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STATE TAXATION OF RESIDENT TRUSTEE

*Greenough v. Tax Assessors of City of Newport*¹

The testator, a New York resident, executed a will which established a trust consisting of shares of capital stock in a New Jersey corporation. The life beneficiary of the trust was a resident of New York and the stock certificates constituting the corpus of the trust fund were physically located in that state.² The will was duly probated in New York and a court of that state granted letters of trusteeship to co-trustees, one a resident of that state and the other domiciled in Rhode Island. Although ancillary letters testamentary were issued and a copy of the will was recorded in Rhode Island, the resident trustee did not exercise any of his powers as trustee in Rhode Island. As per a statute of that state,³ a personal property *ad valorem* tax was assessed by the City of Newport against the resident trustee upon one-half of the value of the corpus of the trust. The co-trustees paid the tax and instituted suit in a Rhode Island court to recover the tax. The lower court dismissed the petition and a bill of exceptions was overruled by the Supreme Court of Rhode Island.⁴

On appeal the Supreme Court of the United States affirmed the dismissal of the petition by a five to four decision with Mr. Justice Reed delivering the opinion, Mr. Justice Frankfurter writing a separate concurring opinion, and with Mr. Chief Justice Vinson and Justices Rutledge, Jackson, and Murphy dissenting.

Throughout these proceedings the appellants argued that to tax the resident co-trustee an amount measured by

¹ 331 U. S. 486, 67 S. Ct. 1400 (1947). See Note, *Taxation—Power to Tax; Where Property May Be Taxed—State in Which Trustee Resides May Tax Him on Intangibles of Out-of-State Trust*, (1947) 60 Harv. L. Rev. 1169, and Note, *State Power to Tax Intangible Property—Due Process* (1947) 47 Col. L. Rev. 865.

² Rhode Island, New York, and New Jersey, which are the three states that have contacts in this case, all have the Uniform Stock Transfer Act.

³ General Laws of Rhode Island 1938, Ch. 30, Sec. 9: "Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee, resides; and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

⁴ *Greenough v. Tax Assessors of City of Newport*, 71 R. I. 477, 47 A. 2d 625 (1946).

the intangible personal property of the trust all of which was outside of Rhode Island and to which that state gave no protection or benefit was unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution. The appellants therefore claimed that Rhode Island could not tax the proportionate part of these intangibles of the trust merely because the resident co-trustee was a resident of Rhode Island.

In the opinion of the court delivered by Mr. Justice Reed the court decreed that Rhode Island, by making its courts available for suits by and against the resident trustee in regard to trust matters, had the power to levy the tax. The resident trustee by his legal interest in the trust was held to have sufficient ownership interest in the intangibles to allow the state to tax him. This opinion was delivered by four members of the court. Mr. Justice Frankfurter wrote a concurring opinion to form a majority. He stated that Rhode Island in taxing its residents for the advantage of living within the state could use as a measure "the wealth which a person controls, whatever his ultimate beneficial interest in the property".⁵ Mr. Justice Frankfurter also stated that Rhode Island could tax its residents for acting in a trusteeship capacity.

This case is rather startling evidence of the present tendency of the Supreme Court to recognize fewer restrictions upon the state power to tax intangibles. Supreme Court decisions consistently hold that the due process clause prevents a state from taxing a resident on his real and tangible personal property located outside of the jurisdiction of the taxing state.⁶

In regard to the state taxation of intangible property the Supreme Court, however, has had difficulty with questions of the jurisdictional situs of the intangibles, and whether the due process clause of the Fourteenth Amendment would permit several states to tax certain interests in the same intangible property. In the *Farmer's Loan & Trust Co. v. Minnesota*⁷ case the court applied the maxim, *mobilia sequuntur personam*, to hold "that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxa-

⁵ 67 S. Ct. 1400, 1407 (1947).

⁶ *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905); *Frick v. Pennsylvania*, 268 U. S. 473 (1925). See also, Anno.—*Personal Property—Situs for Taxation*, 123 A. L. R. 179.

⁷ 280 U. S. 204 (1930); See *Blackstone v. Miller*, 188 U. S. 189 (1902) which was expressly overruled by this case.

tion at more than one place similar to that accorded tangibles".⁸ Two years later the *First National Bank of Boston v. Maine*⁹ case held that to levy an inheritance tax on certificates of stock that were within the taxing state, although the owner was a non-resident decedent, infringed upon the Fourteenth Amendment. In following the doctrine laid down by the *Farmer's Loan* case, the Court said: "We conclude that shares of stock, like other intangibles, constitutionally can be subject to a death transfer tax by one state only."¹⁰ But signs of a breakdown in the single tax rule of these cases were already appearing. In the *First National Bank of Boston* case, Mr. Justice Stone, joined by Mr. Justice Holmes and Mr. Justice Brandeis dissented, stating that they believed the due process clause was being unduly stretched to cover the case. The dissenting justices said "Situs of an intangible, for taxing purposes . . . is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired".¹¹

It is interesting to note that Mr. Justice Stone delivered the opinion of the Court in *Curry v. McCanness*¹² some seven years after the *First National Bank of Boston* case. The *McCanness* case in effect reversed the holding of the majority of the Court in the *First National Bank of Boston* case. This is a strong indication of the belief that the individual opinions of the Supreme Court's remaining members have not changed but the shifting of the Court's opinion on this question has been the result of a change in the personnel of the Court.¹³

In *Curry v. McCanness*, the Court pointed out that, when a taxpayer of X state extends his activities with respect to his intangibles into Y state which gives him the protection and benefit of the laws of Y state, the application of the so called single place of taxation rule should not hinder Y state's constitutional power to tax. This, the Court continues, could be based on the power to tax as "an incident of sovereignty, and . . . co-extensive with that which it is an incident. All subjects over which the sovereign power of a state extends, are objects of

⁸ *Ibid.*, 212.

⁹ 284 U. S. 312 (1932).

¹⁰ *Ibid.*, 328.

¹¹ *Ibid.*, 332.

¹² 307 U. S. 357 (1939).

¹³ See Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle* (1943) 8 Mo. L. Rev. 155. See also, Mr. Justice Frankfurter's concurring opinion in *Graves v. New York*, 306 U. S. 466 (1939).

taxation", as stated by Chief Justice Marshall in *McCulloch v. Maryland*,¹⁴ or it could be based on the benefit and protection afforded by the taxing state. Here the Court admitted, "consequently there . . . are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the [non-resident] taxpayer's intangibles".¹⁵ The Court stated that on the facts of the *Curry* case in regard to the tax assessed by the decedent's domicile [Tennessee] and the trustee's domicile [Alabama] on the transfer of a trust of intangibles, "We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax".¹⁶ It should be noted that in this case the administration of the trust was conducted in both Alabama and Tennessee.

The subsequent case of *State Tax Commission of Utah v. Aldrich*¹⁷ expressly overruled *First National Bank of Boston v. Maine*.^{17a} In the *Aldrich* case a New York resident owned stock in a Utah corporation. Upon the death of the New York resident, Utah imposed a death transfer tax upon the stock even though the certificates representing those shares were physically within New York. In a seven to two decision with Mr. Justice Jackson and Mr. Justice Roberts dissenting, the Court upheld Utah's power to tax the transfer of the Utah corporation's stock even though the certificates of stock and owner thereof were outside of the state, based on the reasoning that the corporation owed its existence to Utah and the nature and extent of the individual stockholder's interest was defined by Utah law. The Court follows the *Curry v. McCannless* case and concludes that "there is no constitutional rule of immunity from taxation of intangibles by more than one state".¹⁸

The *Aldrich* case results in the complete adoption of the present rule now followed by the Supreme Court, a rule which was introduced in the *Curry v. McCannless* case although at that time the *First National Bank of Boston* case was not expressly overruled. Based on this current doctrine of the Supreme Court that the jurisdictional

¹⁴ 4 Wheat. 316 (1819).

¹⁵ *Supra*, n. 12, 368.

¹⁶ *Supra*, n. 12, 372.

¹⁷ 316 U. S. 174 (1942).

^{17a} *Supra*, n. 9.

¹⁸ *Ibid.*, 181.

power is the only constitutional test necessary in the field of state taxation of intangibles, the *Greenough* case deals with the further question of what is sufficient benefit and protection over intangible property to give the state jurisdiction so to tax.

In the *Greenough* case, the taxing state levied a personal property tax measured by the value of a foreign trust of intangibles upon a resident co-trustee where the taxing state's only contact was the residence of one of the trustees. In the opinion, the Court, in discussing state taxation of out of state intangibles belonging to a resident owner, said "the states unrestricted by the federal Constitution have been accustomed to assess property taxes upon intangibles 'wherever held or deposited' belonging to their citizens".¹⁹ Then the Court stated that there is more reason for the domiciliary state of the owner of intangibles to collect a property tax on the intangibles than any other taxing jurisdiction because the intangibles are under the immediate control of the owner who is benefited and protected by the domiciliary state. The Court qualifies these statements by admitting that taxing jurisdictions other than the state of the owner's domicile may also have the power to tax these same intangibles and refers to *Curry v. McCanless*.^{19a} At this point the Court posed the question as to whether the same relationship as exists between an owner and his intangibles, exists between a trustee and the intangibles of a trust.

The Court in answering this question divides "the entity" of the trust into two separate interests; one, the equitable interest that the beneficiary of the trust has in the trust *res*, and, two, the legal interest in the trust *res* which is a distinct right held or owned by the trustee.²⁰ As to the status of this legal interest, the trustee as the owner of this legal interest in the *res* may incur personal obligations in the administration of the trust which are enforceable against him.²¹ It was admitted that the resident as trustee had received no specific benefit or protection from Rhode Island to date but the Court thought that Rhode Island's keeping its courts available for furnishing aid to the trustee constituted in itself a benefit and protection and concluded that "the resident trustee was the possessor of interest in the intangibles, sufficient . . .

¹⁹ *Supra*, n. 5, 1403.

^{19a} *Supra*, n. 12.

²⁰ 1 SCOTT, TRUSTS (1939) Sec. 88.1.

²¹ 2 SCOTT, TRUSTS (1939) Sec. 261.

to support a proportional tax for the benefit and protection afforded by Rhode Island".²²

The fact that there were co-trustees, only one of whom was a resident of the taxing state, was not considered significant by the Court, but Mr. Justice Jackson in his dissent pointed out that, if the majority be correct, Rhode Island's only taxing a proportionate one-half of the estate was merely an act of grace, and that, since any one of a number of trustees holds a power over all of the trust, Rhode Island could tax the entire value of the trust corpus if it had the power to tax it at all.

Mr. Justice Rutledge with whom Mr. Chief Justice Vinson concurred stated that whether or not due process forbids state taxation of property is a practical matter and a question of degree depending on factual connections and that "I do not think the mere fact that one of a number of trustees resides in a state, without more, is a sufficiently substantial connection to justify a levy by that state upon the trust corpus, by an *ad valorem* tax either fractional or on the entirety of the *res*".²³ As was suggested by the dissents, the fact that Rhode Island has kept its courts available for suits by and against the resident trustee is not particularly significant because the same benefit and protection would be afforded a non-resident trustee in the same courts.

Although the appellants specifically disclaimed any reliance on the argument that Rhode Island's assessment might subsequently result in a multistate taxation of the trust and although the opinion of the Court had nothing to say about the probability of this occurring, the growing problem of multistate taxation of intangibles and the interests thereof was touched upon by Mr. Justice Jackson in his dissent. There has been a great volume of writings and opinions upon multistate taxation of intangibles.²⁴

²² *Supra*, n. 5, 1406. The Court also noted and discussed *Goodsite v. Lane*, 139 Fed. 593 (C. C. A. 6th, 1905). In the *Goodsite* case the Circuit Court of Appeals held that a foreign trust consisting of intangibles which had received no benefit whatsoever from the taxing state could not have a state property tax levied against it merely because the trustee resided in the taxing state. The Court, however, in the *Greenough* case did not believe that the above decision gave proper recognition to the state's power to tax the owner of the legal interest in the trust res.

²³ *Supra*, n. 5, 1408. Also note, as stated in *State Power To Tax Intangible Property—Due Process*, *supra*, n. 1, 867: "In addition, it (the *Greenough* decision) ignored the opportunity to provide more specific criteria for determination of a state's power to tax."

²⁴ See *Fraught, Reciprocity in State Taxation as the Next Step in Empirical Legislation* (1944) 92 U. of Pa. L. Rev. 258; Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle* (1943) 8 Mo. L. Rev.

The Supreme Court has recognized that multistate taxation may occur. This was recognized in the unanimous opinion of the court delivered by Mr. Chief Justice Hughes in *Massachusetts v. Missouri*,²⁵ that "the validity of each claim [of the two states to apply their respective inheritance taxes to the transfer of the same trust] is wholly independent of that of the other and, in the light of our recent decisions, may constitutionally be pressed by each state without conflict in point of fact or law with the decision of the other".²⁶ Mr. Justice Douglas writing the majority opinion in *State Tax Commission of Utah v. Aldrich*,^{26a} stated "More basically, even though we believed that a different system should be designed to protect against multiple taxation, it is not our province to provide it".²⁷ Mr. Justice Frankfurter in his concurring opinion in the *Aldrich* case summed up the problem by stating "whether a tax is wise or expedient is the business of the political branches of government, not ours. Considerations relevant to invalidation of a tax measure are wholly different from those that come into play in justifying disapproval of a tax on the score of political or financial wisdom. It may well be that the last word has not been said by the various devices now available—through uniform and reciprocal legislation, through action by the states under the Compact Clause, Art. 1, Sec. 10, Cl. 3, or through whatever other means statesmen may devise . . ." ²⁸

The general impression that can be reached from opinions such as these is that unwholesome though constitutional multistate taxation may be eliminated by uniform or reciprocal legislation by the political branches of the state governments. There was considerable development of reciprocal legislation before the early 1930's²⁹ and the development of the single place of taxation policy under the *First National Bank of Boston v. Maine*^{29a} line of cases, but the Supreme Court decisions of the early 1930's relaxed this development since those decisions made such reciprocal legislation and compacts unnecessary.

155: Anno.—*Personal Property—Situs for Taxation, supra*, n. 6, Brown, *The Present Status of Multiple Taxation of Intangible Property* (1942) 42 Mich. L. Rev. 806.

²⁵ 308 U. S. 1 (1939).

²⁶ *Ibid.*, 15.

^{26a} *Supra*, n. 17.

²⁷ *Supra*, n. 17, 181.

²⁸ *Ibid.*, 184.

²⁹ Discussed by Mr. Justice Jackson in his dissenting opinion in *State Tax Commission of Utah v. Aldrich, ibid.*, 197. See also, *supra*, n. 24.

^{29a} *Supra*, n. 9.

In conclusion, it would be of value to discuss briefly the problems of multistate taxation of intangibles that confront the taxpayer, and to draw some conclusions as to the contacts which may be sufficient to enable states to tax intangibles or some interest thereof constitutionally. In view of the fact that the Supreme Court opinions have passed through a cycle in regard to the extension of the due process clause to the constitutionality of multiple state taxation, it is often necessary to consider at what part of the cycle a specific case was decided in order to evaluate to what extent that case may be considered as applicable under the present Supreme Court holdings as represented by *Curry v. McCanless*^{29b} and the *Aldrich* case.^{29c}

No attempt will be made at this time to collect or annotate all the cases on the taxability of intangibles or on the interests thereof, but a general review of the leading cases should be given to show the scope of the problem that the taxpayer faces in attempting to minimize multiple state taxation.

As was pointed out in the opinion of *Greenough* case, the domiciliary state of the owner may impose property taxes on intangibles regardless of where the evidences of ownership may be.³⁰ Promissory notes executed by a non-resident and left by a non-resident testator in a safe deposit box within the taxing state have been held assessable under a death transfer tax.³¹ The state of "commercial domicile"—the place where a foreign corporation maintains its general offices³²—and the state where a "business situs" of stock issued by a foreign corporation and owned by foreign stockholders is maintained³³ have been permitted to tax. The domicile of a corporation can levy a death transfer tax on stock owned by a non-resident and held outside of the taxing state.³⁴ A property tax on intangibles imposed by the domiciliary state of a corporation whose "business situs" is in a foreign state has been held constitutional.³⁵

^{29b} *Supra*, n. 12.

^{29c} *Supra*, n. 17.

³⁰ *Fidelity and Columbia Trust Co. v. City of Louisville*, 245 U. S. 54 (1917); *Blodgett v. Silberman*, 277 U. S. 1 (1928).

³¹ *Wheeler v. Sohmer*, 233 U. S. 434 (1914).

³² *Wheeling Steel Corporation v. Fox*, 298 U. S. 193 (1936); *The Present Status of Multiple Taxation of Intangible Property*, *supra*, n. 24.

³³ *First Bank Stock Corporation v. Minnesota*, 201 U. S. 234 (1937).

³⁴ *Supra*, n. 17.

³⁵ *Newark Fire Ins. Co. v. State Board of Tax Appeals*, 307 U. S. 313 (1939).

The discouraging complexities of the multiple state taxation problem have even more variations within the field of trusts. In addition to many of the situations already mentioned in the previous paragraph, the state taxation of trust interests can be again subdivided if the equitable interest of the beneficiary and the legal interest of the trustee are not within the same state. The decisions as to whether the equitable interest of a foreign trust, created by a non-resident testator and administered by a non-resident trustee, could be taxed were to the effect that the equitable interest of intangibles in such a case could not be so taxed.³⁶ But the companion cases of *Curry v. McCanless*, and *Graves v. Elliott*³⁷ decided in 1939 changed this rule. Under these two decisions and the memorandum decision of *Stewart v. Commonwealth of Pennsylvania*,³⁸ a state where only the beneficiary resides may be able to tax. The exercise of the general testamentary power of appointment by a resident donee of the power is taxable.³⁹ Probably the state in which the trust is administered can impose a tax.⁴⁰ The relinquishment by the death of a domiciled resident of the taxing state of a power to revoke or to appoint new beneficiaries of a foreign trust of intangibles held by a non-resident trustee is taxable even though the power was never exercised.⁴¹ The *Greenough* case, hereinbefore discussed, held that a state could assess an *ad valorem* personal property tax on a resident co-trustee where the state's *only* contact with the trust was the mere residence of a co-trustee within the state and where the resident trustee had in no way utilized the taxing state's courts in regard to trust matters.

In addition to the above possible combinations of multiple state taxation, there is also the possibility that, if there are a number of trustees all of whom live in different states, each resident state of the respective trustees might be able to tax the trust *res* in the form of a personal property tax to the full extent of the trust. This rather unnerving suggestion is pointed out by Mr. Justice Jackson in his dissent⁴² in the *Greenough* case. In addition to the double domicile type of situation as illustrated by the

³⁶ *Brooke v. City of Norfolk*, 277 U. S. 27 (1928); *Safe Deposit and Trust Company v. Virginia*, 280 U. S. 83 (1929); see also *Baltimore v. Gibbs*, 166 Md. 364, 171 A. 37 (1933).

³⁷ 307 U. S. 383 (1939).

³⁸ 312 U. S. 649 (1941).

³⁹ *Graves v. Schmidlapp*, 315 U. S. 657 (1942).

⁴⁰ See *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936).

⁴¹ *Supra*, n. 37.

⁴² *Supra*, n. 5, 1407.

Dorrance case⁴⁸ could possibly arise in regard to any one of the trustees or beneficiaries.

Because of the possibility that the various taxable interests of a trust may be spread over several states and that each of the states having taxing power over such interests may possibly tax to the full value of the trust estate, settlors should exercise care in drawing up the trust. The settlor may be wise to confine the elements of his trust to one state as much as possible; the state in which the beneficiary resides may well be the preferable state. But at best this is only a first approach to the problem on the assumption that the beneficiaries and trustees will remain in the state in which they presently reside. What if one of the trustees or one of the beneficiaries subsequently takes up a new domicile in another state? Might this not subject the trust to the additional taxing power of that state? This danger of multistate taxation subsequently caused by the moving of the trustees or the beneficiaries could be guarded against by drawing the trust agreement with express elastic powers to move the trust *res* into another state if necessary or to give the trustees the power to supplant a trustee if the latter sets up a domicile outside of the state in which the interests of the trust have been concentrated.

⁴⁸ In *Re Dorrance's Will*, 333 Pa. 162, 3 A. 2d 682 (1939). See also, *State of Texas v. Florida*, 306 U. S. 398 (1939).