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## Standard Oil, Consolidated Coal, and the Roots of the Resource Curse in West Virginia

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# STANDARD OIL, CONSOLIDATION COAL, AND THE ROOTS OF THE RESOURCE CURSE IN WEST VIRGINIA

*Alison Peck\**

## ABSTRACT

*Despite its natural resource wealth, West Virginia today ranks last among all states in its residents' overall sense of well-being, a puzzle that economists call "the resource curse." Much of West Virginia's wealth, in the form of coal, oil, and gas, left the state in the late nineteenth and early twentieth centuries before the state could tax it. This discouraging story was not inevitable. In 1905, a Morgantown lawyer named George C. Baker led an effort to tax coal, oil, and gas leases as personal property that nearly succeeded. Baker and his allies, Governor William M.O. Dawson and Tax Commissioner Charles W. Dillon, won a high-profile court battle in 1905 against industries that had managed to defeat hot-button tax reform efforts in the legislature the year before. While powerful Standard Oil Company was resigned to comply as it focused on more threatening battles elsewhere, the coal industry resisted. Coal companies and their attorneys succeeded in diluting the new taxes nearly out of existence at the assessment stage under a theory that the West Virginia Supreme Court of Appeals would uphold in late 1906, changing course from its decision just a year earlier. Despite the efforts of Baker and his colleagues, the corporate reforms that prospered on the national level during the Progressive Era never took root in West Virginia. This history bears revisiting in the current debates over tax reform and the prospects for economic and social development of the state.*

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## I. INTRODUCTION

“There is not a possible doubt but that in a very few years West Virginia will be ranked as one of the wealthiest states in the Union. It cannot help but be,” gushed the authors of a state promotional journal in 1900. “The coal is of the very best quality. . . . Oil and West Virginia are synonymous.”<sup>1</sup> *The Morgantown Post* was equally bullish on the state’s development prospects: “There is no state in the Union that has such a bright outlook for the future as West Virginia.”<sup>2</sup> But similarly high hopes had been disappointed before. The West Virginia Tax Commission of 1884 wrote, “[w]hen the war ended, it was confidently expected that West Virginia would advance in population and wealth more rapidly than any other State.” But despite the state’s central location, moderate climate, mineral wealth, and coal and timber resources, the Commission observed, “this State has not progressed one half as much as she ought to have done.”<sup>3</sup>

It would be nearly a century before economists and political scientists would amass substantial evidence of a “resource curse.” The resource curse theory suggests that a region’s natural resource wealth may adversely affect its economic, social, or political well-being.<sup>4</sup> While much of the research on the

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<sup>1</sup> JOHN ALEXANDER WILLIAMS, *WEST VIRGINIA AND THE CAPTAINS OF INDUSTRY* 170 (1976) (quoting *THE WEST VIRGINIAN* 7 (1900)).

<sup>2</sup> *Id.* at 170 (quoting *THE MORGANTOWN POST*, May 22, 1900).

<sup>3</sup> *Id.* at 167 (quoting *WEST VIRGINIA TAX COMMISSION, PRELIMINARY REPORT* 4 (1884)).

<sup>4</sup> See Michael L. Ross, *What Have We Learned About the Resource Curse?*, 18 *ANN. REV. POL. SCI.* 239, 240 (2015) (defining “resource curse”). The term “resource curse” may have been coined by *The Economist* in the late 1970s. See Michael L. Ross, *The Political Economy of the Resource Curse*, 51 *WORLD POL.* 297, (1999) [hereinafter Ross, *The Political Economy*] (reviewing TERRY LYNN KARL, *THE PARADOX OF PLENTY* (1997); Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* (Nat’l Bureau of Econ. Rsch., Working Paper No. 5398, 1995); and D. MICHAEL SHAFER, *WINNERS AND LOSERS: HOW SECTORS SHAPE THE DEVELOPMENTAL PROSPECTS OF STATES* (1994)). The phrase has been a term of art in development

resource curse is based on comparisons between countries, recent scholarship has also applied the analysis to resource-rich regions of the United States with historically high levels of poverty, especially Appalachia.<sup>5</sup> Although scholars of the resource curse still disagree whether there is an inverse causal relationship between natural resources and development, there is broad consensus that natural resource wealth does not routinely lead to prosperity for a region—a proposition that would have been highly counterintuitive to those West Virginia state promoters from the Civil War to the turn of the century (and to neo-classical economic theory in general).<sup>6</sup>

Scholars have suggested several types of traps that resource-rich areas may fall into. Economists have pointed to causes including declining terms of trade, global price instability, and underinvestment in or distortion of other sectors.<sup>7</sup> While these factors have some explanatory power, all can be substantially reduced based on a country's economic policies, which led scholars to a different question: If countries can avoid the economic traps of the resource curse, why don't they reliably succeed in doing so? To answer it, political scientists have suggested several political, rather than economic, failures that may lead to a resource curse: myopia (either laxity or overexuberance) among public or private actors; excessive political leverage of private actors who favor production; or institutional factors such as a tendency to prefer the status quo over change that may cause social instability.<sup>8</sup>

Has West Virginia suffered from a resource curse? Scholars disagree whether the state's natural resource wealth is the cause of its slow development or merely a counterintuitive corollary to it.<sup>9</sup> At a minimum, the state's natural resource wealth has failed miserably in the promise it held out to promoters a century ago to make West Virginians prosperous. In Gallup's 2018 national survey of well-being, West Virginians reported the lowest levels of satisfaction

economics since Richard Auty used it in the title of a groundbreaking 1993 work. See RICHARD M. AUTY, *SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS* (1993). Leading economic studies include AUTY, *supra*; Jeffrey D. Sachs & Andrew M. Warner, *Natural Resources and Economic Development: The Curse of Natural Resources*, 45 EUR. ECON. REV. 827 (2001); Sachs & Warner, *Natural Resource Abundance and Economic Growth*, *supra*.

<sup>5</sup> For domestic studies, see, e.g., Stratford Douglas & Anne Walker, *Coal Mining and the Resource Curse in the Eastern United States*, 57 J. REG'L SCI. 568 (2017) (comparing counties across Appalachia, 1970–2010); Mark D. Partridge, Michael R. Betz, & Linda Lobao, *Natural Resource Curse and Poverty in Appalachian America*, 95 AM. J. AGRIC. ECON. 449 (2013) (comparing counties across Appalachia, 1990–2010).

<sup>6</sup> See Graham A. Davis & John E. Tilton, *The Resource Curse*, 29 NAT. RES. F. 233–35, 240 (2005).

<sup>7</sup> See Ross, *The Political Economy*, *supra* note 4, at 301–07 (surveying research).

<sup>8</sup> *Id.* at 308–13.

<sup>9</sup> See, e.g., Douglas & Walker, *supra* note 5 (finding evidence supporting resource curse theory in coal mining counties in Appalachia); Partridge, *supra* note 5 (finding evidence contradicting resource curse theory in Appalachia).

of any state in career, community, and physical health metrics.<sup>10</sup> West Virginia was 48th in its residents' sense of financial health and 49th in their sense of social support.<sup>11</sup> West Virginians ranked their well-being last among all 50 states every year for a decade since polling began in 2008.<sup>12</sup> West Virginia also ranked last in a 2020 survey of overall happiness by WalletHub, with especially low ratings of emotional and physical well-being (50th) and work environment (49th).<sup>13</sup>

The frustration many West Virginians feel with their state's lagging performance is nothing new. As early as the turn of the twentieth century, West Virginians had grown discontented with the pace of economic and social development compared to the growth of natural resource-extractive industries in the state. The time seemed ripe for change. In 1901, reform-minded Theodore Roosevelt entered the White House; over the next few years, muckraking journalists like Ida Tarbell would be pointing their pens at massive corporate trusts like the one led by the Standard Oil Company.<sup>14</sup> The Progressive Era ultimately led to significant legal limits on corporate power, including the implementation of the Sherman Act, the passage of the Clayton Act, and the creation of the Federal Trade Commission to dismantle corporate trusts;<sup>15</sup> the expansion of the powers of the Interstate Commerce Commission over railroad rates;<sup>16</sup> and the passage of the Pure Food and Drug Act in response to Upton Sinclair's exposé of the meat packing industry.<sup>17</sup> In this time of profound change

<sup>10</sup> Dan Witters, *Hawaii Tops U.S. in Wellbeing for Record 7th Time*, GALLUP (Feb. 27, 2019), <https://news.gallup.com/poll/247034/hawaii-tops-wellbeing-record-7th-time.aspx>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Adam McCann, *2021's Happiest States in America*, WALLETHUB (Sept. 22, 2020), <https://wallethub.com/edu/happiest-states/6959>.

<sup>14</sup> See IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904); see generally DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* (2013).

<sup>15</sup> Sherman Antitrust Act of 1890, 26 Stat. 209 (codified at 15 U.S.C.A. §§ 1–7 (West 2021)); Clayton Antitrust Act of 1914, 38 Stat. 730 (codified at 15 U.S.C.A. §§ 12–27; 29 U.S.C.A. §§ 52–53 (West 2021)); Federal Trade Commission Act, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C.A. §§ 41–58); see also Herbert J. Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 77–78 (2018); Terrell McSweeney, Comm'r, Fed. Trade Comm'n, Keynote Remarks at the American Bar Association Clayton Act 100th Anniversary Symposium (Dec. 14, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/603341/mcsweeney\\_-\\_aba\\_clayton\\_act\\_100th\\_keynote\\_12-04-14.pdf](https://www.ftc.gov/system/files/documents/public_statements/603341/mcsweeney_-_aba_clayton_act_100th_keynote_12-04-14.pdf).

<sup>16</sup> See Hepburn Act of 1906, ch. 3591, 34 Stat. 584; Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539; see generally GABRIEL KOLKO, *RAILROADS AND REGULATION: 1877–1916* (1965).

<sup>17</sup> See Pure Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768; UPTON SINCLAIR, *THE JUNGLE* (1906); see generally JAMES HARVEY YOUNG, *PURE FOOD* (1989). Sinclair, who had intended to focus attention on the plight of laborers in the meatpacking plants, famously concluded, “I aimed at the public’s heart and by accident I hit it in the stomach.” Upton Sinclair, *What Life Means to Me*, COSMOPOLITAN, Oct. 1906, at 594.

in the relationship between corporations and the state, West Virginians mobilized behind a strategy to spread the state's natural resource wealth among all citizens: tax reform. A legislative reform effort from 1901 to 1904, however, brought some new taxes but failed to reach the oil, gas, and coal wealth that was then flowing from West Virginia to the untaxable pockets of out-of-state industrialists.

Unsatisfied with that outcome, a Morgantown property lawyer named George C. Baker saw an opportunity. West Virginia lawyers today know Baker as the eponym of the George C. Baker Cup, the intramural oral advocacy competition held at WVU College of Law annually since 1967.<sup>18</sup> A well-known member of the state bar of his day, Baker generally focused on private practice over public affairs.<sup>19</sup> In one notable exception, however, Baker squarely entered the public arena to shape legal strategy and public opinion in the fight to tax mineral severances.

Baker believed that classical property law doctrines, combined with the state's constitutional power to tax property, could be used to make an end run around a legislature that refused to tax this form of corporate wealth (as detailed in Part II). In 1905, Baker worked with the newly elected governor and a newly created office of the state tax commissioner to mount a legal and public opinion campaign for what would have been, in substance if not in form, the first severance taxes in West Virginia (Part III). At first, that effort appeared to succeed, garnering approval by the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") in an opinion authored by its most respected and fastidious justice (Part IV). But Baker and his colleagues would win the battle only to lose the war. By the following year, a coalition of industrialists led by the coal industry would dilute the new taxes at the regulatory level by watering down assessments before the county assessors (Part V), and at the legal level by winning a Supreme Court of Appeals victory that whittled the concept of taxable property in minerals down to the slenderest of reeds (Part VI). It would be another decade and a half before West Virginians would pass the first ancestor of the severance tax, still in the heyday of coal and long before the shale boom but well after the decline from West Virginia's peak oil production. Baker's effort is noteworthy as a rare example of a genuine Progressive Era reform effort in a state that failed to meaningfully loosen the grip of the industrialists over state

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<sup>18</sup> See Thomas C. Cady, *The Moot Court Program at West Virginia University College of Law*, 70 W. VA. L. REV. 40, 44 n.14 (1967). The Baker Cup revived an earlier oral advocacy competition that Baker had supported through the donation of a loving cup, which was awarded to the winners in 1926 and 1927 and annually since 1967. *Id.*

<sup>19</sup> For example, Baker was among the prominent lawyers that former governor George W. Atkinson sought to feature in his record on the subject for the West Virginia Bar Association and for posterity, but Baker declined to participate. See BENCH AND BAR OF WEST VIRGINIA iii–iv, vii (George W. Atkinson ed., 1919). Although Baker was closely associated with top elected state and federal officers and was occasionally urged to run for office himself, there is no evidence that he ever seriously entertained the notion.

policy despite the powerful current of reform on the national level during that decade.

In 2021, West Virginia stands on the verge of important decisions that could affect its development for another century, as Senator Joe Manchin wields an important swing vote in the Senate and the West Virginia legislature debates major tax reform.<sup>20</sup> Revisiting this episode of West Virginia's past offers an opportunity to critically evaluate policy decisions for the future. Of course, no single policy decision is sufficient to explain the path of West Virginia's development, and the effects of a tax that was never implemented cannot be tested. But a careful study of the political decision-making of the past—its successes and its failures, its assumptions and its outcomes—may further the effort, still unrealized more than a century later, to bring prosperity to West Virginia.

## II. SPRING 1905: TAX REFORM, DOWN BUT NOT OUT

George C. Baker was not a firebrand, but by the spring of 1905 he had had enough. As one of Monongalia County's commissioners of accounts (what today would be called a fiduciary commissioner), Baker was an administrative officer of the probate system, supervising the work of personal representatives, court-appointed guardians, and the like.<sup>21</sup> In that role, Baker had plenty of occasion to talk to local landowners and their representatives as they came in to settle up debts. But there was one party that never appeared in Baker's office: the oil and gas leaseholder.

Although the 1890s had brought the state's first oil boom in the counties bordering the Ohio River and spreading across the northern part of the state, oil producers—led in West Virginia by the South Penn Oil Company, part of the Standard Oil trust—were charged no taxes for severance of the minerals.<sup>22</sup>

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<sup>20</sup> See Emily Badger, *West Virginia Has Everyone's Attention. What Does It Really Need?*, N.Y. TIMES (Feb. 8, 2021), [https://www.nytimes.com/2021/02/08/upshot/west-virginia-manchin-stimulus.html?fbclid=IwAR2bvKrp0KW2GkmO2valFzfaJjdYXzaA7BHbrza\\_jNmwoQLJtfgQ6b3Q9Qw0](https://www.nytimes.com/2021/02/08/upshot/west-virginia-manchin-stimulus.html?fbclid=IwAR2bvKrp0KW2GkmO2valFzfaJjdYXzaA7BHbrza_jNmwoQLJtfgQ6b3Q9Qw0); Brad McElhinny, *West Virginia Income Tax Cut Is on Legislative Wishlist, but Details Are Fuzzy*, METRONews (Feb. 7, 2021), <https://wvmetronews.com/2021/02/07/west-virginia-income-tax-cut-is-on-legislative-wishlist-but-details-are-fuzzy/>. In 2021, West Virginia ranked 22nd among states in friendliness of its business tax climate. Jared Walczak & Janelle Cammenga, *2021 State Business Tax Climate Index*, TAX FOUNDATION 3 (2021), <https://files.taxfoundation.org/20201026112452/2021-State-Business-Tax-Climate-Index1.pdf>.

<sup>21</sup> W.VA. CODE ANN. § 44-3-1 (West 2021) (renaming office); *id.* § 44-3-2 (defining powers and duties); *id.* § 44-3-7 (governing matters referred by county commission to fiduciary commissioner).

<sup>22</sup> RALPH W. HIDY & MURIEL E. HIDY, 1 HISTORY OF STANDARD OIL COMPANY (NEW JERSEY) 219, 221, 273–83 (1955); EUGENE D. THOENEN, HISTORY OF THE OIL AND GAS INDUSTRY IN WEST VIRGINIA 199–217 (1964).

Writing to *The Morgantown Chronicle*, Baker described a typical case in his office:

William M. Kennedy, of Clay district, this county, was the guardian of his two children, Cora and Armina Kennedy. The two girls owned a little tract in Clay district of eighty acres. The South Penn Oil company leased it for oil and gas purposes, and oil was produced in paying quantities. The guardian settled his accounts before me . . . each year, and the girls received together the one eighth of the oil produced and saved from the premises.<sup>23</sup>

What troubled Baker was that the girls were paying taxes on the surface, their share of the oil, and royalty income, while South Penn Oil Company paid nothing. In the five years from 1893 until the girls turned 18, they earned \$46,846 on their one-eighth interest in the oil. The land was valued around \$3,200 for the whole tract, which was elevated due to the oil, Baker thought, and the girls paid taxes on that too. As owners of seven-eighths of the oil, South Penn Oil would have earned seven times what the Kennedy girls did in those five years, or \$327,922. “The land was taxed and the guardian of the girls had to pay it for farm purposes,” Baker told *The Chronicle*. “Their oil and oil monies were taxed each year, and yet the record shows that the South Penn Oil company has never paid a penny tax”—not on the lease, the oil, or the income.<sup>24</sup> This was just one example; Baker described two other cases and could name at least a hundred more. Enough was enough, Baker thought.

Is there any reason why that we citizens, who are living in the midst of this wrong, this unequal taxation, and who for fifteen years have scarcely opened our [mouths] or breathed an objection against what I might justly call a crime, should not feel aggrieved and that patience has ceased to be a virtue?<sup>25</sup>

#### A. *The Legislative Tax Reform Movement of 1901–04*

Baker was by no means alone in his outrage. After decades of modest production, the first major oil well in the state had been drilled by E.M. Hukill and Company in Monongalia County in 1889.<sup>26</sup> As other productive wells were drilled, the state’s total oil production jumped from 493,000 barrels in 1890 to 2,406,000 in 1891.<sup>27</sup> By 1900, West Virginia produced over 16 million barrels,

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<sup>23</sup> *Valuable Property Escapes Taxation*, THE MORGANTOWN CHRON., Mar. 11, 1905, at 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 6.

<sup>26</sup> THOENEN, *supra* note 22, at 198–99; *see also Valuable Property Escapes Taxation*, *supra* note 23, at 1.

<sup>27</sup> THOENEN, *supra* note 22, at 78.

surpassing Pennsylvania, the birthplace of the American oil industry, and accounted for more than 25% of all petroleum production in the country.<sup>28</sup>

Yet despite the oil boom, the state itself was broke. Appropriations for ordinary expenses in fiscal year 1902 were more than \$1.1 million, an amount that was estimated to be at least \$150,000 too low to meet the needs of ordinary state operations, and nearly \$500,000 more would be needed to complete other works already ongoing and authorized.<sup>29</sup> Despite this price tag of perhaps \$1.75 million for state expenses, the state's net revenues for fiscal year 1901 were just over \$1.27 million and were predicted to be only \$1.35 million for fiscal year 1902.<sup>30</sup> Most of this revenue came from real and personal property, and assessment was notoriously unequal both within and between assessment districts and counties.<sup>31</sup> So bad was the state of the budget in early 1901 that Governor George W. Atkinson had to take a personal loan to pay for the state's exhibit at the Pan American Exhibition in Buffalo after the legislature overwhelmingly rejected \$25,000 in appropriations intended for that purpose.<sup>32</sup>

In 1901, a burgeoning movement for tax reform found footing in the state legislature, to the alarm of oil, gas, and coal producers and the railroad magnates who relied on them for business.<sup>33</sup> The issue brought the body to a standstill until U.S. Senator and state Republican kingmaker Stephen B. Elkins paid a timely visit to Charleston. Elkins suggested the legislature constitute a commission to study tax reform and make a report before the next legislative session.<sup>34</sup> Defending industrialists were satisfied by the punt, especially when Governor Albert Blakeslee White appointed former U.S. Senator (and Elkins's father-in-law and coal business partner) Henry G. Davis to the commission.<sup>35</sup>

The industrialists got a rude shock in 1902 when the Tax Commission delivered its report. The Commission proposed licenses to produce oil and gas and to mine coal, with an annual tax (albeit a modest one) on the licenses pegged to the volume of production—a half of a cent per barrel of oil, one and a third cent per hundred thousand cubic feet of gas, and one third of a cent per ton of coal.<sup>36</sup> With respect to coal mining, the Tax Commission described the tax as just adequate to recover costs incurred by the state due to the many social costs

<sup>28</sup> *Id.*

<sup>29</sup> PRELIMINARY REPORT OF THE WEST VIRGINIA COMMISSION ON TAXATION AND MUNICIPAL CHARTERS (1902) [hereinafter 1902 TAX COMMISSION PRELIMINARY REPORT].

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 12.

<sup>32</sup> WILLIAMS, *supra* note 1, at 206, 214.

<sup>33</sup> See THOENEN, *supra* note 22, at 309–10; WILLIAMS, *supra* note 1, at 211–12.

<sup>34</sup> WILLIAMS, *supra* note 1, at 216.

<sup>35</sup> *Id.* at 220.

<sup>36</sup> FINAL REPORT OF THE WEST VIRGINIA COMMISSION ON TAXATION AND MUNICIPAL INCORPORATION 33–34 (1902) [hereinafter 1902 TAX COMMISSION FINAL REPORT].

associated with coal mining and coal communities—mine inspectors, miners’ hospitals, militia or national guard to resolve industrial conflicts, crime control, and education for children of laborers—as well as to counter the elusive tax base with miners earning very little and owners often residing out of state.<sup>37</sup> With respect to oil and gas production, the Commission cited the same reasons, with one additional concern: because the location of productive oil and gas wells was often speculative, it was difficult to accurately assess the value of productive land, and at the same time production was immediately consumed, often out of state, leaving nothing to tax. To make matters worse, lands subject to drilling were often left injured, reducing their tax value going forward.<sup>38</sup>

The Tax Commission knew its proposal to tax coal, oil, and gas production would cause an uproar. Its members were prospectively unmoved—but prepared. “It would only be natural,” the Commission wrote,

If those likely to be affected by the imposition of such tax should be disposed to resist it. It will be impossible for them, however, to say that the amount of tax here suggested would constitute any serious burden upon those engaged in the development of the resources of the State by carrying on these industries.<sup>39</sup>

Lest the light tax be viewed as an “entering wedge” by industrialists and their allies, however, the Commission disclaimed any interest in ever raising the tax, encouraged the legislature to give the same assurance, and even proposed a constitutional guarantee against it.<sup>40</sup>

The Tax Commission’s proposal, while relatively conservative, nevertheless created a stir among the industrialists. To prevent a split in the state Republican party, Senator Elkins organized a meeting of ten pro- and anti-tax leaders in Washington, D.C., in January, 1904, to work out a compromise, and a committee of four was appointed to craft a less aggressive alternative to the Commission’s proposal.<sup>41</sup> The Republican party dutifully adopted only the alternative proposal as its platform and, in the view of one observer, “most positively agreed” not to call a special session of the legislature or, if one were called, to limit it to consideration of the alternative proposal of the committee (despite the obvious democratic defects of substituting the proposal of a

<sup>37</sup> *Id.* at 32–33.

<sup>38</sup> *Id.* at 33–34.

<sup>39</sup> *Id.* at 34.

<sup>40</sup> *Id.*

<sup>41</sup> WILLIAMS, *supra* note 1, at 224–25. Governor White’s papers include an unsigned statement that appears to be a summary of the committee’s alternative proposal. See Albert B. White, W. Va. Governor, Executive Proclamation: Summary Statement (June 1904) (on file with the West Virginia University West Virginia & Regional History Center). The statement declares the license taxes “particularly objectionable.” *Id.* The statement did propose the assessment of intangible property but would have allowed assessed parties to deduct debts without public disclosure.

privately-selected group for that of the publicly-appointed Commission).<sup>42</sup> Opponents to tax reform were frustrated once again, however, when Governor White's call for a special session charged the legislature to consider "the bills prepared by the Commission . . . and any amendments thereto."<sup>43</sup> Although the governor did mention the Washington committee in his message to the legislature and urged the legislature to adopt the compromise proposal, tax reform opponents complained that the call nevertheless left the door open for consideration of the Commission proposal and its license tax on coal, oil, and gas.<sup>44</sup> Not to be outdone, the industrialists and their allies managed to defeat the coal, oil, and gas tax provisions in the Tax Commission bill during the special session of the legislature in 1904. Although the special session did produce many new taxes, including an inheritance tax and a license tax on businesses such as taverns and barber shops, extractive industries escaped once again.<sup>45</sup>

But Baker wasn't done. The state constitution gave the government the power to tax all property, real and personal.<sup>46</sup> If oil, gas, and coal leases were delivering such value to the leaseholders, he reasoned, shouldn't they be considered property and taxed as such? This shift would require the cooperation of the executive branch, but the new office of the state tax commissioner conveniently offered a centralized mechanism for assessing and enforcing taxation on this theory. What it wouldn't require is any action by the legislature, since the state power to tax property was already clear. "The farmer is compelled to pay taxes on his farm if a drouth comes along and his crops are an utter failure," Baker argued.

The state, and its institutions and officials must be supported, and the wheels of government must be run, and it can only be kept in motion by taking from the owners of real and personal property [an] equitable portion, called taxes, each year to maintain the machinery of the state.<sup>47</sup>

<sup>42</sup> Letter from Aretas B. Fleming to Mortimer F. Elliott (July 18, 1904), in PAPERS OF ARETAS B. FLEMING (on file with the West Virginia University West Virginia & Regional History Center) [hereinafter FLEMING PAPERS].

<sup>43</sup> Albert B. White, W. Va. Governor, Special Message to the Legislature of West Virginia 3 (July 26, 1904) (on file with West Virginia University West Virginia & Regional History Center) (emphasis added).

<sup>44</sup> Letter from Fleming to Elliott, *supra* note 42.

<sup>45</sup> See generally 1904 Special Session W. VA. ACTS 6–119, 132–39; see also Williams, *supra* note 1, at 230–32.

<sup>46</sup> The West Virginia Constitution expressly exempts household goods under a value of \$200 and permits the legislature to make certain other enumerated exemptions not relevant to coal, oil, or gas extraction, such as property used for education, scientific, or charitable purposes and public property. W. VA. CONST. art. X, § 1.

<sup>47</sup> *Valuable Property Escapes Taxation*, *supra* note 23, at 6.

### B. Dodging and Weaving: The Early Oil Cases

The case for taxing mineral leases as property, while intuitively obvious, required a sophisticated legal theory in light of a series of decisions of the Supreme Court of Appeals during the first decade of the oil boom that many thought to have foreclosed the argument. In the rush to the oil during the early years of the boom, some developers entered into leases with parties who held only the life estate in the land to be drilled. When oil was discovered and royalty checks began to flow in, the holders of the future interests in the land went to court seeking to void the conveyance of the lease, or at least to receive their share of proceeds derived from it. To protect the rights of these remaindermen, the Supreme Court of Appeals in *Williamson v. Jones* adopted the Pennsylvania rule that the oil was part of the real estate and thus it would constitute waste for the life estate holder to open a new well without the consent of the remaindermen.<sup>48</sup> In 1894, the court held that “[p]etroleum or mineral oil in place is as much a part of the realty as timber, coal, iron ore, or salt water.”<sup>49</sup> As such, the oil “is part of the inheritance, and an unlawful removal thereof is a disherison of him in remainder, constituting waste, which a court of equity in a proper case will restrain and enjoin.”<sup>50</sup> That conclusion was reiterated in similar circumstances three years later in *Wilson v. Youst*.<sup>51</sup> The court there, again borrowing from Pennsylvania law, explained that “[a]n oil lease, investing the lessee with the right to remove all the oil in place in the premises . . . is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises.”<sup>52</sup>

When it came to taxation, this doctrine left the state in a bind. Under state law, realty was (and is) taxed in its entirety to the possessor of the freehold interest, defined as ownership of the land for an indefinite period—in other words, to the owner of a fee or a life estate.<sup>53</sup> Minerals could be separately assessed only where one party held a freehold in the minerals while another held a freehold in the surface.<sup>54</sup>

Counties in the oil region sought strategies to work around this doctrine. In 1893, Marion County, one of the most productive counties in the oil boom, attempted to list and assess as real property several leases held by South Penn Oil in that county.<sup>55</sup> Those leases were substantially identical, and all gave South

<sup>48</sup> *Williamson v. Jones*, 19 S.E. 436 (W. Va. 1894).

<sup>49</sup> Syl. Pt. 3, *id.*

<sup>50</sup> *Id.*

<sup>51</sup> 28 S.E. 781 (W. Va. 1897).

<sup>52</sup> *Id.* at 787 (quoting *Blakley v. Marshall*, 34 A. 564, 565 (Pa. 1896)).

<sup>53</sup> *See* *U.S. Coal, Iron & Mfg. Co. v. Randolph Cnty. Ct.*, 18 S.E. 566, 568 (W. Va. 1893).

<sup>54</sup> *Id.*

<sup>55</sup> *State v. South Penn Oil Co.*, 24 S.E. 688 (W. Va. 1896).

Penn Oil the right to “mine, bore, excavate, and produce petroleum, rock, or carbon oil, and gas, or other valuable or volatile substances.”<sup>56</sup> The right was for a term of ten years “or as long as oil and gas may be found in paying quantities.”<sup>57</sup> The lessor was paid a standard royalty of one-eighth of the oil.<sup>58</sup> In *State v. South Penn Oil Company*, the court held that the leases did not create a real property interest in the oil company because the lessor did not part with any ownership but merely conveyed for a term of years the right to explore and produce oil.<sup>59</sup> Nor did the open-ended lease term transform the lease into realty; according to the court, if oil were discovered, the oil company merely became a tenant at will on a year-to-year tenancy.<sup>60</sup> The attorney general argued that the leases, if not real property, were at least personal property and could be assessed to the oil company as such. The court, while acknowledging that the leases were property, rejected this argument too: Since the minerals are part of the real estate, the court said, they had already been fully assessed and taxed (to the surface owner, although the court did not point that out).<sup>61</sup> Moreover, the court said, it would be improper to assess the property as realty rather than personal property because taxes on real property created liens that could be enforced in equity, which would create confusion regarding land titles in tax sales.<sup>62</sup>

The counties tried other methods to recover tax value from the oil wealth leaving the state. In 1893, Tyler County, home of the massive Sistersville oil field, prospectively assessed the oil from a tract with producing wells to the oil producer as personal property for the tax year 1894.<sup>63</sup> In *Carter v. Tyler County Court*, the court struck this down as well.<sup>64</sup> Because the oil in place was part of the real property, the court held, the oil producer actually owned nothing until the oil was extracted. The fact that he had drilled productive wells did not change the matter. “While he was the owner of the wells that had been drilled in the rocks, they were merely the conduit through which the oil might be drawn to the surface,” the court held.<sup>65</sup> “[H]e had the privilege of pumping it to the surface; but the oil in its place among the rocks was not his, and might possibly never be.”<sup>66</sup> His recovery was still speculative; “he could not be assessed on property

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<sup>56</sup> *Id.* at 689.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 696.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 696–97.

<sup>63</sup> *Carter v. Tyler Cnty. Ct.*, 32 S.E. 216, 216–17 (W. Va. 1899).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 218.

<sup>66</sup> *Id.*

that he had not yet acquired.”<sup>67</sup> Did that mean that the surface owner had to pay taxes on the entire oil value—predicted at \$81,000 from 90 producing wells in that year alone? Side-stepping the uncomfortable question, the court took no position on who should pay the taxes, but said that, nevertheless, “[w]e . . . do hold that it is not assessable as personality.”<sup>68</sup>

The year after that decision, Tyler County attempted to assess as personal property \$250,000 that an oil producer named Louis A. Brenneman had on deposit at a local bank.<sup>69</sup> This attempt failed too because Brenneman moved back to Pennsylvania just days before the beginning of the tax year, and thus, as an out-of-state resident, the West Virginia taxing authority could not reach his income.<sup>70</sup>

It appeared to be the perfect crime. By structuring the agreements as leases with an indefinite duration for the life of production rather than as freeholds, the oil producers could recover seven-eighths of the oil forever without paying taxes on it. Not only that, but the oil wealth, to the extent its value could be predicted by the assessors, could even be charged to the surface owner rather than the producer. It could not be taxed as personal property until it was produced, and once produced and quickly sold, both the property and its owner left the state and the reach of the West Virginia taxing authorities.

### *C. The Counterpunch: Leaseholds as Chattels Real*

Analyzing this case law, Baker, an astute property lawyer, thought he spotted a theory the oil cases left open—a theory that would not only permit but require the state to tax oil and gas leases as property. The problem with the Marion and Tyler County cases, Baker believed, was simply that they had incorrectly classified the oil and gas leaseholds under the common law of property.<sup>71</sup> The Supreme Court was correct in holding that the leaseholds themselves were not realty, and equally correct that the oil and gas in the ground were not personalty but still part of the surface owner’s real estate interest.<sup>72</sup> But it was difficult to argue that the leasehold interests were not property; why else would the oil company pay for them?<sup>73</sup>

The answer, Baker concluded, is that the leasehold interests themselves, rather than the oil to be produced, were taxable personal property—specifically,

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Pyle v. Brenneman*, 122 F. 787 (4th Cir. 1903); *see also LA Brenneman Died This Morning—End Had Been Expected for Some Time*, TITUSVILLE HERALD (Mar. 2, 1914), <https://www.findagrave.com/memorial/170605266/louis-a-brenneman>.

<sup>70</sup> *Pyle*, 122 F. at 788–89.

<sup>71</sup> *Valuable Property Escapes Taxation*, *supra* note 23, at 6.

<sup>72</sup> *Id.*

<sup>73</sup> *See Judge Jacobs and Taxing Leaseholds*, DAILY OIL REV., Mar. 30, 1905, at 2.

a category of personal property known as “chattels real.” According to Blackstone, chattels real were a type of chattels (or personal property) “such as concern, or savour of, the realty; as terms for years of land” and other such interests.<sup>74</sup> Chattels real had been part of the Anglo-American common law since at least the Jacobean era, as Blackstone attributed his definition to Sir Edward Coke’s *Institutes*.<sup>75</sup> Chattels real, Blackstone said, were interests that were “annexed to real estates,” and thus possessed the quality of immobility characteristic of real property, but were characterized as chattels for lack of the other essential quality of real estate, “a sufficient, legal, indeterminate duration.”<sup>76</sup> Chattels real remain part of the American common law; modern treatises note that “[c]hattels real are to be distinguished, on the one hand, from things which have no concern with the land, such as mere movables and rights connected with them, which are chattels personal, and on the other hand, from a freehold, which is realty.”<sup>77</sup>

If oil and gas leases were chattels real, Baker concluded, the producers’ clever arguments ran aground on a constitutional principle: Article X of the West Virginia Constitution stated (and still states) that

Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value . . . .<sup>78</sup>

By embedding a guarantee of equality to citizens alongside its grant of taxing power to the state, Article X appeared to foreclose the arguments of the producers that their leases should not be subject to tax.<sup>79</sup>

<sup>74</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*386–87 (1771).

<sup>75</sup> *Id.* (citing SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND: OR, A COMMENTARY UPON LITTLETON (1832) (first published 1628–1644)).

<sup>76</sup> BLACKSTONE, *supra* note 74, at \*386.

<sup>77</sup> 63C AM. JUR. 2D *Property* § 23 (2021); 73 C.J.S. *Property* § 33 (2021).

<sup>78</sup> W. VA. CONST. of 1872, art. X. The 1872 constitution contained exemptions for public interest purposes; amendments in 1932 added other permissible exemptions and provided for graduated taxation of property across four different classifications. See ROBERT M. BASTRESS, THE WEST VIRGINIA STATE CONSTITUTION 284–85 (2d ed. 2016). The West Virginia Supreme Court of Appeals has interpreted the new Article X to mean that the guarantee of equal and uniform taxation now applies within categories but not between them. See *In re Assessment of Kanawha Valley Bank*, 109 S.E.2d 649 (W. Va. 1959).

<sup>79</sup> The Equal and Uniform Taxation clause of Article X was tightly bound up with the history of West Virginia; the refusal of the western counties of Virginia to secede in 1861 arose in part from dissatisfaction with the state taxation laws, which taxed property such as livestock typical to the western counties at full value while largely exempting slave property concentrated in the east. See BASTRESS, *supra* note 78, at 284–85; see also CHARLES H. AMBLER, WEST VIRGINIA STORIES

In addition to taxing the leases themselves, Baker thought, West Virginia authorities could retrospectively assess five years of back taxes on the oil and gas actually produced.<sup>80</sup> Although the oil and gas in place were realty, according to the court, once produced they were clearly personal property, and state law gave the authorities the power to assess and collect up to five years of back taxes. If the state had the power to collect taxes previously owed, it appeared irrelevant that the property had since been shipped out of state.<sup>81</sup>

It was all perfectly legal and proper under existing state law, no assistance required from the recalcitrant legislature. “All we need in this state,” Baker told *The Chronicle* and its readers,

is to have moral courage to do our plain duty, and if necessary to force those corporations or trusts to do their duty under the constitution after they have failed and refused to do so for these many years. Is there any one in the state will say that I am wrong? I remain,

Yours most respectfully,  
GEORGE C. BAKER.<sup>82</sup>

### III. MARCH 1905: TAXING LEASEHOLDS

While Baker could develop the legal theory sitting alone in his law office, its implementation would require cooperation. In 1905, Baker found an ally in the state’s new governor, William M.O. Dawson. A former newspaper editor and lawyer from Preston County who served as secretary of state under the previous two governors, Dawson had been known as a canny political organizer and not one especially aligned with industry.<sup>83</sup> In his inaugural address, he acknowledged criticism that he was “too friendly to labor.”<sup>84</sup> While pledging fairness, Dawson nonetheless affirmed that “the humblest toiler will be as welcome to my office to tell his grievances and wrongs, as will the greatest capitalist to tell his.”<sup>85</sup> In substance, his remarks were devoted largely to reform: of discriminatory freight rates by out-of-state railroad companies; of corrupt

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AND BIOGRAPHIES 199, 317–18 (1937); Jane Moran, *Is Everyone Paying Their Fair Share? An Analysis of Taxpayers’ Actions to Equalize Taxes*, 85 W. VA. L. REV. 209, 212–13 (1983).

<sup>80</sup> *Valuable Property Escapes Taxation*, *supra* note 23, at 6.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See JOHN G. MORGAN, WEST VIRGINIA GOVERNORS 73 (2d ed. 1980); Williams, *supra* note 1, at 52, 142–43.

<sup>84</sup> William Mercer Owens Dawson, Governor of W.Va., Inaugural Address (Mar. 4, 1905), <http://www.wvculture.org/history/government/governors/dawsonia.html> [hereinafter Dawson Inaugural Address].

<sup>85</sup> *Id.*

lobbyists; of education; and of the executive branch (which he wished to expand to help implement the changes).

“Underlying these reforms and changes . . . is the system of taxation,” Dawson finally acknowledged.<sup>86</sup> Over the prior decade, he said, and especially the past few years, the question had been one of the most important and heated in the state.<sup>87</sup> As secretary of state, Dawson had become closely associated with tax reform; a former member of the state Senate Finance Committee, he had drafted the bill that would soon usher in the lucrative new tax on corporate charters.<sup>88</sup> In his inaugural address, Dawson made no proposals on the tax question, but evidently he did not consider it settled by the reforms passed by the legislature the previous fall, which were set to be implemented later that year. Dawson again pledged fairness, but his perceived inclinations were apparent in his assurances that “I am not an enemy of corporations. I am their friend; and . . . it shall be my endeavor, as it will be my duty, just as strongly to safeguard their interests as to safeguard the interests of the humblest citizen.”<sup>89</sup>

#### A. *Leveraging the New Office of the Tax Commissioner*

Reassurances aside, Dawson would immediately begin working with Baker to see to it that his friends the corporations paid taxes on the resources they were draining from the state. Conveniently, their theory did not require any action from the legislature, but it did require the cooperation of the assessors of West Virginia’s 52 counties, in an era when state jobs were largely distributed under a system of industry-backed political patronage.<sup>90</sup> Although the new tax law changed the office of county assessor from an appointed to an elected position, that reform would not take effect until 1909.<sup>91</sup>

The new law did give Dawson and Baker a wedge, however. Under the new system, county assessors would be supervised by a state tax commissioner, whose duty was to ensure that “the laws concerning the assessment and collection of all taxes and levies . . . are faithfully enforced.”<sup>92</sup> By “faithfully,” the law meant that county assessors were no longer at liberty to look the other way (or worse); the state tax commissioner was empowered to visit the counties, inquire into the work of county officers in tax collection, and either make “suggestions” or even “require such action as will tend to produce full and just assessments . . . and the diligent collection of all taxes and levies” throughout the

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> MORGAN, *supra* note 83, at 74.

<sup>89</sup> Dawson Inaugural Address, *supra* note 85.

<sup>90</sup> WILLIAMS, *supra* note 1, at 129–37.

<sup>91</sup> 1904 Special Session W. Va. Acts 35, § 6.

<sup>92</sup> *Id.* at 33, § 2.

state.<sup>93</sup> Not only that, but the law had bite: If the state tax commissioner discovered that a county taxing official had committed any misconduct or neglect of official duty, the commissioner was required to report the violation, with supporting evidence, to the circuit court.<sup>94</sup> If the report was sustained after investigation, the official would pay a penalty of between \$10 and \$100 (the equivalent of nearly \$3,000 today) and could be removed from office.<sup>95</sup>

*B. Assessment Ordered: “The Monongalia Way”*

Baker and Dawson wasted no time. Appropriations for the office of the tax commissioner began on March 1, 1905; on March 4, Dawson was sworn in as governor. Five days later, on March 9, 1905, Baker appeared before the Monongalia County Court and struck the first blow in this new battle. According to the court’s order, “This day came George C. Baker, attorney, on behalf of the tax payers of this county, praying that the court will direct the two assessors of the county to assess to the oil and gas producers and owners their leases and fixtures for oil and gas purposes.”<sup>96</sup>

The court first found that “the oil and gas, in this county, are held by leases upon the farms and other real estate, and that the oil and gas have not been taxed to the lessee or lessees.”<sup>97</sup> Moreover, it added, “this county is being drained of its oil and its gas pumped from this State by corporations and persons residing outside of the State of West Virginia.”<sup>98</sup> Finally, the court announced its “opinion that all persons or corporations owning property, either real or personal, in this county, should pay their fair proportion of taxes, as provided by the Constitution of the State.”<sup>99</sup> The court spared no small detail about what was to happen next: It ordered the clerk of the court to “procure a well bound book for each of the two assessors in this county, which book shall be divided off into columns, setting forth at the head of each column the following words and figures . . . .”<sup>100</sup> The assessors were to list data in 11 columns, including the names of landowners with oil and gas leases, the names of the lessees, the number of acres and wells and of what type, the amount produced on the first day of the tax year, April 1, 1905, and the valuation of leases and fixtures.<sup>101</sup>

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 40, § 19.

<sup>95</sup> *Id.*

<sup>96</sup> *The Monongalia Way*, FAIRMONT WEST VIRGINIAN, Mar. 10, 1905, at 4 (reprinting order of Monongalia County Court).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

Thus, a new strategy was set in motion. Monongalia County assessors would assess and tax oil and gas leases, plus fixtures, as personal property for tax year 1905. With the support of the governor and the new tax commissioner, Charles W. Dillon, reluctant county assessors would come under scrutiny if they declined to assess the oil and gas interests.<sup>102</sup> Since, under their view, assessment was required by the state constitution, assessors who refused to assess would be derelict of duty and could be fined or even removed from office.

The leadership from Monongalia County's lawyers and courts was not an accident. In 1905, West Virginia politics was a tussle between industrialists of just slightly different shades, the Democrats led by former Senator Davis and the Republicans led by his son-in-law, Senator Elkins.<sup>103</sup> Together, the pair owned a major coal company and interests in the local railroads that transported the state's products to the trunk lines to major markets.<sup>104</sup> Although Roosevelt was gallantly leading Washington Republicans in an upending of the settled expectations of industrialists, the leading historian of the era in West Virginia found no real evidence of a progressive movement in the state.<sup>105</sup> The difference may have been economic insecurity. In West Virginia, incomes were so low and jobs so scarce that even those with relative privilege, such as lawyers and former legislators, were often dependent upon the patronage system for a livelihood, leaving little leverage to demand anything but state jobs from their newly elected representatives.<sup>106</sup>

By comparison, however, Monongalia County had retained some measure of political independence.<sup>107</sup> Home of the state university and proximate to the steel belt and the railroads that served it, Mon County and its Republican leaders had other sources of income that may have enabled them to stay outside of Senator Elkins' iron grip of influence. Baker himself, with his law partner Frank Cox, ran a prosperous practice that included the Second National Bank and the Seneca Glass Company as clients.<sup>108</sup> With these reliable sources of income, Baker had never depended on patronage; apart from his longtime service as commissioner of accounts, the only public office Baker had held was as the county prosecutor, a position that was known to produce few of the financial perks that state patronage officeholders often relied on.<sup>109</sup>

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<sup>102</sup> See WILLIAMS, *supra* note 1, at 233–24.

<sup>103</sup> *Id.* at 15.

<sup>104</sup> CHARLES M. PEPPER, *THE LIFE AND TIMES OF HENRY GASSAWAY DAVIS 185* (1920); OTIS K. RICE & STEPHEN W. BROWN, *WEST VIRGINIA 185–86* (1985); WILLIAMS, *supra* note 1, at 3, 19–25.

<sup>105</sup> WILLIAMS, *supra* note 1, at 97–98, 233–34, 248–49.

<sup>106</sup> *Id.* at 129–34.

<sup>107</sup> WILLIAMS, *supra* note 1, at 97–98.

<sup>108</sup> See Letter from George C. Baker to Aretas B. Fleming (Jan. 20, 1906), in FLEMING PAPERS, *supra* note 42.

<sup>109</sup> See JAMES MORTON CALLAHAN, *2 HISTORY OF WEST VIRGINIA: OLD AND NEW 59–60* (1923); *Valuable Property Escaping Taxation*, *supra* note 23 (describing work as commissioner of

In pressing for tax reform, Baker was continuing the work of his mentor and first law partner, George C. Sturgiss.<sup>110</sup> Sturgiss, a former state legislator, gubernatorial candidate, and U.S. Attorney, had been a vocal advocate of tax reform, garnering such opposition that the legislature in 1901 made an appropriation to West Virginia University only on the condition that Sturgiss be removed from its board of trustees.<sup>111</sup> Riding the tax reform wave in 1906, Sturgiss would be elected to the U.S. House of Representatives, where he served two terms.<sup>112</sup> Cox, Baker's law partner since 1889, was also known as a tax reformer and had been elected to the Supreme Court of Appeals in 1904 over vigorous opposition from oil producers.<sup>113</sup> The influence of Monongalia County's Republicans on the issue was readily acknowledged; the *Wheeling Intelligencer* noted that "in Monongalia abides the foremost champions of tax reform in the state."<sup>114</sup>

Baker's victory in the Monongalia County Court immediately made headlines. The next day, the *Fairmont West Virginian* called the decision "one of the most important orders in the history of the State."<sup>115</sup> Similarly, the *Morgantown Chronicle*, in a piece reprinted in the *Mannington Daily Record*, called it "one of the most important orders ever placed on the books of Monongalia county."<sup>116</sup> The *Wheeling Intelligencer* was less prosaic but no less interested in how this legal strategy would fare: "Naturally the Standard Oil company will object to the process," the editors said, "but the farmers and other citizens of Monongalia have not been allowed to escape taxation on their real estate or personal property and the law was never intended to let other owners, whether corporations or individuals, escape."<sup>117</sup> The *Mannington Daily Record* summed up the state of play: "He is a far-seeing man who can foretell the result. But this much is certain, something is about to happen."<sup>118</sup>

Baker himself became something of a local celebrity. In an article headed "The Monongalia Way," the *Fairmont West Virginian* called its neighboring county to the north "the home of the two illustrious Georges—Hon. George C. Sturgiss and Hon. Geo. C. Baker," whose "work is being felt

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accounts since 1897). In 1909, Baker was appointed by Governor William E. Glasscock to the position of Judge Advocate General of the West Virginia National Guard. See *Governor Glasscock's Staff*, EVENING STAR, May 19, 1909, at 5.

<sup>110</sup> See *The Monongalia Way*, *supra* note 96, at 4; see also CALLAHAN, *supra* note 109, at 59.

<sup>111</sup> WILLIAMS, *supra* note 1, at 98, 217.

<sup>112</sup> See CALLAHAN, *supra* note 109, at 7.

<sup>113</sup> See Letter from Thomas P. Jacobs to Aretas B. Fleming (July 4, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>114</sup> *What Papers Say of Oil and Gas*, MORGANTOWN CHRON., Mar. 12, 1905, at 1.

<sup>115</sup> *The Monongalia Way*, *supra* note 96, at 4.

<sup>116</sup> *What Papers Say of Oil and Gas*, *supra* note 114, at 1.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

throughout the state.”<sup>119</sup> Owen D. Hill, owner of vast coal and timber lands in Kanawha County and a fierce political independent, publicly lauded Baker’s stance and his character for taking it.<sup>120</sup> In a letter published in the *Fairmont West Virginian*, Hill wrote to Baker, “I do not know your politics, but knowing as I do that statesmen put principle above party, . . . you are made out of the kind of material out of which statesmen and patriots are made, and some day I hope to see you governor of the State of West Virginia.”<sup>121</sup> The students of West Virginia University even dedicated their yearbook that spring to their suddenly-famous graduate. “By his sound, logical arguments, striking illustrations and plain discussions on the subject of equal and uniform taxation,” the editors wrote, “he started a reformation, which spread like a conflagration over the state, from hilltop to valley, into every city, town and hamlet.”<sup>122</sup> To their minds, “[n]o more important measure has been brought to the attention of the people of the state since the great Civil War.”<sup>123</sup>

### C. *Industry Resists: Legislative Victories, Executive Failures*

The industrialists were surprised to find themselves once again fighting this argument, which they more than once thought they had put to rest. The draft bill submitted to the legislature in the special session of 1904 originally included two provisions that could have been used to tax oil, gas, and coal leases. The first provided for the taxation of money and all personal property of any corporation having its principal place of business in the state.<sup>124</sup> On reviewing the bill, Standard Oil’s solicitor general in New York, Mortimer F. Elliott, protested, “I have never seen a more unfair provision than this.”<sup>125</sup> Elliott allowed that Ohio was already taxing personal property located there, but still thought West Virginia’s proposal “a very unjust law.”<sup>126</sup> Belying his own superlative, Elliott found later in the bill “a still worse provision.”<sup>127</sup> That section would have expressly required the assessment of “any interest in the minerals, mineral

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<sup>119</sup> *The Monongalia Way*, *supra* note 96, at 4.

<sup>120</sup> See CALLAHAN, *supra* note 109, at 594–96 (biography of Owen D. Hill); *A Great Movement for Fair Taxation*, FAIRMONT WEST VIRGINIAN, Mar. 29, 1905, at 7.

<sup>121</sup> See *A Great Movement for Fair Taxation*, *supra* note 120, at 7.

<sup>122</sup> WEST VIRGINIA UNIVERSITY CLASS OF 1906, THE MONTICOLA 8 (1905).

<sup>123</sup> *Id.* at 9.

<sup>124</sup> W. VA. TAX COMM’N, BILLS PROPOSED BY THE WEST VIRGINIA TAX COMMISSION OF 1902, at 92–93 (1903) [hereinafter TAX COMMISSION BILLS].

<sup>125</sup> Letter from Mortimer F. Elliott to Aretas B. Fleming (July 28, 1904), in FLEMING PAPERS, *supra* note 42; see also HIDY & HIDY, *supra* note 22, at 335–36.

<sup>126</sup> Letter from Elliott to Fleming, *supra* note 125.

<sup>127</sup> *Id.*

waters, oils, gases, coal or ore, or privileges of or pertaining thereto” held by anyone other than the surface owner.<sup>128</sup>

Despite Standard’s objection, the provision separately taxing all interests in land passed with only minor amendments, but lobbyists for industry succeeded in blunting the force of the provision taxing the personal property of corporations. The version that originally passed the House of Delegates required assessment of all personal property, expressly “including chattels real.”<sup>129</sup> In the Senate, an amendment was introduced to strike those words but was defeated; the bill passed with the language expressly requiring that chattels real be assessed as personal property.<sup>130</sup> After successful motions to reconsider first the bill passage, then the earlier defeat of the amendment, a renewed amendment to strike “including chattels real” was introduced and this time passed by a considerable majority.<sup>131</sup>

In July 1904, the industrialists also thought they had Dawson, then attorney general and author of the tax reform bill, in their corner. U.S. Representative Alston G. Dayton recorded a phone call he had received from Dawson on July 22. Calling from Senator Elkins’ home, Dayton said, Dawson told him that he had “reached the conclusion . . . that the proposed license taxes on coal, oil, and gas are not right and [he would] *never* advocate their adoption” because “the principle is wrong.”<sup>132</sup> Stunned at this apparent reversal, Dayton said he asked Elkins, who was also on the line, if he heard what Dayton heard. Elkins said he did.<sup>133</sup>

Dayton and his Republican colleagues were overconfident. While Dawson may have decided to oppose the license tax, he did not disclaim an intent to tax coal, oil, and gas leases by a different mechanism. Even before the Monongalia County court had issued its order, newly inaugurated Governor Dawson and his tax commissioner, Dillon, had publicly announced their intention to begin assessing leaseholds as chattels real in the new tax year.<sup>134</sup> Knowing what Dawson and Dillon had in mind, representatives of the oil and coal industries began girding for battle soon after the inauguration.<sup>135</sup> On March 6, coal industry lobbyist and former Democratic state chairman William A.

<sup>128</sup> See 1904 Special Session W. Va. Acts § 54.

<sup>129</sup> Letter from Mortimer F. Elliott to Aretas B. Fleming (Mar. 22, 1905), in FLEMING PAPERS, *supra* note 42 (forwarding letter from William A. Ohley, Mar. 21, 1905).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Memorandum from Alston G. Dayton to Aretas B. Fleming (July 23, 1904), in FLEMING PAPERS, *supra* note 42 (emphasis in original).

<sup>133</sup> *Id.*

<sup>134</sup> Letter from Aretas B. Fleming to Mortimer F. Elliott (Mar. 10, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>135</sup> *Id.*; see also Letter from Aretas B. Fleming to William A. Ohley (Mar. 9, 1905), in FLEMING PAPERS, *supra* note 42.

Ohley wrote to former governor Aretas B. Fleming about a meeting that coal producers were planning to hold two weeks later in Charleston to coordinate their response to Dawson's assault.<sup>136</sup> As governor, Fleming was known more for the controversy surrounding his entry into office—after challenging the election results, he was chosen by the legislature in a vote that split along partisan lines—than for any notable achievements as chief executive.<sup>137</sup> He did, however, win the favor of Standard Oil by smoothing the company's efforts to move from refining to production in the early years of the West Virginia oil boom.<sup>138</sup> After leaving the statehouse in 1893, Fleming had returned to private law practice in Fairmont, where he served as Standard's leading legal representative in the state.<sup>139</sup> He also held substantial shares in the coal company founded by his in-laws.<sup>140</sup>

Fleming, who was suffering ill health for much of that spring, didn't anticipate making the meeting and instead set out his views in writing. Candidly, Fleming said that Baker was likely correct about the law: Even though the words "chattels real" had been successfully stricken from the assessment provision of the tax reform act, the definition of personal property in a separate chapter still expressly included chattels real. The arguments Fleming saw against assessment of leases were more political and pragmatic than legal. First, if coal and oil leases were personal property, then so were farm leases, commercial leases, and so forth, all of which would have to be listed and assessed as personal property to the tenants. Second, Fleming said that many coal lessees had contracted to pay the taxes of their lessors and might now be forced to pay twice. Moreover, since assessments were done by county, in some cases the coal and the improvements

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<sup>136</sup> See Letter from Fleming to Ohley, *supra* note 135 (summarizing Mar. 6, 1905 letter from Ohley to Fleming); see also WILLIAMS, *supra* note 1, at 85, 211; Letter from Fleming to Elliott, *supra* note 42.

<sup>137</sup> See MORGAN, *supra* note 83, at 47; see also CALLAHAN, *supra* note 109, at 5–6. One historian of West Virginia's governors was blunt: "Despite his excellent background as a lawyer, judge and businessman, Fleming managed to accomplish little of note during his tenure of three years and one month." MORGAN, *supra* note 83, at 47. According to Morgan, the only major reform passed during Fleming's tenure was the move to voting by secret ballot. *Id.* Callahan was slightly more solicitous; after glossing quickly over the election controversy, he wrote that, in addition to "executive economy," Fleming was most noted for "his constant effort to induce capital to enter the state for investment and the building of railroads, opening of mines, and developing of timber lands and oil and gas fields." CALLAHAN, *supra* note 109, at 6.

<sup>138</sup> See MORGAN, *supra* note 83, at 47; CALLAHAN, *supra* note 109, at 6.

<sup>139</sup> See WILLIAMS, *supra* note 1, at 138–39; see also Letter from Mortimer F. Elliott to Aretas B. Fleming (June 22, 1905), in FLEMING PAPERS, *supra* note 42; Letter from Mortimer F. Elliott to Aretas B. Fleming (June 26, 1905), in FLEMING PAPERS, *supra* note 42 (persuading Fleming to continue as "chief counsel" representing Standard in West Virginia).

<sup>140</sup> WILLIAMS, *supra* note 1, at 139; see also RICE & BROWN, *supra* note 104, at 190.

would be split into different counties, neither worth separately what they would be worth together.<sup>141</sup>

As the newsmen predicted, Standard Oil was actively involved in the resistance effort, led by their solicitor general, Elliott, in regular correspondence with Fleming. The same day he sent his views to the coal operators, Fleming sent an equally frank letter to Elliott on the progress of tax reform. “I think our friends at Charleston are to be congratulated in the way they defeated obnoxious legislation,” Fleming wrote.<sup>142</sup> “Still I am afraid that chattels real or lease hold estates are taxable as personal property under the definition of [personalty].”<sup>143</sup> Fleming warned Elliott that the new governor and tax commissioner were planning to press the issue and suggested that Standard Oil cooperate with the coal producers on how best to report the leasehold interests. At the time, Standard Oil was facing the heat of an attack by the governor and legislature in Kansas that would ultimately lead to the company’s dismemberment; just days before, the attorney general of Kansas had filed a petition in the Supreme Court of Appeals for receivership against a Standard affiliate.<sup>144</sup> Fleming realized the West Virginia reformers were riding a rising tide. “It seems to me that the demagogues are getting the country into a bad condition in many places,” Fleming wrote to Elliott. “Our state is bad enough.”<sup>145</sup>

After receiving a copy of the *Morgantown Chronicle* publicizing the decision of the Monongalia County Court, Elliott promptly wrote to Fleming. Though Fleming would no doubt have been well aware of such a momentous order from his neighboring county, Elliott coolly directed, “I call your attention to this matter so that you may do what you think proper to protect the interest of the oil and gas companies which you represent.”<sup>146</sup> Senator Davis also reached out to Fleming, directing an employee to ask the former governor to protect the interests of Davis’s Empire Coal & Coke Company, which owned thousands of acres in Marion County that bordered on Monongalia.<sup>147</sup>

Together, the coal, oil, and gas producers secured an audience with Governor Dawson and Commissioner Dillon, urging that they be allowed to present their concerns before Dillon issued his directions to the county assessors. Dawson and Dillon agreed, and the meeting was set for March 28 in

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<sup>141</sup> Letter from Fleming to Ohley, *supra* note 135.

<sup>142</sup> Letter from Fleming to Elliott, *supra* note 134.

<sup>143</sup> *Id.*

<sup>144</sup> HIDY & HIDY, *supra* note 22, at 674–75.

<sup>145</sup> Letter from Fleming to Elliott, *supra* note 134.

<sup>146</sup> Letter from Mortimer F. Elliott to Aretas B. Fleming (Mar. 14, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>147</sup> Letter from C.M. Hendley to Aretas B. Fleming (Mar. 19, 1905), in FLEMING PAPERS, *supra* note 42.

Charleston.<sup>148</sup> Ohley, the coal lobbyist, was able to speak to Dillon in advance and came away confident that Dillon and Dawson would change their minds.<sup>149</sup>

On that Tuesday at the statehouse, Ohley, Dawson, and Dillon assembled for the hearing, along with coal, oil, and gas attorneys Z. Taylor Vinson of Huntington and James F. Brown of Charleston, and their supporter, U.S. Representative Joseph H. “Jodie” Gaines.<sup>150</sup> Fleming, unable to travel due to his continuing ill health, was represented by an associate, G.F. Alexander.<sup>151</sup> To the unpleasant surprise of the producers, Governor Dawson had also invited H.P. Hubbard, chairman of the recent Tax Commission, to present the case in favor of taxation.<sup>152</sup> “The fact that Dawson and Dillon had invited Hubbard to be present and defend their position . . . clearly indicated that they had pre-judged the case and had no intention of being influenced by the views of the coal and oil people,” Ohley later wrote to Fleming. In fact, Ohley was so frustrated that he left the room and walked to the office of Attorney General Charles W. May while the parties were presenting their arguments to the governor and commissioner. The attorney general showed Ohley the form that Commissioner Dillon had already prepared to be sent to assessors, which included a place to list leaseholds under tangible personal property. This confirmed Ohley’s judgment that the hearing was a charade.<sup>153</sup> Ohley held out one hope, however, as he was told that the commissioner was planning to travel to Washington that night to discuss the issue with Senator Elkins before issuing his instructions. “Unless Elkins can change the situation, therefore, the matter will have to go to the courts,” Ohley concluded.<sup>154</sup>

Meanwhile, Baker’s public opinion campaign in the newspapers was gathering steam. The *Morgantown Chronicle* published a summary of the reactions of newspapers in Weston, Parkersburg, and Charleston; according to the article, the *Weston Independent* attributed Baker’s suit to the frustration of

<sup>148</sup> Letter from William A. Ohley to Aretas B. Fleming (Mar. 20, 1905), in FLEMING PAPERS, *supra* note 42; *see also* Letter from Aretas B. Fleming to Van Winkler and Ambler (May 4, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>149</sup> Letter from William A. Ohley to Aretas B. Fleming (Mar. 22, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>150</sup> *See* Letter from Ohley to Fleming, *supra* note 148; *see also* Letter from William A. Ohley to Aretas B. Fleming (Mar. 30, 1905), in FLEMING PAPERS, *supra* note 42; Letter from E.W. Knight to Aretas B. Fleming (Apr. 10, 1905), in FLEMING PAPERS, *supra* note 42; *see also* BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 186–87 (Brown profile), 205–06 (Gaines profile), 213–14 (Vinson profile).

<sup>151</sup> Letter from William A. Ohley to Aretas B. Fleming (Mar. 25, 1905), in FLEMING PAPERS, *supra* note 42; *see also* Letter from G.F. Alexander to Aretas B. Fleming (Mar. 22, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>152</sup> Letter from William A. Ohley to Aretas B. Fleming (Mar. 25, 1905), in FLEMING PAPERS, *supra* note 42; *see also* BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 160.

<sup>153</sup> Letter from Ohley to Fleming, *supra* note 152.

<sup>154</sup> *Id.*

taxpayers with the failure of the legislature to pass taxes on coal, oil, and gas.<sup>155</sup> “[I]t is thought that the Standard will be engaged in one of the biggest legal fights it has ever had on its hands,” the editors of the *Independent* were quoted as saying. L.J. Williams, another member of the Tax Commission and of the WVU board of regents, appearing with Baker at the hotel Peabody in Morgantown, “publicly endorsed the plan of Mr. Baker to tax oil and gas leases according to their true worth.”<sup>156</sup>

On March 30, the *Daily Oil Review* in Sistersville published a letter from former judge Thomas P. Jacobs of New Martinsville to Baker.<sup>157</sup> In the letter, Jacobs told Baker that he agreed that productive oil and gas leases constituted chattels real and should be assessed as personal property under existing law. Condensing an opinion he had written while on the bench, Jacobs was unequivocal: “Are not therefore all the conditions of taxation present: the property; its character; its value? Can any officer in these circumstances obey his oath and let it escape?” In Jacobs’ view, “[m]illions escape taxation on account of failure of officers to do their plain duty.”<sup>158</sup> This opinion was remarkable, not so much for its hearty concurrence with Baker’s view, but for the identity of the author. Jacobs, after leaving the bench, had returned to law practice in New Martinsville and frequently worked for Elliott and Fleming to represent Standard Oil’s interests in West Virginia.<sup>159</sup> The fact was not lost on the company; after being apprised by Fleming of the results of the hearing and the publication of Jacobs’ letter to Baker, Elliott responded, “I was greatly surprised that [Jacobs] should write such a letter, especially for publication, as he evidently intended that it should be published.”<sup>160</sup>

#### D. *The Fight Moves to the Courts*

Senator Elkins either did not intervene or did not succeed in dissuading Commissioner Dillon, because Dillon ruled against the producers and issued the assessment forms with instructions to assess leasehold interests as chattels real under personal property.<sup>161</sup> Informed that Dillon’s decision was reached and even

<sup>155</sup> *Movement Spreads for Fair Taxes*, MORGANTOWN CHRON., Mar. 19, 1905, at 1.

<sup>156</sup> *L.J. Williams on Taxing Leases*, MORGANTOWN CHRON., Mar. 16, 1905, at 1.

<sup>157</sup> *Judge Jacobs and Taxing Leaseholds*, DAILY OIL REV., Mar. 30, 1905, at 2.

<sup>158</sup> *Id.*

<sup>159</sup> See, e.g., Letter from Mortimer F. Elliott to Aretas B. Fleming (Sept. 5, 1905), in FLEMING PAPERS, *supra* note 42; Invoice from Thomas P. Jacobs to Aretas B. Fleming (Oct. 24, 1905), in FLEMING PAPERS, *supra* note 42; Invoice from Thomas P. Jacobs to South Penn Oil Co. (Apr. 16, 1906) (on file with the West Virginia University West Virginia & Regional History Center).

<sup>160</sup> Letter from Mortimer F. Elliott to Aretas B. Fleming (Apr. 3, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>161</sup> See Letter from J.H. St. Clair to Aretas B. Fleming (Apr. 3, 1905), in FLEMING PAPERS, *supra* note 42.

written prior to the hearing, coal company attorney J.H. St. Clair of Fayette County told Fleming that his clients were “determined to fight to the bitter end and to fight viciously.”<sup>162</sup> A coalition of coal, oil, and gas executives quickly mobilized for a fight in the courts.<sup>163</sup> It was decided that the coal companies would lead the fight with a test case involving coal leases in the state courts, while the oil producers would file a separate suit on the oil leases.<sup>164</sup> On May 1, Dillon informed Baker of the anticipated test cases expected around the end of the month and invited Baker to appear on behalf of the taxpayers.<sup>165</sup> Baker readily agreed.<sup>166</sup>

The oil case, *South Penn Oil Company v. Dillon*, was filed in the circuit court covering Monongalia and Marion Counties.<sup>167</sup> The suit challenged the validity of taxing an oil lease between South Penn Oil and Jesse King on Miracle Run in Batelle District, in western Monongalia County.<sup>168</sup> On June 1, 1905, the parties assembled in the courtroom of Judge John W. Mason in Fairmont. Though Fleming was still in poor health, he appeared on behalf of South Penn Oil, as did Z. Taylor Vinson of Huntington and the company’s vice president and one of its general counsels, R.M. Cummings.<sup>169</sup> Baker and Dillon himself represented the commissioner, along with the clerk of the Supreme Court of Appeals, W. Gordon Mathews.<sup>170</sup>

Like the industrialists themselves, tax reformers in West Virginia were not neatly split along partisan lines. The coal partnership and familial relationship between Senator Davis, long the state’s leading Democrat, and Senator Elkins, its most influential Republican, had produced a dual-party control of power, both financial and political, often viewed with suspicion but

<sup>162</sup> *Id.*

<sup>163</sup> See Letter from Knight to Fleming, *supra* note 150; see also Telegram from Aretas B. Fleming to William A. Ohley (May 6, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>164</sup> Telegram from William A. Ohley to Aretas B. Fleming (Apr. 27, 1905), in FLEMING PAPERS, *supra* note 42; Letter from Mortimer F. Elliott to Aretas B. Fleming (May 23, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>165</sup> *Injunction in Supreme Court*, FAIRMONT WEST VIRGINIAN, May 6, 1905, at 2 (publishing letter from Dillon to Baker).

<sup>166</sup> *Id.*

<sup>167</sup> BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 84; *Oil Case Argued Before the Court*, MORGANTOWN CHRON., June 3, 1905, at 1. A separate lawsuit may have been filed by Standard Oil in federal court before newly appointed Judge Alston G. Dayton, the former U.S. Representative who had rejoiced over Dawson’s apparent change of heart on oil and gas taxes the year before. See BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 133–34; Letter from Mortimer F. Elliott to Aretas B. Fleming (June 13, 1905), in FLEMING PAPERS, *supra* note 42; see also *supra* notes 132–133 and accompanying text.

<sup>168</sup> *Oil Case Argued Before the Court*, *supra* note 167, at 1.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*; BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at xiii, 279–80.

never really undermined.<sup>171</sup> Fleming, a Democrat, had been closely associated with influential Democratic Senator Johnson N. Camden before becoming governor in 1888,<sup>172</sup> but prominent Democrats could be found in the other camp as well; Baker's co-counsel in the test case, Mathews, was the son of former Democratic governor Henry Mason Mathews (himself known for his efforts at post-conflict reconciliation and bipartisanship).<sup>173</sup> Within the Republican party, the split mirrored national politics during the Progressive Era: Senator Elkins sought to contain the reform impulses of the Monongalia County Republicans at the same time Senator Mark Hanna of Ohio was battling Roosevelt over the issue of corporate trusts on the national level until the senator's death in 1904.<sup>174</sup> Judge Mason, before whom the oil producers chose to bring their test case, had been a prominent Republican party leader and Commissioner of Internal Revenue (then one of the patronage plums in the federal government controlled by Senator Elkins) during the Benjamin Harrison administration.<sup>175</sup> Mason was publicly perceived by his contemporaries as more lawyer than policymaker, having refused several offers of nomination or appointment to high state and federal offices before being elected to the circuit court, though behind the scenes he was also a consistent and determined seeker of patronage offices.<sup>176</sup>

Judge Mason devoted hours to hearing the parties' arguments. Court finally adjourned around 10 p.m., "[t]he case being of such moment and involving such large interests that the court practically gave the day and night to the argument of the case," the *Morgantown Chronicle* reported.<sup>177</sup> The stakes were enormous, as Dillon represented them to the court: According to the commissioner, the oil leases in question represented \$200 million in value and would produce taxes of \$4 million per year, about four times the value of all taxes collected by the state in 1904.<sup>178</sup> "It is no wonder that the public conscience

<sup>171</sup> WILLIAMS, *supra* note 1, at 32–35, 72–77.

<sup>172</sup> MORGAN, *supra* note 83, at 48.

<sup>173</sup> BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 279; *see also* MORGAN, *supra* note 83, at 33.

<sup>174</sup> *See generally* DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* (2013); WILLIAM T. HORNER, *OHIO'S KINGMAKER: MARK HANNA, MAN AND MYTH* (2010).

<sup>175</sup> BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 83–84; *see also* WILLIAMS, *supra* note 1, at 50, 82.

<sup>176</sup> BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 83–84; WILLIAMS, *supra* note 1, at 132–33.

<sup>177</sup> *Oil Case Argued Before the Court*, *supra* note 167, at 1.

<sup>178</sup> *Id.* at 6; *see also* W.P. Hubbard, *Development of Taxation and Finance*, in *HISTORY OF WEST VIRGINIA* 605, 606, *supra* note 109 (reporting gross receipts of \$2.35 million for 1904 before deduction of amounts distributed to counties, districts, and municipalities such as \$578,000 for schools); *cf.* TAX COMMISSION PRELIMINARY REPORT, *supra* note 36, at 11–12 (describing deductions from state receipts in 1901–02).

has been shocked and nerves of the people are on a tingle, when two hundred million dollars are escaping taxation in West Virginia,” the *Chronicle* said.<sup>179</sup>

#### IV. THE COURTS DECIDE: LEASES ARE TAXABLE

It was the coal company’s suit that reached the Supreme Court of Appeals first. The court had agreed to hold a special session on May 25 to hear arguments on a case that, crafted by the same lawyers and using identical language as the oil company’s petition, challenged the tax commissioner’s right to order assessment of coal leases as chattels real.<sup>180</sup> The court’s decision in *Harvey Coal & Coke Co. v. Dillon*, announced on June 16, definitively settled the question of taxation of leaseholds—to the dismay of the coal and oil producers.<sup>181</sup>

##### A. *Harvey Coal & Coke v. Dillon: A Major Blow for Coal*

Like the oil case, the coal case involved a typical agreement, which contained a grant from Morris Harvey and others to the Harvey Coal & Coke Company to “demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years” the tract described; if the coal were not exhausted after thirty years, the lease would be extended “until the whole of said coal shall be so mined and removed.”<sup>182</sup> At the hearing, Dillon, Baker, and Mathews again appeared on behalf of the commissioner and the taxpayers.<sup>183</sup> The coal producers were represented by attorneys including Vinson, Jackson, and Gaines, who had made arguments to Dawson and Dillon in March, as well as lawyers from Fayetteville where the leases at issue were located.<sup>184</sup> Justice Henry Brannon, writing for the court, immediately noted the high stakes. “This is a very important case,” Brannon stated plainly. “It is vastly important to the state, as it involves large revenue imposed by recent legislation . . . .”<sup>185</sup> Because the amounts in question were so large—again represented by Dillon at \$200 million in taxable property—the matter was obviously of great importance to the coal lessees as well. The “able and elaborate oral and printed arguments by distinguished counsel” in the case were further evidence of its magnitude,

<sup>179</sup> *Oil Case Argued before the Court*, *supra* note 167, at 6.

<sup>180</sup> *Leasehold Tax Will Be Fully Tested*, SISTERSVILLE DAILY REV., May 12, 1905, at 1; *Statement of the Fayette County Leasehold Case*, FAIRMONT WEST VIRGINIAN, June 17, 1905, at 4.

<sup>181</sup> *Harvey Coal & Coke Co. v. Dillon*, 53 S.E. 928 (W. Va. 1905).

<sup>182</sup> *Id.* at 929.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; see also Letter from J.H. St. Clair to Aretas B. Fleming (Apr. 3, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>185</sup> *Harvey Coal & Coke Co.*, 53 S.E. at 929.

Brannon wrote, by way of apology for the “perhaps too lengthy opinion” that followed.<sup>186</sup>

While indeed lengthy, Justice Brannon’s opinion carried great weight in West Virginia in 1905. A few years after his death in 1914, former governor George W. Atkinson called him “perhaps the greatest jurist that West Virginia has ever brought forth.”<sup>187</sup> A careful and methodical lawyer, his influence in shaping West Virginia law during his 24 years on the Supreme Court of Appeals has been remarked by both contemporaries and historians.<sup>188</sup> Elected as a Democrat in 1896, he became disenchanted with the agrarianism and bimetallism movement of William Jennings Bryan and became a Republican soon after.<sup>189</sup> An early biographer of the court called him “quite liberal in his opinions,”<sup>190</sup> but as a jurist, he had, by 1905, established himself as hospitable to the corporation as a result of his laissez-faire philosophy on economic regulation.<sup>191</sup>

Standard Oil and the coal producers had reason to expect a favorable opinion from his pen. Four years earlier, Brannon had authored an opinion in a case upholding the dismissal of a claim by an oil transportation and storage business unable to compete with certain ruinous practices of Standard Oil.<sup>192</sup> In Brannon’s opinion, these business practices, while perhaps regrettable in their effects, could not be challenged by law:

That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? . . . Human intellect, human laws cannot prevent these disasters. The dead and wounded have no right of action from the working of this imperious law.<sup>193</sup>

The coal and oil producers must have been astonished when the court, in an opinion authored by Brannon, ruled against them on the taxation of leaseholds. In his opinion, Brannon carefully canvassed and rejected more than a dozen arguments of the coal producers. Characteristically, he relied more on precedent than principle, but the opinion more than once sounded notes of

<sup>186</sup> *Id.*

<sup>187</sup> See BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 64; see also John Reid, *Henry Brannon and Marmaduke Dent: The Shapers of West Virginia Law, Part I*, 65 W. VA. L. REV. 19, 20–21 (1962). Although Atkinson’s volume has been noted for its universal flattery of its subjects, its profile of Judge Brannon exceeds most others in superlatives.

<sup>188</sup> See BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 64; Reid, *supra* note 187, at 21; J.W. Vandervort, *The Supreme Court of West Virginia, III*, 12 GREEN BAG 292, 299 (1900).

<sup>189</sup> Reid, *supra* note 187, at 22; Vandervort, *supra* note 188, at 299.

<sup>190</sup> Vandervort, *supra* note 188, at 299.

<sup>191</sup> Reid, *supra* note 187, at 27.

<sup>192</sup> See *West Virginia Transp. Co. v. Standard Oil Co.*, 40 S.E. 591 (W. Va. 1901).

<sup>193</sup> *Id.* at 595.

reform-minded idealism, even hinting at times of carefully controlled outrage. After noting the broad taxing power of the state, the court noted that both the common law and the West Virginia code had historically categorized chattels real as personal property.<sup>194</sup> “Try this property or right under these definitions,” Justice Brannon wrote. “It is surely a lease, and therefore a chattel real.”<sup>195</sup>

The fact that the lease could be extended until the coal was exhausted did not undermine that conclusion; the court noted its holding in *State v. South Penn Oil Co.* that this merely transformed the lease into a tenancy at will.<sup>196</sup> Nor did it matter that there would be no coal to revert to the owner once the coal was exhausted, because the agreement granted not the coal itself but an intangible right to mine the coal, leaving a reversion of interest to the owner once the coal was gone.<sup>197</sup> Valuation of the lease was not difficult; a mining claim, like any other property interest, was worth what it could be sold for.<sup>198</sup>

The court squarely rejected the coal company’s argument that the right conveyed remained part of the real estate and therefore had to be taxed to the surface owner. Distinguishing Pennsylvania cases involving leases of “all the coal,” the court held that the Harvey lease was not for the coal but for the privilege of mining it.<sup>199</sup> “Thus, even if it conveys an interest in land, it is a chattel interest,” the court held, and both at common law and under the 1905 tax reform law a chattel interest could be taxed as personal property of the lessee.<sup>200</sup> Earlier cases such as *Peterson v. Hall*<sup>201</sup> and *Carter v. Tyler County Court*<sup>202</sup> were not to the contrary, the court stated; those cases merely held that the oil itself, not the right to produce it, was part of the land and the freehold interest.<sup>203</sup> *Wilson v. Youst* did not support the plaintiff’s argument either.<sup>204</sup> Despite language in that case that a lease to remove oil was “in legal effect a sale of a portion of the land,” the holding in the case was limited to protection of the rights of minors against a lease conveyed without their consent.<sup>205</sup> Moreover, the coal producers

<sup>194</sup> *Harvey Coal & Coke Co. v. Dillon*, 53 S.E. 928, 930–31 (W. Va. 1905).

<sup>195</sup> *Id.* at 931.

<sup>196</sup> *Id.* (citing *State v. South Penn Oil Co.*, 24 S.E. 688 (W. Va. 1896)).

<sup>197</sup> *Id.* at 932.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 933–34.

<sup>200</sup> *Id.* at 934.

<sup>201</sup> 50 S.E. 603 (W. Va. 1905).

<sup>202</sup> 32 S.E. 216 (W. Va. 1899).

<sup>203</sup> *Harvey Coal & Coke Co.*, 53 S.E. at 935 (distinguishing *Peterson v. Hall*, 50 S.E. 603 (W. Va. 1905) and *Carter v. Tyler Cnty. Ct.*, 32 S.E. 216 (W. Va. 1899)).

<sup>204</sup> 28 S.E. 781 (W. Va. 1897).

<sup>205</sup> *Harvey Coal & Coke Co.*, 53 S.E. at 936–37 (distinguishing *Wilson v. Youst*, 28 S.E. 781, 787 (W. Va. 1897)).

could not have it both ways; “how can it be said that such leases impart ownership in the very coal in the lessee, if it remains in the surface owner?”<sup>206</sup>

While the leases might already have been taxable under common law as chattels real, the court held, the amendments to the tax laws made clear that the legislature now intended to capture leases for taxation. The 1904 amendments to the valuation law were amended to provide for the assessment of “any interest in the minerals, mineral waters, oil, gases, coal, ore, or timber,” rather than simply a freehold interest.<sup>207</sup> The 1905 act carried this policy through by striking the word “freehold” from the description of mineral interests that assessors should assess and by adding the words “including chattels real” to the definition of personal property.<sup>208</sup> The court paused over the coal producers’ argument about their legislative victory the year before in having that same language, “including chattels real,” stricken from the section describing property that corporations must report to the assessor.<sup>209</sup> While acknowledging the inconsistency, the court concluded that the commissioner had the better argument, as “[s]o much of the statute speaks intent to tax chattels real.”<sup>210</sup> Moreover, if the legislature intended to exempt only the leases of corporations, “no matter how plain its language, such exemption of chattels real of corporations would be baldly unconstitutional” under Article X of the state constitution.<sup>211</sup> The court was unmoved by one of the producers’ favorite arguments, that taxing leaseholds would constitute “double taxation” since the court had previously held that coal or minerals in place were part of the freehold. “[T]here is no double taxation in taxing leaseholds,” the court stated bluntly. “They are distinct properties . . . . There can be several estates or interests, each property, in a tract of land.”<sup>212</sup> Nor was this a violation of equal protection: “All chattels real are taxed alike, and valued alike.”<sup>213</sup>

Justice Brannon’s otherwise workmanlike opinion included a few moments of stylistic flourish. Rejecting the producers’ equal protection argument, the court strung together four rhetorical questions:

Is not the lease in this case a highly valuable asset of the corporation? Has it not a distinct property in it alone? Who can say that a conveyance of coal in fee does not create a separate

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<sup>206</sup> *Id.* at 937.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 938–40.

<sup>210</sup> *Id.* at 940.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 941.

<sup>213</sup> *Id.* at 943.

property, taxable as such? Why is not a long lease vesting the lessee with right to take coal not a valuable separate property?<sup>214</sup>

Baker's legal theory provided a convincing hook for a jurisprudentially conservative judge like Brannon. Taxation of chattels real, far from requiring judicial activism or even sanction of an extension of the legislative power into private economic affairs, rested on fundamental common law and constitutional concepts: the estate of chattels real and the taxing power of the state. Concluding, the court took a position of deference to the legislature, but not without hinting at its own sense of the magnitude of the issue for West Virginia and its sympathy for the cause:

We cannot forget, we cannot be blind to, the fact that vast values in coal leases, in which millions and millions of dollars are invested, have in the past contributed nothing to the public treasury. . . . We cannot forget that great agitation and discussion before the people of this state has recently prevailed upon the subject of their taxation. It has been widely asserted that they have not helped to bear the burden resting till then on other shoulders. This long and warm agitation is a part of the history of the state. . . . The Legislature has plainly expressed its will that these chattels real shall be taxed, and, it being within the taxing power of the state, it ill becomes a court to defeat and frustrate the public and legislative will.<sup>215</sup>

The day the decision was handed down, Baker received a telegram from Mathews: "Geo. C. Baker, Morgantown, W.Va: Harvey Coal Company vs. Dillon, Fayette County, decree affirmed; no dissent."<sup>216</sup> Congratulations poured in to Baker as the primary author of the strategy.<sup>217</sup> Baker was particularly gratified by the unanimity of the decision; his longtime law partner, Frank Cox, had been elected to the court in 1904 and may have been expected to vote with the commissioner, but the court also included three justices from within the coal region.<sup>218</sup>

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<sup>214</sup> *Id.* at 941.

<sup>215</sup> *Id.* at 943.

<sup>216</sup> *Leaseholds and Chattels Real Are Taxable*, FAIRMONT WEST VIRGINIAN, June 16, 2021, at 1.

<sup>217</sup> *Id.*

<sup>218</sup> These included Joseph M. Sanders of Mercer County and Henry C. McWhorter of Kanawha County, both coal producing regions, and George Poffenbarger of Mason County, with its coal shipping port on the Ohio River. See West Virginia Division of Arts, Culture & History, JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS, <https://archive.wvculture.org/history/government/supremecourt.html> (last visited October 22, 2021).

B. South Penn Oil Company v. Dillon: *Oil Case Follows Suit*

In the oil regions, the newspapers noted that the principles of the court's ruling applied not only to coal but to oil leases, and Judge Mason's anticipated decision in *South Penn Oil Co. v. Dillon* must necessarily follow suit.<sup>219</sup> Counsel for Standard Oil also had "no doubt that our suit will be decided the same as the coal case."<sup>220</sup> Elliott found especially frustrating the court's conclusion that the oil might remain part of the freehold, and thus taxable to the surface owner, but the lease itself could be taxable as personal property to the lessee.<sup>221</sup>

Even with the suspense largely relieved, when Judge Mason announced his decision on July 1, 1905, the *Fairmont West Virginian* called it "the most important case ever decided in this Circuit Court" and reprinted it in full across six columns and three pages.<sup>222</sup> As expected, the decision cited and followed *Harvey Coal & Coke* in holding that the leases were chattels real and taxable as personalty, but Judge Mason advanced what he thought would be a better and simpler argument were he not constrained by the Supreme Court's decision:

If I were left to my own judgment I should be inclined to construe those oil and gas contracts as conditional sales, regarding the royalties as the purchase prices, and vesting the title in fee in the lessee when the oil or gas was found in the premises in paying quantities. This would eliminate all questions as to the estates or interest of the parties, and also all question of the place at which the property should be assessed.<sup>223</sup>

There was one issue that the Supreme Court of Appeals had left open, however: whether the leases, if taxable as personal property could be subject to five years of back taxes. Judge Mason held that they could not: Although chattels real might have been taxable interests, in fact the legislature had not chosen to include them until the legislative amendments of 1904 and 1905.<sup>224</sup> Judge Mason rejected Commissioner Dillon's and Baker's argument that the leases had been taxable under the general definition of personal property because the statute, prior to 1904, had elsewhere specifically defined different classes of property without mentioning chattels real. "This entire chapter is devoted to declaring what property shall be, and how assessed," Mason wrote. "I could not adopt the

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<sup>219</sup> *Dillon's Ruling Stands*, SISTERSVILLE DAILY REV., June 17, 1905, at 1; *Statement of the Fayette County Leasehold Case*, FAIRMONT WEST VIRGINIAN, June 17, 1905, at 4.

<sup>220</sup> Letter from Elliott to Fleming, *supra* note 139.

<sup>221</sup> *Id.* at 2.

<sup>222</sup> *Judge Mason's Decision on Taxing Oil and Gas Leases as Chattels Real*, FAIRMONT WEST VIRGINIAN, July 3, 1905, at 1.

<sup>223</sup> *Id.* at 2.

<sup>224</sup> *Id.* at 2–3.

construction asked by defendants without violating every rule upon that subject.”<sup>225</sup>

Vinson, who had appeared on behalf of South Penn Oil, suggested that the parties request reargument of the case.<sup>226</sup> The idea initially appealed to Elliott in New York, but Fleming must have discouraged it as fruitless, or possibly worse. Elliott conceded.<sup>227</sup> “Of course there is no object in obtaining a reargument if the ruling of the Court would not be changed,” Elliott wrote to Fleming after receiving his letter. “I note particularly what Judge Mason said to you in regard to what he would have held had it not been for the opinion of the Supreme Court.”<sup>228</sup> Though Elliott thought other Supreme Court of Appeals precedent precluded Judge Mason’s notion that the leases were conditional sales, he appeared willing not to push the matter further.<sup>229</sup>

## V. A NEW ARENA: VALUATION

After *Harvey Coal & Coke* and *South Penn Oil*, the state’s right to tax coal and oil leaseholds was “fix[ed] beyond further conjecture,” as the *Sistersville Daily Review* concluded.<sup>230</sup> But that didn’t mean the fight was over. The following spring brought the next battle, over the value at which the leases were to be assessed.

Standard Oil, for its part, largely focused on the details of compliance. In late winter, Theodore M. Towl, who handled tax matters for Standard’s pipeline companies, took issue with the extent of the financial disclosures requested by the forms issued by the Board of Public Works for disclosure of corporate property.<sup>231</sup> Towl prevailed upon Governor Dawson to call a meeting of the Board, and Towl traveled to Charleston to make his presentation.<sup>232</sup> The Board agreed that the forms overreached the law and permitted Towl to make his company’s disclosures on alternative forms he showed them.<sup>233</sup> Towl did not attempt to avoid disclosure of property, however. On March 17, Commissioner Dillon wrote to Fleming, advising that he was instructing personal property assessors to collect reports of all personal property of pipeline companies and

<sup>225</sup> *Id.* at 3.

<sup>226</sup> Letter from Mortimer F. Elliott to Aretas B. Fleming (July 10, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>227</sup> *Id.*; Letter from Mortimer F. Elliott to Aretas B. Fleming (July 15, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>228</sup> Letter from Elliott to Fleming, *supra* note 227.

<sup>229</sup> *Id.*

<sup>230</sup> *Dillon’s Ruling Stands*, *supra* note 219.

<sup>231</sup> Letter from Theodore M. Towl to Aretas B. Fleming (Mar. 6, 1906), in FLEMING PAPERS, *supra* note 42.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

any real estate used in connection with its business and would use both in calculating the lease value.<sup>234</sup> After receiving a copy of the letter, Towl wrote to Fleming that “I think Mr. Dillion is entirely correct in the conclusions he comes to, as stated in his letter, – that all personal property of every description is taxable by the State Board.”<sup>235</sup> Towl encouraged others also not to use the Board’s forms, but he convinced other companies to adopt the rates at which he was reporting Standard’s pipelines, although some of them thought the rates too high.<sup>236</sup>

The coal producers, however, put up a fight. On February 10, 1906, Fleming and other coal company representatives made a presentation to Governor Dawson and Commissioner Dillon, with Baker in attendance, in Morgantown.<sup>237</sup> According to a later report by Baker, Fleming, as chief counsel for the Fairmont Coal Company, represented that the company merely “broke about even each year,” earning “good money” only during the occasional years when strikes disrupted production elsewhere.<sup>238</sup> Baker wrote to the editors of the *West Virginian* a few weeks later after noticing, buried in the back pages of the paper, some financial disclosures of the Fairmont Coal Company and its affiliate, the Consolidation Coal Company.<sup>239</sup> Baker noted that Consolidation Coal reported net earnings of more than \$1.3 million for the prior year, with additional credits of close to \$2.8 million and had recently purchased 4,500 acres of coal property in West Virginia.<sup>240</sup> Fairmont Coal reported net earnings of over \$669,000 and credits of nearly three million dollars and had issued gold bonds, secured by a \$5.5 million mortgage, earning five percent interest.<sup>241</sup> “Fairmont Company Is Prospering,” proclaimed a subheading in the report, reprinted from the *Baltimore Sun* after the directors’ meeting there.<sup>242</sup> Yet the West Virginia coal, Baker pointed out, was assessed between \$15 and \$90 an acre, less than one-tenth of its mortgage value.<sup>243</sup>

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<sup>234</sup> Letter from Charles W. Dillon to Aretas B. Fleming (Mar. 17, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>235</sup> Letter from Theodore M. Towl to Aretas B. Fleming (Mar. 20, 1906), in FLEMING PAPERS, *supra* note 42.

<sup>236</sup> Letter from Towl to Fleming, *supra* note 231; Letter from Towl to Fleming, *supra* note 235.

<sup>237</sup> *Marion County’s Record Is One of the Best*, FAIRMONT WEST VIRGINIAN, Feb. 10, 1906, at 1; see also *Mr. Baker Read Our “Supplement” and Found Some Facts*, FAIRMONT WEST VIRGINIAN, Mar. 28, 1906, at 1.

<sup>238</sup> *Mr. Baker Read Our “Supplement” and Found Some Facts*, *supra* note 237, at 1.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 4.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*; *Governor Fleming—Is Now on Directorate of Consolidation Coal Company—Mr. Watson Is Still President*, FAIRMONT WEST VIRGINIAN, March 23, 1906.

<sup>243</sup> *Mr. Baker Read Our “Supplement” and Found Some Facts*, *supra* note 237, at 1. Baker made the still-common mistake of referring to the parent corporation as “Consolidated Coal.” *Id.*

Baker was incensed. His lengthy letter to the editors included the most impassioned statement of his tax reform campaign:

The farmers of this state do not net 2 per cent. on their investment, throwing away their labor for the year, and yet this great Fairmont Coal Company declared 5 per cent. on \$5,525,000 during the year, and still had left in the “till” to divide among its stockholders \$669,709, and to begin the year for good luck, it still had in the “jack pot” on December 31, 1905, in round numbers, \$3,000,000 to the credit of profit and loss. Such a report shows a golden harvest, for whether it rains or shines the coal king reaps his rich returns year after year, regardless of rain or weather conditions, for God laid up the coal and garnered it away, millions of years ago, which ought to have been for the benefit of the land owners, to-wit, the farmers, and from which magnificent mines the great officials of the railroads are reaping splendid harvests, summer and winter, and turning the golden stream towards Baltimore and New York, where in their luxury they are courted as millionaires, while at the same time they should be branded [as] monumental grafters and tax dodgers. I remain,

Yours Respectfully,

GEORGE C. BAKER.<sup>244</sup>

In addition to minimizing the value of their property, coal producers also sought in the regulatory process to challenge the underlying legal theory. Under the 1904 assessment law, the role of the Board of Public Works was to act as a “Board of Review and Equalization” of county tax assessments, a response to the criticism of unequal assessment between districts or counties under prior law.<sup>245</sup> The Board was empowered to “review, correct and equalize the reassessment in the several counties and any inequalities therein and may either raise or lower such assessments in any one or more counties to the end that the assessment shall be according to the true and actual value of the property . . . .”<sup>246</sup>

At a hearing before the Board of Public Works in mid-March to reconsider assessments in Marion County, counsel for coal producers argued that the Board could not raise assessments on certain leases—that is, coal leases—

at 1, 4. The figures quoted by Baker accurately represented the earnings for the two companies as reported by the paper. *Compare id.* at 4, with *Governor Fleming*, FAIRMONT WEST VIRGINIAN, Mar. 23, 1906, at 12.

<sup>244</sup> *Mr. Baker Read Our “Supplement” and Found Some Facts*, *supra* note 237, at 4.

<sup>245</sup> 1904 Special Session W. Va. Acts ch. 15, § 12; *see also* 1902 TAX COMMISSION PRELIMINARY REPORT *supra* note 29.

<sup>246</sup> 1904 Special Session W. Va. Acts ch. 15, § 12.

without also raising the value of all other leases and perhaps associated realty.<sup>247</sup> Baker, arguing at the hearing on behalf of the taxpayers of Monongalia and Marion Counties, responded that the power of the Board to equalize assessments “in the several counties *and any inequalities therein*” would be surplusage unless read to permit the Board to reassess property—such as coal and oil leases—that were not being assessed fairly in relation to other types of property within the county.<sup>248</sup> The scales were more than a little weighted against the coal companies at the hearing, since Dawson had been the author of the law and had stated that “he fully intended to give to the Board of Public Works the power to correct any inequalities, such as you have in Marion county, relating to the Pittsburg or Connellsville vein of coal,” Baker wrote.<sup>249</sup>

Baker’s zealous advocacy for the taxpayers was not appreciated by everyone. A note of acrimony appeared in Baker’s correspondence with the editors of the *Fairmont West Virginian*, whom Baker took to task, as “the Republican organ in Marion county,” for what he considered inadequate coverage of the tax reform debate.<sup>250</sup> The editors didn’t refrain from making a dig of their own: Under the headline “Mr. Baker Undertakes to Answer Our Questions,” the editors added a subhead: “Tries to Show Why He Takes Our Money.”<sup>251</sup> The same month, two letters to the *Fairmont West Virginian* accused Baker of political opportunism and self-promotion. “After he finds some one has struck some popular chord George at once proceeds to ‘blow his horn’ to the music,” one reader grouched.<sup>252</sup> “‘Blow’ is just exactly the word to use in connection with Sir George’s articles,” another agreed. “His prime motive in writing them is to ‘blow his own horn.’”<sup>253</sup> The criticism seems largely unfounded; although Baker was highly vocal in the campaign for tax reform in 1905 and 1906 and often publicly supported Republican candidates for office, this was and would remain his only period of political activism.<sup>254</sup>

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<sup>247</sup> *Mr. Baker Undertakes to Answer Questions*, FAIRMONT WEST VIRGINIAN, Mar. 23, 1906, at 1; see also *State Tax Rate Will Not Be Over Five Cents, Says Mr. Dillon*, FAIRMONT WEST VIRGINIAN, Mar. 9, 1906, at 1.

<sup>248</sup> *Mr. Baker Understands to Answer Questions*, FAIRMONT WEST VIRGINIAN, Mar. 23, 1906, at 4; see also *As to Coal Valuations*, FAIRMONT WEST VIRGINIAN, Feb. 22, 1906, at 4 (Baker hired to represent Marion County Court in seeking increase of coal valuations before Board of Public Works).

<sup>249</sup> *Mr. Baker Understands to Answer Questions*, FAIRMONT WEST VIRGINIAN, Mar. 23, 1906, at 4.

<sup>250</sup> *Id.* at 1.

<sup>251</sup> *Id.*

<sup>252</sup> FAIRMONT WEST VIRGINIAN, Mar. 15, 1906, at 4.

<sup>253</sup> *Id.*

<sup>254</sup> By spring of 1906, Baker may have been under contract with the governor’s office to undertake the public opinion campaign in lieu of calling another special session of the legislature. See *Extra Session Not Needed*, FAIRMONT WEST VIRGINIAN, Mar. 31, 1906, at 8.

Baker's testimony about the value of coal leases to the Board of Public Works appeared to have caused concern to former Fairmont mayor Thomas W. Fleming. On March 5, 1906, Baker responded to a letter from the mayor, defending the source and citation of facts he had related during the hearing.<sup>255</sup> Baker noted that he would happily correct his facts to the Board if shown to be in error, but that "your farmers and fellow citizens" wouldn't get a fair deal if corporations weren't assessed on the fair value of their coal. Switching to the personal form of address – highly uncharacteristic for business correspondence at the time – Baker wrote, "[n]ow Tom, you know the Saxmans would not take \$200.00 an acre for those 5,000 acres of coal. [They] would probably ask five or six hundred dollars, if they would even take that. Isn't this so?"<sup>256</sup>

The Board of Public Works continued to support Dawson, Dillon, and Baker's program throughout the spring. In the coal stronghold of Fayette County, the county assessor had originally assessed real estate at 18 million dollars, but on appeal the county court had lowered the figure to approximately eight million.<sup>257</sup> Although Dillon "did not protest this reduction" and was expected to use his influence with the Board to let it stand, reported the *Fairmont West Virginian*, the Board nevertheless raised the figure by 80% to more than 15 million.<sup>258</sup> Similar actions were anticipated in several districts in Raleigh County.<sup>259</sup>

## VI. LAST MAN STANDING: THE SUPREME COURT CHANGES COURSE

Standard Oil was initially displeased with the assessments it received for its companies, issued June 19. Towl wrote to Fleming after receiving the notices, requesting immediate direction as to how to file appeals within the statutory deadline.<sup>260</sup> After responding to Towl by telephone, Fleming promptly asked his law partner, Charles Powell, to assist Towl with an appeal from the assessment in Monongalia County and perhaps others.<sup>261</sup> Only one day later, and without explanation, Towl wired to Fleming that "[w]e have decided not to appeal in any county."<sup>262</sup>

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<sup>255</sup> Letter from George C. Baker to Thomas W. Fleming (Mar. 5, 1906), in FLEMING PAPERS, *supra* note 42.

<sup>256</sup> *Id.*

<sup>257</sup> *Coal Values to Be Restored in Fayette*, FAIRMONT WEST VIRGINIAN, Apr. 7, 1906.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Telegram from Theodore M. Towl to Aretas B. Fleming (July 12, 1906), in FLEMING PAPERS, *supra* note 42.

<sup>261</sup> Letter from Aretas B. Fleming to Charles Powell (July 12, 1906), in FLEMING PAPERS, *supra* note 42.

<sup>262</sup> Telegram from Theodore M. Towl to Aretas B. Fleming (July 13, 1906), in FLEMING PAPERS, *supra* note 42.

In 1906, Standard was busy frying much bigger fish. Ida Tarbell's devastating series of articles for *McClure's* and Roosevelt's trust-busting rhetoric had produced a powerful antitrust current that was sweeping across the states and would lead to the trust's dismemberment in 1911.<sup>263</sup> In Texas—which in 1905 produced 36.5 million barrels, or 27% of total crude output in the country—the company suffered a blow in September 1906 when testimony by Henry Clay Pierce in a Missouri antitrust suit linked the company to the Waters-Pierce Oil Company that had oppressively controlled distribution in Texas.<sup>264</sup> Unconvinced that the Texas Spindletop field had staying power, Standard was betting even bigger on oilfields centered in Nebraska, which in 1905 produced over 12 million barrels.<sup>265</sup> In March 1905, Kansas' trust-busting attorney general, C.C. Coleman, had filed an antitrust action against Standard's three Kansas affiliates and, buoyed by facts discovered in an investigation by the federal Bureau of Corporations, Coleman filed a renewed petition in October 1906.<sup>266</sup>

By contrast, West Virginia's day as a center of oil production had passed. As one historian of the era noted, in the first five years of the twentieth century, "[t]he Standard board of trustees welcomed the flood of mid-continent oil because production in the great Appalachian field was declining at an alarming rate."<sup>267</sup> In this climate, even a significant tax increase in West Virginia was likely not worth the expense or the political capital it would have cost Standard to fight it.

The coal companies, however, took one more shot. In Fayette County, two of the district assessors, B.E. Bare and S.T. Carter, had assessed numerous coal leases at a fraction of what the land itself appeared to be worth.<sup>268</sup> For example, a lease of the Hemlock Coal Company sold for \$163,000 in 1903 and was worth at least \$200,000 in 1906, but was assessed by Bare that year at only \$12,000.<sup>269</sup> Dillon alleged the lease should be valued at no less than \$100,000. Making good on the promise (or threat) in the tax reform law to assess equally from all counties, Commissioner Dillon filed suit seeking a writ of mandamus compelling Bare to assess the 21 leases in question at \$1,340,000 and compelling Carter to assess an additional 32 coal leases at \$5,635,000.<sup>270</sup> The coal companies lined up to resist.

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<sup>263</sup> See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); BRUCE BRINGHURST, *ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890–1911* at 145–57 (1979).

<sup>264</sup> BRINGHURST, *supra* note 263, at 57–59.

<sup>265</sup> *Id.* at 77.

<sup>266</sup> *Id.* at 81–83.

<sup>267</sup> *Id.* at 77.

<sup>268</sup> *State ex rel. Dillon v. Bare*, 56 S.E. 390, 393 (W. Va. 1906).

<sup>269</sup> *Id.* at 390.

<sup>270</sup> *Id.*

The Supreme Court of Appeals decided the matter in *State ex rel. Dillon v. Bare* on October 23, 1906, this time in an opinion authored by Justice George Poffenbarger, a Mason County Republican who would be known principally for advocating reforms of the court's procedures.<sup>271</sup> Dillon and Mathews appeared on behalf of the state—this time without Baker, whose clients, the taxpayers of Monongalia and Marion counties, were not involved.<sup>272</sup> In its opinion, the court first rejected Bare's argument that mandamus was improper because an assessor's duty involved the exercise of discretion. While a court would not compel a particular valuation, the court held, it was "beyond question or doubt that the remedy by mandamus to compel execution, in good faith, of discretionary power, cannot be barred by a mere pretense of such execution."<sup>273</sup> The standard for mandamus, however, was a high one: "The absence of discretion must be so flagrant as to be irreconcilable with honest judgment."<sup>274</sup>

In analyzing Bare's and Carter's performance of their duties, the court held that the assessments of the coal leases were reasonable. In one paragraph, Poffenbarger eviscerated the entire program of tax reform put in motion by Baker, Dawson, and Dillon:

What is taxable under the designation of "leasehold" on the personal property book? My answer to that question is that it is the right to use the property upon which the lease is held for the purposes of the lease. It is an intangible property, one which the law recognizes as a thing of value, but is incorporeal and intangible in its nature. It is not the property upon which the lease is held, nor the property used in its exercise. Therefore, in determining the taxable value of the leasehold, the pecuniary value of the property used in connection therewith, or the use of which constitutes the leasehold estate, is not to be taken into consideration.<sup>275</sup>

The land, Justice Poffenbarger wrote, was chargeable to the surface owner and could not be considered in determining the lease value.<sup>276</sup> The fixtures on the land weren't part of the lease value because they were chargeable separately as personal property, and then only at the value to the average owner, not to the coal

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<sup>271</sup> BENCH AND BAR OF WEST VIRGINIA, *supra* note 19, at 146–47. In 1903, at Poffenbarger's urging, the court adopted the preliminary conference of judges in every case, a move that eliminated "any possibility of a one judge decision in the court of last resort." *Id.* at 146. Poffenbarger also led the move to reduce the length of argument from two and a half hours to one hour. *Id.*

<sup>272</sup> *State ex rel. Dillon*, 56 S.E. at 390.

<sup>273</sup> *Id.* at 391, 392.

<sup>274</sup> *Id.* at 392.

<sup>275</sup> *Id.* at 393.

<sup>276</sup> *Id.*

company.<sup>277</sup> The improvements made by the coal company—excavations, embankments, entries, shafts—were also part of the land, valuable to the lessor as well as the lessee, and therefore could not be taken into account in valuing the leasehold interest.<sup>278</sup> By the time Justice Poffenbarger was done, he had concluded, “what is left that can be taxed under the additional designation ‘leasehold’? Plainly, nothing but the naked intangible right of use of the land.”<sup>279</sup>

In a discussion spanning nine pages in the West Virginia Reports and containing only one citation, Justice Poffenbarger detailed what could not be considered in valuing the leasehold interest.<sup>280</sup> The price must be based on the value of working the coal lease, but the profits obtained by the coal producer could not themselves provide a basis for valuation. “Successful, profitable operation requires skill, capacity, and judgment, not only in the operation of the mine, but in the disposition of the products. Did the Legislature intend to tax that?”<sup>281</sup> The sale price of the lease was not relevant either because a portion of the purchase price would likely represent payment for the improvements and fixtures themselves, which were already separately assessed to the lessee as personal property.<sup>282</sup> Having already held that the improvements and fixtures should only be valued at their objective worth to the average person rather than their value as part of a coal operation, those separate valuations were undoubtedly a fraction of the lease price. To this the court shrugged its shoulders: If the separate valuation of those improvements and fixtures were too low, that was the fault of the assessor of the improvements and fixtures and could not be recovered in taxing the lease.<sup>283</sup> Nor was the lease value equal to the lease sale price minus the assessed value of the improvements and fixtures. “Would it be right to go upon a man’s premises and guess at the aggregate value of all his tangible property and then attempt to apportion it out among the several articles? Certainly not.”<sup>284</sup> The court went further, however: Not only was the lease sale

<sup>277</sup> *Id.* at 393–94.

<sup>278</sup> *Id.* at 394.

<sup>279</sup> *Id.* In a twist of irony, the first two student winners of the oral advocacy competition sponsored by Baker, in 1926 and 1927, were members of the “Poffenbarger Club.” Cady, *supra* note 18, at 44 n.12–13. Justice Poffenbarger had retired from the bench in 1922 after serving for 22 years. See West Virginia Department of Arts, Culture & History, JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS, <https://archive.wvculture.org/history/government/supremecourt.html> (last visited October 22, 2021).

<sup>280</sup> *State ex rel. Dillon*, 56 S.E. at 395–98. The decision cited to the prohibition on double taxation recognized by the court in a companion case, *Dillon v. Graybeal*, 55 S.E. 398 (1906). See *State ex rel. Dillon*, 56 S.E. at 396.

<sup>281</sup> *State ex rel. Dillon*, 56 S.E. at 396.

<sup>282</sup> *Id.* at 397–98.

<sup>283</sup> *Id.* at 397.

<sup>284</sup> *Id.* at 398.

price not apportionable, it was no evidence of value at all. “The value of each [lease and improvements] must be determined separately, and, in determining the value of one, no attention can be given to the values of the others. The evidence offered here does not afford any indication of the value of the leasehold considered separately.”<sup>285</sup>

Having dismissed all objective bases urged by the commissioner for valuing the leaseholds, the court ultimately deferred to the subjective beliefs of the assessors. According to the court, Bare denied under oath having any personal knowledge that the Hemlock Coal lease had recently sold for \$163,000, but asserted that “if it was, it was on account of the value of the improvements upon the land.”<sup>286</sup> Despite denying knowledge of the recent sale price, however, Bare testified that he had “made due and diligent inquiry of all persons who had information touching the value of the said leases and obtained from them all the information he could obtain with respect to the fair valuation to be placed upon the chattels real” and that he had “in all respects [done] therein what he could do in the way of procuring information as to their respective values.”<sup>287</sup> Based on this testimony, without citing any supporting figures or calculations, the court accepted Bare’s “good faith” in determining the lease values.<sup>288</sup>

In this way, the court reached the conclusion that a lease that sold for \$163,000 three years earlier could reasonably be valued for tax purposes at \$12,000. In *Harvey Coal*, the court had held that “the universal standard of value is the amount of money that can be realized by a sale of the property.”<sup>289</sup> Justice Poffenbarger’s view that improvements and fixtures could be deducted from the sale price but that the difference should then be disregarded served to divorce valuation from sale price entirely. The notion that the value of the land could not be considered because the land was taxable to the surface owner appeared inconsistent with the court’s holding in *Harvey Coal* that more than one taxable estate may exist in the same piece of land.<sup>290</sup>

Justice Poffenbarger’s opinion commanded the votes of only two justices – Poffenbarger and Justice McWhorter of Kanawha County. Justice Sanders, of Mercer County, concurred in the judgment on different grounds. The *Fairmont West Virginian* reported that “Judges Brannon and Cox dissented and will later set out their reasons,” but it is unclear whether those dissenting opinions were ever filed.<sup>291</sup> Cox resigned from the court in early 1907, citing a desire to

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 396.

<sup>287</sup> *Id.* at 396–97.

<sup>288</sup> *Id.*

<sup>289</sup> *Harvey Coal & Coke Co. v. Dillon*, 53 S.E. 928, 933 (W. Va. 1905).

<sup>290</sup> *Id.*

<sup>291</sup> *What the Assessor Does Stands*, FAIRMONT WEST VIRGINIAN, Oct. 24, 1906, at 1. The reported case does not include dissents but the syllabus of the court notes that the decision was “by

be in Morgantown where his property interests were located and to be near the state university for his school-aged children.<sup>292</sup>

Justice Sanders concurred in the judgment on the grounds that the writ could not issue unless there were a complete refusal by the assessors to perform their duties or some evidence of fraud, collusion, or bad faith in the performance, which Commissioner Dillon had not alleged.<sup>293</sup> Justice Sanders stated that the sale price need not be taken by the assessor as conclusive evidence of the value of the leasehold.<sup>294</sup> Sanders appeared to hold the assessors to a lower standard of proof than the commissioner, however, since he would not have required that Bare and Carter submit any evidence to show that the sale price was unreliable or that their alternative valuation was justified.<sup>295</sup>

The *Charleston News* published the decision the day it was released, but other newspapers scarcely noted it.<sup>296</sup> The *Fairmont West Virginian* covered the decision but devoted only one paragraph to the court's conclusions.<sup>297</sup> The *Morgantown Chronicle*, the *Wheeling Intelligencer*, and the *Sistersville Daily Review*, all of which had followed the tax reform project intently, made no mention of the decision.

One reason may be that the state was no longer broke. While the tax reform laws of the 1904 session had failed to reach coal, oil, and gas leases, new taxes such as those on inheritances and business licenses had eliminated the state budget deficit.<sup>298</sup> The tax reforms were widely popular as the new scheme shifted a substantial part of the burden from property taxes paid by individuals to license taxes paid by businesses.<sup>299</sup> Just to the right of its story about the *Bare* decision, the *Fairmont West Virginian* published a long list of taxpayers and their reduced tax burdens under the headline, "Grant District Citizens Rejoice Along with the Rest in Lower Tax Bills under the Beneficent New Laws."<sup>300</sup> The editors of the

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three Judges." *State ex rel. Dillon*, 56 S.E. at 483. The original case file is no longer available from the Supreme Court of Appeals archives. Email from Christopher Garner, Assistant Clerk/Messenger, West Virginia Supreme Court of Appeals (May 17, 2021) (on file with author); see generally West Virginia Department of Arts, Culture & History, *West Virginia Supreme Court of Appeals Records*, <https://archive.wvculture.org/history/collections/ar/ar1800.html> (last visited Oct. 26, 2021).

<sup>292</sup> *Judge Cox Resigns*, CEREDO ADVANCE, Jan. 30, 1907, at 1.

<sup>293</sup> *State ex rel. Dillon*, 56 S.E. at 398–99 (Sanders, J., concurring).

<sup>294</sup> *Id.* at 399.

<sup>295</sup> *Id.* at 400.

<sup>296</sup> See Letter from J.H. St. Clair to Aretas B. Fleming (Oct. 25, 1905), in FLEMING PAPERS, *supra* note 42.

<sup>297</sup> *What the Assessor Does Stands*, *supra* note 291.

<sup>298</sup> See Hubbard, *supra* note 178, at 606–07, 617.

<sup>299</sup> See *id.* at 606.

<sup>300</sup> *Grant District Citizens Rejoice Along with the Rest in Lower Tax Bills Under the Beneficent New Laws*, FAIRMONT WEST VIRGINIAN, Oct. 24, 1906, at 1.

Republican paper were eager to show that the residents of the predominantly Democratic Grant district, like their neighbors from Republican areas, obtained benefits from the reforms.<sup>301</sup> Another reason was likely politics. It was election season, and a fatal blow to the latest Republican tax reform effort would not help their candidates campaigning on the wave of the popular reforms. Republican newspapers like the *Intelligencer* and the *Chronicle* would not have been eager to advertise defeat of a major tax reform measure.

Baker himself kept quiet about the decision. Three days after the Supreme Court announced its decision in *Bare*, Baker stumped for his one-time mentor in Sturgiss's campaign for the U.S. House of Representatives, a race Sturgiss would win.<sup>302</sup> Baker spoke for an hour and half, three times as long as the other two speakers, and "dwelt at length upon tax reform with which the voters of Cheat Neck are more than pleased."<sup>303</sup> In early 1907, Baker filed a special report with the Monongalia County Court detailing the additional revenue secured by the county as a result of his efforts. As to future prospects, Baker simply concluded that his services were likely no longer needed as the "relevant principles of law" had been settled by the courts and "basis of valuation . . . fairly well ascertained by the past two years' experience."<sup>304</sup>

Attorneys for the coal industry understood the magnitude of their victory, however. On October 25, J.W. St. Clair, whose law firm represented both the coal company in *Harvey Coal* and the Fayette County assessors in *Bare*, wrote to Fleming to call his attention to the case.<sup>305</sup> "[I]t seems to me that the effect of this decision is to very largely destroy the value of coal leases in this state for taxation purposes," St. Clair wrote.<sup>306</sup> St. Clair seemed to be in the know about the court's deliberations. "You will find when Poffenbarger's revised opinion is filed," St. Clair told Fleming, "he will be much clearer and go farther even, than he has gone in his first opinion, in that direction."<sup>307</sup>

Anticipating a legislative pushback in the next session, St. Clair invited Fleming to a "quiet conference" of various representatives of the state's coal, oil, and railroad interests. No single group was powerful enough to prevent new tax legislation, St. Clair thought, but through coordination, they might defeat any

<sup>301</sup> *Id.*

<sup>302</sup> *All for Sturgiss*, MORGANTOWN DAILY POST, Oct. 27, 1906; *Sturgiss, George Cookman*, BIOGRAPHICAL DIRECTORY OF THE U. S. CONG., <https://bioguide.congress.gov/search/bio/S001049> (last visited Sept. 3, 2021).

<sup>303</sup> *All for Sturgiss*, *supra* note 302.

<sup>304</sup> GEORGE C. BAKER, SPECIAL COUNSEL FOR THE MONONGALIA CNTY. CT., SPECIAL REPORT (Mar. 4, 1907) (from personal files of Baker heirs, on file with author).

<sup>305</sup> Letter from J.W. St. Clair to Fleming (Oct. 27, 1906), in FLEMING PAPERS, *supra* note 42; *Harvey Coal & Coke Co. v. Dillon*, 53 S.E. 928, 929 (W. Va. 1905).; *State ex rel. Dillon v. Bare*, 56 S.E. 390, 390 (W. Va. 1906).

<sup>306</sup> Letter from St. Clair to Fleming, *supra* note 305.

<sup>307</sup> *Id.*

renewed efforts at legislative tax reform.<sup>308</sup> In fact, the 1907 legislature would not pass any significant reforms of coal, oil, and gas taxes.<sup>309</sup>

## VII. CONCLUSION

Coal producers succeeded in defeating Baker and his colleagues' efforts to obtain value for the state from the coal, oil, and gas production that had held out such promise for the state's promoters a few years earlier and would manage to avoid taxes on production for another decade and a half. The first law to include any tax on coal, oil, and gas production was the Gross Sales Tax Law of 1921, which taxed all types of gross business receipts over a \$10,000 exclusion threshold.<sup>310</sup> Taxation of coal, oil, and gas production would proceed at a slow crawl through the rest of the twentieth century, and the first express severance tax took effect in 1987.<sup>311</sup> Property, including leaseholds, used in coal, oil, and gas production were first expressly taxed in 1932; the state constitution had been amended that year to provide for taxation of four classifications of property, including "all other property outside municipalities," and the state tax commissioner was given the power to assess industrial property.<sup>312</sup> Decades of dispute over valuation and assessment methods ensued.<sup>313</sup> In 1990, legislation was enacted directing that assessment of all property be at sixty percent of actual value.<sup>314</sup> Valuation of coal property, however, remained subject to vigorous dispute for decades longer.<sup>315</sup>

Has West Virginia suffered a resource curse? No single policy decision or court decision explains the failure of West Virginia to realize the promise of wealth for its citizens that it held in the decades between the Civil War and the turn of the century. But Baker's crusade and its ultimate failure suggest that a

<sup>308</sup> *Id.*

<sup>309</sup> See Williams, *supra* note 1, at 234–35.

<sup>310</sup> Renamed the Business and Occupations Tax in 1925, the law continued the gross income exclusion and taxed coal receipts at .42%; oil at 1%, natural gas at 1.85%; limestone, sand, and other common variety minerals at .45%; and timber at .21%.

<sup>311</sup> Throughout most of the twentieth century, it remained political suicide to openly propose severance taxes, as Governor William Casey Marland learned when the legislature delivered his proposal a resounding defeat in 1953. Paul F. Lutz, *Governor Marland's Political Suicide: The Severance Tax*, 40 W. VA. HIST. 13 (Fall 1978).

<sup>312</sup> See BASTRESS, *supra* note 78, at 285; Calvin A. Kent, *Ad Valorem Taxation of Coal Property in West Virginia and Other States—Part I*, 7 J. PROP. TAX ASSESSMENT & ADMIN. 41, 44 (2010).

<sup>313</sup> Kent, *supra* note 312, at 44–45; see, e.g., Killen v. Logan Cnty. Comm'n, 295 S.E.2d 689 (W. Va. 1982), *partially overruled on other grounds by In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 672 S.E.2d 150 (W. Va. 2008) (statute allowing assessment at 50–100% of face value violates constitutional guarantee of equal taxation). For a useful history of the equal taxation movement of the 1970s and 1980s, see generally Moran, *supra* note 79.

<sup>314</sup> W. VA. CODE ANN. § 11-4-9 (West 2021); W. VA. CODE ANN. § 110-1J-4.1 (West 2021).

<sup>315</sup> See Kent, *supra* note 312, at 50.

Progressive movement did flicker briefly in the state but died out before igniting the type of flame that led nationally to a widespread restructuring of the relationship between the corporation and the state. West Virginia's fledgling Progressive movement may have been strong enough to outmaneuver Standard Oil, for which West Virginia was a minor battlefield by 1905. In the end, however, it could not overcome the power of the coal producers, especially when working in tandem with the out-of-state oil and railroad industrialists and with support from top politicians of both parties. Well over a century later, with the oil long since gone and coal production waning, West Virginia has failed to realize the development its promoters long promised.