unequal representation. It appears to me, sir, in framing a new constitution now for the people of West Virginia we should be particularly careful to guard against the liability in future of the perpetration of any such injustice on any portion of our own people." 3 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 55 (n.d.). Similar views were voiced uniformly though somewhat less explicitly by other delegates participating in the ensuing debate.

\(^6\) W.Va. CONST. Art. VIII, § 1 (1863).

\(^7\) Op. cit. supra note 5, at 56.
In the 1873 convention, the Committee on Taxation and Finance favored a much different approach. It placed the basic exemption provision in a separate section, constitutionally directing exemption of the included types of property rather than authorizing the legislature to extend exemptions, and rephrasing the list of exempt categories so as to clarify and perhaps somewhat to amplify them. Additionally the legislature was to be empowered to exempt agricultural products in the hands of the producer "and all other products of labor and capital . . . produced within the state during the year preceding and remaining in the hands of the producer". The Committee of the Whole was less ready to innovate. It substituted virtually the language of the 1863 constitution, only adding "all cemeteries" before the phrase "and public property". In the form so approved by the Committee of the Whole, the phrase entered into the constitution.

The record though obscure sheds some light on what the provision encompassed. Clearly it rejected the idea of constitutionally established exemptions and left implementation to the legislature. Clearly also it ruled out the policy of a tax subsidy to agricultural and other private producers, confining its operation in the main to the same eleemosynary and public institutions as the 1863 provision. Apparently no real change from those embraced under the earlier constitution was envisaged by either the proposal of the Committee on Taxation and Finance or the text which emerged from the Committee of the Whole. The almost universal usages which the 1863 constitution sought to connote would hardly have changed much in ten years. The 1863 language was eventually unchanged except for specification of "all cemeteries". This was probably viewed as itemizing something *ejusdem generis* with the immediately preceding categories, for the rejection of an attempt to limit the exemption to "public" cemeteries suggests that doubt existed concerning the status of the family burial plot, frequent in quiet rural communities, rather than sentiment for an enlargement beyond conventionally accepted eleemosynary activities. The Taxa-

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8 "2. The property of the State, counties, townships, and other municipal corporations, both real and personal, and such other property as may be used, or the proceeds of which may be used, exclusively for agricultural or horticultural societies, for educational, literary, or scientific, religious or charitable purposes, or for a public burial ground, shall be exempt from taxation; but such property and use shall be determined in such manner as the Legislature shall direct by general law, uniform as to the class to which it applies."


tion and Finance Committee's proposal had been limited to "a public burial ground"\(^\text{11}\) so the change showed clearly that the convention was not disposed generally to confine the classes of public welfare beneficiaries more narrowly than was the committee. Nor was the latter apparently espousing curtailment of the state of affairs existing under the 1863 constitution, for its proposal failed to reflect, it is to be assumed after due deliberation by the Committee, a delegate's motion referred to it which would have confined permissible exemptions to property "used for charitable and religious purposes",\(^\text{12}\) thus inferentially excluding from exemption public property and that used for educational, literary, and scientific purposes. On the whole it seems legitimate to view the 1863 provision, the Taxation and Finance Committee proposal, and the final 1873 provision as having the same content except for elimination of doubt as to the status of family burying grounds. The committee's proposal was more verbose and cumbersome; and that, as well as a conservative impulse of adherence to familiar terminology, told against it. But there is nothing in the record which indicates that the proposal was not in substance a statement of those categories "sanctioned by almost universal usage and . . . conceded . . . everywhere to be right and proper", which were to be legislatively exemptable under the 1863 phrasing. Except for the family burial plots, they probably were regarded as expressing essentially the same content. If so, the mention of "property . . . the proceeds of which may be used exclusively"\(^\text{13}\) for the designated objects has a relevance which will appear in connection with the review hereafter of the decisions.

There has been one further constitutional change. As a part of the extensive revision of 1932\(^\text{14}\) by the Tax Limitation Amendment, setting up the fourfold classification scheme and authorizing a graduated income tax, there was included for the first time a constitutionally mandatory exemption, household goods of two hundred dollars value, and two more legislatively exemptable categories were added, "personal property, including livestock, employed exclusively in agriculture . . . and the products of agriculture . . . while owned by the producer". Institution of a constitutional exemption, whether motivated by the judgment that the revenues foregone did not justify the administrative cost and effort of collection, or

\(^{11}\) See note 8 supra.

\(^{12}\) See JOURNAL OF 1872 CONSTITUTIONAL CONVENTION 53.

\(^{13}\) See note 8 supra.

\(^{14}\) See W. Va. Acts Ex. Sess., 1932, c. 9. This amendment was ratified by the voters at the 1932 general election.
more probably, by hopes of political ingratiation, was a complete departure from the consistent tradition of legislatively exemptable—in contrast with constitutionally exempt—property. The tax subsidy to agriculture, with its tardy qualified approval of the view of the 1873 convention’s Committee on Taxation and Finance, was only somewhat less of an innovation. No doubt both changes are permissible under the federal constitution. Neither has been the basis for any reported decision. In themselves they have no bearing on the problem under investigation here, the scope of the exemption for public property and for primarily public welfare enterprises. As a matter of sentence structure, however, the addition of one more item after cemeteries, themselves added to public property, tends to make the categories of exemptables break in two in the middle. Superficially read, without remembering the provision’s history, there appears to be one subgroup where the inquiry focuses primarily on the nature of the use and a second where that is relatively immaterial and the character of the property is all important. Such obscurities consequent to haphazard growth are an open invitation to questionable construction.

Public property has aspects which make its separate consideration appropriate. To tax the state’s own property or that of its subordinate divisions pretty much involves simply a wasteful transfer from one civic pocket to another. To tax that of the federal government offends the supreme law of the land as construed by the United States Supreme Court. These peculiarities have influenced legislative and judicial treatment of this category of property.

The code makes refined distinctions based on the character of the proprietor government. All “property belonging to the United States, other than property permitted by the United States to be taxed under state law” is exempt; but tax immunity derives from the state only with respect to property “belonging exclusively” to it while, as to municipal, county, and such like property, there must be not only this exclusive ownership but the property must be used for public purposes. As to property of the federal gov-

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15 For the constitutional validity of prescribing quantitative minima as a condition to tax liability, see Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927). As to distinctive treatment of personal property used in agriculture and the products of agriculture, including livestock, see Charleston Federal Savings & Loan Ass’n v. Alderson, 324 U.S. 182 (1945).


17 W. VA. CODE c. 11, art. 3, § 9 (Michie, 1949).
ernment, the question is one of power; as to the state's, of title; as to that of political subdivisions, of concurrent title and use. Nothing is said about the property of sister states and their subdivisions but exempting the property of "the" state and, even more distinctly, the property of any county, town, et cetera "in this State" implies that they are to be treated no differently than private owners. While there are no West Virginia cases in point, the isolationist attitude of the Supreme Court of Appeals in another context and the majority doctrine that tax exemptions benefit only the enacting state and its subdivisions, even in cases where it derives advantages from another state's enterprise located within its borders, make it virtually certain that the provision would be so construed. A contingency which seems not to have been considered is also at least theoretically relevant to property in which the state or a subdivision has a property less than exclusive ownership. There, as well as where a sister state or its municipalities are concerned, though the statute makes the property no better off than that which is privately owned, arguably it ought to make it no worse off. It is not likely that there could be any such property devoted to the purposes of religion but there might well be property so owned devoted to some of the educational or eleemosynary ends spelled out in the statute. If so, it would seem that its taxable status should not suffer because the character of its ownership does not meet the statutory specifications if the character of its use meets the prescribed tests. It is, however, an open question that would be held. So is the situation where the state and a municipal or similar subdivision are co-owners. Since neither owns exclusively, the statute literally read does not entitle such property to

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18 The general code provision as to the construction of states, W. VA. CODE c. 2, art. 2, § 10 (h) directs that "The word 'State' when applied to a part of the United States and not restricted by the context includes the District of Columbia and the several Territories..." but use in conjunction with the definite article would no doubt be deemed a restriction by the context rendering this section inapplicable.

19 See Ferguson v. Townsend, 111 W. Va. 432, 162 S.E. 490 (1932). discussed infra p. 188.


21 See State ex rel. Taggart v. Holcomb, 85 Kan. 178, 116 Pac. 251 (1911) (denying exemption to a waterworks owned by Kansas City, Missouri, and used co-operatively by the fire departments of that municipality and Kansas City, Kansas.) In such circumstances, at least, the state of the situs may by valid interstate compact extend the exemption to the extrastate owner, State ex rel. Baird v. Joslin, 116 Kan. 615, 227 Pac. 543 (1924).

22 As to taxation of municipally owned property located outside the municipality but within the state, see Stimson, The Exemption of Publicly Owned Property from Taxation, 8 U. OF CIN. L. REV. 82, 37 (1934).
exemption. It is almost unthinkable, however, that it would be denied if between them such governmental owners shared the whole title, at least if the property was being used for a public purpose as would normally be the situation.

Turning from these unresolved statutory ambiguities to the case law, one finds few if any surprises in the latter. There are no decisions as to the state's own property. As to that of political subdivisions on the one hand and of the federal government on the other, the approach is superficially but probably not actually divergent.

The two cases where the exemption urged traced to a municipality display a manifest bias against extending exemptions. *State v. Page* 22 disallowed a claim of exemption from personal property tax for privately owned securities consisting of district road and school bonds and bonds of the city of Welch. The opinion stressed the point that the code provision was as to public property, not public securities. The latter, says the syllabus, "if not exempted from taxation by law or by contract, are taxable . . . in the same manner as other property". 24 It does not suggest that the state might not exempt such property by apt legislation. 25 Indeed the inference is fairly clear from the quotation that that possibility was assumed. The amendment of the code, at the next session of the legislature, to exempt "mortgages, bonds and other evidences of indebtedness in the hands of bona fide owners and holders hereafter issued and sold by churches and religious societies for the purpose of securing money to be used in the erection of church buildings . . ." 26 (a provision still in effect without ever having been judicially discussed) appears to indicate a legislative reading to that effect. The absence of a parallel provision for municipal bonds is a plain legislative concurrence in the result of the *Page* case.

22 100 W. Va. 166, 130 S.E. 426 (1925).
24 Ibid., syllabus 4.
25 In Bates v. State Bridge Comm'n, 109 W. Va. 186, 153 S.E. 305 (1930), sustaining the constitutionality of W. Va. Acts 1929, c. 8, which established the Commission, the court stated, id. at 189, 153 S.E. at 307, that a provision in section 7 of the Act exempting from taxation bonds issued by the Commission was constitutional and that without it the bonds would have been taxable, citing the *Page* case. The statement is however only weak authority and perhaps only dictum, since the case did not involve any bonds of the Commission but arose out of a contest by persons whose property the Commission was condemning under the grant of the power of eminent domain, the tax exemption question while duly certified for review was not briefed (nor apparently discussed) by counsel, and the Act contained a standard "separability" clause, section 16, apparently adequate to disable individuals situated as the contestants there were from gaining any benefit even had the tax exemption provision as to the bonds been unconstitutional.
That result was of course orthodox enough\textsuperscript{27} that even the taxpayer's counsel can hardly have been greatly surprised. \textit{Greene Line Terminal Co. v. Martin}\textsuperscript{28} presented a much nicer question but here again the claim of exemption was denied.

The city of Huntington owned in fee a wharf which it seems at one time also to have operated. Shortly after the turn of the century, however, its operation as a public wharf was turned over to appellant's assignor under a fifty year "lease" providing for payment to the city of an annual license fee and of all the proceeds above a percentage retained as "commission" as shown by an accounting. After some twenty years, the assignment to appellant was made and a little later the "lease" was modified to reduce the license fee and excuse appellant assignee from the accounting. The whole net proceeds seem to have accrued thenceforth to appellant which, in conjunction with the wharf, owned and operated a warehouse connected with it by an inclined plane. Taxes were assessed and paid on these associated parts of the enterprise but none on the value of the leasehold interest until 1939 when, at the Tax Commissioner's direction, the county court entered it for taxes for that and the four preceding years. The company's contention was, essentially, that it was to be treated as the municipal \textit{alter ego} in the operation of the wharf, enjoying the same exemptions as the city would have had the latter elected to have persons on the municipal payroll run it. The city, it was asserted, had merely exercised a discretion as to the manner in which public wharfage was regulated and the form of the regulation created no taxable property. This claim that all that was involved was an election as to the mode of regulation, giving rise to no taxable proprietary incident, is reminiscent of that advanced in \textit{South Carolina v. United States}\textsuperscript{29}—and proved equally unavailing.

If the holding had been that the existence or creation of any third party interest at all in a parcel of property destroyed the exclusiveness of ownership requisite for municipal exemption, the doctrine, while strict, would have been clear cut. Or if the court had been prepared to assert that operation of an enterprise by a private person was \textit{per se} inconsistent with use for a public purpose, an obvious basis for denying the exemption would have emerged.

\textsuperscript{27} \textsc{Cooley}, \textit{op. cit. supra} note 20, § 628. There is some conflict among the states, depending in considerable measure on variations in constitutional language, but the result in West Virginia apparently conforms with the majority position, see Notes 26 A.L.R. 547 (1923), 44 A.L.R. 501 (1926).

\textsuperscript{28} 122 W. Va. 483, 10 S.E.2d 901 (1940).

\textsuperscript{29} 199 U.S. 437 (1905).
although with consequential difficulties—chief among them, perhaps, the reconciliation of such a proposition with any theory which would permit exercise of the power of eminent domain by public utilities. Moreover, the natural (although not quite the necessary) upshot of either such position would have been to divest the whole property of the exemption, so rendering assessable the city's freehold as well as the operator's leasehold interest. This the court was not prepared to do. Indeed, the opinion expressly characterized the wharf as "city property in public use" and declared obiter that such public use relieved the city from tax liability. How, then, could the lessee be held taxable, as it was, if the two legislative conditions, exclusive proprietorship and public use, were concurrently satisfied? Of course the quite ordinary technique of judicial legislation supplies the answer. The court started its reasoning from the indisputable proposition that leaseholds are separately assessable in West Virginia and without much trouble concluded that the operator's interest in the wharf was a leasehold rather than, as was contended, a franchise. All this, however, only got the court to, not through the real difficulty. While our tax system undoubtedly contemplates the allocation of taxable values among persons with divided property interests in assessable realty, it does not logically follow that a division of interests generates assessability where none existed before—and furthermore generates it differentially so that some of the resultant divided interests are taxable and others are not. Instead of essaying to grapple with the logical difficulties, the opinion added to the legislative prescriptions of exclusive ownership and public purpose use, a third element applicable to the estates or interests of individuals in publicly owned property, that they are taxable if exercised "on a personal profit basis, though public convenience is thereby served".

This judicial supplement permits the dismemberment of the complex of claims and demands which all together comprise the property rights in any particular res, so as to retain tax immunity for so much as may be formally in public proprietorship while denying it to associated claims of private persons in the same res. No comparable isolation of the elements of substantive economic value seems possible. As obligor marketing its securities, as lessor demising its realty, or in any kindred capacity, a political subdivi-

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30 See Greene Line Terminal Co. v. Martin, 122 W. Va. 483, 488, 10 S.E.2d 901, 905 (1940).
31 W. Va. Const c. 11, art. 5, § 4 (Michie, 1949); cf. id., c. 11, art. 4, § 9 (assessment of undivided interests).
32 See Greene Line Terminal Co. v. Martin, supra note 30, at syllabus 1.
sion logically should be and in all probability would be in a position to obtain better terms if rights derived from it were taken free of tax liabilities. Denial of that attribute shifts the tax burden to such subdivision in the sense of disabling it from making as advantageous bargains as it might if exemption were allowed. While no recognition of this substantive effect was voiced in either the Page or the Greene Line case, the court has elsewhere\(^{33}\) revealed its awareness of business realities and their relevance to sustain constitutionally a grant of exemption when the legislature sees fit to declare one. The "public property" which the legislature is constitutionally authorized to exempt would thus seem not to be limited by the conditions of exclusive ownership or of use for a public purpose which the statute in fact expresses, if the factor of economic impact has a capacity for sustaining exemption. But that factor will be given no independent judicial recognition, for interpreting what the legislature has exempted, at least in the absence of explicit provision. Instead a judicially contrived doctrine that subsidiary interests of individuals in public property are taxable whenever they are appreciably employed for the purpose of private gain is enforced. This does not represent a repudiation of the existence of a public interest of substance\(^{34}\) under the circumstances but an election to subordinate it to certain individual interests supposed to form part of the context of a laissez faire economy, which have been more forcefully expounded in some of the charitable exemption cases in reviewing which they will be discussed in due course. At this point it must suffice to remark that the court is reluctant to let an entrepreneur obtain a preferred position vis-a-vis potential competitors by being relieved from tax liabilities to which they are subject and will not do so unless it finds an unequivocal legislative command.

At first blush, the propositions in the preceding paragraph seem to be belied by and the law of the cases thus far examined to be inconsistent with the course of decision in situations involving exemptions claimed because of a federal nexus with the property affected. thrice exemption has been claimed and thrice sustained.

The earliest case excused from taxation a vendee in possession of realty under the United States, which still held legal title and


\(^{34}\) Pound, Outline of Lectures on Jurisprudence 103 (5th ed. 1943).
a vendor's lien for unpaid instalments of the purchase price.\textsuperscript{35} (There had been no default and there was no suggestion of prospective default).

The other two\textsuperscript{36} were much alike and quite complex. Both involved the operation of federal grant-in-aid programs, one under the United States Housing Act of 1937,\textsuperscript{37} the other under the Federal Airport Act of 1946.\textsuperscript{38} In neither was the United States a predecessor in the chain of title or in any manner connected with the specific property involved except as contributor of funds for its acquisition which acquisition was, however, in each instance pursuant to and integrated with a program federally conceived and whose basic conditions were federally prescribed. In both, record title was to be in and operations conducted by a special statutory "authority" created by state legislation, so presenting some overlap with the problem of exemptions tracing to the state's political subdivisions. Since the state legislation in both instances provided for tax exemption and since in both the court was willing to accept the "authority"'s operations as constituting a public purpose and its holding as being ownership by a public corporation,\textsuperscript{39} the opinions might conceivably have ignored the federal relationship involved and proceeded as simple expositions of the tax immunities attributable to political subdivisions of the state. Their failure to do so and the invocation of the federal relationship, in the earlier case distinctly,\textsuperscript{40} in the later by reference,\textsuperscript{41} are highly suggestive.

If the court had been content to treat the question purely as one of tax exemptions of political subdivisions, it would not have overruled any earlier law. It would, however, have had to lay

\textsuperscript{35}Copp v. State, 69 W. Va. 439, 71 S.E. 580 (1911).
\textsuperscript{36}Chapman v. Huntington Housing Authority, 121 W. Va. 318, 3 S.E.2d 502 (1939); Meisel v. Tri-state Airport Authority, 135 W. Va. 528, 64 S.E.2d 32 (1951).
\textsuperscript{39}That one of the six constituent bodies, with the right to appoint one of the nine members of the Authority, was a private non-profit corporation, all the others being public bodies, was held not to deprive the Authority of the status of a "public corporation" in Meisel v. Tri-State Airport Authority, 135 W. Va. 528, 64 S.E.2d 32 (1951).
\textsuperscript{40}Chapman v. Huntington Housing Authority, 121 W. Va. 319, 348, 3 S.E.2d 502, 516 (1939).
\textsuperscript{41}Meisel v. Tri-State Airport Authority, 135 W. Va. 528, 544, 64 S.E.2d 31, 41 (1951) stated only that "this case is controlled on the question of tax exemption by the decision in Chapman v. Huntington Housing Authority, supra, and from the position taken therein this Court does not depart."
down the principle, certainly for the housing authority case,\textsuperscript{42} that business enterprises conducted by governmental bodies in competition with the ordinary business interests in the community are exemptable as to the plant devoted to such activities, at least where the operations are so far public in purpose as to permit them to be governmentally conducted—a principle almost inevitably colliding with the underlying premise of the Greene Line case. Any such general commitment could be avoided, however, to the extent that reliance was placed on the interest of the federal government. Where such an interest is present, indeed, our court’s view has been that it is so transcendent that exemption traces not to the legislative grant—which, of course, the code expresses and has all along expressed—but to legislative impotence to tax.\textsuperscript{43} By investing a situation with the majesty of federal interests beyond the state’s legislative grasp, considerations are adduced which distinguish it from situations parallel in every respect except that the United States does not enter the picture at any point. Moreover, invocation of that distinction strongly implies that in those analogous situations the court will not be disposed to accord the exemption. The governing principle is that of “exemption by association” if the associate happens to be the United States.

It is perhaps worthy of note that the airport case was decided flatly on the authority of the housing case without adverting to the fact that, while the United States Housing Act required as a condition for federal aid that the housing development be relieved from state taxes, the state’s exemption in the airport case was volunteered, there being apparently no such condition stated in either the Federal Airport Act or the regulations under it.\textsuperscript{44} It is stretching the argument mighty far to derive tax exemptions for federal collaterals from a constitutional touch-me-not policy and then to apply the derivation to a case where the related federal program has not seen fit either by statute or by regulation to condition the federal grant on tax immunity. That our court has so

\textsuperscript{42} Not only is the rental of residential realty a common, income-producing activity of individuals but the opinion in Chapman v. Huntington Housing Authority affirmatively discloses, see 121 W. Va. at 422, 3 S.E.2d at 504, that the challenge to the validity of the Act was raised by a plaintiff who owned and was engaged in the rental of competitive housing units. Airports, of course, are less generally operated as competitive businesses, partaking rather of the character of “natural monopolies”; but that is also true, at least under such geographic and demographic circumstances as were in fact present, of wharves situated like that in Greene Line Terminal Co. v. Martin.


\textsuperscript{44} For the governing administrative regulations implementing the statute, see 14 CODE FED. REGS. § 550.1-11 (1952).
done heavily underscores its bifocal vision where the exemption urged is and where it is not in some aspect federal. If it is, there is extreme wariness in allowing taxation, extreme—perhaps unwarranted—sensitiveness to the coercion of a supposed federal policy that the property shall be exempt. Where not federally connected, the court compensates with a vengeance. Then not only will there be no construction to favor exemption,48 there may even be a gloss of conditions additional to those legislatively expressed so as to deny exemptions unless the judicial policy favorable to laissez faire is satisfied.

The law regarding pro bono publico enterprises is ampler and more varied than that as to public property. The code's relatively sparse provision as to the latter contrasts with the proliferating itemization46 of uses "for educational, literary, scientific, charitable or religious purposes". In the case law, there is a similar disproportion; but the ramifications are not necessarily clarifications.

The legislature has been disposed to a generous construction of its authority to exempt, as witness its exercise in behalf of college fraternities ("any college or university society")47 and the lodges of Masonic and similar bodies ("benevolent associations")48, as to

42 It is a well-worn generality that statutes are to be construed to extend taxation and limit exemptions, see 2 COOLEY, op. cit. supra note 20, § 672.
46 W. VA. CODE c. 11, art. 3, § 9 (Michie, 1949) ("All property . . . described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say: . . . property used exclusively for divine worship; parsonages, and the household goods and furniture pertaining thereto; mortgages, bonds, and other evidence of indebtedness in the hands of bona fide owners and holders hereafter issued and sold by churches and religious societies for the purposes of securing money to be used in the erection of church buildings used exclusively for divine worship or for the purpose of paying indebtedness thereon; cemeteries, property belonging to, or held in trust for, colleges, seminaries, academies, and free schools, if used for educational, literary, or scientific purposes including books, apparatus, annuities, money and furniture; public and family libraries; property used for charitable purposes, and not held or leased out for profit; all real estate not exceeding one-half acre in extent, and the buildings thereon, and used exclusively by any college or university society as a literary hall, or as a dormitory or club room, if not leased or otherwise used with a view to profit; all property belonging to benevolent associations, not conducted for private profit; property belonging to any public institution for the education of the deaf, dumb, or blind, or any hospital not held or leased out for profit; house of refuge, lunatic, or orphan asylum; homes for children, or for the aged, friendless or infirm, not conducted for private profit; fire engines and implements for extinguishing fires, and property used exclusively for the safe-keeping thereof, and for the meetings of fire companies. . . .")
47 Such groups are not exempt in most states, see Chamberlin, Tax Exemption of Greek Letter Fraternities, 4 U. or Cin. L. REV. 186 (1950); cf. Comment, 23 IOWA L. REV. 438 (1938) (fraternity building corporations).
48 This appears to be the general rule although with some exceptions in states having more narrowly phrased statutes, see 2 COOLEY, op. cit. supra note 20, § 764.
each of which it has aligned itself on the less restrictive side of a split of opinion among the states. By and large so has the court, but with an unevenness which a review of prior decisions will indicate—and which in turn may indicate the course of future decision.

Once satisfied that a claimant comes fairly within a constitutionally and legislatively specified category of beneficiaries and that it holds the property for which exemption is claimed as property devoted to the ends which entitle it to be so ranked, the court has not quibbled over particulars of more or less so as to deprive the claimant of leeway for flexible operation. Thus, in State v. Kittle,49 premises held by trustees as a parsonage and occupied as such for over a year but thereafter for fourteen years rented to lay persons and the rentals applied to parish activities (the church evidently being served by a supply pastor) were held to have been properly omitted from assessment. Antecedent holding preparatory to the appointed use or subsequent holding incident to advantageous disposition with as much expedition as could reasonably be exercised were as effective as occupancy itself to sustain the exemption.50 In Mountain View Cemetery Co. v. Massey,51 exemption as a "cemetery" was allowed for an entire sixteen acre holding, on the outskirts of Charleston, of which only three acres had been developed and even less sold, the rest being held as a reserve for future development. Neither bad faith nor disproportion of amount to prospective need appearing, the exemption accrued to all the land in the project even though there was nothing to hinder the owner's diverting the undeveloped portions to other purposes. Prima facie these allowances of time and area margins would seem equally valid for other exemption beneficiaries. One cannot be quite positive, because the opinions laid some stress on the circumstance that parsonages and cemeteries respectively are mentioned eo nomine in the statute, because the Kittle case hints at a differentiation between parsonages and property whose exemption is phrased in terms of its use,52 and because some mawkish language in the

49 87 W. Va. 526, 105 S.E. 775 (1921).
50 Id. at 533, 105 S.E. at 777 ("Unrestrained exemption of parsonages clearly extends to property in course of preparation for such use and to property in process of disposition, after discontinuance thereof, or held in vacancy pending determination as to its ultimate disposition"); cf. Cole v. State, 78 W. Va. 410, 80 S.E. 487 (1913) (vendor of church premises not given possession of or deed to premises until 3 January not taxable although contract was made the preceding November, the state's "tax day" being (?) 1 January).
Mountain View case might be read as according cemeteries also an exceptional status. As against this, however, and strongly indicative of a more generalized doctrine is the result in Reynolds Memorial Hospital Ass'n v. Marshall County Court.53 The exemption beneficiary there was a hospital whose operations were decided to be charitable in nature. What is here pertinent is that the exemption was allowed not only as to the land occupied by hospital and nursing school buildings but also as to other contiguous vacant lots, some of which were used for hospital purposes and others perhaps unused. No stress is laid on that circumstance in the opinion which is, however, quite clear to the point that exemption rested on the charitable nature of the beneficiary's activities. The net effect would seem to be to rebut any inferences that might be derived from casual expressions in the Kittle and Mountain View cases limiting the principle to parsonages and cemeteries.54

It is not the law, however, that occupancy and use for exemption qualifying purposes of part of a parcel of realty will confer exemption on the entire parcel owned by an eleemosynary body. State v. McDowell Lodge No. 112, A.F. & A.M.55 refused exemption to a four story building, the upper two floors of which were used for lodge purposes by the owner, a Masonic lodge, but the lower two of which were rented out to individuals as ordinary income producing property, even though the income was all applied to paying the construction and maintenance charges of the building and to the lodge's charitable objects. The situation is readily distinguishable from those in the Mountain View and the Reynolds Memorial Hospital cases where the surplus land was simply held for use in connection with present or prospective uses of the exempted enterprise, not put on the rental realty market as a source of income.56 It is more difficult to reconcile it with State v. Kittle. The distinction proposed has already been alluded to, namely, that parsonages are exempted in terms whereas the Masonic lodge's exemption was conditioned on charitable user. It is respectfully submitted that that distinction is illusory for, while it is

54 It may also be observed, that although both those cases were subsequent to the Reynolds Memorial Hospital case, neither of them contains language purporting to limit or distinguish it.
55 96 W. Va. 611, 123 S.E. 561 (1924).
56 There may be economic unwisdom in a distinction which promotes resource waste by placing a premium on lands' standing idle or at any rate not being applied to their highest and best use; but, if so, it is not peculiarly a West Virginia phenomenon that elements of the tax structure—judicial, legislative or constitutional—fall short of the economic ideal.
true that the statute says nothing about the use of parsonages,\(^{57}\) it rests on a constitutional provision, "property used for ... religious purposes" which fixes its allowable scope\(^ {58}\) and which does mention use. Moreover the result of "once a parsonage, always a parsonage" (at least until change of title) which would follow is one which the court can hardly be seriously have supposed to intend. A more tenable distinction between the Kittle and the McDowell Lodge cases would seem to be that in the former the leasing was only \textit{ad interim} and incidental to a purpose of disposing of the property when a suitable opportunity arose while in the latter it was apparently designed as a continuing financing program. Actually the difference in result probably represents an inarticulate response to still a third and more fundamental consideration which will later be adverted to in its appropriate place.

An interesting question raised by the McDowell Lodge case but unanswered there or elsewhere in the West Virginia cases is whether the lodge (or a comparable exempt activity) although not entitled to exemption of the whole property could successfully claim it \textit{pro tanto} for that part of the property's value, \textit{e.g.}, the value of the upper two stories, occupied by it and used for its exemption conferring purposes.\(^ {59}\) The contention may well have been unavailable in that case for it seems to raise issues of valuation no longer available under the procedure which was resorted to, instead of addressing itself to taxability only (though that too is involved). Another even more puzzling question is possible if separation is temporal rather than spatial, with the building let out, say, as a convention hall at certain times but reserved for lodge uses a stated number of days per week.\(^ {60}\) The problems of valuation would be most perplexing but the questions are in-

\(^{57}\) The common law requirement seems to have been that the parson (or vicar) continue in residence at the parsonage, see 1 BL. COMM. *392.

\(^{58}\) Differentiation of parsonages into a favored category might well raise doubts on "First Amendment due process" grounds under the United States Constitution, in view of the fact that the validity of property tax exemptions for religious bodies seems to relate to their being assimilated with other social welfare institutions, \textit{cf.} Watchtower Bible & Tract Soc. \textit{v.} Los Angeles County, 181 F.2d 739 (9th Cir. 1950); \textit{see} dissenting opinion of Reed, J., in Illinois \textit{ex rel.} McCollum \textit{v.} Board of Education, 333 U.S. 203, 249 (1948).

\(^{59}\) The matter is fully treated in Note, 159 A.L.R. 685 (1945) which indicates a general tendency to grant \textit{pro tanto} exemption. \textit{But cf.} Note, 65 HARV. L. REV. 288, 297 (1950).

\(^{60}\) Suppose a ladies' aid society serves junior-senior banquets, Kiwanis luncheons, etc. in the church basement? If it is concluded that does not eliminate the exemption, what about letting out the dormitory of an exempt private college to parents and alumni attending commencement, during summer months for conventions or conferences?
triguing enough to stimulate the hope that some taxpayer will some time find it worthwhile dollars-and-cents-wise to raise them.

Technicalities of record title or of formal legal capacity are not of governing importance. In the Reynolds Memorial Hospital case, the hospital owned none of the lots exempted. Title to some was in a nursing school (itself probably qualified for exemption), to others in trustees for a religious body (which, however, was not shown to receive any benefit from their holding), but there were still others whose title was individually in one of those trustees, not subject to any trust instrument although shown by proof to be held for the same trust purposes as the others in behalf of still another religious organization which was equitable owner of all the lots. Regardless of these variations in title, all were equally held exempt, the opinion expressly asserting that the nature of the use and not that of the title was the criterion.61 And the fact that the hospital was not incorporated nor even an orthodox charitable association functioning under a standard declaration of trust62 but was wholly managed and controlled by the individual "lot owner", thus having in strictness no separate legal existence, was likewise no bar to exemption.

Again, the fact that the exemption beneficiary's bounty is not extended to everybody, or to everybody gratuitously, does not deprive it of tax immunity. Here we are not concerned, though later we must be, with exemptability of enterprises operated for a profit, but are dealing with those whose privileged position is conditioned upon their activity's being eleemosynary. The Reynolds Memorial Hospital case is again in point. So far as they were financially able to pay, in the judgment of the hospital manager, patients were received as pay patients, otherwise as charity patients. But no one was refused admittance because of inability to pay and no distinction was made on that basis in the treatment of those admitted. Well over half, on the average, were charity patients and there was regularly a large annual deficit, made good by voluntary contributions. Under the circumstances the reception of pay patients did not negative exemption. In re Masonic Temple

61 Reynolds Memorial Hospital v. Marshall County Court, 78 W. Va. 685, 688, 90 S.E. 238, 239 (1916) (“The applicants do not seek exemption from taxation on account of the title by which they hold the property, nor the character of the authority to control it but for the reason that it is property used for 'charitable purposes'... It is the use to which the property is to be applied that determines whether or not it may be exempted from taxation”).

62 See W. Va. Code c. 35, art. 2 (Michie, 1949) and especially § 6, constituting the trustees of organizations qualifying under the article “a corporation” with “all the privileges and powers of nonstock corporations".
Society rejected a suggestion that limitation of the benefits to a restricted class, members of the organization (in the instant case specifically to Masonic lodges) avoided the claim. That result is of course reminiscent of the one applied in determinations respecting charitable trusts and it may be expected that the latter affords a pattern for decisions in the analogous field of tax exemption in close cases.

On this record, the Supreme Court of Appeals cannot be charged with an unsympathetic attitude toward public welfare claims to tax exemption. Still, there is a reverse side to the coin.

Ferguson v. Townsend settles that our liberality in the matter of exemptions is distinctly intramural. There the privilege was denied a Hampton Roads, Virginia, museum, as to West Virginia property which under the then law would have been tax immune if similarly held for a like institution having its operating situs within our borders. The result, predicated on the idea that the rationale of exemption is a reciprocal of benefit conferred on the people of the state by the exemption beneficiary, seems to be in line both with the prevailing rule elsewhere and with manifestations of the legislative will. One can hardly reproach the court for not adopting a position of superior moral elevation in this matter from what West Virginia charities could expect to encounter abroad—yet it was ungracious to characterize the dwellers in our ancient mother state as "foreign peoples". A highly sophisti-

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63 90 W. Va. 441, 111 S.E. 637 (1922).
67 A legislative attitude is clearly spelled out in the inheritance tax statute which, from first enactment, limited its exemption of charitable bequests to cases where the property transferred "is used for the purpose herein mentioned in this state", W. Va. Acts 1909, c. 63, § 2 (b), a qualification later re-emphasized to read that it be "used exclusively in this state", W. Va. Acts Ex. Sess. 1921, c. 3, § 2 (b), in which form it continues, see W. Va. Code c. 11, art. 11, § (e) (Michie, 1949), with a recent extension, W. Va. Acts 1951, c. 177 to allow similar treatment for a bequest which is to be used "for the sole benefit of persons domiciled in this state" if that restriction is manifested in the manner prescribed by the amendment. There is no reason to suppose that the legislative will as to property tax exemptions differs from that declared as to inheritance tax exemptions. Its elaboration in the latter, as contrasted with the silence of the former, is explainable by the circumstances that the latter is a much more modern statute with consequent greater refinement of draftsmanship and that the court's construction in Ferguson v. Townsend dispensed with any need for a legislative declaration. Indeed, the 1951 amendment cited, in adopting a position adumbrated in that opinion, rather indicates both legislative awareness of the opinion and concurrence in it both as to its holding and as to the question impliedly reserved.
68 See Ferguson v. Townsend, 111 W. Va. 432, 436, 162 S.E. 490, 491 (1932)
cated argument that residents were in fact specially benefited by this extrastate institution was demolished with caustic accuracy;\textsuperscript{69} but the very fact of its being answered in terms of the particular case rather than broadly rejected leaves alive a possibility that an outside activity may still qualify for exemption provided it ad-

duces clear and convincing proof that its holding of the property involved enures peculiarly to the benefit of West Virginians.

It is the “trust deed” situation, however, which has vexed the court most and oftenest and where, after an about-face, it has established the most revealing limitation as to the operation of exemptions. The issue involved is, whether use as a source of income for an institution within the permissible category of public welfare enterprises without other use made of property by the institution is enough to sustain the exemption.

So far as its intention might govern, the legislature said “yes” in 1917, by a statutory provision setting up detailed administrative safeguards requiring the tax commissioner's approval of the deed of trust under which the income producing property was held.\textsuperscript{70} The statute was initially accepted as valid and the court busied itself with the matter of construing and applying the terms. Use of the income to discharge debts was compatible with the existence

\textsuperscript{69} \textit{Id.} at 439, 162 S.E. at 493 (“It is argued that the museum will benefit the people of this state, because Hampton Roads is the state's chief harbor for the shipment of coal, especially for coal from southern West Virginia. The argument is that the coal industry in that part of the state will be stimulated and the entire citizenship correspondingly benefited. We are not impressed with that argument. There is now no lack of water transportation for coal at Hampton Roads. The coal industry is suffering for want of markets and adequate prices for its product, and not for transportation either by rail or water”).

\textsuperscript{70} W. Va. Acts 1917, c. 62 (“... and, \textit{provided, further}, that such exemption from taxation shall apply to all property, including the principal thereof, and the income therefrom, held for a term of years or otherwise under a bona fide deed of trust, transfer or assignment, by a trustee or trustees required by the terms of such trust to apply, annually, the income derived from such property to education, religion, charity, and cemeteries, when not used for private pur-

poses or profit. Such transfer or assignment shall be in writing and have the approval of the state tax commissioner endorsed thereon; and a copy thereof shall be filed in his office before such exemption shall apply to the property embraced therein; and all books or papers showing the collection and distribu-

tion of money or property under or by virtue of any such trust shall be open to the inspection of such commissioner, his deputies or assistants, at all reason-

able times. And, whenever from any cause, such commissioner shall determine that any such trust is not bona fide, or that it was created or is carried on for the purpose of evading taxation, then he shall withdraw his approval thereof by written notice served upon any trustee in such trust, and thereafter all property served by such trust shall be subject to taxation; but any person beneficially interested may appeal from any such decision of said commissioner to the circuit court of the county wherein the trustee resides, and if such trustee resides outside the state of West Virginia, then to the circuit court of the county wherein the seat of government is located; and with the further right of appeal to the supreme court of appeals by any party to the proceedings”).
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of the exemption where the debts arose out of loans to the trustees for the prescribed institutional purpose and so served merely to make funds available anticipatorily71 but incompatible where the debts, though secured by encumbrances on the property, were anterior to the trust which had never received from them anything to apply to its charitable purposes.72 The cestui must be dispensing its bounty in West Virginia or in special aid of West Virginians, not elsewhere and at large.73 Instalment payments received on account of a projected transfer of the trust property by the trustee, whether construed as lease with option to purchase and apply or conditional sales contract, were as operative as conventional rentals to preserve the exemption.74 Prichard v. Kanawha County Court75 ruled squarely and with elaborate reasoning in favor of the statute's constitutionality while all the other cases cited assumed it.

Central Realty Co. v. Martin76 held that the statute could not constitutionally be applied under circumstances not distinguishable from those involved in the earlier cases. The Central Realty Company decision remains the latest—and therefore governing—expression of judicial doctrine. The legislature has acquiesced to the extent of dropping the "trust deed" clause from the statute and substituting other language77 which probably78 should be taken to paraphrase the Central Realty Company holding. The case is thus of sufficient importance for the current law of tax exemption to demand careful consideration of what it held, and beyond that, of how it affects the general pattern of tax exemption in this state.

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72 State ex rel. Farr v. Martin, 105 W. Va. 600, 143 S.E. 356 (1928).
73 Ferguson v. Townsend, 111 W. Va. 432, 162 S.E. 490 (1932).
74 Patterson Memorial Fund v. James, 120 W. Va. 155, 197 S.E. 502 (1938).
75 109 W. Va. 479, 155 S.E. 542 (1930).
77 W. Va. Acts 1945, c. 143 ("Notwithstanding any other provision of this section, however, no language herein shall be construed to exempt from taxation any property owned by, or held in trust for, educational, literary, scientific, religious or other charitable corporations or organizations, unless such property is used primarily and immediately for the purposes of such corporations or organizations").
78 The hedging, an instance of the writer's cautious if not ultraconservative nature, is because the formula, "used primarily and immediately for the purposes", originates not in the Central Realty case but in State ex rel. Farr v. Martin, 105 W. Va. 600, 143 S.E. 356 (1928) where it was used to differentiate the case where income was used to discharge antecedent encumbrances on the property from the situation where it becomes available for application to the charity's objects. The Central Realty case did, indeed, proceed to rest on a distillation of the principles derived from reading State ex rel. Farr v. Martin in association with a couple of other (non-"trust deed") cases and mentioned the "primarily and immediately" formula repeatedly in the opinion (though never in the syllabus). The only syllabus reference to the formula is in State ex rel. Farr v. Martin, which assumed the constitutionality of the "trust deed" provision and used "directly and immediately" as a rule for its interpretation. It
As a focus of benevolence, redounding to the advantage of the community, the charity involved in the Central Realty case had perhaps something of an edge on those in the other cases. It was an offshoot of an old-line nationally known benevolent association which, it may be assumed, would attract outside subsidies and visitors and make business for Elkins, where it operated, whereas they seem without exception to have been those single donor projects which so often languish as undernourished bids for individual immortality. This is not meant to impugn the propriety of classifying their purposes as being within the terms of the statute. As to that, we may accept, as did the court, the determination made by the tax commissioner in approving the trusts. But it does suggest that the relative prospects of substantive benefits to the people of the state was not an inarticulate premise influencing the difference in result.

The nature of the trust property from which the income derived was substantially alike in all the cases. In all it was improved real estate—indeed, in both State ex rel. Farr v. Martin and Central Realty Co. v. Martin, it was by a most improbable coincidence a Huntington hotel.

This aspect of the cases, while not of course providing any basis for distinction, is of great relevance in settling the scope of decision in the Central Realty case. Not only does the syllabus particularize “real estate” as not entitled to exemption, the opinion, in its analysis of the “use” test, is meticulous to designate land as the species of property whose physical use is distinct from the use of the income. “We do not mean”, says the court, “that the exemption clause of the constitution should be applied with the same rigor to all property... There are certain kinds of personal property such as stocks, bonds, evidences of debt and other intangibles where the income therefrom is sufficiently identical with the use of the property that the use of the income is, in effect, the

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79 The Odd Fellows Home.
80 105 W. Va. 600, 143 S.E. 356 (1928). This fact does not appear in the report of the case but it is so stated in Prichard v. Kanawha County Court, supra note 71.
81 Central Realty Co. v. Martin, supra note 76, at syllabus 1.
82 Id. at 921, 30 S.E.2d at 724.
use of the property. But this does not hold true as to land". This is about as plain a warning as one can want against generalizing the conclusion of unconstitutionality to embrace all trusts of income producing property whatever the property's kind. Superficially the distinction seems to be between realty and personality. It is doubtful, however, that this is more than an approximation of the line intended to be drawn. Some personality, e.g., a fleet of trucks, is as capable as any building of physical use and occupancy distinct from income use. Some realty—very possibly any separate ownership of mineral rights and certainly a lessor's interest under a coal lease, to mention locally important situations—is not. It is submitted that a trust holding of the former would be denied and one of the latter could be accorded the exemption under the Central Realty doctrine. Clearly the specification of "stocks, bonds, evidences of debt and other intangibles" implies that they and other property ejusdem generis fall outside the constitutional bar. What then is the idem genus by which they are related? Despite the expressions indicative of its being their personal property status, it is believed that the really significant common element is their practical incapacity for enjoyment by occupancy and the consequent limitation of their use to use of the income from them. This view is supported by the remark that "Land is corporeal, albeit there are incorporeal rights connected therewith, but in this case were are concerned with the use of a tangible and material res", as well as by the opinion's recurrent emphasis on the "primary and immediate" use of property as opposed to a use of the second order. The notorious poor enforcement of the personal property tax, most scandalous as to moneys and credits, may blunt the edge of this distinction in application (as no doubt it does explain why all the situations which arose under the "trust deed" clause involved realty), but cannot alter the content of the holding. That holding, on my reading of the case, is that the exemption is unconstitutional insofar as the property held in trust is readily capable of a use more direct than the use of its income, to wit, physical occupancy and enjoyment, but not otherwise, and

82 Ibid.
84 On the nature of a landowner's title to mineral interests, see DONLEY, LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA §§ 1-3 (1951).
85 Id. at § 121a.
86 The ejusdem generis rule has been applied in connection with classification of property for taxation, see Greene Line Terminal Co. v. Martin, 122 W. Va. 483, 492, 10 S.E.2d 901, 906 (1940).
87 Central Realty Co. v. Martin, 126 W. Va. 915, 921, 30 S.E.2d 720, 724 (1944).
that a capacity for such more direct use is commonly present where interests in realty are involved but less characteristically so as to interests in personality.

All this is to some extent speculative and must now remain so. The legislature, if not by the enactment of the "primarily and immediately" amendment, certainly by the excision of the trust deed proviso, has swept away the whole exemption. Whatever the constitution, as interpreted by the Central Realty case, may direct, the code at present places realty and personality, tangibles and intangibles, all on the same plane—taxability if the charity's interest is limited to receiving as cestui the income. As to all alike, any mitigations derive from structural laxity in the assessment process, not from a valid claim to exemption. The question whether the constitutional position of Prichard v. Kanawha County Court or that of Central Realty Co. v. Martin is right is therefore of no practical consequence.

More than that, it is pointless. Right by what standard? If the question addresses itself to which view is in line with that more generally prevailing elsewhere, "the weight of authority," the Central Realty doctrine gets the nod. Probably that is true, too, if the test is which comes closer to what the draftsmen of the constitutional provision contemplated. Our examination of the extant materials, while it shed little light on what notions they entertained about the tax provisions, did show that they were looking to contemporary customs and practices as the measure of what they had embraced in the category of permissible exemptions. Undoubtedly they deliberately rejected the legislative latitude given by the Virginia constitution as it then stood; but, being, like all of us, children of their time and place, they could hardly escape the context of their Virginia culture in appraising what those contemporary customs and practices were. It therefore seems appropriate to look to the Virginia situation, not as constituting legal authority but as a cultural matrix. Prichard v. Kanawha County Court undertook to do that, leaning heavily on Virginia materials and particularly on Petersburg v. Petersburg Benevolent Mechanic's Ass'n. That case held squarely enough that tax exemption appertained to property as to which the

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88 Supra note 77.
89 See Howard University v. District of Columbia, 155 F.2d 10, 12 (D.C. Cir. 1946); 2 COOLEY, op. cit. supra note 20, § 686; Note, 64 HARY. L. REV. 288, 294 (1950). The Central Realty case disclaims reliance on this particular basis of support, however, 126 W. Va. at 920, 30 S.E.2d at 723.
90 Supra page 172 at note 7.
91 78 Va. 431 (1884).
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charity's interest was that of income recipient. But it was decided in 1884 and even the statute there involved was not enacted until 1877 whereas the West Virginia constitutional provision is a product of 1863. With nothing better to go on, the passage of fifteen or twenty years might indeed legitimately be dismissed as insufficient to bring about a change in general understanding regarding the appropriate range for tax exemption. But there is something better and it points to the Central Realty result. A proviso to the real property tax exemption section as it stood just prior to separation read, "that nothing herein contained shall be construed to exempt from taxation any lot or building partially or wholly used as a residence, or for any private purpose". A primitive formulation of the Central Realty doctrine was thus officially evidenced as the received understanding as to the appropriate scope of exemption and seems to have an excellent claim to show what the constitutional framers thought to be normal practise. Insofar as the question is which decision is better supported by authority, either the authority of judicial opinion elsewhere or the authority of the intention of the framers of the constitution to the extent that is discernible, the Central Realty case seems to be indicated.

Unwilling to rest on these adequate but humble formal grounds, that opinion essayed to establish a substantive basis as well. The attempt is not quite convincing. One gropes for enlightenment in a compound fog of linguistics and economics. "The word 'used'", we are told, "means exactly what is there said", but that hardly helps, there being numerous alternative senses of the word among which choice may be made. The problems involved in the concepts of property as the origin of a flow of goods and

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92 Unlike the West Virginia provision, which deals with real property and personal property exemptions in one consolidated section, the Virginia statutes at the time of separation treated them separately. Those as to personal property were organized on so different a plan as to have no relevance and only the real property exemptions are pertinent.


94 The 1944 edition of Webster's unabridged dictionary gives nine senses of "use" as a transitive verb.

95 Capacity for multiple meanings, unaccompanied by guidance as to which applied, has been suggested as the criterion of "ambiguity in a statute or other instrument", see State v. Harden, 62 W. Va. 313, 315, 58 S.E. 715, 716 (1907) (syllabus 13). On the general problem of the need for choice in assigning meaning to statutory words and the shortcomings of the "plain meaning" approach, see 2 Sutherland, STATUTES AND STATUTORY CONSTRUCTION §§ 4502, 4503 (3d ed. 1943).
services in specie or the origin of a flow of income\textsuperscript{96} are noticed\textsuperscript{97} but the relevance of the distinction is left to assertion without demonstration. Some familiar types of property are capable, others incapable of use otherwise than for the production of income, we are told, and therefore (so the court seems to conclude) income-producing use of the latter must be enough to sustain exemption while such use of the former is not enough to meet the constitutional test of use. The logic is faulty. Suppose we grant the accuracy of the observation as to differences between kinds of property in the modes of use possible, the correctness of the premise that the constitution by speaking generally of "property used" for designated purposes implies that no species of property was wholly proscribed as a potential object of exemption, and the conclusion that property capable of no use other than income production to escape such proscription must be allowed to be exempted as to that income producing use. That property which is capable of other use is not to be allowed to be similarly exempted does not follow, as the court seems to have assumed it did. "Property used", as a verbal formula, if comprehensive as to "property" is also comprehensive as to "used"; and the limitation read into the latter because of observed variances in the members constituting the former nicely illustrates the common vice of rendering negatives too casually pregnant.

The trouble with the opinion is that it undertakes to establish a logical foundation and does not deliver. This means only that the conclusion was not supported by sufficient reasons. After what was just said, it should be needless to state that this does not suggest that it could not be, far less that reason demanded the contrary result. There one gets beyond the operations of formal logic into the factors influencing selection of major premises, vulgarly nicknamed policy questions. As to them, it has latterly

\textsuperscript{96} Economists do not usually discuss the matter in just this way but analogous distinctions in various formulations are a staple of economic discourse, see e.g., Fisher, The Nature of Capital and Income 22 (1906) ("wealth" and "property"); 1 Taussig, Principles of Economics 84 (1911) ("capital" and "capital goods"). For an elaborate classification, collating this with other bases of distinction, consult Noyes, The Institution of Property 458 (1936). The text's imputation of intellectual ancestry may of course be disclaimed and the alternative of professional conceptual inbreeding, from sources such as the classical legal notions about corporeal and incorporeal hereditaments, see 2 BL COMM. 20, plausibly preferred. Even so, no apology is offered for showing kinship of ideas with those entertained by another discipline whose thinking about the matter has been more rigorous than has ours.

\textsuperscript{97} See Central Realty Co. v. Martin, 126 W. Va. at 921, 30 S.E.2d at 724.
been the intellectual fashion to frown upon tax exemptions.\textsuperscript{98} Diffidence in translating one's predilections into axioms, however commendable, is always rare. My own bias is to leave such choice of policies largely to the legislature as being the representative organ, duly recognizing nevertheless that our fundamental arrangements of rigid constitutions and of judicial review presuppose that under some circumstances the judiciary shall discard the legislative choice in favor of its own. That spells neither approval nor disapproval of the result in the particular case. Even if it did, that would be beside the point. Nothing that has come to my attention indicates that any one is or ought to be especially concerned with my conclusions as to the proper evaluation of the interests pressing for recognition. But an analysis—descriptively, not critically—of the court's evaluation of them in the whole series of cases is essential to any understanding of the law of tax exemptions. Indeed, in any proper sense, that is the law of tax exemptions.

The competing claims and demands involved in tax controversies are perhaps sufficiently indicated by Holmes' famous characterization of taxes as the price the individual pays for civilization.\textsuperscript{99} The interest of the taxpayer in keeping his personal share of the outlay as low as possible is obviously an individual interest of substance and more specifically an interest in property.\textsuperscript{100} The state as purveyor of the "civilization" asserts representatively the whole range of public and social interests.\textsuperscript{101}

When it comes to exemptions, the analysis becomes more complex. On the assumption that the quantum of "civilization" which a community with a particular culture demands must still be supplied and must still be paid for, the question resolves itself into how far the state in recognizing others as its surrogates to provide portions of it shall in return relieve them of a share of the general burden and correspondingly redistribute it to bear more heavily on the rest of the population. The latter's interest continues

\textsuperscript{98} See, e.g., Killough, \textit{Exemptions to Educational, Philanthropic and Religious Organizations} in \textit{Tax Exemptions} 23 (Tax Policy League Symposium 1939); Stimson, \textit{The Exemption of Property from Taxation in the United States}, 18 \textit{Minn. L. Rev.} 411 (1934).

\textsuperscript{99} See 2 \textit{Holmes-Laski Letters} 1247 (1933)

\textsuperscript{100} But see Stone, \textit{The Province and Function of Law} 491 (1946). For a systematic discussion of the interest in property as an individual interest of substance, see Pound, \textit{An Introduction to the Philosophy of Law} c. 5 (1922). An extensive list of citations to illustrative materials will be found \textit{id.}, \textit{Outline of Lectures on Jurisprudence} 99 (5th ed. 1943).

\textsuperscript{101} As to these classes of interests, see Pound, \textit{A Survey of Social Interests}, 57 \textit{Harv. L. Rev.} 1 (1945), \textit{A Survey of Public Interests}, 58 id. 909 (1945).
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to be the same interest as before, i.e., the general taxpayer’s individual interest of substance, of property, larger in size because of the diminished divisor, but no different in kind. There is regularly and basically opposed to this the competing range of social and public interests, now marshalled in support of the claim to tax exemption instead of the original claim to taxes. In the primary taxpayer—tax collector situation, the preference almost universally is given to the interests represented by the latter.102 In the taxpayer-tax exemptee variant, this near universality dis-appears and courts often manifest a disposition to reverse the preference.103 No doubt this traces partly to the simple increase in size of the taxpayer’s claim but a great deal more seems attributable to a discounting of the genuineness or substantiality of the social (or—less frequently—public) interests asserted against it. Disallowances of exemption because of disparagement of the type of benevolence performed or insufficient generality in the recipients of the bounty or the commingling of compensated and gratuitous activity and the like represent judgments that the social interests asserted by the exemption claimant are not significant enough to prevail. As has been seen, our court is slow to make that judgment and readier than many courts of last resort to accept the legislative judgment on that point. If enhancement of its tax burden is the only disadvantage the taxpayer can show it sustains because of the exemption, the attitude has been and very likely will continue to be to subordinate that consideration and uphold the exemption.104

But some taxpayers as to some exemption claims experience an opposition of interests more particularized than merely how the residual costs of “civilization” left for the government’s provision shall be shared. If the exemption claimed is incident to owner-

102 Such commonplaces of judicial discourse as that the judiciary will only interfere with exercises of the legislative power to levy and collect taxes in case of clear violation of some constitutional provision or some fundamental concept of government and that the burden of proof to establish the incorrectness of an assessment rests on the taxpayer verbalize this attitude.

103 Such commonplaces of judicial discourse as that taxation is the rule and exemption the exception verbalize this attitude. Like other judicial policy determinations, this, although unrelated to semantic operations, is often disguised as a principle of statutory construction, see 2 COOLEY, op. cit. supra note 20, § 672.

104 However, Ferguson v. Townsend, 111 W. Va. 432, 162 S.E. 490 (1932) did make a deliberate judgment that extrastate charitable activities did not promote social or public interests of sufficient moment to the state to support their claim to exemption under generic terms. This is the only limitation of the attitude mentioned in the text which has thus far been disclosed by our court.
ship of an enterprise which puts the taxpayer and the exemption claimant in competition for compensated patronage, claims and demands besides those described in the preceding paragraph are affected. The exemption claimant's position may not, indeed, be significantly different. There may be an increment of individual interests to the social (or public) interests it asserts but these it asserts no differently than and with no superior pretensions to any purely private entrepreneur. The taxpayer's position is changed in this context, however. True, the interest asserted by the taxpayer may still be classified as an individual interest and even an individual interest of substance but it is no longer confined to the interest in property. It expands to embrace other branches of individual interests of substance—the interest in freedom of industry and contract and the interest in advantageous relations with others. Alertness in protection of these interests has played a chief part in the furtherance of the economic and social values popularly spoken of as freedom of competition or, by metonymy, "the American way". Our court's commitment to that aspect of our culture (therein faithfully reflecting the feeling of major segments of the population) is sufficiently intense that a taxpayer, asserting claims or demands in which are associated with an interest in property the further interests in freedom of industry and contract and in advantageous relations with others, may fairly expect a sympathetic valuing of the interests he asserts.

Hence, when the individual's role becomes, instead of that of a taxpayer trying to scale down his "civilization" bill by assailing the social (or public) interests urged by the exemption claimant, that of an entrepreneur setting up the claims and demands appropriate to that capacity, against one occupying a sheltered competitive position by virtue of a tax exemption, the new role assumes dominant importance. The social and public interests represented by the exemption claimant may be quite unchanged. Their evaluation, with our court so high they will almost always prevail as against a taxpayer's mere interest of property, is not high enough to subdue this new opposition. They have met more than their match. Our court's attitude is not unique—witness, as a relatively well-known recent parallel the amendment of the federal income law by Congress to expunge the exemption of corporate business activities of eleemosynary institutions. Nevertheless it is evident and affords an organizing principle which re-

conciles virtually our whole case law of property tax exemptions—both the usual liberality in applying legislative exemption grants and the sharp limitation in Greene Line Terminal Co. v. Martin and Central Realty Co. v. Martin. The common element of those two otherwise dissimilar cases, appearing also in State v. McDowell Lodge No. 112, A.F. & A.M., will be seen to be the functioning of the exemption claimant as a business competitor of taxpayers. These are significantly the only cases where domesticated social or public interests have had to give way. Rejection in the 1873 constitutional convention of the committee proposal favoring producer-owned goods during the year of production suggests the operation of the same sentiment, evidencing the consistency of the court's position with a value pattern continuous since the state's beginnings.  

The few cases that might be urged against this analysis raise objections which are apparent rather than real. All allowed the exemption in situations superficially incompatible with it. One, Chapman v. Huntington Housing Authority, reached a truly contrary result but is easily accommodated as involving an instance where state policy was made to yield to the superior compulsions of the federal system. In State v. Kittle, no such constraint existed but the competitive effect of the exemption grant was de minimis or even slighter. The case involved a single single-family residence in a country village and even at that sanctioned exemption only for a temporary participation in the rental market incidental to starting or winding up a holding for a non-market use. Read as a whole, qualifications together with case disposition, rather than challenging it re-enforces the general analysis. Mountain View Cemetery Co. v. Massey and In re Mountain State College, Inc., Assessment call for closer reading. Both involved exemptions of property, in the first case of a cemetery, in the second of a commercial college, devoted permanently and regularly to the conduct for a profit of the exemption claimant's business. In neither was

107 The continuity was no doubt broken pro tanto by the line of cases which the Central Realty case afterwards overruled and the legislation on which they rested but the latent possibilities of conflict between that line of cases and the co-existing decisions in the Greene Line and McDowell Lodge No. 112 cases seems not to have occurred to the court, so that the Central Realty decision would seem to have corrected an aberration from what was all along the basic principle.

108 121 W. Va. 319, 8 S.E.2d 502 (1939).

109 Intimations in the opinion that it may rest on a differential valuation of religious activities even more highly than the valuation of social interests promoted by secular agencies, together with the risk that such a differentiation might raise federal constitutional difficulties as an establishment of religion, have been noted in the discussion of this case.

110 117 W. Va. 819, 188 S.E. 480 (1936).
there any federal connection. In both, exemption was allowed, without limitation except that the property be genuinely held for and employed in the exempting use. It will be observed that in both the business affected is atypical, out of the main stream of a market economy. The great preponderance of educational activity clearly and of cemetery operation traditionally and perhaps even currently is on a not-for-profit basis. Unlike the rental real estate field—and, a fortiori, hotel operation—they involve situations where equalization of competitors is to be made in a population nearly all of whose members enjoy tax exemption rather than one nearly all of whose members have no particular basis for claiming an exemption. In such a setting, the interests in freedom of industry and contract and in advantageous relations with others will be given primacy by generalizing the exemption, not as in the more familiar case by generalizing tax liability. Recognition of exempt status for the commercial undertakings in the Mountain View Cemetery and Mountain State College cases does not impeach, therefore, the conclusion that the court's high evaluation of those interests is of controlling importance. It illustrates and confirms it.

The primary purpose of this article has been to inquire what the West Virginia law of property taxation is, which means, what can be predicted with reasonable confidence as to the probable disposition of future claims to exemption? The answer has been deemed to require a comprehensive review of the prior determinations in the field and a systematic appraisal of them according to some useful frame of reference. Such a frame of reference has been found in the scheme of interests delineated by Pound. A secondary purpose, indeed, has been to demonstrate the relevance of a broad jurisprudential approach for articulating the heterogeneous particularities of case law. This, in other words, is a detailed working out in one small area of insights afforded by a study of jurisprudence. It is not intended to suggest that the particular jurisprudential approach selected is uniquely capable of giving fruitful results. It is emphatically not intended to express (or imply) any criticism, either favorable or adverse, of the content of the law or, what says the same thing, of the relative weight given by the court to competing interests. Evaluation is the court's function. Mine is description. It has been discharged by an examination whose results may be summarized thus: To the social (or public) interests represented by exemption claimants, a very high value is attached—but not the highest. They are
strong enough to prevail against a property interest merely, which is what a taxpayer *qua* taxpayer asserts. They take second place to the interests in freedom of industry and contract and in advantageous relations with others which are relevant where grant or denial of exemption would modify the conditions of competition as between exemption claimant and other sellers in the same market.

111 The statement has to do with the character of the competing interests, not with the matter of the formal parties to the litigation. The adverse litigant appearing against the exemption claimant may be and often is the state or an official, and conversely the formal assertion of the exemption claimant's claims may be tendered on its behalf by an official, sued by a taxpayer.

112 The court seems to have been sensitive only to competition among sellers in disregard of competition among buyers. In thus concentrating on the supply and correspondingly neglecting the demand features of competition, it follows what seems to be the current convention in popular and journalistic discussions of competition.